

WAIKATO LAW REVIEW

TAUMAURI



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SPECIAL ISSUE ON DOMESTIC VIOLENCE

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GENERAL EDITOR'S INTRODUCTION

I am pleased to present this Special Issue of the fourth edition of the *Waikato Law Review*. We initially decided that a Special Issue focusing on family violence would be a good opportunity to present the variety of research work being done in the Law School in this area. Not only did we have more submissions that we could publish in one general issue but also this work was original, extremely topical and deserved to be published. We have thus created an outlet for it.

Because of her expertise in this area, Ruth Busch was approached to be the Special Editor. Ruth seized the opportunity not only to publish the work being done but also to celebrate the passage and coming into force of the Domestic Violence Act 1995. There is a range of articles, both from New Zealand and overseas. All are not only of very good quality but are also on the cutting edge of research work on domestic violence.

I wish to thank both Ruth and the editorial committee for their work on this issue. The end result has been worth the effort.

I must note to our subscribers that this Special Issue will be in addition to the general issue that we publish annually but will be covered by your existing subscription. We intend to repeat this next year, also, with a special issue on the topic of globalisation, to be edited by Peter Jones. We hope that you are as pleased as we are with the *Waikato Law Review* and look forward to your continued support.

Catherine Iorns Magallanes,
Editor, *Waikato Law Review*

DEDICATION

To Claudia Abby (18 months), Holly Alyse (3 years) and Tiffany Anne Bristol (7 years)



This photograph was taken less than two months prior to their murders on 5 February 1994

EDITORIAL

This special edition of the Waikato Law Review celebrates the passage and implementation of the Domestic Violence Act 1995 and the Guardianship Amendment Act 1995. It is exactly four years ago since the controversy over the Victims Task Force report, *Protection From Family Violence*. That report highlighted the gap between victims' experiences of domestic violence - a lived reality of violence and the ever-present threat of further violence - and the minimisation, trivialisation, and victim blaming that they so often encountered when they sought protection from the legal system. That report, with its 101 recommendations for statutory and policy change, challenged the "two-to-tango" analysis of domestic violence so prevalent in the social discourses of the early 1990s and underscored the need for decision-makers in domestic violence-related areas to prioritise victims' and children's needs for safety over all other concerns, including family (re)conciliation.

The report also criticised the then commonly held view of judges, lawyers, psychologists, and counsellors that spousal violence was in most instances a relationship issue that upon separation became irrelevant in the determination of custody and access arrangements. The prevalent view of domestic violence held that if the victim would simply leave her marriage (or relationship), violent incidents would in all likelihood end and each parent's qualities as a parent could then be properly assessed. The fact that there was a correlation between spousal violence and child abuse in its array of physical, sexual and psychological manifestations was virtually ignored.

On February 5, 1994, Tiffany, Holly and Claudia Bristol were killed by their father in Wanganui. The shock of those murders led to a public call for a Ministerial Inquiry into the actions of the Family Court in awarding custody of the Bristol children to a known spousal abuser. In June 1994, the findings and recommendations of the Bristol Inquiry were released.

In his report to the Minister of Justice, the former Chief Justice of New Zealand, Sir Ronald Davison, stated:

My conclusion is that under the law as it presently is and with the current practices of the family court the deaths in the circumstances of this case were not foreseeable and were not preventable.

They were not preventable simply because the law and practices did not deal with a situation where a parent, although he had allegedly been violent to his spouse, was otherwise regarded by all who dealt

with him, including counsel for the children, as being a proper person to have custody of his children and there was no requirement of the law or practice of the Court that it should investigate his fitness to do so when faced with an application to make the orders sought by consent.” (at p. 35)

In a very tragic and powerful way, the Bristol Inquiry showed that the gap had been a significant factor in the deaths of these three small children. The Domestic Violence Act 1995 was enacted partly in response to Sir Ronald Davison’s recommendations. Its 133 sections, along with amendments made to the Guardianship Act, the Family Proceedings Act and the Legal Services Act, go a long way to codifying a power and control analysis of domestic violence. For instance, the definition of “domestic violence” in the Domestic Violence Act includes not only physical abuse but also various tactics of power and control that perpetrators commonly employ. Sexual and psychological abuse (defined in the Act as including threats, intimidation, harassment, damage to property, and causing or allowing a child to witness physical, sexual, or psychological abuse of a family member) have been defined as acts of domestic violence. To curtail the tactics of trivialisation, minimisation, and denial that decision-makers have at times employed to deny a victim legal protection, the Act specifies that acts which “when viewed in isolation can appear to be minor or trivial” may form “part of a pattern of behaviour” against which a victim can claim protection. Similarly, in order to curtail a victim blaming approach in respect of the issue of child witnessing, the Act provides that “the person who suffers the abuse is not regarded...as having allowed the child to see or hear the abuse”.

The scope of the Domestic Violence Act has been widened to include gay and lesbian couples, people who have had a child together but have not lived together, whanau and extended family members, and others who have a “close personal relationship”. This widening allows protection to be afforded to many categories of people (for example, elderly parents dependent upon their adult children and parents in need of protection from their teenage children) who previously could not obtain protection orders but were in fact being abused within a domestic context.

In an attempt to deal specifically with problems that can arise as a result of separation violence, new partners of previously victimised ex-spouses can also obtain protection under the Act. The court may also direct that a protection order apply against an associated respondent, that is, a person who is engaged by the perpetrator to commit an act of violence against his victim.

The effect of these amendments should result in shifting the focus of judges and other practitioners away from a concentration on physical violence in heterosexual marriage-like relationships to an emphasis on prohibiting the use of a myriad of tactics of power and control against a diverse range of domestic victims. As a result of the Domestic Violence Act, commonplace discourses of domestic violence will need to be re-shaped. Providing legal protection for victims of violence in gay and lesbian relationships or elder abuse will entail recognition of previously unacknowledged power and control tactics. For instance, “outing” may be an important tactic of power and control in same sex relationships. Similarly, withholding medication may be a common tactic in elder abuse situations. Like the famous “categories of negligence” in *Donaghue v Stevenson*, the tactics of power and control are clearly not exhaustive. Because it has been developed as an analytical tool to deal with adult heterosexual relationships, the Power and Control Wheel itself may mask certain tactics used by perpetrators.

A power and control analysis of domestic violence includes the belief that violence will only be prevented if the perpetrator is held responsible for his violence. Abuser accountability means that there must be a consequence for every act of violence and incremental penalties for further acts of violence. Sentencing provisions for breach of protection orders implicitly reject the idea that an abuser’s violence is a product of a given relationship and focus on whether the respondent has repetitively engaged in prohibited behaviours. A perpetrator’s three convictions, for instance, need not involve breaches of the same protection order for the enhanced penalty under section 49 to become operative. Serial abusers, those perpetrators who commit acts of domestic violence against two or more victims, also face the increased penalty provision.

Concerns about separation violence, one of the most lethal forms of domestic violence, are found in many sections of the Domestic Violence Act and Guardianship Act. For instance, it is now a standard condition of protection orders that firearms will be confiscated and firearms licences suspended on the granting of interim protection orders. In addition, the Guardianship Act amendments attempt to curtail the high incidence of violence on access changeovers. Section 16B(4) states that the Family Court *shall not* make any order giving custody or unsupervised access to a party who has used violence against a child of the family or against the other party to the proceedings *unless* the Court is satisfied that the child will be safe while the violent party has custody of or access to the child. In addition, Section 15(2B)(b) mandates that the Court consider imposing “any conditions for the purpose of protecting the safety of that other parent

while the right of access conferred by the order is being exercised (including while the child is being collected from, or returned to, that other parent).”

The s16B(4) presumption is a major improvement over the “welfare of the child” statutory formulation. The presumption highlights Parliament’s recognition of the on-going nature of spousal violence even after separation and prioritises safety of children as the primary consideration in custody/access decisionmaking. Had this provision been in effect in early 1994, the murders of the Bristol children might have been averted.

Section 16B(5) provides a list of statutory criteria to be used in deciding the child safety issue including the nature and seriousness of the child and/or spousal violence; how recently and frequently such violence has occurred; the likelihood of further violence; the physical or emotional harm caused to the child by the violence; and the opinions of the other party and the child as to safety. However, practitioners must be aware that the expanded definition of “domestic violence” under section 3 of the Domestic Violence Act has not been carried forward into the Guardianship Act.

It is clear that psychologists, social workers, and other practitioners will be relied upon by the Court to make such risk assessments, just as they now are involved in determining whether there is an “unacceptable risk” to children in custody/access cases involving sexual abuse allegations. Inherent in this assessment process is the practitioner’s view about the causes of domestic violence in the relationship of particular parties. The “safety” issue may well be determined by whether a judge or psychologist or counsel for the child views such violence as the perpetrator’s attempt to exercise power and control over his victims or whether he/she characterises the violence as arising from “the stress of a collapsing marriage” or a dysfunctional family system to which each party at least somewhat contributes. In cases where the perpetrator’s violence is characterised as out of character violence or as provoked by the abused party, it is likely that custody/access proceedings will be perceived as a contest between sets of competing parental rights, and the child’s need for safety in its widest sense will be lost sight of.

The articles in this special edition deal with a wide variety of issues and ideas about domestic violence. The article by Nan Seuffert on legal representation of battered women is important in terms of its analysis of the legal culture within which domestic violence advocacy is performed and its emphasis on needed changes to that culture in order to maximise

the legal protections currently available to domestic violence victims. The article by Tania Pocock and Fiona Cram on the effects of domestic violence on child targets and child witnesses brings together recent New Zealand and overseas research findings on this important topic and pinpoints ways in which practitioners may utilise these findings under the new statutory provisions. The article by Stephanie Milroy about Maori concerns about domestic violence research highlights an important issue, namely, the development of culturally appropriate methodologies for researching and writing about domestic violence from a Maori perspective. This article is an important addition to the literature on domestic violence and the intersectionality of race and gender.

Other articles in this edition deal with areas which have received only scant attention previously in New Zealand. For instance, the article by Chris Cunneen and Julie Stubbs about domestic violence among Filipino women in Australia underscores the paucity of research about and services for immigrant women in this country. The legislative comment on gay male relationships by Nigel Christie highlights the previous invisibility of protection for victims of violence in intimate same sex relationships. The article on restorative justice initiatives by Stephen Hooper and myself queries whether discredited approaches to domestic violence (that is, joint counselling and mediation) are being re-packaged under new labels without sufficient attention being paid to issues involving power imbalances and social legitimisation of victim-blaming discourses. Finally, the articles on memory and childhood abuse by Fred Seymour and Brenda Midson deal with a controversial aspect of family violence research, namely repressed memories of childhood sexual abuse.

I would like to thank members of the Waikato Law Review advisory group for their help on this issue. I would especially like to thank Ellen Naudts, *templater extraordinaire*, and Joan Forret for their support and editorial assistance. I would also like to thank the Dean and Chairperson of the Waikato Law School, Margaret Bedggood and Peter Spiller, and my academic colleagues who for the past four years have listened to me rant and harangue and sometimes cry about the state of the law concerning domestic violence in this country. In June 1996, when we knew that the law would indeed be implemented, we broke open bottles of champagne to celebrate the advent of the new Act - despite knowing that while some things would clearly improve with this new legislation, the deaths and brutality would continue. Indeed, we hardly had to wait until a Huntly woman, Leonie Newman, was murdered by her former partner. She went to her grave with the words "Property of Leon" tattooed on her face.

I would like especially to thank the workers and volunteers at the Hamilton

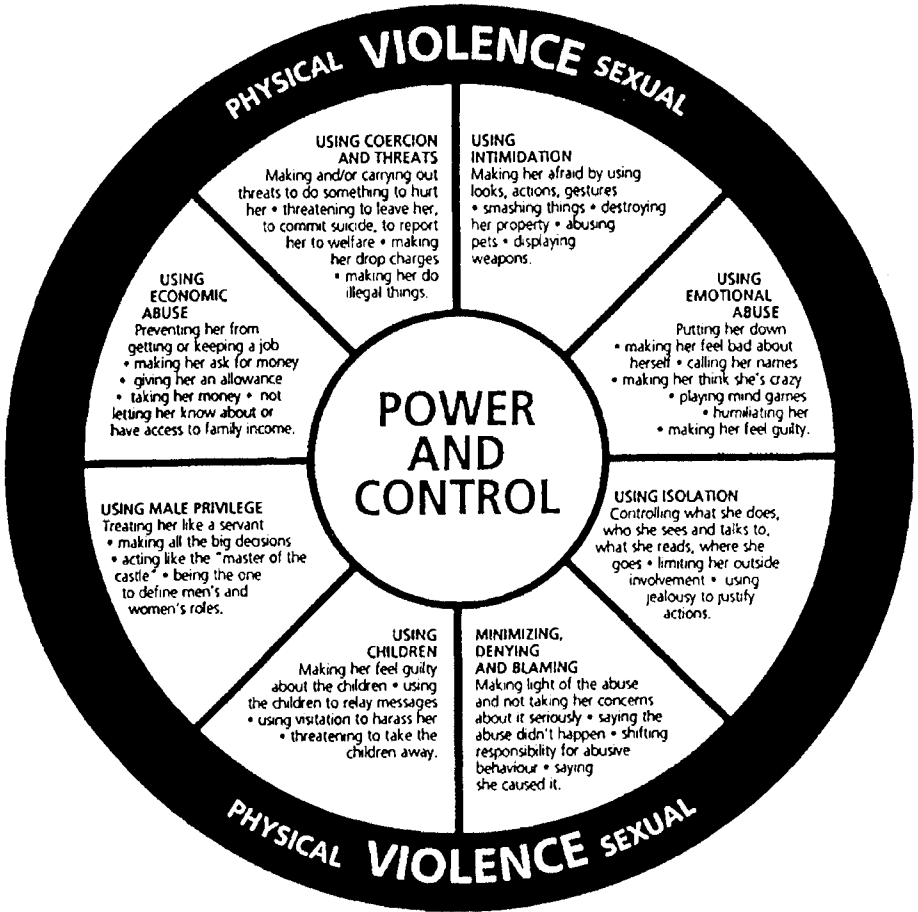
Abuse Intervention Project, the Hamilton Refuge and Support Services and Te Whakaruruhau—those who do the work seven days a week, 24 hours a day; who comfort the women and children and deal with the police, the courts, probation, hospital staff; who see the bruises and hear the heartaches; who get paid minimally, if at all and yet continue to do the work. Your inspiration has kept me going. In years to come, when the question is asked, “Who was responsible for getting the Domestic Violence Act passed?,” one answer will be battered women and their advocates, many of whom also are survivors of battering. And to those who were legally trained and could no longer countenance the silencing of women’s and children’s voices in the debates about domestic violence solutions.

The preface of the 1992 report ended with a challenge: “Whether first posited by Rabbi Hillel or Tracy Chapman, the relevance of the question still echoes, “If not now, when?”” Four years later, there has been a beginning. Legislative reforms have created a legal culture which is more sympathetic to battered women and their children. But we are faced with a disquieting lack of adequate government funding. We must now demand that the government increase its resourcing of domestic violence initiatives. There is no point in amending the law unless a proportion of the \$1.2 billion that Suzanne Snively states is annually being spent - in some cases, squandered - on domestic violence-related services is funnelled into coordinated community responses to domestic violence including intervention projects. Supervised access centres must also be government funded so that children will not be exposed to further and on-going violence as a result of court ordered custody and access arrangements. Anticipated government funding of children’s, victims’ and respondents’ programmes is to be applauded but what is the point of having programmes to deal with the consequences of past abuse if the government does not fund services which will ensure that children are not exposed to future violence during access changeovers.

In on-going debates about domestic violence, may we keep the image of the Bristol children with Santa Claus before our eyes. It reminds us of the children they were, the women they could have been. It gives us insights into how easy it is for us to forget that domestic violence is about real people with faces and names and Christmas wish lists who are not *just* victims and especially not *simply* cost entities.

Lest we forget

Ruth Busch
15 September 1996



THE POWER AND CONTROL WHEEL

Source: Reprinted with permission from Minnesota Program Development, Inc., Domestic Abuse Intervention Project, 206 W. 4th Street, Duluth, MN 55806.

LAWYERING FOR WOMEN SURVIVORS OF DOMESTIC VIOLENCE

BY NAN SEUFFERT*

I. INTRODUCTION

Domestic violence represents a serious risk to physical safety for women in New Zealand. Every week a woman in New Zealand is killed or dies as a result of injuries inflicted by an intimate partner.¹ Almost half of all homicides in New Zealand are domestic-related.² Police attend 40,000 domestic violence incidents per year.³

New Zealand, like many other countries,⁴ has treated domestic violence as a problem requiring a legal solution. The Domestic Protection Act 1982 created a legal framework for addressing domestic violence. It provided

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¹ National Collective of Independent Women's Refuges, Inc. ("NCIWR"), *Fresh Start: A Self Help Book for New Zealand Women in Abusive* (1993) 10. This includes women who die as a result of injuries inflicted in beatings, including from damaged kidneys, intestinal and head injuries. The incidence of cancer among battered women is also well above average.

