

## Strengthening independent oversight of children's issues and the Oranga Tamariki system.

### Submission from The Backbone Collective

July 2018

The focus of our submission is on the urgent need for independent oversight of children who have experienced violence and abuse and who are party to Care of Children Act hearings and orders in the Family Court. Children who have experienced violence and abuse are typically on one of two pathways in the Family Court:

1. Under the Care of Children Act where children are ordered into care and contact arrangements with the abusive parent.

In October 2017 Backbone conducted a survey to ascertain the impact the Family Court is having on children who have been exposed to violence and abuse. There were 291 responses from mothers who collectively have 591 children involved in Family Court proceedings. Thirteen mothers said their children had been made Wards of the State. The remainder had been party to other Family Court proceedings, primarily Care of Children Act proceedings.

2. Under the Oranga Tamariki Act where the Family Court is acting alongside Oranga Tamariki to take children into state care.

Since Backbone was established our focus has been on examining practices in the Family Court for cases of violence and abuse. We have not yet surveyed women specifically about their experiences with Oranga Tamariki and hence are not well placed to comment in this submission on the independent oversight of children placed in state care under Family Court orders.

#### **Relevant overall findings from Backbone's reports<sup>1</sup>**

Children exposed to violence and abuse who are involved in Care of Children Act proceedings in the Family Court are at significant risk of further harm.

Under Care of Children Act, the Family Court is removing children from protective mothers and placing them in the care of abusive fathers.

Children's rights are being breached by those working in the Family Court and in the decisions made about their care and contact.

There is an urgent need for independent oversight of what is happening to these children.

---

<sup>1</sup> <https://www.backbone.org.nz/reports/>

## Key points made in this submission

From the findings of our surveys and other investigations, we believe that the New Zealand Government is in effect funding state sanctioned abuse of children via the Family Court. The Government has a duty of care to provide independent oversight of these children. Currently:

1. There is no independent oversight of the response system for women and children who have experienced violence and abuse, which means there is no way to readily identify where the system is failing and to make improvements.
2. There is no authority that is responsible for independently overseeing the safety and rights of children who are subject to Family Court proceedings.
3. Children who have been exposed to violence and abuse and who are involved in the Family Court are being further abused by the processes and decisions being made about their care.
4. Under the Care of Children Act, children are being ordered into dangerous situations by the very agencies and institutions that have been set up and funded by the state to protect them.
5. There is no safe and independent way for children to complain when they are being harmed and not having their rights upheld by the Family Court.
6. The Children's Commissioner legislation prevents him/her from providing independent oversight for children involved in Family Court proceedings.<sup>2</sup>

## Introduction

### About the Backbone Collective

The Backbone Collective (Backbone), a registered not-for profit trust, was established in March 2017. Backbone's mission is to help facilitate the continuous improvement of the system because we believe the system needs to be accountable for how it responds to its users.

Backbone's primary purpose is to enable women to safely and anonymously tell the Government, others in authority, and the public about how the 'system' responded to them when they experienced violence and abuse, and how they need it to respond in order to be safe and rebuild their lives.

In just over a year the membership (women who have experienced violence and abuse) has swelled to over 1300 and Backbone has 2700 followers on Facebook. In May 2018, 93% of members who responded to a survey said that Backbone has been either 'very effective' or 'effective' in achieving its stated objectives and 80% felt Backbone is making an overall difference at a public/political/societal level.

The first part of the system that Backbone has examined is the Family Court, because members said that was the area of greatest concern to them.

---

<sup>2</sup> Whilst the Commissioner can advocate for children in state care and those under plans with Oranga Tamariki, he cannot advocate for children who are part of either Care of Children Act or Domestic Violence proceedings.

In the past 16 months Backbone has produced five comprehensive reports based on what women have told us is happening in the Family Court - all of which have provided extensive evidence of systemic failures in the Family Court:

1. All Eyes on the Family Court: A watchdog report from the Backbone Collective<sup>3</sup>
2. Out of the Frying Pan and into the Fire: Women's experiences of the New Zealand Family Court<sup>4</sup>
3. Don't Tell Me Your Problems: The Family Court complaints and appeals landscape<sup>5</sup>
4. Seen and Not Heard: Children in the Family Court. Part One Force<sup>6</sup>
5. Seen and Not Heard: Children in the Family Court. Part Two Lawyer for Child?<sup>7</sup>

Rather than attempting to capture all the relevant findings relating to children's issues in these five reports, we urge you to refer to these reports in full to understand more completely the systemic failures for children in the New Zealand Family Court.

### About the Authors

Backbone's Co-Founders Deborah Mackenzie and Ruth Herbert jointly have over 35 years' experience working in New Zealand's system response to violence against women and children – doing research, strategy, policy, service delivery and advocacy work – for the public service, NGOs and in a voluntary capacity.<sup>8</sup>

In 2014, when we were working as The Impact Collective,<sup>9</sup> we published an independent report entitled 'The Way Forward: An Integrated System for Intimate Partner Violence and Child Abuse and Neglect in New Zealand.'<sup>10</sup> In this report we proposed the establishment of a new model to better address the epidemic of intimate partner violence and child abuse and neglect in New Zealand.

In this submission we provide findings from surveys conducted by The Backbone Collective in the past 12 months,<sup>11</sup> findings from the five reports Backbone has released over the past 15 months,<sup>12</sup> reproduce material from The Way Forward report, and draw on our many years of experience in the violence against women sector and the extensive research that we have done individually and collectively in these many roles.

