

Feedback on Exposure draft: proposed changes to the Family Court Rules 2002 to enable Te Au Reka to be implemented in the Family Court

Thank you for the opportunity to provide feedback on these proposed changes to the Family Court Rules to enable implementation of Te Au Reka.

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 over 50 years. We represent victim-survivors of family violence, specifically wāhine and tamariki, the primary groups subjected to and impacted by family violence.

Clearly, there are many good reasons for a programme of work to digitise court records, and Te Au Reka has the potential to positively impact on the experience of court users who are family violence victim-survivors; however, we want to ensure that the Ministry of Justice is cognisant of the potential for Te Au Reka to negatively impact on the safety of this group of court users and makes a proactive effort to mitigate these risks in the design of Te Au Reka and any rule changes needed to support its implementation.

Background

Many victim-survivors experience coercive controlling tactics during and after separating from an abusive partner. Some do not recognise what they experience as 'family violence', while others do but do not disclose this to the court for a number of possible reasons, not least of which is a rational fear that a disclosure will result in less safe outcomes. This fear may be based on their lawyer's recommendation or hearing about other victims' experiences of the Family Court.

Family Court proceedings in particular often involve family violence –often more than is known or recorded by the Family Court. According to the Backbone Collective:

"The Family Court does not collect specific data on the incidence of family and sexual violence cases in relation to COCA¹ and in New Zealand more recently cases involving family violence have been referred to as 'complex cases'. The use of the term 'complex cases' often masks or distorts the family violence dynamic thereby resulting in a response that views the parties' inability to resolve matters as the issue at fault. This view ignores the dynamics of violence and abuse, including coercive control, which are what inhibit the fast or straightforward resolution of matters before the court.

¹ 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. In Backbone's first Family Court survey we found that of the 496 women who were involved with the New Zealand Family Court 70% had applied for a Protection Order.

However, 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. Research in Australia undertaken to assess parenting arrangements made after separation found that only 3% of families used the family court to make parenting arrangements after separation. However, of the families using the family court to make parenting arrangements, violence was a key feature with 54% reporting physical violence, and 85% reporting emotional abuse. Further, almost half of the parents that went to court said they had concerns for their own or their children's safety.² There is no reason to believe that the numbers in New Zealand would vary significantly from these figures, as our rates of family violence are currently higher than Australia.³

A recently published research study in New Zealand by the University of Otago looked at parenting arrangements after separation and found that more participants had 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, 5}

Coercive control often involves digital monitoring and abuse, which may include obtaining passwords through coercion or subterfuge, putting tracking devices on computers or hacking into devices. These forms of abuse mean that victims' ex-partners may have access to information they provide or receive from the court, even if that information is officially off-limits to them, such as information that includes their current address and contact details which were previously unknown to the ex-partner.

Women's Refuge and Backbone Collective representatives met with Ministry of Justice officials in January 2025 after requesting a meeting to discuss our concerns about Te Au Reka and offer suggestions about how it could be helpful for victim-survivor court participants' communication with the court without putting them at further risk of abuse. We were concerned to learn at this meeting that stakeholders consulted with up to that point about Te Au Reka implementation had only included two local family violence service providers and no national family violence specialists with capacity and capability in research and policy consultation, *and* that consultation had specifically explored the potential risks for the specific population of family violence victim-survivors, a significant group of family and criminal court users.

The family violence sector has called for reform of the Family Court for many years, as it is well-known and well-documented that the Family Court system is, at best, inconsistent in providing safe

² Kaspiew, R., Carson R., and others, (2015) Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments). Melbourne: Australian Institute of Family Studies and also

Kaspiew, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., De Maio, J. et al. (2015a). Evaluation of the 2012 family violence amendments: Synthesis report. Melbourne: Australian Institute of Family Studies. aifs.gov.au/publications/evaluation-2012-family-violence-amendments. <https://aifs.gov.au/publications/parenting-arrangements-after-separation>

³ Prevalence of family violence in a woman's lifetime is higher for New Zealand women (33%) than for Australian women (25%) - for comparisons by country as of 2014 <https://stats.oecd.org/index.aspx?datasetcode=GIDDB2014>

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 Backbone Collective email communication to Te Au Reka team at Ministry of Justice, 19 Nov 2024

decisions with relation to adult and child victims of family violence, and often causes further harm with devastating consequences for victims. There are many reasons for this, including:

- No mechanism in place to screen participants for family violence and then decide on safe and appropriate decision-making pathways, i.e. avoiding family dispute resolution processes which are inherently unsafe for adult and child victims of family violence
- No system to enable routine sharing of family violence information to inform court decision-making, particularly with regards to care of children
- No safe process for gathering views of the children involved in proceedings when there has been family violence

Another issue we'd like the Ministry to consider in implementing Te Au Reka, is their system requirements relating to the use of legal names, which is of particular importance for transgender court users. Our affiliated Women's Refuge services are available to all family violence victim-survivors who identify as women, including transgender women. Family violence disproportionately affects this community because entrapment is caused not just by the family violence, but also by poor system responses and social inequity.