² Fanslow, J, Chalmers, D, and Langley, J, *Injury From Assault: A Public Health Problem* (Injury Prevention Research Unit, Occasional Report Series, 1991) 10. Fanslow et. al. report that at least 39% of homicides for 1978-87 were domestic-related. In 1990 28 out of 67 homicides were domestic-related and 17 of the non-domestic homicides were the Aramoana shootings. Smith, D, *Abuse Intervention Overview* (Paper Prepared for the "Family Violence Prevention in the 1990s" Conference, at Christchurch, 1-6 September 1991). In 1993, 24 out of 55 homicides in New Zealand were domestic-related.

³ Ford, G, *Research Project on Domestic Disputes: Final Report* (1990). See also Haines, H, *Women's Mental Health: Research Issues in Women's Health Research : Report of Workshop held 21 September, 1989*, 52-55.

⁴ United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs, *Strategies For Confronting Domestic Violence* (1993) 12-25.

for a series of court orders designed to protect survivors of domestic violence by prohibiting certain actions by the perpetrators of the violence. The effectiveness of the legal protection provided to women in New Zealand under the Domestic Protection Act has been evaluated and critiqued.⁵ In response to critique, The Domestic Violence Act 1995 (the "Domestic Violence Act") was passed by Parliament on 15 December 1995.⁶ The Domestic Violence Act provides for one protection order⁷ as well as various orders relating to property.⁸

New Zealand has also become an international leader in coordinating the legal and government agency response to domestic violence through the establishment of the Hamilton Abuse Intervention Pilot Project.⁹ Unfortunately, while passage of the Domestic Violence Act in response to criticisms of the Domestic Protection Act seems to be a significant step forward,¹⁰ funding for intervention programmes has all but disappeared, with 1995 governmental funding for the Hamilton programme at approximately one-third of its prior level.¹¹ Moreover, while attention, if sporadic, has been paid to the law, judges, police, family court personnel and procedure, and inter-agency co-ordination, little attention has been focused on the effectiveness of lawyers in assisting women seeking legal protection.

⁵ Busch, R, Robertson, N, and Lapsley, H, *Protection From Family Violence: A Study of Protection Orders Under the Domestic Protection Act* (1992). This evaluation focused on judges, police and Family Court proceedings.

⁶ The Domestic Violence Act became effective on 1 July 1996.

⁷ *Ibid.*, Section 7. The Domestic Protection Act 1982 provided for two distinct protection orders, ie non-violence and non-molestation orders. These orders differed from one another in terms of who could apply for them, the behaviours proscribed by each, and the penalties for breaches.

⁸ Sections 52, 56, 62, 66.

⁹ Busch and Robertson, "An Intervention Approach to Domestic Violence" (1993) 1 *Waikato LR* 109.

¹⁰ The Domestic Violence Act, for instance, adopts a power and control analysis to domestic violence.

¹¹ Discussion with Roma Balzer, the Co-ordinator of the Hamilton Abuse Intervention Project.

This article presents the findings and conclusions of in-depth qualitative interviews with fifteen non-Maori women who are survivors of domestic violence¹² and of interviews with lawyers who represent survivors of domestic violence.¹³ For lawyers and others interested in women's access to justice, these interviews provide valuable feedback about women's experiences of legal representation. The women report that along with police, judges¹⁴ and society generally, their lawyers hold attitudes which tend to minimise and trivialise domestic violence and to blame victims for the violence. The women also report that many of their lawyers did not understand the dynamics of domestic violence and often neither believe their stories nor provided them with adequate advocacy. Based on the experiences of the women interviewed, these attitudes affect lawyer-client interactions and legal representation in ways that are detrimental to the women.

There is some good news about legal representation for survivors of domestic violence. There are clearly some lawyers practicing who diligently advocate for these clients. However, the women's reports that their lawyers sometimes presented barriers to obtaining effective protection from the legal system, and thus barriers to access to justice, require urgent attention.

This research was conducted while the Domestic Protection Act was in force, and therefore the findings are in some instances specific to practice and procedure under that Act. Some of these practices and procedures have changed under the Domestic Violence Act, and where appropriate, note will be made of these changes and of the likely impact of these changes on the findings presented here. However, the main subject matter of the research, the women's interactions with their lawyers and the

¹² While the sample of women interviewed is not representative of women who are survivors of domestic violence in any statistical sense, there is no reason to suspect that the experiences of these women vary significantly from the general population of women who hire lawyers to represent them in obtaining protection orders. Interviews were conducted in a parallel Maori/non-Maori interview process. The interviews with Maori women have been interpreted separately by Stephanie Milroy. The interviews upon which this article is based therefore do not include the interviews of Maori women. For a more complete discussion of the epistemology, methodology and methods used in the research project see Seuffert "Lawyering and Domestic Violence: A Feminist Integration of Experiences, Theories and Practices" in Stubbs, J (ed), *Women, Male Violence and the Law* (1994) 79.

¹³ Eight lawyers from four different towns who represent women survivors of domestic violence were also interviewed, some in person and some by questionnaire.

¹⁴ Busch et. al., *supra* n. 5, at 184-190.

recommendations to lawyers as a result of these interactions, are relevant to practice under the Domestic Violence Act and provide feedback that is rarely collected.

The importance of the context in which women approach lawyers for protection from abusive partners was one of the findings of the research. The article, therefore, first briefly summarises the context of the women's experiences: the legal process involved in obtaining non-violence and non-molestation orders, the histories of abuse that preceded the women's applications for these orders, the gender bias in the legal system and among lawyers, and the importance of safety to the women. It then presents findings specifically related to legal representation: first meetings with lawyers, counselling and mediation and other specific aspects of client representation. Finally, other relevant findings are discussed: the importance of support for women during the process of representation and of training for lawyers in the dynamics of domestic violence.

Because it is crucial that women who are survivors of domestic violence have the opportunity to speak, to be heard, and to give feedback to lawyers concerning their legal representation, much of the discussion in this article focuses specifically on the experiences and concerns of the women interviewed. Particularly where the women convey negative experiences with their lawyers, the conclusions and suggestions are intended to present constructive and positive possibilities and alternatives for lawyers, and to stimulate discussion about appropriate legal representation for women who are survivors of domestic violence.

II. CONTEXT: LEGAL PROCESSES, HISTORIES OF ABUSE AND GENDER BIAS

The context in which women approach lawyers for assistance in gaining physical protection from abusers is integral to the response that they receive. Three aspects of this context will be focused on here. First, the legal context, including the types of protection that are available to women survivors of domestic violence. The protection available is relevant to the legal representation provided because it constrains the possible legal outcomes that the lawyers may pursue. Second, the context includes the histories of violence that the women have suffered prior to their approach to the lawyers, which often make physical safety for them and their children an overwhelming priority. Third, the context of gender bias in the legal system creates and interprets the legal responses available as well as the histories of violence and the resulting needs for safety.

This section will, therefore, present the legal framework for obtaining protection orders, with due note of the implications of intervening changes in the law; reveal the histories and patterns of violence endured by women before approaching lawyers for help; examine the gender bias of the legal system; and highlight the importance of safety to the women interviewed.

1. Legal Framework for Obtaining Protection Orders

At the time that these interviews were conducted the Domestic Protection Act set out the legal procedures and responses to domestic violence. This section will therefore set out the relevant provisions of that Act, and will also discuss the corresponding and additional provisions of the Domestic Violence Act. The Domestic Protection Act provided the protection of non-violence and/or non-molestation orders to married and formerly married persons against their (ex)spouses, and to heterosexual couples who lived or had lived together in the same household.¹⁵ The court issued a non-violence order if it found that the respondent had used violence against or caused bodily harm to the applicant and that the respondent was likely to do so again.¹⁶ The non-violence order prohibited the person against whom it was issued from using violence against, causing bodily harm to or threatening the use of violence or bodily harm to the applicant or a child of the family.¹⁷

Non-molestation orders were designed for protection from harmful actions that fall short of physical violence.¹⁸ The statutory criterion for granting a non-molestation order was simply that the court make a finding that the order was “necessary for the protection of the applicant or of any child of the applicant’s family.”¹⁹ A non-molestation order generally prohibited the person against whom it was issued from entering or remaining on any land or building which was occupied by the applicant or a child of the applicant’s family or in which any of these people were dwelling.²⁰ It also prohibited the person against whom it was made from molesting the

¹⁵ Domestic Protection Act, sections 4, 13(1) and (2); *Y v Y* (1984) 3 NZFLR 124; Busch et. al., supra n. 5, at 179; Butterworths Family Law Guide (4th ed. 1991) paras 7.507 and 7.512. Only non-violence orders were available where the parties were still living together.

¹⁶ *Ibid.*, section 6.

¹⁷ *Ibid.*, section 7.

¹⁸ *Butterworths Family Law Guide*, supra n. 15, at para 7.511.

¹⁹ Domestic Protection Act, section 15. For a discussion of the application of this criterion, see Busch et. al., supra n. 5, at 184-190.

²⁰ *Ibid.*, section 16(a). *Butterworths Family Law Guide*, supra n. 16, at para 7.514.

applicant or any child of the applicant's family.²¹ A non-molestation order lapsed if the parties freely resumed cohabitation.²²

Both non-violence and non-molestation orders could be granted on an *ex parte* basis where the court found that the delay that would be caused by proceeding on notice "would or might entail risk to the personal safety of the applicant or a child of the applicant's family"²³ or that such delay "would or might entail serious injury or undue hardship."²⁴ *Ex parte* applications were normally supported by an appropriate verifying affidavit.²⁵ Where an order was made on an *ex parte* basis the respondent could "apply immediately for variation or discharge of the order,"²⁶ *Ex parte* orders were interim orders; they were finalised after a hearing upon notice to the respondent.²⁷ The penalty for breach of non-violence orders included arrest and detention in police custody for up to 24 hours.²⁸ Penalties for breach of a non-molestation order included imprisonment for up to three months or a fine not exceeding five hundred dollars.²⁹

As noted, the Domestic Protection Act's scheme for protecting women from domestic violence has been thoroughly critiqued.³⁰ In response to those critiques, the Domestic Violence Act was passed. It provides protection for people in a broader range of relationships, including same-sex partners,³¹ family members, people living in the same household and those with close personal relationships.³² It also provides for protection orders in response to "domestic violence" which is more broadly defined, consistent with a power and control analysis.³³ Physical, sexual and

²¹ Domestic Protection Act, section 16(b) and (c).

²² *Ibid.*, section 17.

²³ *Ibid.*, sections 5(1)(a) and 14(1)(a).

²⁴ *Ibid.*, sections 5(1)(b) and 14(1)(b).

²⁵ *Police v Phillips* (1983) FLN-137 (2d).

²⁶ Domestic Protection Act, sections 5(3), 8, 14(3), and 17.

²⁷ *Ibid.*, section 31. Under sections 60 and 61 of the Domestic Violence Act 1995, the respondent is entitled to notify the court that he or she wishes to be heard on whether a final order should be substituted for a temporary order. If the respondent does not notify the court that he or she wishes to be heard, then a temporary order becomes final three months after the date on which it is made by operation of law.

²⁸ *Ibid.*, sections 9-12.

²⁹ *Ibid.*, section 18.

³⁰ See Busch et. al., *supra* n.5.

³¹ Domestic Violence Act, sections 2 and 4.

³² *Ibid.*, section 4.

³³ See text, *infra* at n. 45-51, for a discussion of the power and control analysis of domestic violence.

psychological abuse are included as well as acts which in isolation may appear trivial but form part of a pattern of behaviour that amounts to abuse.³⁴

Under the Domestic Violence Act, the Court may make a protection order where the respondent is using or has used domestic violence against the applicant or a child of the applicant's family and the Court is satisfied that the order is necessary for the protection of the applicant or the child.³⁵ Section 19 of the Act provides for one protection order that has two sets of standard conditions. The first set of conditions, which applies to all orders, prohibits the abuser from doing a range of acts consistent with the definition of domestic violence: physically, sexually or psychologically abusing the protected person; threatening any of these acts; damaging or threatening to damage property of the protected person; and encouraging anyone else to do any of these acts.³⁶ The second set of conditions applies to orders where the protected person and the respondent do not live in the same dwellinghouse, and generally requires the abuser to stay away from the protected person and any land or building occupied by her.³⁷ The judge may also impose special conditions on the respondent that are reasonably necessary for the protection of the applicant.³⁸ The second set of conditions on the protection order are suspended while the protected person and the respondent are living in the same dwellinghouse with the express consent of the protected person, but they revive when consent is withdrawn.³⁹

Under section 13(1) of the Domestic Violence Act protection orders may be granted on an application without notice if the court finds that delay might cause a risk of harm or undue hardship to the applicant or a child of the applicant's family. In response to critiques of judges' determinations of risk under the Domestic Protection Act, the Domestic Violence Act requires the Court in making this determination to have regard to the perception of the applicant and the applicant's family and to the effect of the respondent's behaviour on the applicant or a child of the applicant's family.⁴⁰ Where the protection order is granted on application without notice the respondent may apply immediately for variation or discharge

³⁴ Domestic Violence Act, section 3.

³⁵ *Ibid.*, section 14.

³⁶ *Ibid.*, section 19(1).

³⁷ *Ibid.*, section 19(2).

³⁸ *Ibid.*, section 27. The Court may vary or discharge an order upon the application of the applicant or the respondent. *Ibid.*, sections 46 and 47.

³⁹ *Ibid.*, section 20.

⁴⁰ *Ibid.*, section 13(3).

of the order.⁴¹ While protection orders made without notice are temporary orders,⁴² the new Act provides that temporary orders become final orders automatically after three months unless the respondent requests a hearing on whether a final order should result.⁴³

The Domestic Violence Act also increases the penalties for breaches of protection orders, particularly where there are multiple breaches of the same order. The penalties range from imprisonment for up to six months or a fine not exceeding five thousand dollars for the first breach of a protection order to imprisonment for up to two years for breach of an order where there are two previous convictions for breach on different occasions within a 3 year period.⁴⁴

While the new Act has taken significant steps towards providing better protection for women survivors of domestic violence, it too may have shortcomings.⁴⁵ It is, however, in the context of this imperfect scheme provided by the Domestic Protection Act that the women interviewed approached lawyers for assistance in gaining protection from abusive partners.

2. *Histories of Abuse*

Another aspect of the context in which women survivors of domestic violence approach lawyers includes the history of abuse that these women suffer. This section first explains the range of tactics used to gain and maintain power and control in situations of domestic violence. Then, the women's stories of abuse are examined, noting the power and control

⁴¹ *Ibid.*, section 13(4).

⁴² *Ibid.*, section 13(3).

⁴³ *Ibid.*, sections 13(3) and 13(4).

⁴⁴ *Ibid.*, section 49.

⁴⁵ For example, the new Act provides that breaches of protection orders are offences when committed "without reasonable excuse." Domestic Violence Act, section 49(1). Determination of whether a respondent has an "excuse" and whether it is "reasonable" could result in costly litigation. Further, if this determination is made without reference to the perceptions of the protected person, it may well result in determinations that are subject to the same critiques that have been levelled at the determination of risk under the Domestic Protection Act, section 5. For identification of other shortcomings see Busch and Robertson, "The Domestic Violence Act: A Reform Half Done" [1995] 1 *Butterworth's Family Law Journal* 216; Busch, R and Robertson, N, *Submission to the Justice and Law Reform Committee on the Domestic Violence Bill* 15-17 (Unpublished paper on file with the author).

aspects revealed in these narratives.

Power and Control

The power and control wheel (see figure 1 on page vii) was developed to represent the role played by physical abuse in gaining and maintaining power and control as well as the high incidence of specific abusive, but not physically violent, behaviours used by abusers.⁴⁶ It represents physical abuse and the other tactics as intentional acts used to gain power and control over another person, rather than as an anger management problem or a problem with loss of control by the abuser. The hub, or centre of the wheel represents the intention of all of the abusive tactics—to establish power and control. Each spoke of the wheel represents a particular tactic used by abusers. The non-physical tactics include economic abuse, coercion and threats, intimidation, emotional and verbal abuse, isolation, using male privilege by treating the victim as subservient, minimising and denying the violence, and blaming the victim.⁴⁷ The abusers' tactic of blaming victims for the abuse is intended, and often succeeds, in producing feelings of guilt in women who are targets of domestic violence.⁴⁸ The rim of the wheel, which gives it strength and holds it together, is physical and sexual abuse. The design of the wheel is important to an understanding of abuse in all of its forms; physical abuse is only one part of a whole system of abusive behaviour that an abuser uses against his partner. Physical violence is never an isolated behaviour; it is used to back up and reinforce other tactics.

Minimisation, denial of violence and blaming of victims⁴⁹ are also used

⁴⁶ For a discussion of tactics of power and control see eg, Pence, E, *The Justice System's Responses to Domestic Assault Cases: A Guide for Policy Development* (1986); Pence, E and Paymar, M, *Power and Control: Tactics of Men Who Batter* (1986) 30; Mahoney, "Legal Images of Battered Women: Redefining The Issue of Separation" (1991) 90 Mich LR 1. For discussions of a power and control approach to domestic violence in the New Zealand context, see Busch and Robertson, *supra* n. 9, at 116-17; Barnes, G, Fleming, S, Johnston, J and Toone, S, *Domestic Violence: New Zealand Law Society Seminar* (1993) 2-9; Busch et. al, *supra* n. 5 at, 10-12.