<sup>3</sup><https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/58e696a21e5b6c7877e891d2/1491506855944/Backbone+Watchdog+Report+-+Family+Court.pdf>

<sup>4</sup><https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5949a425a5790a3989f7e74e/1497998414103/Family+Court+Survey+report+final+080617.pdf>

<sup>5</sup><https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/59b71d81197aea15ae01133b/1505172890050/Complaints+and+appeals+watchdog+report+12+Sept+2017+FINAL.pdf>

<sup>6</sup><https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5a3171c59140b743f5abbe36/1513189837189/Seen+and+not+Heard+Children+in+the+Family+Court+%281%29.pdf>

<sup>7</sup><https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5ae99c5588251bf787133d44/1525259361189/Seen+and+not+Heard+-+Lawyer+for+Child+3+May+2018.pdf>

<sup>8</sup> Bios of authors in Appendix one

<sup>9</sup> [www.theimpactcollective.co.nz](http://www.theimpactcollective.co.nz)

<sup>10</sup> Herbert, R. & Mackenzie, D. (2014). *The way forward: An integrated system for intimate partner violence and child abuse and neglect in New Zealand*. Wellington: The Impact Collective. Available at [http://theimpactcollective.co.nz/thewayforward\\_210714.pdf](http://theimpactcollective.co.nz/thewayforward_210714.pdf)

<sup>11</sup> <https://www.backbone.org.nz/surveys/>

<sup>12</sup> <https://www.backbone.org.nz/reports/>

## The context for this submission

### Children exposed to violence and abuse.

Police report that in approximately 70 percent of family units where intimate partner violence (IPV) exists, the children are also direct victims/survivors of some form of violence.<sup>13</sup> Oranga Tamariki say that approximately 70 percent of children in state care have been exposed to intimate partner violence before being taken into care.<sup>14</sup>

Children's exposure to domestic violence has long been recognised as a form of child abuse and neglect in New Zealand. Our Domestic Violence Act defines a child seeing or hearing the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship as child abuse.<sup>15</sup> The FVDRC *Fourth Annual Report*<sup>16</sup> says: '*It is well known that exposure to IPV is a form of child abuse.*'

The international evidence is clear that:

- Children do not need to see the violence occurring to suffer the negative effects. The international literature shows that there is little differentiation between the harm caused by direct abuse and that caused by exposure to IPV.<sup>17</sup>
- All children are affected by the presence of IPV or other forms of domestic violence in their family, regardless of the nature of the violence.
- As with children and young people who are directly abused, for children who are exposed to IPV, the impacts affect all aspects of their lives.
- In particular, boys who are exposed to IPV are more likely to become IPV abusers later in life.<sup>18</sup>
- Children recover better from exposure to IPV if they are supported to have a relationship with their protective parent and protected from contact with the abusive parent.<sup>19, 20</sup>

<sup>13</sup> New Zealand Police. *Family violence policy and procedures*; 2010 cited in NZFVC Issues Paper #3 available at <http://www.nzfvc.org.nz/issues-papers-3>

<sup>14</sup> Personal communication with Oranga Tamariki management

<sup>15</sup> [http://www.legislation.govt.nz/act/public/1995/0086/latest/DLM372117.html?search=ts\\_act%40bill%40regulation%40deemedreg\\_domestic+violence\\_resel\\_25\\_a&p=1](http://www.legislation.govt.nz/act/public/1995/0086/latest/DLM372117.html?search=ts_act%40bill%40regulation%40deemedreg_domestic+violence_resel_25_a&p=1)

<sup>16</sup> Family Violence Death Review Committee, 2014. *Fourth Annual Report: January 2013 to December 2013*. Wellington: Family Violence Death Review Committee. Available at <http://www.hqsc.govt.nz/assets/FVDRC/Publications/FVDRC-4th-report-June-2014.pdf>

<sup>17</sup> In fact, some studies, such as the meta-analysis of 118 studies by Kitzmann et al., (2003), which evaluated the psychosocial outcomes of children living with IPV (but not directly abused themselves) showed significantly poorer outcomes on 21 developmental and behavioural dimensions for the children exposed to IPV than those not exposed to any IPV and that the outcomes for those exposed to IPV were similar to those where children were also directly physically abused. These findings are now supported by multiple other studies and widely reported in the literature.

<sup>18</sup> Flood, M & Pease, B 2006, *The factors influencing community attitudes in relation to violence against women: a critical review of the literature*, Victorian Health Promotion Foundation, Melbourne

<sup>19</sup> Murphy, C., Paton, N., Gulliver, P., Fanslow, J. (2013). *Understanding connections and relationships: Child maltreatment, intimate partner violence and parenting*. Auckland, New Zealand: New Zealand Family Violence Clearinghouse, The University of Auckland.

<sup>20</sup> Lundy Bancroft is recognised internationally as an expert in domestic violence and child maltreatment, in particular the risks abusive fathers pose to their children. Refer <http://lundybancroft.com/articles/assessing-risk-to-children-from-batterers/>

The New Zealand Labour Party Manifesto 2017<sup>21</sup> provides some insight into the thinking of the current Government in this respect:

*Our children are impacted by the violence they experience and witness at home, even if they don't see the violence, they are acutely aware of what happens in their home, where they expect to be safe can be traumatic and damaging. Presently there is little in the way of effective, accessible support for children to help them overcome the effects of violence.*

Strategies aimed at addressing child abuse and neglect are less likely to be successful if any current or past intimate partner, domestic or sexual violence of the adults in this child's life is not also addressed and vice versa.<sup>22</sup>

Backbone believes it is now time that the impact domestic and sexual violence has on children (directly or indirectly) is understood and reflected in policy, legislation and practice at all levels of the system that responds to violence and abuse.

### Care of Children Act pathway for children in the Family Court

When mothers make the decision to attempt to escape violence and abuse with their children they find themselves entering the Family Court via several different 'doors':

#### The Domestic Violence Act door.

Women turn to the Family Court for protection for themselves and their children - applying to the Family Court for a Protection Order under the Domestic Violence Act. They believe the Family Court will keep them safe. However, once they approach the Family Court they become embroiled in Care of Children Act proceedings which are pitted against their Protection Order proceedings. Suddenly, their position as protective parent and 'victim' is removed.