We understand from communications with Hohou te Rongo Kahukura that the Police database currently requires a work-around when police first come into contact with someone who either later transitions their gender or whose legal name is different from the name they use (i.e. someone who has transitioned in their day to day life, but who hasn't yet changed their driver's license, passport, birth certificate, etc.). This results in people going through court proceedings that may continually out them as transgender, regardless of whether it is relevant to the particular proceedings – potentially a breach of the Privacy Act and regardless, an attack on their dignity.

Changes to Family Court Rules to enable the implementation of Te Au Reka should be future-proofed as much as possible to be safe and appropriate for processes and systems to improve how the court responds to family violence in *all* relevant proceedings, not just 'family violence proceedings,' but also care of children, care and protection, separation and divorce, and relationships property proceedings.

Feedback and recommendations on the Exposure Draft

1. **Compulsory for lawyers to use Te Au Reka:**

We have no concerns about this, and rules seem clear.

2. **Optional for parties:** Parties will be able (but not required) to use Te Au Reka to provide information to and receive information from the court.

Rules are clear about this being optional, and we strongly agree that use of Te Au Reka needs to be optional but not required for parties. There are risks for victims of coercive control to use digital platforms if their device is being monitored or tracked and/or has been hacked. If victims know this is likely to be the case, they may feel the only safe option is to opt out of using Te Au Reka and instead use traditional forms of communication with the court.

- **Recommended addition:** Allowing the option of a third-party support person authorised by the victim to use Te Au Reka on their behalf would offer a safer alternative for victim-survivors to use Te Au Reka that would minimise risk to safety while still retaining the benefits of the ease of electronic communication offered by Te Au Reka. Reliance on lawyers for access to these benefits of Te Au Reka is highly problematic in that many victims have enormous difficulty accessing family lawyers in their communities with a good understanding of family violence, especially those who do legal aid.

As one research participant told us:

"I wouldn't have been able to deal with the court stuff and keep going with my life without [third party]. She was across everything for me."

One of the most common queries that Women's Refuge National Office receives from both women and from our affiliated refuges, is for help finding family lawyers who are both knowledgeable about family violence and affordable and/or able to legal aid. As another research participant told us:

"I know of one lawyer who actually helps, but he is on extended leave, so if I can get in with him I think we might be okay, but I'm worried if I can't. This is all just such a mess."

This option is particularly important and necessary for court users who have care, support or communication needs so that they will need support from someone else to communicate with the court who may be their caregiver or a volunteer or paid and trained advocate.

This option does not seem to be allowed under the proposed rules, which define a user of the e-solution as:

- a) the court (as defined in this subclause) or a Registrar; or
- b) a person who—
 - i. is in or outside New Zealand; and
 - ii. may or must use the e-solution to bring or deal with proceedings in the court (see rule 5 and Part 1A)

3. Service:

- For parties, express agreement to receive served documents through Te Au Reka must be evidenced through Te Au Reka. Initial service may be possible through Te Au Reka, for example if the registry can confirm before service of initial documents that a lawyer or party agrees to receive such service (and this is evidenced through the portal). Service will take effect once the registry or serving party has indicated through Te Au Reka that certain documents are served on a specified recipient.
- It will be possible to use Te Au Reka for the service of documents if personal service is not required and when service is made to a lawyer, or to a party who has expressly consented to this.
- Te Au Reka can be used when documents being served by a party on another party or lawyer also need to be filed with the court. 1 For example, the information in Form G7 (information sheet) of the Family Court Rules 2002.