⁴⁷ For a proposal for training lawyers in the power and control dynamics of domestic abuse see Seuffert, "Lawyering and Domestic Violence: Feminist Pedagogies Meet Feminist Theories" (1994) 10 *Women's Studies Journal* 63.

⁴⁸ United Nations, *supra* n. 4, at 59.

⁴⁹ *Ibid.*

by members of society in general to render domestic violence invisible⁵⁰ and not worthy of the attention of the courts. The coincidence of the use of these tactics by abusers and members of society, especially by those members who have the power to make decisions about the abuser and the victim, such as judges, tends to legitimise the perspective of the abusers and further victimise women who are targets of domestic violence.⁵¹ This has been called the “cultural facilitation of violence.”⁵²

3. *Women's Stories*

At the beginning of each interview, the women were asked to briefly describe the abuse that they had suffered.⁵³ Almost all had been abused over long periods before they sought protection, and some of the women were still experiencing some forms of abuse at the time of the interviews. These long histories of abuse may be typical of women who approach lawyers for assistance, and are not unusual. Two Family Court judges have noted that long histories of abuse are typical of the applicants who approach the courts for protection.⁵⁴

⁵⁰ See Busch, “Was Mrs Masina Really ‘Lost’?: An Analysis of New Zealand Judges’ Attitudes Towards Domestic Violence” (1993) 8 Otago LR 1 for a discussion of New Zealand cases in which judicial opinions blame the women for their violent abusers’ behaviours; *Gender Equality in the Courts, Criminal Law: A Study By the Manitoba Association of Women and the Law* (March 1991) xi (hereafter “Gender Equality in Manitoba Courts”); Zorza, *The Gender Bias Committee’s Domestic Violence Study: Important Recommendations and First Steps* (Report presented to the Boston Bar Association, May 15, 1989) 4 (on file with The National Center on Family Law, New York, New York); Mahoney, *supra* n. 46, at 12-3; Ptacek, “Why do Men Batter Their Wives?” in Yllo, K and Bograd, M (eds), *Feminist Perspectives on Wife Abuse* (1988) 141-9, 154-5; Murphy, “Lawyering For Social Change: The Power of Narrative in Domestic Violence Law Reform” (1993) 21 Hofstra LR 1243, 1263, 1275.

⁵¹ United Nations, *supra* n. 4, at 10.

⁵² See Pence, *supra* n. 46, at 1-8.

⁵³ For a collection of histories of abuse of women who have killed their abusers see Murphy, *supra* n. 50, at 1279-84. Recognition of societal barriers to women speaking about domestic violence suggests that women may not discuss the sexual abuse and extreme forms of physical abuse they suffer nor the physical and sexual abuse of their children: the women’s stories may in fact underrepresent the actual levels of violence. See Astor, *Doing the Impossible: Talking About Violence in Family Mediation* (Paper presented at the 1993 Canadian Learned Societies Conferences, Law & Society Conference, Carleton University, Ottawa, on file with the author).

⁵⁴ Busch, et.al., *supra* n. 5, at 207.

Two women described their histories of abuse.

The abuse went on for - the [entire] twelve year relationship. It was physical, it was emotional, it was verbal, it was sexual... So every type of abuse was involved. My children were abused in all those ways as well except for my son who wasn't sexually abused...

Well for quite a number of years, possibly 10 or 11 years I had been...he would bash me around. He had abused the children. Physically and mentally we had both had that. I basically had no real life of my own with him.

The next woman's experiences are perhaps unusual because although the history of abuse includes sexual and emotional abuse, isolation tactics (such as alienating her from her family and making visiting unpleasant for her friends), and very violent threats of physical abuse, it does not include recent physical abuse. It may represent a situation where physical abuse was not necessary to maintain power and control as the other tactics were sufficient. She describes the abuse:

Mine was mainly emotional, verbal and sexual abuse actually and he didn't start any abuse until after we got married and the day we got married I remember feeling this terrible sense of dread and being trapped... If he didn't get his own way or I wouldn't agree with him he would start arguing with me and it was constant. It was little things like never supporting me, never affirming me, putting me down and later on he would start screaming....he ended up smashing the place up and had me backed up in the corner with an arm chair thrown at my feet and it was that kind of level and I was with him for about twelve years.... I tried several times to get away... This was before I had children and then about the last four years of the relationship it was something like screaming at me for about three or four hours a day and smashing the place up. I was so shaken emotionally that I couldn't cope and my whole life was focused on looking after him and nurturing him so he wouldn't abuse me and the kids, yell and scream, and it was constant, the sexual abuse was constant... In the day timealways touching me, and then at night time he was demanding sex all the time whether I wanted to or not. Even in my sleep he would have his arms around me so there was just like no escape. No escape ever.... it is that common thing systematically stripping you of anything that you enjoy, anybody that you enjoy, not having telephone conversations, not being able to read your mail, making it so unpleasant that people won't come around to the house, alienating you from your family so that there is no one and that your whole life is just based around nurturing somebody like that.

The next woman noted the similarities of tactics used by abusers, such as the reinforcement of economic dependency and use of isolation:

I think when you listen to abused women a lot of the stories are similar in content and that a lot of the men won't let you get a job. I was never allowed a job. I don't have a driver's licence. I was never encouraged to get my driver's licence. Friends were always abused and there was deliberate attempts to break up friendships. Lying about what they had said or what you said, the whole thing, and so a lot of these things we have in common.

Without support networks and financial resources women may be dependent on their partners for many of their needs, and that dependence facilitates the abuser's control.

All of the histories illustrate the tactics abusers use to gain and maintain power and control. Continued abuse and harassment as well as memories of abuse are likely to inform the women's actions throughout the legal processes. Lawyers should remain aware of the histories of the abuse, the effects of the abuse on women and children throughout the legal process, and should make every effort to ensure that these histories inform the decisions of the court throughout the proceedings. In particular, lawyers should be aware that the Domestic Violence Act's concerns about children witnessing domestic violence have also been recently incorporated into the Guardianship Act 1968 ("the Guardianship Act").⁵⁵ This Act recognises that witnessing domestic violence is harmful to children even where the

⁵⁵ The amendments are found in sections 15(2B), 16A, 16B and 16C of the Guardianship Act.

violence is not directed at them.⁵⁶ The Guardianship Act provisions will be discussed further below.

4. Gender Bias

A. Gender Bias in the Legal System

A third aspect of the context in which women approach lawyers for protection from domestic violence is the gender bias of the legal system. In the last ten years there has been a growing concern with and response to gender bias in the legal systems of common law countries. Gender bias in the courts involves a range of issues, including the differing degrees to which women and men are believed as witnesses, clients and advocates. It can result in men receiving more favourable treatment from courts than women in similar circumstances. In the United States and Canada there

⁵⁶ These amendments were made in response to recommendations. Busch et. al., *supra* n. 5, at 238. *The Australian Law Reform Commission Report No 69, Part I (Equality Before the Law: Justice for Women) and Part II (Equality Before the Law: Women's Equality)* (1994) Part I, 175 [hereafter Australia Report Part 1 and Part 2]:

A substantial body of research indicates that children are significantly affected by a history of violence by one parent against the other. They are at significant risk of developing emotional and behavioural problems such as low self-esteem, depression and anxiety, passivity, self-destructive and aggressive behaviour and poor school performance....These effects can arise through the child witnessing the parent being physically or psychologically abused, becoming directly involved in the situation... or suffering more indirectly as a result of the mother's frustration or fears.

In the United States, at least 38 states are required by statute to consider domestic violence in custody cases. Zorza, J, *State Custody Laws With Respect to Domestic Abuse* (1993). A few states create a rebuttable presumption that custody or visitation should not be granted to a parent who has a history of inflicting domestic violence. Cahn, "Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions" (1991) 44 *Vanderbilt LR* 1041, 1062. The American Bar Association has recently recommended that all states require judges to consider histories of domestic violence in making custody decisions, and suggests that statutes include presumptions that custody not be awarded, in whole or in part, to a parent with a history of inflicting domestic violence. Davidson, H, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (Second (Revised) Printing, October 1994) 15. "Anyone who has committed severe or repetitive abuse to an intimate partner is presumptively not a fit sole or joint custodian for children. Where there is proof of abuse, batterers should be presumed by law to be unfit custodians for their children." *Ibid.*, 13.

have been numerous reports on gender bias in the court systems.⁵⁷ All reports have found extensive gender bias in those courts and legal systems studied.⁵⁸

In 1993 the Australian Attorney General referred to the Law Reform Commission (the “Australian Commission” and the report the “Australian Report”) the task of determining whether any changes should be made to the laws of Australia to “remove any unjustifiable discriminatory effects of those laws on or of their application to women with a view to ensuring their full equality before the law.”⁵⁹ Approximately 600 submissions were received by the Australian Commission, and the major issue raised was violence against women and access to justice.⁶⁰ The Commission concludes that the “legal system fails to deal effectively with violence perpetuated by men on women.”⁶¹

No empirical study focusing on gender bias has yet been conducted of the New Zealand legal system.⁶² However, there has been some recognition that a problem exists. In 1995 the New Zealand Law Commission initiated the Women’s Access to Justice: He Putanga Mo Nga Wahine Ki Te Tika Project.⁶³ The experiences of the women interviewed in this study also

⁵⁷ See eg Nobel, D and Roberts, M (eds), *Proceedings of the National Conference on Gender Bias in the Courts* (1989); Wikler, “Identifying and Correcting Judicial Gender Bias” in Mahoney, K, and Martin, S (eds), *Equality and Judicial Neutrality* (1987)12; Supreme Judicial Court *Gender Bias Study of the Court System in Massachusetts* (1989) 1.

⁵⁸ See eg Wikler and Schafran “Learning from the New Jersey Supreme Court Task Force on Women in the Courts: Evaluation, Recommendations and Implications for Other States” (Fall 1991) 12 *Women’s Rights Law Reporter* 313, 341.

⁵⁹ Australia Report Part 1, supra n. 56, at xv. Since 1993, a number of other studies concerning women and the law have been undertaken in Australia, including *Gender Bias and the Judiciary*, *ibid.*, 5-6

⁶⁰ Australia Report Part I, *ibid.*, 4.

⁶¹ *Ibid.*, 7.

⁶² See Ertel, K, Kettle, CD, and McDonald, E, *Gender Issues For New Zealand District Court Judges: A Discussion Paper* (1993); Busch et. al., supra n. 5.

⁶³ The terms of reference for the project state that:

Priority will be placed on examining the impact of laws, legal procedures and the delivery of legal services upon:

- family and domestic relationships
- violence against women, and
- the economic position of women.

Law Commission, Women’s Access to Justice Newsletter January 1996, 1.

indicate that gender bias exists in the New Zealand legal system. There is, therefore, no reason to believe that New Zealand is vastly different from the United States, Canada and Australia on this issue.

Gender bias in the legal system results in the system's failure to protect women from violence. It reflects and perpetuates the gender bias of society.⁶⁴ Some of the women interviewed explicitly noted the connection between gender bias in society, domestic violence, and their own self-blaming attitudes about the abuse.⁶⁵ Further, some women related experiences where blame for the abuse was focused on them. For example, the children of one woman, who had suffered twelve years of abuse, were sexually abused by her ex-husband.⁶⁶ In an attempt to protect her children from further abuse she refused to agree to allow the children to visit their father.⁶⁷ The judge suggested that the woman, rather than the abusive man, was responsible for putting the children through the "horrible process of psychiatrists" required to cut off access:

[The Judge] said to me, not to him, do you realise that by not agreeing to some form of custody or access or whatever here that you're actually going to put your children through a really horrible process of psychiatrists... and he didn't actually say that to him.

The suggestion that the woman has unreasonably refused to agree to

⁶⁴ Australian Report Part I, *supra* n. 56, at 26-9.

⁶⁵ Gender Equality in Manitoba Courts, *supra* n. 50, at (v), "Victims also experience self-blame which is reinforced by society's 'blame the victim stereotypes.'"

⁶⁶ A very high incidence of child abuse has been found in situations where there is domestic violence: more than half of male abusers beat their children, and the more severe the partner abuse the more severe the child abuse. Significant numbers of men who abuse partners (up to one third) also sexually abuse their children. Bowker, Arbitell and McFerron, "On the Relationship Between Wife Beating and Child Abuse" in Yllo, K and Bograd, M (eds), *supra* n. 50, 164; Hoff, L, *Battered Women As Survivors* (1990) 240; Toone, S., *Treasure the Child* (1991); Zorza "Women Battering: A Major Cause of Homelessness" (1991) 25 Clearinghouse Review 421, 424-426.

⁶⁷ One New Zealand commentator has suggested that lawyers who know that their clients have abused their children should counsel the clients against seeking custody or unsupervised access and that the lawyer is under a duty not to resist disclosure on the grounds of legal professional privilege. Enright, "Legal Ethics and the Family Lawyer" (1994) 7 Auckland University LR 821, 830-1.

access⁶⁸ implies that she is lying about the sexual abuse of the children.⁶⁹ Perpetuation of the myth⁷⁰ that women only raise allegations of child abuse in custody actions to win strategic advantage is a form of gender bias.

As noted above, the Guardianship Act has been amended to recognise the prevalence of child abuse in situations where there is spousal abuse and to recognise that witnessing domestic violence is itself traumatic and a form of child abuse. The amendments provide that the Court shall not grant custody or unsupervised access to the violent party in any custody or access proceedings where violence against a child of the family or a parent is proven, unless the Court is satisfied that the child will be “safe”.⁷¹ In deciding whether the child will be safe the Court is required to consider a number of factors, including the frequency and severity of the past violence, the likelihood that the violence will continue, and the wishes of the protected parent and the children who are able to express wishes.⁷² These new provisions clearly have a number of implications for lawyers. First, lawyers should be aware that in order to trigger the rebuttable presumption, it will be necessary to prove that violence occurred. Determining whether domestic violence is an issue in any custody or access

⁶⁸ It has also been found that lawyers are very reluctant to make arguments for denial of access, apparently because “they believe that such an argument would not succeed.” Australian Report Part I, supra n. 56, at 179. Roxburg, T, *Taking control: Help for Women and Children Escaping Domestic Violence* (1989) 155. “Many solicitors and barristers will go to almost any length to convince you that you cannot deny access and (a woman) must therefore agree to it before (going) into court and it can be almost impossible to have them obey... instructions and oppose the application.”

⁶⁹ Women have been accused of lying about domestic violence in order to gain advantage in custody and access proceedings as well. Australian Report Part I, supra n. 56, at 171.

⁷⁰ Recent research in the United States has found that in cases where fathers seek custody and mothers raise allegations of child abuse fathers are more likely to be awarded custody than in cases where mothers do not raise allegations of child abuse. Statistically allegations of child abuse raised during custody determinations are just as likely to be true as allegations raised at any other time. The myth that women are lying when they raise allegations of child abuse by fathers during custody determinations is still very powerful, and this research suggests that women are punished in custody actions as a result of this myth. Liss and Stahley, “Domestic Violence and Child Custody” in Hansen, M and Harway, M (eds), *Battering and Family Therapy: A Feminist Perspective* (1993) 175, 178; Zorza “How Abused Women Can Use the Law to Help Protect Their Children” in Peled, E, Jaffe, P and Edleson, J (eds), *Ending the Cycle of Violence* (1995) 147, 152.

⁷¹ Guardianship Act, section 16B(4).

⁷² *Ibid.*, section 16B(5).

proceeding right at the start of the proceeding is therefore crucial. Lawyers should consider asking all women who approach them for representation on these issues whether violence has been a part of their relationship. Where violence is an issue, lawyers will need to gather historical evidence, such as medical records, police reports and photographs, as well as current photographs and affidavits from witnesses. As this evidence is likely to be used not only to determine that violence has occurred, but also to assist the court in determining whether the child might be safe despite the history of violence, the evidence gathered should be as complete as possible. Second, the court must consider whether the other parent considers that the child will be safe and consents to custody or access by the abuser.⁷³ Lawyers should be aware of issues of consent and coercion surrounding women survivors of domestic violence,⁷⁴ and attempt to ensure that their client is safe enough to avoid coercion, so that her consent is given voluntarily.

Many of the women felt that the legal system is biased in favour of men. There were a number of comments expressing surprise and disappointment that the law and the legal system were not fair and neutral. For example:

Yes, I always knew that women were inferior but I always believed that we've got a legal system that was just, prior to going through it. I thought no, well the legal system has got to be just, I mean I know out there with the average kiwi bloke that women are inferior, but surely to goodness in the legal system, it never even crossed my mind that it would be so unfair....but now, yeah, I sort of, the understanding that I've got now is that racially and sexually the law is really just totally white male, whereas I wouldn't have believed that before. I really wouldn't. ...If you're a white woman or a Maori woman you're at the bottom. Yeah, just that it's white male thinking.

Women also talked about how they were silenced by the legal system. This feeling came about as a result of not having the chance to tell their stories, or not being heard,⁷⁵ or of having experiences of harms that did not fit into the categories recognised by the legal system for redress.

I felt like ... there was absolutely no point in me being there, might as well not even be there. What was going to happen was going to happen. The whole system was set up

⁷³ *Ibid.*, section 16B(5)(f).