#### The Property Relationships Act door.

If a woman and her children leave the abuser and the family home they quickly find themselves living in poverty, relying on a benefit, unable to work while they address the effects of the trauma they and their children have suffered, living in temporary and unsatisfactory accommodation, and frozen out of joint assets. The abuser is usually not interested in mutually agreeing a settlement because as long as he remains in the family home, keeps working and keeps their joint bank accounts etc frozen, he can continue to control and abuse his victims.

#### The Care of Children Act door.

After they leave the abusive ex-partner (father of the children) makes application to the Family Court for primary care, shared care or other contact arrangements under the Care of Children Act. By entering via this door as the respondent, women and children frequently find themselves in what is often many years of drawn out hearings, conferences, and interim orders as their abusers use Family Court proceedings as a mechanism to continue to control and abuse their victims.

<sup>21</sup> [file:///C:/Users/RH/Downloads/2017%20Labour%20Family\\_Violence\\_Policy%20\(2\).pdf](file:///C:/Users/RH/Downloads/2017%20Labour%20Family_Violence_Policy%20(2).pdf)

<sup>22</sup> Humphreys reports that recent policy and practice developments around the world now emphasise the importance of separate but linked services for women and children. These two very different intervention systems (statutory child protection and specialist, community-based, domestic violence services) have needed to find ways of working together, as have the other services involved in domestic violence intervention to recognise that the safety and well-being of children is tied closely to the safety and well-being of their mothers. [http://www.adfvc.unsw.edu.au/documents/IssuesPaper\\_13.pdf](http://www.adfvc.unsw.edu.au/documents/IssuesPaper_13.pdf)

Most people would expect that the child's parent/s would support and advocate for them through the Family Court process. On the contrary, many hundreds of women have told Backbone that in cases before the Family Court where domestic and sexual violence has been alleged the children are treated as relationship property.

This reflects the international evidence showing that abusive fathers often use their rights of access to the child/ren as a new tool to abuse his ex-partner.<sup>23</sup> Many of these men had little or no involvement in their child/ren's life before the victim left the relationship, and suddenly they have an interest in having as much unsupervised care of the child/ren as possible. The father's rights to have an ongoing relationship with his children appears, time and time again, to trump the child/ren's rights to safety and the child/ren's views.

No matter which door they enter the Family Court through, mothers tell us that because of the adversarial nature of the Family Court she, her abusive ex and their children are all treated as separate parties in proceedings. Each party is expected to have legal representation to advance the evidence to the court and uphold their different positions. The Family Court does not view women and children who have experienced intimate partner violence as 'victims'—only parties to proceedings. This has a significant impact on the response they receive.

When children who have been exposed to intimate partner violence are separated from their protective parent (usually their mother) in proceedings, they are left extremely vulnerable, unsupported and at risk of being abused by the processes and decisions being made about their care.

Children who have experienced violence and abuse need safe and competent representation in the Family Court. In most cases where there has been violence and abuse the court will appoint a Lawyer for Child to represent the child in Family Court proceedings. However, as we show later in this submission, these lawyers are working for the judge and not for the children, meaning they cannot provide independent oversight for the children. This leaves thousands of children with no-one independently overseeing their safety and rights.

Furthermore, the practice of responding to children separate from their protective parent of the Family Court is operating counter to the practice of other (often simultaneous) state interventions being provided to that mother and child/ren. For example:

- in the criminal court the same mother and children will be treated collectively as the 'victims' of the abuse and violence they have suffered
- in multi-agency community interventions, the mother and children will be considered as 'victims' and a safety plan and interventions provided for together
- in all domestic violence call outs the New Zealand Police are required to record both the details of the immediate victim (usually the mother) and any children present as victims
- children are automatically included as protected persons under their mother's Protection Order.<sup>24</sup>

---

<sup>23</sup> <http://lundybancroft.com/articles/assessing-risk-to-children-from-batterers/>

<sup>24</sup> Granted under the Domestic Violence Act

## The New Zealand Family Court

The justice system in New Zealand is based on the Westminster System which holds judiciary independent from the Parliament. Judges are not accountable to the government or its agencies. Legislation decided by Parliament determines the basis for activity in the Family Court. The judiciary must implement or apply the law in a way that upholds the parties' rights to natural justice. The judiciary must also ensure that it upholds New Zealand's obligations under the various international conventions, such as UNCROC.

The Westminster system is supposed to have built-in checks and balances to protect the judicial system from bias, corruption, and inefficiency and to ensure court users' domestic and international rights are being upheld. However, the New Zealand Family Court, which came into effect in 1980, is a mostly closed court. The media attended only 14 Family Court hearings in 2016 - a miniscule percentage (.002%) of all the Family Court hearings that year.<sup>25</sup> A similarly small percentage of Family Court cases are published online by the Ministry of Justice, but these are handpicked by a judicial panel. It is impossible for members of the public to scrutinise, unsafe for court users to speak out about, and difficult for media to report on. This enables the Family Court to operate without the usual (and legislated) checks and balances to ensure it acts fairly, safely, and lawfully.

## Backbone's findings about children in the Family Court

Children who have experienced violence and abuse need safe and competent representation in the Family Court. In October 2017 Backbone conducted a survey to examine the impact the Family Court is having on children when they and their mothers have experienced violence and abuse.

The survey was designed to give mothers an easy, safe, and anonymous way to say how the Family Court experience was for their children. We asked them about the Court's use of orders and decisions for care and/or contact arrangements with abusive parents and the impact these orders and decisions are having on these children's lives. There were 291 valid responses from mothers who collectively have 591 children involved in Family Court proceedings. 15.4% of respondents (38 women) identified as Māori. Between them, these mothers had 88 children.