- **Recommendation:** Initial service through Te Au Reka should only happen if the registry can confirm before service of initial documents that *a lawyer* (and not a party) agrees to receive such service. We are concerned that the registry communicating by phone, for example, with a party to get confirmation of service via Te Au Reka will not be aware of coercion to accept this option. Initial service to parties should be in-person only in any family court proceedings where there is risk that one party is perpetrating family violence on the other party (i.e. the majority of family court proceedings), in order to minimise the possibility that a participant is coerced into agreeing (See our recommendation in point 9).
4. **Access to information:** When Family Court proceedings are in Te Au Reka, parties, their lawyers, approved delegates, and party representatives will be able to view and download substantively the same information through the Te Au Reka portal as they can currently access in hard copy or by email.
- Information will be able to be accessed for as long as is reasonably required in terms of the person's role. Default access rights can be amended on application to or own motion of the Judge, Family Court Associate or Registrar.
 - Access to highly sensitive information, such as psychological, cultural, or medical reports will continue to be restricted, as it is currently.
 - Detailed operational settings for information access through Te Au Reka, for example what notice will be given of access being terminated, are still being worked through.
5. **Digital endorsement/ verification:** Requirements in the rules for signatures or seals, and other means of approval, endorsement, authentication or verification will be able to be evidenced digitally.
- **Recommendation:** There must be a clear pathway established and communicated to parties so that they can communicate concerns if their access to Te Au Reka has been compromised, for example, via coercion or subterfuge, and be reassured that any concerns raised would trigger a rapid response to shut off access at least temporarily until concerns can be verified. This possible risk does not seem to be addressed in the proposed rule changes.
6. **Effective timing:** Information filed, notified, served or otherwise transmitted by a court participant through Te Au Reka after 5pm on a working day will be deemed to be received at 9am on the next working day.
7. **Business continuity:** If Te Au Reka is offline or cannot be accessed or used for any reason, court participants (including lawyers) may or must use another method to interact with the court.
8. **Transitional approach:**
- Te Au Reka will be implemented throughout Family Court offices in stages. The obligation on lawyers to use Te Au Reka will apply for new proceedings when Te Au Reka has been implemented in the relevant court office which applies to the particular proceedings.
 - Transitional arrangements will apply when proceedings are transferred from an office which has implemented Te Au Reka to one which has not, and vice versa.
 - Proceedings which have started before Te Au Reka is implemented in a court office can be moved into Te Au Reka following a direction from a Judge, Family Court Associate or Registrar.

- After implementation of Te Au Reka in the relevant court office, we intend that lawyers or parties can choose to file new documents for proceedings which began prior to the implementation either through Te Au Reka or through current routes (e.g. email or hard copy). After such filing, the lawyer or party will be advised if a direction has then been made to move the proceedings into Te Au Reka. If a direction has been made, a lawyer must use Te Au Reka for those proceedings from that point, and notification to other parties and counsel would occur. If a direction has not been made, the proceedings would continue to be managed, and communication would occur, using pre-existing methods outside of Te Au Reka.
- Please note that we are still considering whether adjustments may be needed to the definition of 'proceedings' as it is used in the transitional provisions (new Schedule 5 1AA). Any adjustments would be to ensure it is clear exactly which proceedings are covered by Te Au Reka following implementation.

We have no concerns about points 6 and 7.

9. Minor changes to other rules relating to service of judgments:

The rules currently require most Family Court judgments to be personally served, however this is not what happens in practice. Personal service is always used for respondents in certain Family Violence orders and judgments, restraining orders under the Oranga Tamariki Act, and for without notice orders, and any other time a Judge directs. Requiring most judgments to be personally served is costly, not justified, and can be more difficult for the registry and parties. Accordingly, personal service of a judgment will only be required:

- for the respondent, in relation to:
 - all Family Violence Act orders and judgments,
 - restraining orders under the Oranga Tamariki Act, and
 - all orders made without notice (including notices of equivalent orders made in certain overseas courts which are registered in New Zealand), and
 - for anyone, any time a Judge or Family Court Associate directs.
- **Recommendation:** There needs to be a clear rationale and greater transparency around when personal service is and is not required. Basing rules on current practice is not a legitimate rationale. We recommend stating a rationale for requiring personal service that is based on safety, to make clear that *personal service should be required when it is necessary to confirm service on a respondent ASAP in order to minimise risk to another party or parties, and/or children of a party, e.g. in relation to:*
- *all Family Violence Act orders and judgments,*
 - *restraining orders under the Oranga Tamariki Act, and*
 - *all orders made without notice,*

This rationale supports current practice for the examples listed, but may apply to other examples of service not listed, particularly in future when the Family Court undergoes reform in order to provide a safer response to family violence.

Overall Recommendations on Implementation of Te Au Reka:

Overall, we strongly recommend that you consult with family violence specialists, including those that work with marginalised communities such as VisAble, Hohou te Rongo Kahukura, and kaupapa Māori family violence specialists (there are no such national organisations, but there are a number of kaupapa Māori local family violence specialist organisations), and we strongly recommend you 'road-test' Te Au Reka with family violence victim-survivors; a safe way to do this would be through the Backbone Collective which has a track record of engaging successfully with this population to get feedback on particular policy issues or processes.

We specifically recommend that you consult with Hohou te Rongo Kahukura on the particular issue of the system requirements around identifying and using legal names versus preferred names and gender.

Note: Please contact us at Research@refuge.org.nz for clarification about any of the points in our feedback.