⁷⁴ See eg Australian Report Part I, *supra* n. 56, at 161-162 for a discussion of a context of domestic violence resulting in undue influence in the signing of a memorandum of transfer.

⁷⁵ Australian Report Part I, *ibid.*, 28 "I never got to tell my story. It was as if what happened to me did not matter... I felt like the player in a game that I had never played before, and was treated as if I was cheating in some way."

to hear this poor man's needs because she had walked out on him and any time he clicked his fingers the whole lot ran, whereas I was just totally and utterly powerless and the children, especially the children had no rights whatsoever.

Clients have a right to have their point of view heard and to have their lawyer advocate for their view over any other.⁷⁶ Feminists and other legal academics have written extensively on the failure of the law to provide categories that recognise the diverse experiences of women in the law and respond to harms experienced by women in society.⁷⁷ This failure means that practicing lawyers may not be able to place women's experiences of injuries into legal categories. However, there is a rich body of literature concerning theories and practices of expanding the categories of the law and making women's voices heard in the law.⁷⁸ Lawyers who represent women should be familiar with this literature, particularly in areas where feminists have identified problems, such as the law's response to domestic violence. They should be prepared to make arguments that current laws and practices are inappropriate if the experiences of women are not addressed, and should argue for changes in the law that further its receptiveness and responsiveness to their clients' needs.

Some women compared their treatment by the legal system to the abuse that they had suffered from their partners.⁷⁹ The legal system did not protect them from violence; it furthered the abuse by condoning the actions of the abusers.

⁷⁶ Thompson, "Conflict of Interest" [February 1994] *New Zealand Law Journal* 64.

⁷⁷ Murphy, *supra* n. 50, at 1253-8; O'Leary, "Creating Partnership: Using Feminist Techniques to Enhance the Attorney-Client Relationship" (1992) *XVI Legal Studies Forum* 207, 213.

⁷⁸ McDonald, "The Law of Contracts and the Taking of Risks: Feminist Legal Theory and the Way It Is" (1993) 23 *VUW LR* 113; Cain, "Teaching Feminist Theory at Texas: Listening to Difference and Exploring Connections" (1988) 38 *Journal of Legal Education* 165; Schneider, "Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse" (1992) 67 *New York University LR* 520; Schneider "The Dialectic of Rights and Politics: Perspectives From the Women's Movement" (1986) 61 *New York University LR* 589; MacKinnon "Feminism in Legal Education" (1989) 1 *Legal Education Rev* 85, 89-92; MacKinnon, C, *Toward a Feminist Theory of the State* (1990) 112.

⁷⁹ Busch, et. al., *supra* n. 5, at 20 regarding the "double victimisation" of victims, first by the criminal and then by the court system; Wilson, M, McLay, J and Johnson, L, *Sexual Violence: A Feminist Perspective* (Paper Presented at Seminar entitled "Sexual Violence: A Case for Rape Law Reform in New Zealand" (1982).

To me, actually to speak, there's like a parallel there. There's a parallel between being in an abusive relationship with a bloke and going through a system that renders you powerless. And there's some really strong similarities in there.

I'd have to say the same ... to a point, ending my abusive relationship or going through the processes to do that, I seem to have got stripped even further. I came out the other end with a lot less ... than there was when I went in.

I didn't think I was that powerless. I thought I was pretty powerless but then when I came up against the law, I really found out how little I had and how much he had. And like [she] said it parallels exactly the same kind of feeling. This person's got power over and no way is emotion acceptable. It's all logic. We only want logic. We don't want to know about your fear.

This concluding comment summarises the disillusion with the legal system's ability to live up to its claims of fairness and neutrality for women.⁸⁰ Recognition of the possibility of the legal process itself being difficult and traumatic for women is important for lawyers who represent survivors of domestic violence. Lawyers should acknowledge that the legal system has the potential to be abusive and should develop strategies with their clients to address and combat abuses. Lawyers should also be prepared as a matter of course to provide women with referral information on appropriate community support services and other services early in the legal process.

Lawyers who are unaware of the gender bias of the system and who do not consider its possible implications for the cases in which they represent women may not be providing effective, or even competent, legal counsel. They should develop strategies to confront and expose gender bias.⁸¹ For example, in the situation described above where a judge suggested that a woman was traumatising her children by insisting on psychologists' reports where there is a history of domestic violence and allegations of sexual abuse of the children, effective counsel might challenge the judge. Counsel could clarify for the judge that the reason the parties are in court is because

⁸⁰ Australian Report Part I, *supra* n. 56, at 29; The Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System: Report No 67* (1994) 25-30, 75.

⁸¹ Feminists have developed approaches to litigation that are designed to reveal and confront gender bias in the legal system. See eg Bartlett, "Feminist Legal Methods" (1990) 103 Harv LR 829, 836-867; Ashe, "'Bad Mothers,' 'Good Lawyers,' and 'Legal Ethics'" (1993) 81 Georgetown LJ 2533, 2551-3.

of the violence of the man, that the allegations are that he has also traumatised the children by sexually abusing them and that the client is concerned with protecting the children. Counsel might also note that studies have found that allegations of child abuse made during custody actions are just as likely to be well-founded as allegations made at any other time.⁸² Counsel could point out that the client is certainly concerned about traumatising the children and willing to consider any options that provide for the children's protection and avoid the traumatisation.

B. Gender Bias Among Lawyers

A number of the women felt that their lawyers exhibited some forms of the same gender bias found in the legal system: the tendency to deny the violence and to discredit and blame the women. The law and society, including lawyers, continue to suspect the credibility of women.⁸³

One woman attributed loss of custody of and access to her children to the failure of the bailiff to promptly serve the protection orders on her abusive ex-partner, and to her lawyer's subsequent refusal to listen to and believe her. During the period after she left the abuser and obtained protection orders, and prior to the bailiff serving the orders, her ex-partner continually harassed her and her five children, often in the middle of the night. In attempts to escape the harassment, she moved with the children several times over a period of several weeks. Eventually, in an attempt to protect the children, she placed them temporarily at the state-operated child care facility while she continued to wait for service of the protection orders on her ex-partner.

Custody of the children was then taken away from her.

⁸² Zorza, *supra* n. 70.

⁸³ Australia Report Part I, *supra* n. 56, at 171 ("many women considered that they were not believed by lawyers, Family Court counsellors and judges, particularly in custody and access proceedings"); Utah Task Force on Gender and Justice, *Report to the Utah Judicial Council* (1990) 57-8. (Female victims as well as women in volunteer roles supporting victims in the court system have difficulty being believed); Gender Equality in Manitoba Courts, *supra* n. 50, at v ("Attitudes of 'blame the victim' and that women stay in abusive relationships because they enjoy being abused foster disbelief in the victim's story by investigators, prosecutors and judges"); Zorza, *supra* n. 50, at 4; Czapansky, "Domestic Violence, the Family and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts" (1993) 27 *Family Law Quarterly* 247.

I explained to [my lawyer] where the children were. Three weeks later when I went in to get the children to take them home, I was told that they were in the custody of the [child care facility] that it had been to court, they had interim custody of all five of my children and I was not allowed, then they got the police. I rang up my lawyer. He did nothing. He knew about it. No one had contacted me in all that time.

The Department of Social Welfare accused this woman of several counts of child abuse, including neglect based on the number of times the children had been moved.⁸⁴ There were also a number of allegations that the woman's abuse had resulted in what were actually symptoms of a rare disease from which one of her children suffered.

The woman said that her lawyer was aware of favourable information that could have been used to support her case for custody, including recent psychiatric reports. She described her reaction to losing custody of her children.

I don't remember half of it. I was so busy bloody yelling at them. What would you do? You know, basically would you really remember something like that? You know, all I remember is when they done it to me for the first week I, well, I had a friend at home, I just wandered around spewing and I was just a wreck. I don't even ... I mean the first couple of weeks they done it to me, I don't even remember it.

She described her lawyer's reaction.

He didn't seem overly concerned or worried. He had a little bit there to say about it and next minute they were talking about whether to make my kids a ward of the Court, state wards. All I remember is that the Magistrate said they were state wards and that was it. ...I asked [my lawyer] to continue fighting, time and time again, but he wasn't interested. He said, it's pointless, and I left it....I was just sort of lost, I thought well, heck, if that's what lawyers do, where do I go now?

She eventually did obtain the services of another lawyer. She described feeling scared during the first meeting with the new lawyer and not trusting "anything legal" until she started to see results from the new lawyer. The new lawyer fought and obtained access to her children for her within one month. When the new lawyer challenged the child abuse allegations they

⁸⁴ Later, when these charges were challenged with a new lawyer, the woman compared with a public health nurse the numbers of times that their children had been moved within the same period. The nurse's children had been moved many more times, but there was no suggestion that the nurse would be charged with child abuse.

were dropped, and she eventually regained custody of three of the children, while the abuser was given custody of the other two.

Other women also felt that their lawyers did not believe them. One of the comments to the Australian Report stated that “death threats [against their clients] meant nothing to solicitors.”⁸⁵ Here, three of the women have a discussion about whether the lawyers heard what they were saying.

So what’s happening is that they are not listening to you, all the way along they are not listening, they don’t hear what we are saying.

I actually don’t even think that they are hearing your words, they are thinking of the procedure, so before you’ve even finished speaking, or before you’ve even started speaking they are thinking of the next step in the procedure.

That’s what I’m saying about when you are talking and they are listening to what you are talking about and they are fitting it into this book.

They are not hearing you at all, their mind isn’t even thinking about your words, ...

This discussion suggests that lawyers need to explicitly acknowledge to their clients who are survivors of domestic violence that they do hear what the clients are saying. An acknowledgment of the situation of the women, and the extent to which the law can offer protection and the places where the law falls short or does not provide remedies or responses can indicate to clients that the lawyers have heard what they are saying even if the law will not respond. Effective advocacy requires that, where appropriate, lawyers discuss gender bias specifically with clients to ensure that clients understand all of the factors that may be influencing the outcome of their cases. Lawyers are responsible for ensuring, in whatever manner necessary, that gender bias does not influence the extent to which they hear and believe their clients. If they cannot ensure this, they are causing a grave disservice to clients for whom they have agreed to advocate.

5. Safety

The histories of abuse that the women endured, facilitated by gender bias in the legal process and societal denial of abuse, make safety a primary concern for women leaving abusive relationships. The women talk about

⁸⁵ Australia Report Part I, *supra* n. 56, at 180.

the danger in which they are placed by the actions of the abusers, the accompanying fear, and the inability of others to see the danger. One woman articulately summed up what it means to know about the danger of an abuser and to know that the tactics the abuser uses may not look dangerous to others:

[T]hings that can appear ordinary can actually be intensely threatening if you have been in an abusive relationship and you have to fight on these points that they think are nothing but in actual fact are really crucial to your safety.⁸⁶

As noted above, lawyers should be aware that under the Domestic Violence Act domestic violence is defined to include apparently trivial acts that form a pattern of behaviour that amounts to abuse.⁸⁷ Further, in making the determination as to whether an order is necessary for protection, courts may consider whether the behaviour forms part of a pattern of behaviour which requires protection, where some or all of the abuse appears minor or trivial in isolation.⁸⁸

The time at which women leave or attempt to leave abusive relationships may be the most dangerous period, during which the abuser may attempt to regain his power and control by escalating the infliction of serious bodily harm or committing homicide.⁸⁹ This fact sheds light on the question often asked about women in abusive relationships—why didn't they leave? For the most part, women who are targets of domestic violence cannot leave by walking out of the door of the domestic residence;⁹⁰ the abusers often make leaving as difficult and dangerous as possible in order to

⁸⁶ Domestic violence is a "pattern of interaction that inevitably changes the dynamics of the intimate relationship within which it occurs. Thereafter, both parties understand the meaning of specific actions and words within the continually changing context that includes a history of violence or abuse and the resultant physical injuries and psychological, social and economic consequences of it.... The meaning of the communication extends far beyond what is being said or done in the moment." Dutton, "The Dynamics of Domestic Violence: Understanding the Response from Battered Women" (October 1994) *Florida Bar Journal* 24.

⁸⁷ Domestic Violence Act, section 3(4).

⁸⁸ *Ibid.*, section 14(3).

⁸⁹ Fanslow, *supra* n. 2; Fanslow, J., *The OASIS Protocol: Guidelines for Identifying, Treating and Referring Abused Women* (1993) 13, 28-32; Mahoney, *supra* n. 46, at 58 ("at the moment of separation or attempted separation...the batterer's quest for control often becomes most acutely violent and potentially lethal").

⁹⁰ Mahoney, *ibid.*, has suggested re-defining "leaving" in the context of the dynamics of domestic violence.

encourage the women to stay, or to return, thus enabling the abusers to perpetuate their power and control.⁹¹ Separation under these constraints becomes a lengthy, even heroic enterprise.⁹² As contact with lawyers and the legal system is also most frequent during the period of separation, lawyers should be aware of the likelihood that the actions of women will be motivated by concerns for their own and their children's safety, often within the context of increased threats and physical violence.

It is also important to acknowledge that the women are the best predictors of the danger.⁹³

I felt like I was going to be murdered, any day and every day. That just went in one ear and out the other ear, with the lawyer....I can just remember sitting there and saying I feel like I am going to get murdered tonight, I really do, and that wasn't crazy.... that was a real thing, I mean I had guns held to my head, there was no problem getting a non-molestation order for me.

I get these, I don't get them so much now, I get these sort of anxiety attacks when he used to start getting wild or raising his voice. I used to get these they are actually anxiety attacks and you start shaking...

The women often fear that the abusers will carry out threats to find them wherever they attempt to hide. This fear is reasonable; one United States study found that half of the women who leave violent partners are subsequently followed and threatened,⁹⁴ or "stalked"⁹⁵ by their abusers,

⁹¹ It has been noted in the United States that women may also be punished for staying in abusive relationships in custody determinations by having the fact that they stayed held against them, even though the legal system and police may have been unresponsive in assisting them to leave, and the court system may have encouraged them to participate in mediation. Zorza, J, *Couples Counselling and Couples Therapy Endanger Battered Women* (1993).

⁹² When President Bush signed Pub. L. 102-528, Sec. 2 [adding U.S.C. § 10705(c)(13)] which amends the federal State Justice Institute Act authorising funding for research relating to child custody decisions in litigation involving domestic violence on November 2, 1992, he stated, "spousal abuse does not always end with divorce. In fact, the abuse can become worse, especially in connection with child custody litigation."

⁹³ Mahoney, supra n. 46, at 58 and n. 273.

⁹⁴ Browne, A, *When Battered Women Kill* (1987) 110.

⁹⁵ At least thirty-one states in the United States have passed stalking statutes that criminalise behaviour by which, for example, a person "wilfully, maliciously, and repeatedly follows or harasses another person and... makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury." S.D. Codified Laws Ann. § 22-19A-I (1992); see generally Note "Developments in the Law: Legal Responses to Domestic Violence" (1993) 106 Harv LR 1498, 1534-5. Busch, et. al., supra n. 5, at 269.

some for long periods after separation. “Stalking” may include behaviours such as repeatedly following victims, lurking outside of victims’ houses, and harassing victims.

He was stalking me and coming around the property and screaming for hours on end and I phoned up in great distress one day and absolute terror. My pre-schoolers and I were lying on the floor under the windows at one stage because we were so frightened. We couldn’t go out.

One excuse that abusers seem to use for breaching protection orders by stalking and by harassing is to say “I just wanted to talk to her”, or “I just wanted to talk to the children.”⁹⁶

Lawyers should be aware that after separation abusers present a continuing danger to the women who are the targets of their violence. Lawyers should be wary of these excuses and aware of the effects of police failure to follow through on all breaches of protection orders. Lawyers should also be aware that many of their clients who are survivors of domestic violence will be experiencing on-going safety issues, even after the issuance of protection orders, and during other proceedings, such as access and custody processes, and should consider all possible legal options that might assist in ensuring the safety of the women and their children.

III. THE LEGAL PROCESSES

1. First Visits to Lawyers

It is in the context of long histories of abuse, the gender bias of society, the danger presented by the abusers, and sometimes unsuccessful attempts to obtain police protection on their own that women who are survivors of domestic violence approach lawyers. It may be their first encounter with a lawyer. At times, the first visit to a lawyer will also be the first time that a woman has told anyone about the abuse. The women interviewed discussed the disincentives to revealing domestic violence.

It is like coming out of the closet, the expression of coming out of the closet, when you come out and declare he is abusing me, he is violent to me, look at my injuries, ...you get a lot of attitude of well, you probably deserved it anyway, you must have got really mad to have got him to do that, and if you really want to get rid of him that much, why are you sort of making it so hard for him. It is this guilt thing again. You

⁹⁶ Busch, *ibid.*, 27-52, 190-9.

are not an equal, it is not male equal with female, it's male above with the female below on a scale and it's right from the word go.