All these children had experienced violence and abuse - by seeing, hearing or knowing about the abuse of their mothers and/or by also being directly physically, sexually and/or psychologically abused,<sup>26</sup> and they had suffered a complex array of trauma as a result of the violence and abuse prior to separation. Despite this, children are not being believed about their experiences of violence and abuse, evidence of it occurring is being disregarded in the court and mothers are being blamed for the fears children's have for their safety.

Women have told us that their children's views were not appropriately represented to the Family Court by those tasked with doing so and as a result, children are being routinely forced – against their wishes – to have care and contact with the abuser. While children are telling lots of people about their concerns for their safety (professionals in the Court and friends, family, doctors, teachers etc.) the Court is not responding appropriately. Once the Family Court has made orders to force care and contact, very little can be done to alter those orders. In addition, no other community advocacy or

---

<sup>25</sup> Information gained via an Official Information Act request to Government made by Backbone in 2017.

<sup>26</sup> Both of which are defined as forms of domestic violence against children in the Domestic Violence Act 1995



specialist services who work with these children are able to present any form of assessment of risk for the children to the Family Court.

Oranga Tamariki were involved in 39% of cases. We have heard that the practices in Oranga Tamariki are not helping women and children to be safe when there has been violence and abuse and that Oranga Tamariki social workers involved in Family Court work have little or no analysis of domestic violence. For some women it is Oranga Tamariki, not the abuser, who women find they are having to fight against in the Family Court – because the way Oranga Tamariki uses the Family Court system means they become the primary abuser of the women and their children. Many women have told us Oranga Tamariki's response has made everything so much worse and this is particularly the case for Māori women and children.

### **Issues for children in the Family Court<sup>27</sup>**

#### **Summary of Backbone's findings<sup>28</sup>**

The Family Court is acting contrary to the legislation which should guide the way the Court responds to children:

- 83% of mothers said the Family Court had not made their children safer after they left the violence and abuse.
- 87% of mothers said the Family Court views their abuser as being safe for the children to spend time with.
- Most children are ordered into unsupervised care and contact with the abuser.
- Only 2% of cases had a risk assessment been done to assess how safe the children would be under these 'care and contact' orders<sup>29</sup>

In cases where there has been violence and abuse the Family Court is unduly prioritising a child's right to stay in contact with both parents<sup>30</sup> over their right to be protected from physical, sexual or mental mistreatment or violence.<sup>31</sup> The result is hundreds of children being forced against their wishes into unsafe care and contact with the abusive parent:

- 54% of the children are being forced into care and contact arrangements that they do not want. These 'forced' children are significantly more worried about what happens at the abuser's house (sexual, physical, and psychological safety issues) than children who were not forced.

<sup>27</sup> All children represented in these findings have (directly or indirectly) experienced violence and/or abuse – often for many years.

<sup>28</sup> Reports available at <https://www.backbone.org.nz/reports/>

<sup>29</sup> Lundy Bancroft is recognised internationally as an expert in domestic violence and child maltreatment, in particular the risks abusive fathers pose to their children. Refer <http://lundybancroft.com/articles/assessing-risk-to-children-from-batterers/>

<sup>30</sup> Article 9 of UNCROC which states 'Children have the right to live with their parent(s), unless it is bad for them. Children whose parents do not live together have the right to stay in contact with both parents, unless this might hurt the child' and s5(e) of the Care of Children Act 2004 which says 'a child should continue to have a relationship with both of his or her parents...'

<sup>31</sup> Articles 19.1 and 19.2 of UNCROC which state 'children have the right to be protected from being hurt and physical, sexual or mental mistreatment or violence' and s5(a) of the Care of Children Act 2004 which states a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995).



- One third of children want no contact at all with abuser whereas nearly all of them are currently ordered into some form of care and contact.

Backbone have been told about 57 children who have experienced a forced uplift – the Family Court orders Police to uplift the child from protective parent and place with abusive parent to enforce the parenting order.<sup>32</sup>

In more than half of all cases either the children or their mother told professionals working in the Family Court about the worries they had at the abuser's house but in the majority of cases those worries were not reported accurately to the Court (by lawyers or the psychologist assigned to the case) or taken into consideration when care and contact orders were made.

Despite the many fears the children had about having contact with their abusive father post separation, children were not listened to and were subsequently placed in unsafe situations:

- For most children their experience of violence and abuse was not believed, was minimised, was excused or told it happened too long ago to mention.
- 86% of mothers say the Family Court has not responded appropriately to their child/ren's wishes/views/experiences and safety.
- 89% of children received no follow up interviews or reviews from anyone working in the Family Court after orders were made placing them into care and contact with the abuser.

Many children are exposed to harmful behaviours, substances and further violence and abuse when in the care of the abuser. While in the abusive parent's care:<sup>33</sup>

- 58% of children are worried about their physical safety
- 14% are worried about their sexual safety
- 81% are worried about their psychological safety
- 15% are exposed to pornography
- 18% are exposed to drug use and paraphernalia
- 24% are exposed to him abusing the new partner and children
- 23% are exposed to illegal behaviour.

In many cases, the care and contact orders result in terrible health impacts for these children. We were told about a range of health impacts mothers attribute to Family Court proceedings and orders, including physical, psychological, social and behavioural impacts.

The damage done to children's health is markedly worse in cases where the Family Court has forced children into care and contact and where the children have refused to go willingly into their father's care.

It is very concerning that collectively 419 women told us about 201 Family Court decisions, orders and directions that prevent them from speaking to their children about the abuse and/or prohibits them from accessing therapeutic services to help their children recover from the abuse and trauma.

<sup>32</sup> In similar circumstances to the case outlined in this story  
<https://www.newsroom.co.nz/2017/08/07/41459/taken-by-the-state>

<sup>33</sup> N= 408 children

### Issues for Māori children (tamariki) in the Family Court<sup>34</sup>

#### Summary of Backbone's findings<sup>35</sup>

Backbone is very concerned that Māori children experience a double whammy in the Family Court – we have consistently found that Māori children (tamariki) are experiencing even greater human rights abuses in the Family Court.

- 22% of children of Maori mothers compared to 11% of children of non-Maori mothers were ordered into the abuser's day to day care by the Family Court.
- Professionals accurately reported children's concerns to the Family Court in only 8% of Maori cases compared to 34% of non-Maori cases.
- 67% of children of Maori mothers and 54% of children of non-Maori mothers are forced into contact arrangements with the abuser against their wishes.
- 52% of Māori mothers reported Oranga Tamariki (New Zealand's child protection agency) involvement in their Family Court case compared to 39% of non-Māori mothers.
- A higher percentage of children of Māori mothers were physically injured while in the abuser's care and did not have their medical needs met.
- As a result of their Family Court proceedings, children of Māori mothers were more likely to experience an inability to concentrate, experience weight loss or gain, have bowel problems to abuse alcohol and drugs and sadly more likely to use self-harming behaviour and make suicide attempts.

## There is no independent oversight or complaints mechanism for children in Family Court

Having considered the widespread harm being done to children who have experienced violence and abuse and been involved in the Family Court, the next obvious step is to ascertain which agency should have been identifying and responding to these issues.

In September 2017 Backbone released a watchdog report called 'Don't tell Me your Problems'<sup>36</sup> in which we examined all the complaints avenues we were aware of that have been receiving complaints from women and children in the Family Court for many years.

<sup>34</sup> All children represented in these findings have (directly or indirectly) experienced violence and/or abuse – often for many years.

<sup>35</sup> Reports available at <https://www.backbone.org.nz/reports/>

<sup>36</sup> <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/59b71d81197aea15ae01133b/1505172890050/Complaints+and+appeals+watchdog+report+12+Sept+2017+FINAL.pdf>

### Independent oversight and complaints mechanisms

#### Summary of Backbone's findings<sup>37</sup>

There are a range of entities that should and could collectively be undertaking aspects of quality management of practice within the Family Court, particularly in cases where there has been violence and abuse, but these are not working.<sup>38</sup>

There is no independent authority tasked with monitoring and overseeing the Family Court or reviewing and regulating its outcomes.

There is no authority responsible for overseeing the safety and rights of children who are subject to Family Court proceedings, and there is no independent and safe mechanism for children to complain.<sup>39</sup>

Our investigation into the complaints and appeals landscape has found the following:

- There is no independent oversight of what happens in the Family Court.
- There is no follow up or monitoring of Family Court decisions.
- There is no accountability for those working in the Family Court.
- The presiding Judge controls the proceedings and how the complaints about those proceedings are responded to.
- Women's, children's and tangata whenua's rights are being breached in the Family Court and no one can intervene.
- Complaints are not collected or reported in a way that allows for them to inform the continuous improvement of the Family Court.

The main agencies/individuals who should be providing oversight and considering complaints from children in the Family Court are:

#### Children's Commissioner

The Children's Commission operates under the Children's Commissioner Act 2003 which gives the commission three key functions that are stated on the Office of the Children's Commissioner (OCC) website as:

1. monitoring, assessing and reporting on services provided to children in care<sup>40</sup>
2. advocating for the rights of children and young people<sup>41</sup>

<sup>37</sup> Reports available at <https://www.backbone.org.nz/reports/>

<sup>38</sup> Refer section below and full report available at:

<https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/59b71d81197aea15ae01133b/1505172890050/Complaints+and+appeals+watchdog+report+12+Sept+2017+FINAL.pdf>

<sup>39</sup> <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/59b71d81197aea15ae01133b/1505172890050/Complaints+and+appeals+watchdog+report+12+Sept+2017+FINAL.pdf>

<sup>40</sup> In other words, monitoring the child protection activities of Oranga Tamariki (formally Child, Youth and Family)

<sup>41</sup> OCC's website says they provide free, independent advice to parents and other adults about the rights of a child or young person and if necessary we advocate on their behalf to remove barriers and generate action

3. raising awareness of and advancing the United Nations Conventions on the Rights of the Child (UNCROC).

One of the stated priorities for the Children's Commission 2017 is:

Encouraging government agencies and NGOs to be more child-centred. We will encourage organisations to be more child-centred by promoting ways to gather children's views and consider their interests. This approach upholds children's rights, ensures better outcomes, and means better decisions are made. Being more child-centred means children have the right to participate in decisions that affect them.<sup>42</sup>

In light of this, Backbone was concerned to learn that the Children's Commissioner does not advocate for children who are involved in Family Court proceedings. The following section of the Children Commissioner's Act 2003 states:

S18. Commissioner may not investigate courts or tribunals

(1) Despite anything in this Act, the Commissioner may not investigate any decision or recommendation, or any act or omission, of a court or a tribunal.

(2) If any matter is the subject of proceedings before a court or a tribunal, the Commissioner may not commence or (if the Commissioner has commenced an investigation) continue an investigation into the matter until the proceedings are finally determined.<sup>43</sup>

#### **Children's Commissioner**

##### **Summary of Backbone's findings<sup>44</sup>**

It is of considerable concern that children involved in Family Court proceedings have no complaints mechanism available to them.

Children's complaints about their Lawyer for Child go directly to the Judge and not an independent authority.

The Children's Commissioner is not able to advocate for these children and this leaves these children even more isolated and vulnerable.