Lawyers should be aware of these disincentives for women in talking about domestic violence. The abuser's and society's denial and blame of the victim also often result in feelings of shame on the woman's part, as well as in the women denying the existence and severity of the violence herself.⁹⁷ These factors suggest that women are far more likely to downplay the level of violence that they have experienced than to exaggerate the violence: in fact, some women may not talk about the violence at all with their lawyers.⁹⁸ A number of the lawyers interviewed noted that they identify cases as involving domestic violence only when the client offers information about domestic violence. Lawyers should consider asking routinely whether female clients seeking separation or divorce feel safe with the process or are in need of protection.⁹⁹ When women do talk about domestic violence lawyers should provide signals that they believe the women, and create an atmosphere in which women will feel safe to talk about all forms of abuse.

Women who are survivors of domestic violence may have many conflicting emotions about approaching lawyers for assistance; hesitation on the part of the woman may not be a reflection of the severity of the violence or of the need for protection.

It was actually the first week of [the month] I think. I went there, I knew what I was going to do but I wasn't sure whether I should be or I shouldn't be. I was sort of a bit scared of what he would do if he found out, confused to know whether I really was doing the right thing because at this stage he was still living in the house. ...I remember feeling very scared and confused. It was my first sort of dealings that I had ever had with a lawyer and probably more sort of scared than anything what my partner would

⁹⁷ Mahoney, *supra* n. 46, at 16-17.

⁹⁸ White, "What You Didn't Learn in Law School: Family Law and Domestic Violence" (October 1994) *Florida Bar Journal* 38, 38 ("[I]t is not always easy to uncover a history of abuse. Many battered spouses are reluctant to tell anyone, including their attorney, about actual or threatened violence. Further, attorneys fail to invite disclosure because they assume the client will automatically tell them about something this important—but the client frequently does not"; Judge Tepper "No One Ever Asked" (Feb 1994) *Family Law Commentator*.

⁹⁹ See Waits, "Battered Women and Family Lawyers: the Need for an Identification Protocol" (1995) 58 *Albany LR* 1027, 1030 ("This Article will argue that family lawyers should use a protocol designed to identify which of their women clients are battered.")

do when he found out you know that I had done this and I had done that. I wasn't sure whether I should really be doing what I was doing. I knew I wanted to but I just ..

At the same time, the context (often of threats and violence) in which the women have made the decision to approach lawyers suggests a deep determination to take charge of their lives in the face of society's denial of domestic violence. Reassurance that a client has the right to decide what is best for herself and is capable of doing so may be important in some situations. The difficulty of the decisions and the courage necessary to make them may also be appropriately and explicitly acknowledged by the lawyer in a manner that supports the woman's ability to make decisions for herself about her life.¹⁰⁰ These acknowledgments can send the message that the lawyer has an appreciation of the situation that the woman has endured and respect for the woman as a person.

There were also a number of comments specifically focused on the physical layout of lawyers' offices. Some of the women discussed their preference not to be talking to the lawyer across a large, imposing work-desk; some suggested that they could best discuss these difficult topics with a cup of tea in a more informal seating arrangement. Other women discussed what it was like to have their children present in the lawyers' offices. All of the women who discussed this issue had clearly thought about it and about what was best for their children at the time. This suggests that lawyers should explicitly discuss childcare arrangements with the women.

Women also discussed safety in the lawyers' offices, especially where the office was a shop front or had large windows facing the street. Lawyers should be aware of on-going safety issues for their clients, in their offices and throughout the legal processes, and should take steps to ensure clients' safety.

One possible scenario for a first meeting with a women who is a survivor of domestic violence is presented here in order to stimulate ideas about ways in which lawyers might begin to address some of the concerns raised by these comments.

In my own experience of representing women who are survivors of domestic violence I began (often over the telephone prior to the meeting)

¹⁰⁰ United Nations, *supra* n. 4, at 60 ("Practitioners can help a woman by offering her different options to consider. Practitioners should not impose their own values or decisions. They should not judge women for the decisions that they make.")

by asking the woman whether she had a safe place to stay for that night. While many women do not telephone lawyers until after they have left the house shared with the abuser, some women do so, and others may not be in the shared house but still be unsafe. The homes of family and friends are often the first place the abuser will look for the woman, and therefore may not be safe. A Women's Refuge may be the only safe alternative. Ensuring the woman's immediate safety is crucial for obvious reasons. It also allows her to focus on the legal process and procedures.

I set aside a substantial block of time for the first meeting. I made it clear to the woman in advance that she was welcome to bring a friend or support person from Refuge to the meeting. I held the first meeting in a conference room, where I would not be disturbed by telephone calls, secretaries, or associates. The woman had the option of having her children with her in the conference room or having them looked after elsewhere. In either situation, toys were provided for the children. With the permission of the woman, I sometimes asked a specially trained female paralegal to sit in on the meetings and take notes, or I tape recorded the session. I explained to the woman that it was important for us to catch all of her words so that we could present the court with an accurate picture of what was happening. Turning over the recording of the session to someone else also freed me to respond appropriately to the woman's story. Tea or coffee, and food at mealtimes was made available, just as it would be for any client.

In this setting I asked the woman for her story of the violence and abuse in the relationship, explaining to her the process for obtaining protection orders, and the necessity to demonstrate to the judge the need for protection. I responded to her story by acknowledging her courage and the difficulty of her situation where appropriate. The difficulty of telling stories of domestic violence to strangers was acknowledged and I always made certain that tissues were readily available. At times I offered to leave the woman alone to recover her composure if that seemed appropriate.

I also asked the woman whether she had any questions about the legal processes or protections, or about anything else. At the time of leaving abusers, women may be required to deal with a bewildering plethora of agencies, including the Department of Social Welfare, the Income Support Service, the Children and Young Persons Service, Housing New Zealand and others. Leaving permanently requires successfully negotiating a path through these agencies at a time when the women are often exhausted by relentless abuse, sometimes suffering from physical injuries, and overwhelmed by fear and the logistics of moving a family. Legal protection is meaningless if these hurdles cannot be overcome. Lawyers should be

prepared to provide as much information on these other processes as possible, to make contact with sympathetic and efficient people within government agencies, and to refer women to other support people.

Although this initial meeting could be time consuming, the investment of time early in the case invariably paid off later. A cooperative lawyer-client relationship, in which the client received clear messages that her case was important and that she was respected, was established. Obtaining the entire story at the beginning of the case also paid off in the development of a coherent long-term strategy from the beginning. As well, there were rarely surprises from opposing counsel. Taking the time to hear the complete story also meant that the affidavit could more accurately represent the complete history of violence in the relationship, setting the appropriate tone about the seriousness of the violence, the threat that the abuser posed to the woman, and the need for protection.¹⁰¹ The affidavit could also be referred to at appropriate times during the process, and the consistency of later arguments with the affidavit lent credibility to those arguments.

Using the first meeting to obtain the entire story from the client also recognised that although the client may initially obtain only protection orders, these cases often lead into further proceedings. Initiating the case in a manner that recognises this possibility of further proceedings and immediately places the client in the most favourable position possible for such proceedings may be crucial to setting the stage for advocacy that can ensure continued success in the form of protection for the client from violence. Further, as discussed above, under the Domestic Violence Act it will be necessary to prove the violence, as well as its level and severity in order for courts to make determinations as to the safety of the child. This process is facilitated by the attention to the woman's entire story at the beginning of the case.

¹⁰¹ There has been some discussion by judges in New Zealand about the possibility that affidavits filed in support of applications for protection orders are too brief. Busch, *supra* n. 5, at 206. Rule 26 of the Domestic Violence Rules 1996 states that (1) "Every application without notice for a protection order or a property order, or both, must include a certificate, signed by the lawyer, and certifying (a) that the lawyer has advised the applicant that every affidavit that accompanies the application must fully and frankly disclose all relevant circumstances, whether or not they are advantageous to the applicant..."

2. Counselling and Mediation Conferences

As a result of the plethora of critiques of mediation¹⁰² and counselling, especially joint counselling,¹⁰³ and the recommendations against joint counselling and mediation in situations where there is a history of domestic violence,¹⁰⁴ under the Domestic Violence Act it appears that joint counselling will not normally be ordered where there is a history of violence, and that an abused woman cannot be required to attend counselling with the abuser.¹⁰⁵ The experiences of the women interviewed in this study support these changes. However, mediation conferences will continue. The women interviewed had many of the same comments regarding mediation conferences as they did about joint counselling; in fact, some of the women could not distinguish between joint counselling and mediation. This section will therefore briefly discuss the provisions of the Domestic Protection Act regarding counselling and the women's

¹⁰² See eg, Astor, "Violence and Family Mediation: Policy" (1994) 8 AJFL3; Astor, "Domestic Violence and Mediation" (August 1990) Australian Dispute Resolution Journal 143; Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 Harv Women's LR 57; Adams, "Counselling Men Who Batter: A Profeminist Analysis of Five Treatment Models" in Yllo and Bograd (eds), supra n. 50, at 176-199; Walker, "Psychology and Violence Against Women" (1989) 44 American Psychologist 695; Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power" (1992) 40 Buffalo LR 441.

¹⁰³ Busch et. al, supra n. 5, at 241-255; Lapsley, Robertson and Busch, "Family Court Counselling, Part I" (March 1993) 3 Butterworths Family Law Bulletin 152; Lapsley, Robertson and Busch "Family Court Counselling, Part II" [June 1993] 1 Butterworths Family Law Journal 9.

¹⁰⁴ Busch et. al, supra n. 5, at 254-255; *A Review of the Family Court: A Report for the Principal Family Court Judge* (Auckland, April 1993 ("where domestic violence is evident, joint counselling and/or mediation is not appropriate. This should only be cautiously considered if there is informed and free agreement by both parties...Domestic violence, as a reflection of power, is obviously an important concept when it comes to considering how a Court process should operate when domestic violence exists. **We believe that mediation should be avoided by the judicial process as a legitimate means of dispute resolution in such circumstances.**") 119 (emphasis in original). See Busch et. al., supra n. 5, at 244-255 for an excellent discussion of Family Court counselling and the experiences of women who are survivors of domestic violence generally.

¹⁰⁵ Domestic Violence Act, section 31 provides that:
A protected person and a respondent, or, as the case may be, a protected person and an associated respondent, cannot be required to attend programme sessions at which the other person is also present.

experiences with counselling and mediation, and discuss ways in which these experiences might inform lawyers' conduct under the Domestic Violence Act.

Under the Domestic Protection Act¹⁰⁶ the judge was authorised to recommend counselling for applicants seeking protection orders. The applicant was not obliged to attend counselling. However, judges could *direct* respondents to attend counselling.¹⁰⁷ This meant that a woman who applied for protection orders could not be required to attend counselling, whether individual or joint. Under the Domestic Violence Act "counselling" is replaced with "programmes".¹⁰⁸ Applicants have a right to request Court Registrars to provide programmes for themselves, children of their families and other specified persons.¹⁰⁹ Lawyers acting for applicants have a duty to ensure that the applicant is aware of her or his right to request the provision of a programme, and, where the applicant wishes to exercise the right, to take steps to enable them to do so.¹¹⁰

Many women who apply for protection orders also file applications for separation orders and/or apply for custody or maintenance orders, thus invoking the jurisdiction of the Family Proceedings Act 1980 (the "Family Proceedings Act").¹¹¹ Under section 10 of the Family Proceedings Act, couples may be required to attend conciliation counselling when there is an application for separation. Judges may also make a referral to counselling when there is an application for a custody or maintenance order.¹¹² The Family Proceedings Act makes it clear that in counselling, reconciliation, or at least conciliation between the couple, is to be sought. Section 12 of the Family Proceedings Act states that counsellors

- (a) Shall explore the possibility of reconciliation between the husband and wife; and
- (b) If reconciliation does not appear to be possible, shall attempt to promote conciliation between the husband and wife.

¹⁰⁶ Domestic Protection Act, section 37.

¹⁰⁷ *Ibid.*, section 37A.

¹⁰⁸ Domestic Violence Act, section 29.

¹⁰⁹ *Ibid.*, section 29(a).

¹¹⁰ *Ibid.*, section 29(6).

¹¹¹ Moore, J, *Is a Non-Molestation Order Enough? Women's Experiences of the Family Court* (Unpublished M.A. Thesis, Victoria University, 1989).

¹¹² Family Proceedings Act, section 10.

In some geographical areas these objectives are reflected in the letter that is sent to the parties informing them of the referral to counselling, which states that the purpose of the counselling is to explore reconciliation and promote conciliation.¹¹³ Further, reconciliation and conciliation are objectives for the Family Court in general,¹¹⁴ and lawyers have a duty to promote at least conciliation of husbands and wives.¹¹⁵

The Family Proceedings Act recognises the inappropriateness of counselling where domestic violence has occurred by granting judges the discretion to dispense with counselling in section 10 where the respondent has used violence or caused bodily harm to the applicant or a child of the applicant's family. Amendments to the Family Proceedings Act passed with the Domestic Violence Act expand section 10 to allow judges to dispense with counselling where the respondent has used domestic violence as more broadly defined in the Domestic Violence Act or where the delay in the proceedings required for counselling would be undesirable, or other reasonable causes to dispense with counselling exist. Further, the amendments add a new section 19A to the Family Proceedings Act. This section prohibits requiring a party who has had violence used against them by the other party to attend counselling with the other party.

Many of the general comments that the women made about counselling and mediation conferences were negative. The women felt that the reconciliation and conciliation goals of Family Court counselling were inappropriate and fuelled their abusers' hopes of their return. Some women were adamant that the abuser only wanted them to return in order that he might continue the abuse and maintain power and control.

Through the Court appointed counsellor, psychologists, that system put a bigger wedge between the family, so although it's called conciliation counselling it actually did a lot of damage, it did as much damage as going to a lawyer would do, for our family it did....Because the original counsellor heard only his story and was only there for reconciliations, so there was one side saying I want to reconcile and really sounding good about wanting to reconcile and coming up with the goods and then there was the other side saying, I don't want to, I don't even want to sit here, and that was me. ...who desperately just wants to get rid of this guy, just desperately wants to be on her own and has got no desire at all to reconcile. So they are making the opportunity for him to be with you even if it is just in a counselling session or him to pull your

¹¹³ See Lapsley et al., Part I, supra n. 103.

¹¹⁴ Family Proceedings Act, section 19.

¹¹⁵ Ibid., section 8.

strings...and with you the more that he keeps on coming into your space, the more you want to go away.¹¹⁶

Some of the lawyers indicated that they routinely reassured their clients that counselling was not about reconciliation. Under the new Act, lawyers should be certain to ascertain cases where domestic violence is an issue and to ensure that these women are not directed to any programmes against their will. In addition, lawyers should ensure that reconciliation does not become the focus of mediation sessions where such a focus does not reflect the interests of their client.

Safety during joint counselling and mediation conferences was also a major concern for many of the women interviewed. Given the high level of danger that these women are in, especially during the period in which they are separating from their abusers, this fear is not surprising. Its justification is also borne out by reports of abuse before, during and after counselling and mediation sessions.

He [the counsellor] actually did make him wait until I had left before he left. We didn't leave at the same time because I actually refused to leave at the same time as him. Because I knew he'd get me in the street.

When I came out [of the court room] he threatened me outside in front of my lawyer, so there was no court officers anywhere to be seen even though you do see them going in and out all the time but there was none around like they should have one on duty or something.

Outside the counselling session each time, I would be hassled by my ex-husband, and you know physically hassled and emotionally hassled by him, and then we would have to go up this lift into the counselling room.

Even individual counselling sessions were dangerous for some of the women, as the abusers had sessions scheduled right after their sessions.¹¹⁷

¹¹⁶ Other researchers have found a focus on the abuser's needs in the Family Court. Busch, *supra* n. 5, at 236. See *eg N v N* (1986) 2 FRNZ 534, where Judge Inglis focuses on the needs of the abusive father (who is in jail for raping the mother) in making a decision about the schooling of the child.

¹¹⁷ See also, Busch, *et. al.*, *supra* n. 5, at xiv ("the risk of compromising safety is most obvious where joint counselling sessions are held but as the case studies show, even individual sessions can be dangerous (one woman was killed as she left a[n individual] counselling session).")

The women discussed how to make joint counselling and mediation safe; their concerns focused on physical proximity and eye contact with the abusers. Several of the women suggested that having a security guard or police officer present in the mediation conference would have made them feel safer. A lawyer's request for police or security protection may highlight for the other actors the seriousness of the abuse and can ensure in a very visible manner that the historical context of the abuse is not lost¹¹⁸ in the mediation conferences and court sessions.

Safety is a major concern for women who are survivors of domestic violence in situations where the legal system requires that they be in close physical proximity to the men who have abused them. At least one Family Court Judge has acknowledged that “[t]he security for the customers of the Family Court is a matter of real concern”.¹¹⁹ Lawyers should consider and discuss issues of safety with their clients, including the possibility of providing overt means of protection for clients, such as police or court officer presence, in all situations where they are required to be near the abusive men.¹²⁰ Lawyers should also investigate the physical layout of each of the areas used for counselling, mediation and court hearings, and design a safety plan for each location that will ensure the maximum protection possible for clients.

The Domestic Violence Act and the amendments to the Family Proceedings Act state clearly that women cannot be *required* to attend joint programmes or counselling with the men who have abused them. However, joint attendance is still possible if the women consent. The women identified lawyers to varying degrees as supporting the position that they should go to Family Court counselling and joint counselling in order to look reasonable and to enhance the perception that they are cooperating in the process.¹²¹ Many of the women often felt a strong compulsion from

¹¹⁸ *Ibid.*, 184-190.