Whilst the Commissioner can advocate for children in state care and those under plans with Oranga Tamariki, he cannot advocate for children who are part of either Care of Children Act or Domestic Violence proceedings.<sup>45</sup>

Many Backbone members have written to the Children's Commissioner asking that he step in to help their children who are suffering terribly due to decisions and orders of the Family Court but are told that he cannot comment or get involved in any way as the matter is before the Family Court.

<sup>42</sup> <http://www.occ.org.nz/assets/Uploads/Childrens-Commissioner-Priorities-March-2017.pdf>

<sup>43</sup> <http://www.legislation.govt.nz/act/public/2003/0121/latest/whole.html#DLM230429>

<sup>44</sup> Reports available at <https://www.backbone.org.nz/reports/>

<sup>45</sup> <http://www.legislation.govt.nz/act/public/2003/0121/latest/whole.html#DLM230429>

On 3 May 2018, Backbone sent the Children's Commissioner a copy of 'Seen and Not Heard: Children in the Family Court. Part Two Lawyer for Child?' report,<sup>46</sup> with a covering letter asking for his feedback about the system failures we identified in that report. On 10 May he replied saying, 'Thank you very much for bringing this to my attention. I have asked members of my staff to read the material as it is important that our office is aware of your work.' An email from the Commissioner's office on 23 May said, 'We have no further comment beyond that in the Commissioner's letter of 10 May 2018.'

Backbone knows that the Children's Commissioner has been alerted to serious failings in the Family Court with regard to children's wellbeing and safety. We wonder what the Commissioner has done to investigate or elevate the issues further if he himself does not have the mandate to intervene.

### Lawyer for Child

The Lawyer for Child service is a key component of the government funded response system. The Judge hearing the case appoints the Lawyer for Child to represent the children. They are one of the groups of professionals routinely contracted by the Family Court when there are Care of Children Act or Domestic Violence Act proceedings and violence and abuse has been alleged. The Ministry of Justice (MoJ) website states the role and function of the Lawyer for Child is to;<sup>47</sup>

- represent the child in the court process and any negotiations between the other people involved
- explain the court process to the child in a way they can understand
- makes sure the judge is told what the child thinks and is told about all the things relevant to the child's welfare and best interests
- explain the judge's decision to the child and talks with them about how it will affect them.

Children desperately need an advocate in the adult centered environment that is the Family Court and mothers rely on Lawyer for Child to advocate for their children, to help them be safe when there has been violence and abuse.

In May 2018, Backbone released a report specifically focusing on Lawyer for Child.<sup>48</sup> That report added weight to the evidence provided in Backbone's four previous Family Court reports<sup>49</sup> that there are widespread systemic failures in the New Zealand Family Court and serious damage is being done to the children who have experienced violence and abuse and who are involved in the Family Court.

<sup>46</sup><https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5ae99c5588251bf787133d44/1525259361189/Seen+and+not+Heard+-+Lawyer+for+Child+3+May+2018.pdf>

<sup>47</sup> <https://www.justice.govt.nz/family/about/lawyer-for-child/>

<sup>48</sup>Seen and Not Heard: Children in the Family Court. Part Two Lawyer for Child? Available at: <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5ae99c5588251bf787133d44/1525259361189/Seen+and+not+Heard+-+Lawyer+for+Child+3+May+2018.pdf>

<sup>49</sup> <https://www.backbone.org.nz/reports/>

### Lawyer for Child

#### Summary of Backbone's findings<sup>50</sup>

Children are not being heard and do not believe that Lawyer for Child is making them any safer.

The Lawyer for Child is not an independent representative of the child but rather is an agent for the Judge.:

- In 11% of cases the Lawyer for Child has never met with the children they are contracted to represent.
- The Lawyer for Child accurately told the Family Court what the child wanted in less than a third of cases.
- Only 21% of children felt heard and understood by their lawyer.
- In 59% of cases the Lawyer for Child would not allow the child/ren to have a support person during their interview.

The Lawyer for Child service is not providing independent oversight of children involved in the Family Court.

There is no safe and independent way for children to complain about their assigned to represent them. If they do, their complaint goes to the presiding Judge who appointed the Lawyer for Child, rather than to the Law Society.

In addition, the complaint is shared with all parties and the Lawyer for Child and thus in all subsequent proceedings the complaint hangs over the woman and seems to affect her treatment from related parties thereafter.

Backbone can find no information regarding whether anyone collates and reports about the total number of complaints made about Lawyer for Child and the outcome of those complaints. It is unclear how the Law Society ensures those appointed as Lawyers for Child are meeting their obligations as lawyers if they are not party to complaints about those lawyers. We asked the Law Society if a complaint is made about a Lawyer for Child to the Registrar at the appropriate Court does the Registry or the Judge have to notify the Law Society of that complaint and its outcome? We also asked for the number of complaints received by the Law Society concerning Lawyer for Child for the year 2016. We received this response:

*There is no obligation on the Registrar to notify the Lawyers Complaints Service if it receives a complaint. If a complaint is investigated by the Court and the outcome is serious the matter may be referred at that stage to the Lawyers Complaints Service. In relation to your inquiry about numbers of complaints against lawyer for child that is not information that is published in our annual report.<sup>51</sup>*

<sup>50</sup> Reports available at <https://www.backbone.org.nz/reports/>

<sup>51</sup> Communication with Law Society dated 30 August 2017

## Ombudsman

The Ombudsman is an independent authority set up in 1962 whose role is to help the public in dealings with government agencies. *'The Ombudsman handles complaints and investigates the administrative conduct of state sector agencies, including in relation to official information requests.'*<sup>52</sup>

However, when women or children have tried complaining to the Ombudsman about their treatment in the Family Court they have been told by the Ombudsman's office they cannot intervene in care or custody cases before the Family Court.

## In summary

From the findings of our surveys and other investigations, we believe that the New Zealand Government is in effect funding state sanctioned abuse of children via the Family Court. The Government has a duty of care to these children and to the New Zealand public to urgently and comprehensively investigate the harm being done. Currently:

1. There is no independent oversight of the response system for women and children who have experienced violence and abuse, which means there is no way to readily identify where the system is failing and to make improvements.
2. There is no authority that is responsible for independently overseeing the safety and rights of children who are subject to Family Court proceedings.
3. Children who have been exposed to violence and abuse and who are involved in the Family Court are being further abused by the processes and decisions being made about their care.
4. Under the Care of Children Act, children are being ordered into dangerous situations by the very agencies and institutions that have been set up and funded by the state to protect them.
5. There is no safe and independent way for children to complain when they are being harmed and not having their rights upheld by the Family Court.
6. The Children's Commissioner legislation prevents him/her from providing independent oversight for children involved in Family Court proceedings.

## Context for Backbone's recommendations

Independent oversight and continuous improvement for family and sexual violence is critical

In our report 'The Way Forward', written four years ago, we said:<sup>53</sup>

*When working to make change in complex social issues there is often only minimal evidence to guide planners and hence a continuous improvement framework is critical when addressing these issues.*

*If continuous improvement processes were put in place from the outset and continued in a consistent and sustained way – with continual learning to improve the system – over time, the incidence of intimate partner violence and child abuse and neglect, the social consequences and the intergenerational transmission would be reduced.*

<sup>52</sup> <http://www.ombudsman.parliament.nz/what-we-do>

<sup>53</sup> [http://theimpactcollective.co.nz/thewayforward\\_210714.pdf](http://theimpactcollective.co.nz/thewayforward_210714.pdf)



*A comprehensive range of what can be broadly called quality management activities would need to occur nationally and within each region to:*

- *ensure all parts of the Integrated System were operating to best practice levels and achieving optimal immediate and, intermediate outcomes*
- *feed information into the continuous improvement process so learning can occur and ongoing improvements made over time.*

Backbone strongly supports the following statements made on the website for this review:<sup>54</sup>

Independent oversight is particularly important where government has statutory powers to protect children, such as the power to apply to the Family Court to remove children and young people from their families, and to place them with caregivers or in care and protection residences.

Independent oversight can improve practices and processes, as well as how people experience the system. It provides agency leaders, managers and Ministers with on-going access to a different and important perspective on agency processes and services, their decision-making and resource use. In this way, independent oversight contributes to a continuous learning culture and has valued system benefits.

Backbone would add to the above comment that children involved in Family Court proceedings between an abusive parent and a protective parent require the same independent oversight of their cases as is provided for children in state care. In these cases, the Family Court is also using its statutory power to intervene and, in many cases, remove children from protective parent's care and ordering children into the care and contact with an abusive parent (against the children's wishes and without a risk and safety assessment being completed). These children are not currently provided any independent oversight such as is the case for children involved in care and protection proceedings under Oranga Tamiki who are overseen by the Children's Commissioner.

### Complaints are an individual right and a key part of quality assurance and continuous improvement

In 'The Way Forward' report we identified complaints mechanisms as one of the key components of quality management and continuous improvement, saying:

*In order to hear about areas where the system was failing it would be important to establish mechanisms regionally and nationally for services users, family/whānau, friends and frontline workers to 'complain' or notify where there are problems.*

One of the general functions listed in the Children's Commissioner Act is: *'to promote the establishment of accessible and effective complaints mechanisms for children and to monitor the nature and level of complaints'.*

However, both the Glenn Inquiry and Backbone have concluded that there are no formalised complaints processes, *'Those affected by child abuse and domestic violence had no genuine right of redress, as their complaints and questions about the quality of the services they received often went*

<sup>54</sup> <https://www.msd.govt.nz/about-msd-and-our-work/work-programmes/policy-development/oversight-for-children/index.html>

*unheard or unaddressed'.<sup>55</sup>*

### Children's rights should underpin quality assurance and continuous improvement

New Zealand is a signatory to the United Nations Convention on the Rights of the Child (UNCROC)<sup>56</sup> which sets out the rights of children, aged 0 to 18 years, and the responsibilities of governments to fulfil those rights. UNCROC requires governments to ensure that the best interests of the child must come first where decisions, laws or services involve children and includes the responsibilities of parents, governments, and children themselves to ensure the rights of children are met,<sup>57</sup> in particular:

**Article 3.1** - In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

**Article 12.1** - States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

**Article 12.2** - For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

**Article 19.1** - States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

**Article 19.2** - Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

### Tangata whenua rights

A further document which guides children's rights in New Zealand is Te Tiriti O Waitangi which is the founding document that guides relationships between tangata whenua and tauwi. The treaty sets out principles of protection, partnership and participation to which New Zealand is bound. Through the colonisation of Aotearoa, the loss of Māori land, language and culture, great harm has been done to Māori. The justice sector is one critical area where racism towards Māori is experienced pervasively.<sup>58</sup> While the Human Rights Act prohibits racism in New Zealand, Te Tiriti O Waitangi upholds tangata whenua's right to experience the same privileges as tauwi and have inequalities reduced. Therefore, racism experienced in the Family Court by children transgresses the principles of Te Tiriti O Waitangi

<sup>55</sup> Ibid.

<sup>56</sup> Ratified by New Zealand on 13<sup>th</sup> March 1993.

<sup>57</sup> <https://www.unicef.org.nz/learn/our-focus-areas/child-rights>

<sup>58</sup> <http://www.stuff.co.nz/national/crime/84346494/new-zealands-racist-justice-system--our-law-is-not-colourblind>

and the Human Rights Act and we therefore understand Te Tiriti O Waitangi is a critical document in the children's rights landscape.