¹¹⁹ *Ibid.*, 230.

¹²⁰ Instances of police attendance at Family Court have been recorded, so there is some precedent for these arguments. *Ibid.* at xvi, 39, 49, 228, 229-230.

¹²¹ Similarly, in the United States a number of states have enacted “friendly parent” provisions in custody statutes which make parents’ receptivity to sharing parental responsibility a factor for consideration in custody decisions. These provisions are problematic for women who have been primary caregivers, especially where they object to joint custody or access on the basis of the abuse of the father, because they allow women to be punished for such objections. Zorza “‘Friendly Parent’ Provisions in Custody Determinations” (1992) 26 *Clearinghouse Review* 921. Especially in the context of denial of abuse and refusal to grant credibility to women’s allegations of child abuse, requirements, express or implied, that women cooperate in custody and access, especially joint custody, where there is a history of abuse are another form of gender bias.

counsellors and lawyers to attend joint sessions with the abusers.¹²² Some of the lawyers interviewed also acknowledged that they encourage women to attend counselling even where domestic violence has occurred. Some lawyers also noted that they tell women that it is in their interests to participate in counselling and mediation because they will have input into, and control over, the outcomes. However, research suggests that in any divorce case, mediation empowers only the already more powerful husband.¹²³

The promotion of counselling and mediation sessions by lawyers may be seen to be consistent with the lawyers' duty to promote conciliation under section 8 of the Family Proceedings Act. However, the often long histories of violence that precede these sessions, the high levels of danger and fear and the existence of on-going explicit or implicit threats of continued violence must be seen to be a serious factor influencing any agreements reached by negotiation or mediation. These factors call into question the consent upon which the agreement is based. Section 8 should therefore be read as consistent with section 10, including the new amendments: where the partner has used domestic violence against the woman or a child of the marriage, which would be almost invariably the case when there are protection orders in effect, lawyers should also recognise that joint programmes and joint counselling are inappropriate. Lawyers should recognise this policy statement and support women in refusing to attend joint sessions with abusers. They should discuss the option of applying for dispensations with clients and should assist clients in obtaining such dispensations under the Family Proceedings Act section 10(3). Lawyers might also consider making arguments that mediation is inappropriate in situations where there has been domestic violence, based on the recommendation in *A Review of the Family Court*.¹²⁴

The women's comments also highlight confusion about the roles of

¹²² Another study found that divorce lawyers manipulate clients to settle. Felstiner and Sarat, "Enactments of Power: Negotiating Reality and Responsibility in the Lawyer-Client Interactions" (1992) 77 Cornell LR 1447, 1463.

¹²³ Bryan, *supra* n. 102, at 445 ("Proponents proclaim mediation's superiority to lawyer negotiation because mediation purportedly enhances autonomy and individual dignity by empowering the couple to order their post-divorce lives...[exploration of]...power disparities between husbands and wives and the impact these disparities have on the spouses relative negotiating abilities...clarifies that, absent ... intervention, mediation empowers only the more powerful husband.").

¹²⁴ *Supra* n. 104.

counselling and mediation. This should alert lawyers to the necessity of clarifying each step of the legal process for their clients, and ensuring that clients who do choose to attend counselling and mediation do so fully informed of their rights and obligations in each situation, including the level of compulsion to attend, to remain, and to agree in each forum.

3. Preparation for Court

Several of the women stated that they had had no preparation at all for the court hearings, or for any other part of the legal process. The women talked about preparation for the mechanics of the court hearings, including issues such as who would sit where, how to address the judge, and what would actually happen during the hearing. Other women also talked about explanations that used “legal jargon”, which they found difficult to understand.

Several women talked about receiving no preparation at all for their participation in the legal processes.

My lawyer just gave me no preparation at all. I haven't really had any preparation at all. I sort of went to the first custody hearing and was ordered to go to counselling, and went, and that's where I found out what counselling was about, and then years later at the final custody hearing, I found out what a custody hearing was about when I went there.... a strange lawyer came up to me and gave me all the information, you know, it was amazing. I remember sitting there thinking 'far out, this is great, someone's come and told me, you know what it's going to be like' and he just said, be polite to the judge etc.

Lawyers should give careful thought to explanations of court processes. The lawyer's preparation should cover both the legal process and the mechanics of the proceedings, such as the physical surroundings, who will sit where, what the judge will do and how long the procedure is likely to take. The physical surroundings and the placement of the parties in the court are likely to have a direct effect on the safety of the women. It is important to ensure that the women are as safe and as informed as possible sufficiently in advance to enable them to direct their attention to participation in the legal proceedings.

The women also talked about the difficulties encountered when their lawyers used legal jargon.

I think there is a huge difference when you see in family courts or any type of family law there is often a huge gap between counsel and client and understanding what is

actually happening in communication of what is going on. Sometimes lawyers can communicate to their clients what they think is a very straightforward way, very clear language or whatever and the client may just simply not understand and may not be able to explain what they do and what they don't understand.

Some women talked about the difficulty of focusing on legal terminology when overwhelmed by emotions.

They may have been saying things to me, but I actually didn't hear what was coming because my emotions were over-ruling ...

The women also talked about the difficulty they encountered in asking their lawyers questions.

I always had the impression whenever I left, the lawyers, my head full of questions, they weren't clear, and feeling really quite dazed.

And why didn't you ask the questions? Do you know? I mean, what was it that was happening that ...

I think I just felt like I was the one that's in the wrong, and the quicker these meetings were over, the less time I had to spend there, the less embarrassed and guilty I felt.

It is important that lawyers not only be prepared to explain the legal processes, but that they be prepared to do so in a manner that their clients can understand. Further, it is not enough for lawyers to assume that clients understand simply because they do not ask questions. They may not be asking questions for reasons completely unconnected to their level of understanding. Lawyers should assume the burden of positively ascertaining that their clients are comfortable with their level of understanding, and should consider stating explicitly to their clients that they have a right to understand the processes and should ask as many questions as necessary to ensure that they do. It is impossible for clients to make informed choices about their legal representation and the strategy decisions involved, which may impact on such crucial issues as physical safety and custody of children, if they do not understand the legal process, including their options in that process.

A clear explanation of the process for the client requires first that the lawyer be familiar with the process and any local variations. Lawyers should think through the steps of the process, and the possible implications at each step for the clients. Lawyers should then ascertain that they can explain the process in a manner that is understandable to non-lawyers, if

necessary, by practicing explaining it to non-lawyers. Through a questioning dialogue lawyers might determine which aspects of their explanations are clear and which need refining. They might also ascertain which aspects of the procedure are the most obscure to non-lawyers.

4. *Understanding Orders*

The women discussed the ability of their lawyers to facilitate understandings of the orders, including their understanding of when the orders are effective, what protection the orders provide, how they are actioned, and when the orders lapse. The women also noted the importance of provision by lawyers of realistic assessments of the use and enforcement of the orders.

I thought once you had been into court and you had got those orders that was it, I didn't know that he actually had to be served the orders before they became effective.

This first comment, along with the story presented earlier about the result of a bailiff's failure to serve protection orders promptly, suggests that there may be misunderstandings about the time at which protection orders become effective. As separation may be a particularly dangerous time for the women, lawyers should be certain that clients understand the timing of the effectiveness of protection orders. Lawyers should also be diligent in following up the service of the orders, and willing to hire private process servers if necessary to ensure that the orders are served immediately. Some of the lawyers interviewed noted that they have successfully had the costs of private process servers reimbursed by Legal Aid. However, it was unclear whether this cost was covered under the Legal Services Act 1991,¹²⁵ and it is not clear that these costs will be covered under the Legal Services Amendment Act 1995,¹²⁶ which becomes effective concurrently

¹²⁵ Section 20 provides that legal aid covers legal representation "including all assistance usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings." It may be argued that process serving is usually carried out by the bailiff and therefore is not usually provided by the solicitor and so is not covered by the Act.

¹²⁶ The Legal Services Amendment Act 1995 amends the Legal Services Act 1991 by adding sections 49A and 49B to provide that persons who are parties to domestic violence proceedings shall not be required to make contributions to those proceedings and shall not have charges imposed on their property by the District Subcommittee with respect to those proceedings.

with the Domestic Violence Act. Clearly, the danger that women are subjected to as a result of delayed service of process justifies coverage of private process servers by Legal Aid.¹²⁷

This next set of comments highlights other misunderstandings about the operation of the orders.

Oh yes his mother died and we ended up back together, but it was only for a short time, but they were broken that time. But there was other times, like when I wasn't with him and he came on to the property and I thought well that's it, they are broken.

Oh because I was told that if I got a non-molestation order and you invited him onto your property, then it is broken.¹²⁸

Under the Domestic Protection Act a non-molestation order lapsed if the parties freely “resumed cohabitation”.¹²⁹ The definition of “resume cohabitation” remains unclear—how long does the party against whom the order has been made have to be on the property in order for the order to lapse?¹³⁰ As a result, when the police respond to calls about breaches of orders, the breaching party may claim that cohabitation has resumed and that therefore the orders are no longer effective. Without clear guidelines, it may be difficult for the police to determine whether the order remains in effect.¹³¹ Under section 20 of the Domestic Violence Act, the standard conditions of a protection order are suspended while the protected person and the respondent are living in the same dwellinghouse with the express consent of the protected person. This provision only suspends, rather than causes to lapse, the protection order, and therefore provides better protection than the Domestic Protection Act. However, the meaning of “living in the same dwellinghouse”, like “resume cohabitation”, may cause difficulties in interpretation.

Lawyers should explain to their clients that this lack of clarity may be interpreted in favour of the abuser. The best manner in which to ensure

¹²⁷ See also Busch et. al., *supra* n. 5, at 210-12.

¹²⁸ Domestic Protection Act, section 17.

¹²⁹ *Idem*.

¹³⁰ Section 17 provided that a non-molestation order lapsed upon resumed cohabitation. The case law defining what resumed cohabitation means is unclear. However, it is clear that simply inviting the man named in the order onto the property is not enough to cause the order to lapse. See Busch et. al., *supra* n. 5, at 216-218.

¹³¹ Busch, et. al., *ibid.*, 210.

protection is for the women to be very clear at all times that they do not want any contact with the abuser. However, while strategically this is the best course of action for the women to follow, they may have good reasons for allowing the respondents onto the property. This situation is complicated by section 49(1) of the Domestic Violence Act, which provides that breaches of protection orders are offences only when committed “without reasonable excuse”. This may allow abusers to enter onto property whenever they can think of a plausible explanation. Especially in light of these complex legal provisions, lawyers should not hold contact with abusers against the women. The activities of the women protected by the orders are not constrained by the orders; they remain free to choose their own actions. It is the job of the lawyers to ensure that they receive the maximum protection possible from the legal system.

A related issue was raised in the lawyer interviews. A number of lawyers noted that they were frustrated when their clients returned to their abusers, especially when they later returned to the lawyer requesting another set of orders. This problem should be alleviated under the Domestic Violence Act as orders become final unless the respondent takes positive action, and as living in the same house only causes suspension of certain conditions of the orders. However, it is still possible for orders to be defended, changed, and discharged,¹³² and, therefore, repeat applications are possible.

It has been recommended that reluctance on the part of judges to grant repeat non-molestation orders is inappropriate,¹³³ and it is at least as inappropriate for lawyers to hold reconciliation against their clients.¹³⁴ Lawyers should offer to review with the women any safety, resource, housing or other constraints that may have prompted their return to the violent relationship and to explore whether there are legal or other services available that might remove these constraints.

¹³² Domestic Violence Act, sections 76, 22, 46, and 47.

¹³³ Busch, et al., *supra* n. 5, at 210.

¹³⁴ Women who are survivors of domestic violence often lead extremely complicated lives, raising children and running households under horrific conditions. They may choose to remain in or return to violent situations due to a complex set of circumstances that are difficult for outsiders to understand. For example, some women have indicated that they have returned to violent relationships because in the context of a society that will not or can not protect them from the abuser, it is easier to know where he is and have some ability to predict his actions than to always be hiding in fear of his sudden, violent discovery. Other women may reconcile because their children have medical crisis that they are physically unable to cope with without the help of another adult, and the abuser may be the only possible choice.

Several women commented that they wanted a realistic assessment of their legal options, their chances of obtaining protection orders and of the protection that the orders would afford.

Oh now I'd like to know both sides of it, what really to expect, what your position really is, there is lots of maybes and might's and want to bes.... You really do have to know what consequences you could suffer. As far as I was aware I would ring the police, they would come, arrest him, take him away, I could get a night's sleep, but that is not how it is. You are peering out the windows at 5 o'clock in the morning thinking 'oh has he gone'. The police aren't going to come even though I've rung them. They've said it is a waste of time because he is half way back to [town] by now.

And they need to be honest.... They need to have said to you, 'look the law is not going to help you that much, the law is going to play games with you and your children's' lives, the law is absolutely hopeless and it is not fair', and they need to tell you that when you walk in there and they need to say, 'this is going to be really tough and the law is not on your side' and if they had said that to you in the first place then you knew what you were up against but they don't, they say, 'the law is fair, the law is this and that and the other thing'.

These comments stress the importance of providing clients with realistic assessments of the protection that the law affords. Although one might expect a realistic assessment of the types of remedies that the law provides and the usefulness of these remedies in any case from a lawyer, and certainly even more so in an area where there has been so much criticism of the adequacy of the law, the women recount few experiences of receiving realistic assessments of the operation of the law from their lawyers.

The second interview conducted with each group of women presented the women with flowcharts of the legal processes that they had used or were using, including one flow chart published in a pamphlet about the custody process that is distributed by the Department of Justice. The flow charts were intended to help explain the legal processes and also to clarify issues concerning the women's understanding of those processes.

The women's positive responses to the flow charts suggest that the use of graphic illustrations could be a positive step toward fully informing survivors of domestic violence about the legal processes in which they are engaged. Lawyers could make the information available in waiting rooms¹³⁵ and explicitly review the charts as part of their explanations of the process. Other educational programmes, such as the Court Orders

¹³⁵ Some lawyers offices in Hamilton do have Department of Justice brochures, including the custody brochure and flowchart, available in their waiting rooms.

Guidance Groups at the Henderson Family Court and the Hamilton Abuse Intervention Project,¹³⁶ might also find flowcharts useful.

5. *Lawyers As Advocates*

Another major theme to arise from the interviews was the women's perceptions of their lawyers' abilities as advocates. The widely accepted "fiduciary model" of lawyering requires the lawyer to further the interests of the client.¹³⁷ This model recognises the power that lawyers exercise in the lawyer-client relationship¹³⁸ and places duties on the lawyer to act in the client's interests in exercising that power.¹³⁹ The lawyer is required to "fearlessly uphold the client's interests."¹⁴⁰ A requirement of partisanship is common to professional ethics in common law countries.¹⁴¹ Upholding the interests of the client includes, at a minimum, discerning what outcome the client would like, presenting legal options to the client, advising the client concerning the options and assisting the client to choose among those options.¹⁴² Once the client has chosen, the lawyer is responsible for making the strongest possible argument in support of the client's case. The comments in this section deal with concerns that the women have with these aspects of their legal representation.

The first group of comments concerns the decision-making process used to discern the client's preferred outcomes. While the legal process for obtaining protection orders may be fairly straightforward compared to other legal processes, there are still opportunities for clients to make

¹³⁶ Busch et. al., *supra* n. 5, at 214-16.

¹³⁷ Thompson, *supra* n. 76, at 64.

¹³⁸ Divorce clients are typically weaker parties in negotiation with lawyers. Felstiner and Sarat, *supra* n. 122, at 1497.

¹³⁹ Thompson, *supra* n. 76, at 65.

¹⁴⁰ New Zealand Law Society, *Rules of Professional Conduct* (2nd ed 1992) Rule 8.01 Commentary.

¹⁴¹ Enright, *supra* n. 67, at 823. In New Zealand, Family Court lawyers also owe a duty to the Family Court, which includes a duty not to mislead the Court and which overrides the duty to the client where there is a conflict. *Ibid.*, 822. New Zealand Law Society, *supra* n. 140, Rule 8.01 commentary.

¹⁴² It has been noted that clients' wishes cannot always be clearly discerned, and that no matter how clear the client, lawyers will have a part in interpreting clients' wishes and should take responsibility for those interpretations. Lawyers' actions, like those of other actors in the legal system, are not neutral. White, "To Learn and To Teach: Lessons From Driefontein on Lawyering and Power" [1988] *Wisconsin Law Review* 699, 765.

decisions and to participate in choosing from among available options. There are, for example, decisions to be made about exactly which orders to apply for, when to apply, and whether to apply with or without notice. In addition, applications for custody and matrimonial property actions present another range of options for the women.

Some women felt that they were not included in the decision-making process in their cases.

No, I don't think I made the decisions. I think [the lawyer] would have made a lot for me....I was given no choices.

There wasn't much choices to go with. The law is the law and if you disagreed with it, you have got no choice anyway, you have got to do it otherwise you are in contempt of court.

I felt like I was a pawn in the game. It seemed to be that [the lawyer] was having a - now how can I describe it - a point scoring thing between him and my husband's lawyer. It seemed like a game to them.