### New Zealand legislation reflects children's rights

The notion of the best interests of the child (UNCROC Article 3.1) is that, 'laws and actions affecting children should put their interests first and benefit them in the best possible way.'<sup>59</sup> This is reflected in s6 of the Oranga Tamariki Act.

The child's rights to express their own views and have those views taken into account (Articles 12.1 and 12.2) are reflected in – sections 6 (2) (a) and (b) and 9B(1)(b),(2) and (3) and in section 5(d) of the Oranga Tamariki Act.

The child's rights to be protected from all forms of violence (Articles 19.1 and 19.2) are also reflected in the Care of Children Act. S 5 (a) states, 'a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi'.

The Children's Commissioner Act lists number of the general functions of the Children's Commissioner specifically relating to children's rights, including:

- to raise awareness and understanding of children's interests, rights, and welfare:
- to act as an advocate for children's interests, rights, and welfare generally (except before any court or tribunal), and, in that regard, to advance and monitor the application of the Convention by departments of State and other instruments of the Crown:
  - if there are issues in proceedings before any court or tribunal that relate to the Convention or to the interests, rights, or welfare of children generally, to present reports on such issues to the court or tribunal.....
  - to report, with or without request, to the Prime Minister on matters affecting the rights of children.

### Backbone recommends

1. That an independent quality assurance body be established to provide independent oversight to all parts of the response system for women and children who have experienced violence and abuse, including the Family Court. The overall objectives of this body would be to:
  - Ensure all parts of the response system are operating to best practice levels.
  - Identify where the system is failing and to ensure improvements are made to ensure the system is continuously improving.
  - Ensure that the voices of those who use the services (in this case children involved in the Family Court) are actively gathered to identify any areas where the system is not working, where victims are not being kept safe and where rights are not being upheld.
2. That an **independent** complaints body be established with powers to make recommendations for change, with jurisdiction over all parts of the system that respond to violence against women and

<sup>59</sup> <https://www.unicef.org/nz/child-rights>

children. This service should have a dedicated team to liaise with children and help them make complaints about the services they are receiving and about breaches in their rights.

3. That Government works with the Law Society, the Psychologists Board, Oranga Tamariki, and the Judicial Conduct Commission to amend their complaints processes so that all complaints regarding the Family Court are reported to and investigated by the independent complaints body or professional body immediately upon receipt rather than referring them back to the Family Court Judge concerned.<sup>60</sup>
4. That a national network of independent children's advocates be established to work alongside children who are involved in Family Court to ensure their voices are heard. These advocates should have specialist knowledge of domestic and sexual violence and its impact on children and they must be completely independent of the Family Court i.e. not appointed by, or answerable to, Judges or the Registrar of the Court. This service could be expanded over time to cover other parts of the system that children who have experienced violence and abuse are involved in.
5. That the Children's Commissioner Act 2003 be amended to ensure the functions of the Commissioner, as listed in s12 of the Children's Commissioner Act do apply to children who are party to Family Court proceedings in particular that the Commissioner is responsible for ensuring the following in respect to children involved in the Family Court:
  - to raise awareness and understanding of children's interests, rights, and welfare
  - to act as an advocate for children's interests, rights, and welfare generally (except before any court or tribunal), and, in that regard, to advance and monitor the application of the Convention by departments of State and other instruments of the Crown
  - if there are issues in proceedings before any court or tribunal that relate to the Convention or to the interests, rights, or welfare of children generally, to present reports on such issues to the court or tribunal.....
  - to report, with or without request, to the Prime Minister on matters affecting the rights of children.
6. That unless/until an independent complaints body be established for all cases of violence and abuse, that s18 of the Children's Commissioner Act 2003 be amended to enable the Commissioner to advocate for, and consider complaints from, children who are involved in Family Court proceedings.

---

<sup>60</sup> Refer

<https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/59b71d81197aea15ae01133b/1505172890050/Complaints+and+appeals+watchdog+report+12+Sept+2017+FINAL.pdf>



Signed:

Ruth Herbert  
Co-founder  
The Backbone Collective  
PO Box 147 138  
Ponsonby  
Auckland  
New Zealand  
[www.backbone.org.nz](http://www.backbone.org.nz)  
[info@backbone.org.nz](mailto:info@backbone.org.nz)  
+64 274486422

## Appendix one - About the authors

### **Ruth Herbert, Co Founder, The Backbone Collective**



Ruth is well known for her work in trying to improve New Zealand's system response to violence against women and children. She has given many presentations and media interviews and researched and written extensively about intimate partner violence, child abuse and neglect and sexual violence.

Ruth has worked in a wide variety of paid and unpaid roles – all focused on improving the domestic and sexual violence system response. This has ranged from being the Director of Family Violence at the Ministry of Social Development and the Executive Director of the Glenn Inquiry to the victim/survivor representative on the independent Ministerial Review Panel assessing ACC's sensitive claims clinical pathway. In 2014 Ruth and Deborah proposed a new model that would build on and strengthen the existing system in New Zealand and established the Backbone Collective to advocate for such change. Ruth has a Master of Public Policy (dist.) and was awarded the Victoria University Holmes Prize in Public Policy in 2008.

### **Deborah Mackenzie, Co-Founder, The Backbone Collective**



Deborah has worked for many years trying to improve New Zealand's system response to violence against women and children. She has worked in advocate roles and policy positions both in NGOs and within Government (woman's advocate, interagency network coordinator, policy analyst, project manager, and researcher).

Deborah has a special interest in the justice sector response to women survivors including writing in depth reports on specialist domestic violence courts and female offenders. During the last five years she has worked as an independent contractor and managed an NGO. In 2014 Deborah co-wrote The Way Forward with Ruth Herbert which proposed a new model for an integrated response system in New Zealand to respond to violence and abuse. Deborah has significant experience as a trainer, presenter and media commentator. She has a Master of Arts in Education (first class honours).