As the decisions in family actions sometimes involve complete life changes, lawyers should be certain that the women are given the opportunity to participate in decision-making.

This next woman's experience illustrates a situation where she is left feeling powerless after having had little participation in two important decisions in her case. This woman identified herself as a lesbian during the interview. The current case law in New Zealand provides that the fact that a mother is a lesbian is not in itself grounds for a denial of custody.¹⁴³ However, this woman described receiving an ultimatum from the judge in her custody case that required that she choose between living with her female partner and retaining custody of her children.

[W]hen I think of the custody battle....I would never have gone through what I [went] through if I hadn't been involved with a woman.... The children had to go and see someone because we were living together. Way before this as well. She was in the house, sharing the house with my girls....And then it must have been a social worker was called in and she had to visit us at our home....My girlfriend had to move out of the house until it was settled.

¹⁴³ See *Y v Y* (Unreported, High Court at Auckland, 17 June 1981, M 1451/80, Barker J).

And, on whose advice was that she moved out?

The lawyers....

Were there any other options?

Until it was cooled over, like until it was sorted. It was the only way that she thought that I was going to be able to have them. By moving her out. Any other options? No, I don't think there were any other options given to me....

How did you feel about that? ...

When I look back, that is the real thing that she let me down on. I think there possibly could have been, it could have been worked better.

The final decision came ... that I had to make a choice, ...[between] my girlfriend or my children. I chose the children. Yeah, that she never was to live with me again. Unless I applied to the court....I've been left anti- what a lawyer, how the lawyer works for you as far as what I went through.

This woman does not recall her lawyer discussing with her any options to her partner moving out of her house or suggesting to her that she might have good grounds for appeal. The point of this story is not, however, that the lawyer failed the client by not suggesting or pursuing an appeal. There are obviously a number of factors involved in such a strategy decision. The point is that the woman is left feeling powerless after not having participated in decisions that profoundly affected her life.

Establishing mutual respect in the lawyer-client relationship, beginning with believing the client, is likely to be an important first step to acknowledging and respecting the client's contributions to the decision-making process, and to advocating zealously for the woman, and upholding her interests. These women noted a lack of respect from their lawyers, which underpinned all of their interactions.

I think things would have been made a lot easier if I had been given straight answers. I mean, I knew what I wanted. I used to walk in with a list of questions I would have written down in my head and I would ask for, I would want to know you know exactly what was going on and I would get fobbed off or get very general kind of answers. He was very obstructionist you know in a very nice charming kind of way. He just wouldn't give me access to information.

She wasn't actually telling me what she wanted to know. She didn't say like this is

what the story is, what I need is this and this, can you give that to me. She wasn't treating me as an equal on that level. She was just saying well what happened then, which aggravated me because I have done some years of law and that aggravated me. That made me feel annoyed. I didn't need to be treated in that way... Yes she kept me in the dark a bit as if there was a lot of stuff I didn't need to bother my head about. You didn't really need to know or whatever which I found annoying.

These comments, combined with earlier discussions of first visits to the lawyers and the lawyers' disbelief, suggest that women detect patronising and condescending attitudes of lawyers.

A few of the women did feel as though they were included in the decision-making concerning the legal processes. These women were quite enthusiastic in discussing their lawyers.

It was really good. I understood everything and, yeah, because I'd been doing a lot of reading, because I was actually doing my refuge training at the same time while I was staying in the refuge. So, I was reading legal books and so, I really understood it. So, I knew sort of what questions to ask him, so it was better that way.

This next woman describes a decision-making process that fits the traditionally accepted model of the professional lawyer, discussed above, and with which she was happy.

I mean even now like when I ring her or have to have any dealings with her she says well what do you want to do. Tell me what you want. I mean she will tell me, she will say no in my opinion I don't think we should go about it that way. We should go about it this way. But she doesn't say, you know you should be doing this or you should be doing that. She says well what do you want to do about it. Do you want me to do this or do you want me to do that. He has actually, I have spoken to him and he has actually agreed to give me some of the property. I mean this has been going on for months and I spoke to her the other day and she said well do you want me to send another letter to his lawyer regarding the property or should we just leave that and see what happens. I am away on holiday for the next couple of weeks, if you need me I will be in Friday or Monday. If nothing works we will continue what we were going to do.

This description of interactions with the lawyer suggests that this woman was satisfied with a relationship in which there was a dialogue based on mutual respect between the lawyer and client. She emphasises that the lawyer would share an opinion but refrain from forcing a particular course of action on her, respecting her ultimate decision. Scholarship on lawyer-

client interactions emphasising power-sharing¹⁴⁴ and dialogue¹⁴⁵ has recently blossomed, and lawyers should be familiar with this literature.

Strikingly, and at times tragically, a number of the women reported that their lawyers sometimes, or even often, did little or nothing on their cases, or made few or no arguments in their favour in court. One such story, which involved a woman losing custody of five of her children, is recounted above in the discussion of the lawyers' disbelief of their own clients. In that woman's experience, when action was taken to deprive her of custody of her children her lawyer did not even tell her. This complete lack of advocacy certainly falls short of the model of the professional advocate sketched above.

This next woman endured twelve years of abuse and her children were abused, including sexually. Although she received an interim non-molestation order from the court, she was not granted a final non-molestation order. Her lawyer advised her that she probably would not receive a final non-molestation order because her ex-husband had not physically abused her during the period in which the interim order was in place. Physical abuse by her ex-husband during this period would have, of course, constituted a breach of the interim orders. The reasoning appeared to be that because the interim orders were working, she did not meet the statutory criteria of being "in need of protection". This reasoning is irrational; there is no statutory requirement of a breach of an interim order in granting a final order. The woman's story also suggests that the

¹⁴⁴ White, *supra* n. 142; Gilkerson, "Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories" (1992) 43 *Hastings Law Journal* 861; O'Leary, *supra* n. 77; Felstiner and Sarat, *supra* n. 122; Ashe, *supra* n. 81; Tremblay, "Rebellious Lawyering, Regnant Lawyering and Street-Level Bureaucracy" (April 1992) 43 *Hastings LJ* 947; Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (August 1989) 87 *Mich LR* 2411; Lopez, "Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration" (1989) 77 *Georgetown LJ* 1603; Alfieri, "Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, (1991) 100 *Yale L. J.* 2107; White, "Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak" (1987-88) *XVI Review of Law and Social Change* 535; Abrams, "Feminist Lawyering and Legal Method" (1991) 16 *Law and Social Inquiry* 373.

¹⁴⁵ White, *supra* n. 142; Simon, "Visions of Practice in Legal Thought" (1984) 36 *Stan LR* 469; Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133 *Univ Penn LR* 291.

abuser would have breached the order had he been able to find her.¹⁴⁶ Consistent with this reasoning then, in order to be granted a final order the woman would have had to expose herself to further abuse. The lawyer appears not to have made any arguments challenging this reasoning in favour of her client's receiving the non-molestation order.

My lawyer said to me that I would probably come out without it, without any protection orders because he hadn't done, like there was the interim period between the order getting put on, interim order being put on him, and the hearing, that mattered, and because he actually hadn't done anything terrible during that time, ... so I guess I went into court thinking, oh, I'm going to come out with no protection, and not understanding that the past, like the past abuse didn't actually have any bearing on the ...[outcome]... [at the hearing my lawyer] didn't say anything, she didn't actually argue it, ...and yet on the affidavit it was really clear, and like the orders went through ex parte, which meant that there was sufficient there for them to do that and I still to this day don't understand why I didn't come out with [the] non-molestation [order].

This lawyer may have been aware, from appearing before this judge in the past, that the judge would not issue final orders absent a breach during the interim period. She may, therefore, have known the futility of making an argument. Such futility might support an argument for failure to advocate for a client, but it is not a persuasive argument. In addition, the criteria applied by the judge, requiring a breach of interim protection orders to support final orders, is not found in the Domestic Protection Act, which should have suggested the possibility of an appeal. The client has no recollection of any discussion about the possibility of an appeal. This particular issue should not arise under the Domestic Violence Act as protection orders are automatically finalised after three months unless the respondent takes positive steps.¹⁴⁷ However, lawyers should take note of the more general issue. The fact that a particular judge has an idiosyncratic

¹⁴⁶ This quote, presented above as part of the discussion of safety, relates to these experiences. We got a call to say we had better leave [the refuge and the town] and I think ...I don't know, I really don't know, a lot of that I have blocked out because I was right in fear then, but I can remember quite often getting phone calls to say, get out of [town] and then the Refuge workers would say, well are you going to run for the rest of your life. And I would stay and we would all be petrified that he would find the Refuge and couldn't go out without two or three workers with us and stuff. But no he got into Government Computers and found out our address and when we had signed up tenancy and our phone number, because he had access through work.

¹⁴⁷ Domestic Violence Act, section 13(3).

interpretation of a statute does not necessarily require lawyers practicing in front of that judge to accept that interpretation uncritically. Where there are good grounds for appeal, and good reasons to do so in particular cases, lawyers should advise their clients appropriately.¹⁴⁸

A related issue arose from the interviews with lawyers. Lawyers may screen out women who would like to obtain protection orders based on the criteria that they have experienced judges applying, even where these criteria are not contained in the statute.¹⁴⁹ The lawyers may therefore be screening out women who should be able to obtain orders under the statutory criteria but cannot because of the manner in which the local judge applies the criteria. Is it the role of lawyers to screen out these cases, or should lawyers make these applications and appeal denials of orders? The fiduciary model of lawyering suggests that once the lawyer-client relationship is established, the lawyer should present the strongest argument possible to the judge and consider an appeal if the argument fails.¹⁵⁰ At a minimum, these decisions should be discussed with clients.

Lawyers refused to represent the next interviewee in applications for protection orders because she had not been recently physically abused by her partner.¹⁵¹ She was then forced to fight a custody case without protection orders. There was also evidence that her daughter had been sexually abused by the ex-partner, but none of the actors in the legal system were prepared to take the allegations seriously, including her lawyer.

And what was your lawyer doing through all this?

Well I would phone him up and he would chat to me or I would go and sit and chat to him in his office and nothing much would happen you know.

Other women also had the experience of their lawyers failing to provide adequate advocacy for them.

¹⁴⁸ The Legal Services Amendment Act 1995 specifically provides for appeals in domestic violence proceedings, and clients are not required to make a contribution towards or have a charge imposed upon their property with respect to such proceedings. Legal Services Act 1991, section 49A.

¹⁴⁹ Interviews with judges and a review of the cases indicate that some judges applied criteria not found in the Domestic Protection Act. Busch et. al., supra n. 5, at 200-204.

¹⁵⁰ Ibid.

¹⁵¹ While it was unclear whether emotional abuse was a sufficient ground for a non-molestation order under the Domestic Protection Act, it is clear that it is under sections 3 and 14 of the Domestic Violence Act.

Although it may be possible to imagine scenarios in which doing nothing is an effective advocacy strategy, it is unlikely when representing a client attempting to obtain protection orders. The comments above suggest that doing nothing was clearly inappropriate in that situation. The lawyer's job is to ensure protection of his or her client's stated interests. Complete inaction or failure to make arguments is not likely to achieve this goal.

I'd like them [lawyers] to stand up for us more.

Lawyers' failure to advocate can result in grave injustice to women survivors of domestic violence.

6. Positive Aspects of Legal Representation

Several of the women also had positive things to say about their interactions with their lawyers. There were four types of positive comments. First, the women appreciated lawyers who they felt listened to them. Second, they spoke highly of lawyers who supported them and their decisions. The women also spoke highly of lawyers who they felt understood the situation that they were in, and this understanding was associated with women lawyers, although some women noted that they felt that male lawyers could have this understanding. Finally, lawyers who could give clear explanations of the process also received favourable comments.

One of the research questions involved asking women what they thought the ideal lawyer would be like. The answers varied.

Direct. [The first lawyer] never directly said to me that he thought I was guilty of all that trouble with the children. He just quietly got rid of me in an indirect way. You know what I am sort of meaning. If [with the second lawyer], because we had had a lot of contact, if I was wrong in something, I was told.

Well he would have to be really understanding.

Definitely got to get results out of them. I would expect them to know that I was telling the truth about everything and I would expect them to get results for me. Yes, definitely.

These two interviewees talked about women as ideal lawyers and what that might mean.

I'd like to walk into an office that had nice easy chairs and no desk, you weren't sitting across a desk, plenty of ash trays, coffee urn in the corner and then sat down

with this woman who was a real feminist and she heard your story so that you could actually get through that. You go in there with all that emotional stuff, so initially you off load that, like they've actually got the skills to sit there and hear that and hear what you are saying and let you let go of all that stuff and then maybe you are in a better position to get on with the writing of affidavits and hear what the procedure is going to be because you are so emotional, I was that you don't hear.

I think I would imagine that I would want a woman lawyer, but then I feel that it's too hard for women lawyers anyway in the system, so perhaps you are better off with a man lawyer, and then you have got to get a man lawyer that actually...you have got to get a lawyer, male or female, that has some tiny idea of what it is like to be on the bread line, which is practically impossible. You can't get a lawyer that knows that. You have got to get a lawyer that understands what it's like to be abused and that's fairly rare too, I would imagine, I don't know. You have to get someone that knows what children are, understands what children are. Everything I would imagine would be to go for a woman, but then having a woman represent you is a risk, I reckon. I can't even picture what a good lawyer is. And quite often I have thought to myself, you just want the most cut throat bastard there is out there and I think, someone that is just going to go in, do it [by] whatever means, don't worry about it. I don't know.

These comments suggest that it is possible that women prefer to talk about violence to other women, and male lawyers should consider giving clients the option of telling their stories to women or being represented by women. Not surprisingly, getting results also emerges as an important aspect of a lawyer's job, as does an understanding of the dynamics of domestic violence, and respect of and support for the women.

7. Opposition Tactics

The women discussed tactics used by their former partners as part of the legal process in which they were engaged. There was considerable discussion about how abusers can use the legal system to continue the abuse.¹⁵² Several women also reported that the men who abused them lied throughout the proceedings, including when they were in court.

The first two women quoted here both endured custody battles that lasted for years and involved issues of abuse of the children.

¹⁵² Busch, et, al., *supra* n. 5, at 16, noting that abusers use court systems as weapons, ("Women can be pursued for many years on matters such as custody by vindictive abusers, for whom the courtroom is the final arena in which they can try to exert power and control.") Australian report Part I, *supra* n. 56, at 169.

I felt much worse after the Court case than I ever did in the marriage because I felt that the abuse had been institutionalised against me.

Something that amazes me is that this guy can play games for so long, use up so many resources for so long and then turn around and being told that it is okay, the game is okay, you have lost nothing and we'll protect your loser feelings, you haven't lost.

My ex-husband used the court system to continue abusing me.

I think that in our situation when you have an aggressive partner the likelihood of a court battle turning into a real battle is a very disturbing thing because you know it can drag on for five years and it can cost you every cent you own. Everything you have and it's simply because of the antagonism and the hatred that the other person puts your way, and they use the legal system.

Lawyers should be aware of the possibility of abusers using the system to abuse and harass through multiple filings, failure to appear, multiple extensions and physical intimidation, coercion and harm in and around the courthouse. Lawyers should be prepared to bring these abuses to the attention of the court by assisting clients in pressing charges where physical intimidation, assault, breaches of orders or other criminal activities occur. Lawyers should also be prepared to argue, where appropriate, that the opposition is using the legal system to harass or intimidate, is filing unnecessary or frivolous papers, or has a pattern of failing to appear or asking for extensions at the last minute.¹⁵³ Recognition of, and response to, these tactics is especially important where such tactics serve to keep clients in suspense over important aspects of their lives, such as the finality of protection orders, custody of children or matrimonial property settlement.

Other women talked about lies by their former partners.

Well, at the court case where the father got custody of those boys, [my ex-partner] and his lawyer, ... lied through their teeth in that court. They told this magistrate that [my ex-partner] was on his own and was not in another relationship ... no one would listen to me in the court or to my lawyer, nothing....as an example, say he got custody of the kids today. Within three weeks the kids come home for me, for the school holidays at Christmas. The day they move back into his house, [his new partner] was there with her kids and him. They've never lived with their father on their own. You

¹⁵³ Section 163 of the Family Proceedings Act confers upon the court the power to dismiss frivolous or vexatious proceedings and, where a person has "persistently instituted vexatious proceedings," to prohibit the commencement of future proceedings without leave of court.

can't tell me that he applied to Housing Corporation for a rental, got a four-bedroom house just for him and three kids. He must have applied to the Housing Corp for her and him and all of them. You can't tell me that Welfare lawyers, [his lawyer] and all them weren't aware of it [at the court hearing].

I felt pretty confident myself because I knew what was lies and what was the truth. I said to her oh well he can lie as much as he likes but underneath he knows what is true and what is not. There was nothing I could do about it because this was the case where his friend came in there and lied point blank. Absolutely lied point blank and so did his mother. I mean it was only sort of little things she told the court that she had heard him saying to me please not to phone him and that wasn't what the case was. He asked me to ring him at least three times a week but she was saying that she had heard him saying don't ever, don't ring me.

He was working and his lawyer got up and lied and said he didn't have a job and he was unable to get a job, because he was on a sickness benefit and working at the same time, and said he was unable to work and made him out to be really pathetic.

These statements should be read in the context of the gender bias of the legal system, and the historical legal rules that challenge the credibility of women.¹⁵⁴ One reading of these comments in this context suggests that women may be unlikely to be believed, even if they are telling the truth, and that men might be more likely to be believed even when they are lying. In fact, experts in the United States report that batterers' public and private images are often wildly divergent. They are usually well-liked and highly regarded in their communities and work places, in contrast to their private behaviour, which includes "pathological dependence on their partners and a need to control and dominate them through repetitive physical and psychological abuse."¹⁵⁵ Their public persona may increase their credibility. Further, in custody disputes, if the history of domestic violence is not considered relevant, but the women's history of coping with the violence is introduced as relevant to her parenting, the abuser "may actually appear to be more stable even though in fact he created the destructive environment."¹⁵⁶

The statements might also be read in the context of an adversarial legal system that is based upon the assumption that lawyers will believe their

¹⁵⁴ Mack, "Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process" (1993) 4 *Criminal Law Forum* 327.

¹⁵⁵ Zorza, *supra* n. 50.

¹⁵⁶ Liss and Stahly, *supra* n. 70, at 178.

clients and present their clients in the best possible light. This process can lead non-lawyers to conclude that lawyers “coach” their clients to “lie” in court. One conclusion that is suggested by even this weaker interpretation of these experiences is that the lawyers for the male respondents are advocating vigorously for them throughout the proceedings. This interpretation supports the arguments made above that lawyers for women who are survivors of domestic violence need to advocate strongly for their clients.

IV. LAWYER TRAINING

The themes discussed above concerning societal denial of domestic violence, gender bias in the legal system, lawyers’ disbelief of women who are survivors of domestic violence, and the level of advocacy that these women receive as compared to the level of advocacy that the respondents receive converge in the theme of lawyer training. Many of the women felt that their lawyers did not understand the dynamics of domestic violence within the context of society and the legal system.

Well talking as a person who I feel who has been done over by the legal system I think it boils down to whether or not you have got an advocate that (a) believes in you, (b) is going to fight for you, and maybe we could go back to training...

I think [lawyers] need to have a really good understanding of abuse, to have a really good analysis of what that is. I also think that they should have some sort of training of skills in listening, not necessarily counselling, but being able to kind of use some feedback or some sort of creative listening skills, so that you know that what you are saying is being understood and you know that they hear what you are saying ...

Some of the women continued the discussion of lawyer training. These two women, who both participated in the same group interview and have both worked in refuges, concluded:

I think that lawyers dealing with this stuff should have a really good analysis, they should have a really good understanding of what abuse is about. I think that would greatly improve [the way that they represent women]. It’s got to. And I can’t see why it’s not ... a specialist area. ... I mean if one lawyer wants to go off and specialise in property that’s what he or she does. And if they want to specialise in [domestic violence] and sure okay we can say some of them specialise in family law, but in fact that’s [domestic violence] what they do, but they don’t have that analysis. They don’t have that proper analysis of it.

I always sort of felt like every person that comes out of law school should have to do

a years, voluntary work for refuge or something before they would even get anywhere near on to it.

Yes, that's the one.

Yes but isn't it when that factor of being human and mature or having that attitude towards abused women takes a lot of, it is almost as if you need another degree.

These comments suggest that lawyer training in the area of domestic violence is inadequate.¹⁵⁷ Some lawyers also indicated an awareness of the lack of training. For example, one lawyer replied:

Have you done any training specifically in this area, ...that is specifically about the dynamics of domestic violence or anything like that?

No and I'm sure it's a great lack, I had no other university training other than the straight forward family law course, but looking back I think it was very poorly taught. I have been to seminars over the years on family law issues and I've been to in-depth seminars training as counsel for child, but nonetheless these things are, are only the most superficial introduction. And beyond being a person in this society, so watching TV documentaries and reading the same books and information and magazines and newspapers that we all read, I've had no proper training. So I am just coming totally from sort of instinct that probably is often completely wide of the mark.

Except for two lawyers who had attended refuge training, no other lawyers interviewed indicated any training other than the seminars referred to in this comment. Lawyers have a responsibility to undertake ongoing training in their areas of practice.¹⁵⁸ The commentary to Rule 1.02 of the Rules of Professional Conduct states that lawyers should only agree to work on matters that they have the ability to handle "promptly and with due competence."¹⁵⁹ Handling domestic violence cases competently requires

¹⁵⁷ White, *supra* n. 98. ("Law school does not prepare an attorney to understand the dynamics of domestic violence—how to recognise it in an initial interview, how to merge your client's safety into case planning, and how to prove what is often hidden as a 'private, family matter'.")

¹⁵⁸ Schafran "Gender Bias in Family Courts: Why Prejudice Permeates the Process" (Summer 1994) 17 *Family Advocate* 22, 27. ("Whatever the biases and shortcomings of the courts in these cases, lawyers are also at fault for the perpetuation of violence against women and children. There is no excuse for a family lawyer's ignorance of domestic violence and its consequences. Fighting for custody or unsupervised visitation for a violent parent is effectively fighting for an abuser's right to batter a spouse and/or children again.")

¹⁵⁹ New Zealand Law Society, *supra* n. 140, Rule 1.02 commentary.

an understanding of the power and control dynamics of domestic violence.

While there has been increased training of lawyers and judges in the area of domestic violence since the time of these interviews, lawyers should be aware that practice in this area requires specialised knowledge. There is a vast body of literature about domestic violence with which lawyers should familiarise themselves. Professional, responsible practice in this area also requires that lawyers demand and pursue appropriate continuing education in the dynamics of domestic violence.¹⁶⁰

V. SUPPORT

People who provided support to the women as they progressed through the legal process, often Refuge workers or friends, were recognised as providing very important services by both the women and some lawyers.¹⁶¹

I had that support from the time I hit the refuge through every interview or meeting or whatever, right through. Having somebody go up to Court and be there for me when I came out. Coming to lawyers, if I felt there was something I needed clarifying, or something that somebody else needed to listen to, that I felt I may not grasp, so I had that support from beginning to end of the whole process and I think that I came out of that having felt that I got everything that I needed to get from the system. Oh, no, no, that's not true, no I didn't. That I had achieved everything that was achievable within the system.... Yes, practically I guess this has made me realise that I probably didn't use my lawyer for information in the same ways that I would have, had I not had that support that could provide the information. So yes, in a practical sense, yes and emotional, yes. The emotional support actually kept me going through a really horrific year.

¹⁶⁰ Seuffert, *supra* n. 12; Barnes et. al., *supra* n. 46. See *A Review of the Family Court*, *supra* n. 104, at 159-160 for a recognition of the specialist nature of Family Court practice and a recommendation that practitioners participate in continuing education programmes; The American Bar Association also recommends that the organised bar offer specialised domestic violence training to all family law practitioners, and support the development of specialised legal centres for victims of domestic violence and their children. *Supra* n. 56, at 9-10.

¹⁶¹ McDonald, "Transition Houses and the Problem of Family Violence" in Pressman, B, Cameron, G, and Rothery, M (eds), *Intervening With Assaulted Women: Current Theory, Research and Practice* (1989) 121-3 (finding that most women's experiences in shelters are positive).

Lawyers should attempt to determine whether their clients have or would like to have support and assist the clients in locating a support person. The fact that support can be a crucial issue should be evident from the discussion above concerning the extent to which the legal process acts to continue the women's traumatisation, especially in situations where the abuser uses the system to continue to abuse the women. Lawyers should invite clients to bring support people to appointments and should actively explore options which provide support. These options should include having support people attend counselling, mediation, criminal court and family court appearances.

Lawyers themselves can also support their clients, as this comment points out.

I think that my lawyer could have supported me in saying, look ... don't worry about it, you are a good Mum you don't have to go to counselling if you don't want to go, believing me when I'm saying I want this marriage ended, just believing me and supporting me and not pushing me through things I don't want to go through and being out to give you full support and get for you what you want and making sure it is very clear in layman's terms you know, really clear, and just trying to do it as fast as possible, making sure that you understand, making sure that you know what you are saying, you know what you want, and then to just speed it up really quick, and not to pussy foot around the other lawyer at all.

Some of the lawyers interviewed acknowledged the importance of support for the women, and even relied on support people, who are often refuge workers, to provide a variety of services. These services included ensuring safety at counselling and mediation and explaining legal processes to women as well as providing child care and emotional and sometimes economic support. Although this reliance on support people reflects the invaluable services that supporters of survivors of domestic violence have provided, it must be questioned whether it is fair or realistic to rely on support people for such services as ensuring physical safety. Refuge workers, for example, are not trained to provide physical protection and should not be requested to do so. Where physical safety is an issue during legal proceedings lawyers should deal with that issue directly. Having to provide child care may also detract from the quality of support that refuge workers are able to provide to the women.

Child care and support for the women should be recognised as two separate activities and child care should also be directly addressed. It is not inconceivable that refuges could provide both child care services and support as two distinct services, but it must also be acknowledged that

refuges in New Zealand are grossly underfunded and often provide these services to women on a volunteer basis. Given that the importance of support is highlighted by both the experiences of the women interviewed and the lawyers, it seems that lawyers might also acknowledge the cost of this support by explicitly supporting increased levels of funding for refuges.

VI. CONCLUSION

Perhaps the most significant findings of the research are the frequency with which the women felt that their lawyers did not believe them, especially with respect to the level of danger in which they live and the severity of the abuse that they endure, and the lawyers' concurrent lack of understanding of the dynamics of domestic violence. These findings provide a backdrop to the other issues raised by the research, especially the lack of involvement of the women in decision-making and the lack of advocacy provided by lawyers. Effective legal representation requires lawyers' awareness of the context in which women seek protection from the legal system, and lawyers' willingness to advocate for protection throughout the legal process. Lawyers should also be prepared to confront and expose gender bias as it operates in particular cases in a manner that furthers the interests of their clients, and to assist in ensuring that women receive adequate support in using the legal process.

Lack of understanding about the dynamics of domestic violence, and a tendency to minimise and trivialise violence, are not unique to lawyers. However, these attitudes on the part of lawyers do raise serious issues about the access to justice available to women who are survivors of domestic violence. If the advocates that the system provides to facilitate access to justice share the same minimising and trivialising tendencies as other members of society, do women who are survivors of domestic violence have access to justice? It is time for lawyers to fulfil their responsibility to act as facilitators of access to justice, rather than as barriers to justice for women who are survivors of domestic violence.

MAORI WOMEN AND DOMESTIC VIOLENCE: THE METHODOLOGY OF RESEARCH AND THE MAORI PERSPECTIVE

BY STEPHANIE MILROY*

I. INTRODUCTION

In 1991/92 Nan Seuffert, a lecturer at Waikato Law School, initiated a project on legal representation of women who were survivors of domestic violence. The project involved arranging group interviews of women through the Women's Refuge movement in order to ask about their experiences of legal representation and the legal system. Issues intended to be covered in the project were: the lawyer's understanding of domestic violence, the relationship between the woman and her lawyer, the woman's understanding of and control over the process, the quality of service provided by the lawyer and the woman's perception of the court process and the legal system.

The Refuge movement in New Zealand at that time ran a parallel structure with a cooperative alliance between the non-Maori and Maori refuges as the two limbs of the organisation. It was considered important that both Maori and non-Maori women were included in the research, and so interviews were arranged through both the Maori and non-Maori women's refuges. A Maori woman researcher was hired to undertake the Maori interviews and, due to my interest in Maori women's issues I agreed to write up the Maori portion of the project.¹

Cultural differences between Maori and Pakeha mean that the methodology of research must be adapted to recognise and take account of those differences. In this article some of the issues which need to be considered in designing research for Maori are canvassed. The approach and methodology used in the project was based on feminist theories of methodology and, while useful in some respects, the application of such theories to research involving Maori participants raises considerable questions. These matters together with suggestions as to different approaches that might be taken are discussed in the first part of this article.

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¹ I am a Maori woman - my iwi affiliations are with Tuhoe and Te Arawa.

If the research had been designed from a Maori perspective it may be that some issues of critical concern to Maori would have been explored. To put these issues in context a traditional Maori perspective on violence towards a partner and the effects of colonisation on Maori in terms of the imposition of a foreign legal system are presented in the second part of the article. The dispossession and disempowerment of Maori throughout colonial history, and the position of Maori women who are the targets of domestic violence as clients of a legal system that is still overpoweringly monocultural, mean that legal responses to domestic violence which may be valid and beneficial for Pakeha women may be inappropriate, ineffective or worse for Maori women. However, because of the primary objectives and methodology of the project, the information that may have informed such an analysis could not be drawn out of the interviews.

II. PART ONE

1. Methodology

For this project the Maori interviewer, Robyn Rauna, was chosen by a group of Maori women law students who had expressed interest in the project being set up by the project initiator. Those students chose Robyn based on their knowledge of Maori methodology and after assessing what they believed the aims of the project should be. The writer² also expressed an interest in writing up the project because there were Maori women who were to be interviewed. Aware that there would be difficulties in carrying out research across cultures, the project initiator was anxious to ensure that the Maori interviews were carried out by a Maori and written up by a Maori. Both she and Robyn consulted with Maori women academics and refuge workers and Robyn talked to her whanau before going ahead with the interviews.

The interviews were set up through Maori women's refuges, and the interviewees were given the opportunity to be interviewed in groups or individually. They were also encouraged to have support people present if they wished. The interviewees included women from small towns and from cities, some of the women were married, some were in de facto relationships. All of the women had children. Most of the women had obtained some kind of protection order or orders; only one did not have any orders.

² Although a lecturer at Waikato law school I was on maternity leave during the period that the interviews were taking place.

The project was designed in two parts. The first part involved interviews with the women. Questions were directed towards the legal representation that the women had received from the first interview up to the court appearance, and included questions about the abuse they had suffered, the understanding the lawyer had of their situation, the way the information was presented in court, what control the women had over the process, and ending with a general question about their view of the legal system.

The second part of the project was designed to give something back to the participants. The interviewer gave them information about the protection orders that were available to them and answered any questions they might have. The project also helped the refuges to set up 'hot' and 'cold' lawyer lists so that refuges would have a better idea of which lawyers women should be referred to.

2. *Appropriate methodology for Maori research*

There is no generally agreed theory about appropriate methodology for Maori research. However, in *He Tikanga Whakaaro: Research Ethics in the Maori Community: A Discussion Paper*³ Te Awekotuku has given some strong guidelines as to an ethical framework for research into the Maori community. She emphasises the importance of knowledge in ancient Maori society, where sanctions were imposed for the protection of highly prized information belonging to a whanau, hapu or iwi.⁴ Knowledge was to be kept from discovery or abuse by hostile people. Those who would learn that knowledge were required to observe the rule holding such knowledge as secret. Betrayal or breaking of this ethical commitment usually resulted in severe punishment. The "researcher" came from the whanau and was always accountable to the chiefs or the whanau.⁵ For Maori there was none of the concept of "researcher" as an independent, neutral observer who was accountable to him/herself or the academic community rather than the community being researched.

Te Awekotuku also makes the point that up until very recently Maori were the objects of research by "dominant and aggressive [Pakeha] researchers and academics with, inevitably, an eurocentric perspective".⁶ The result has been "decades - even centuries - of thoughtless, exploitative, mercenary academic objectification"⁷ from which tangata whenua are actively

³ Published by Manatu Maori: Ministry of Maori Affairs, Wellington (1991).

⁴ *Ibid.*, 7.

⁵ *Ibid.*, 7-8.

⁶ *Ibid.*, 11

⁷ *Ibid.*, 12..

withdrawing and retrenching.⁸

For those doing research involving Maori the overriding rule is that *the researcher's responsibility is to the people studied, themselves and this transcends responsibility to sponsors*. In referring to this requirement Te Awekotuku says:

Research is the gathering of knowledge - more usually, not for its own sake, but for its use within a variety of different applications. It is about control, resource allocation, information and equity. It is about *power*.⁹

It is therefore important that the researcher be accountable for the application of research findings. The research must be of some benefit to the people being studied. In this project one of the women interviewed made it clear that she expected something to come of the research. She said:

I'm glad that we can give you a hand with whatever is going down but I think it is important for us to know what is happening with this information and that we actually see results coming out of it.

Three Maori controlled surveys evidence features characteristic of research that is generated, controlled and carried out by Maori - the MacNeill, von Dadelszen survey;¹⁰ *Rapuora Health and Maori Women*, a survey into Maori women's health carried out by the Maori Women's Welfare League;¹¹ and Moana Jackson's work in producing *He Whaipanga Hou*.¹² One such feature was the importance of a personal approach from the interviewer to the interviewees. For instance, in the MacNeill and von Dadelszen survey it was emphasised that establishing a personal relationship between the interviewer and the person being interviewed was the most important prerequisite.¹³ In the Rapuora survey the field

⁸ Note the example mentioned in MacNeill, H and von Dadelszen, S, *Attitudes to Family Violence: A Study Across Cultures*, Report Presented to the Family Violence Prevention Co-ordinating Committee (FVPCC) (1988) 51, where a health survey was rejected "in no uncertain terms. The objection was based on the monocultural Pakeha bias, structure and approach of the research design. Disgruntled objectors stated loudly and clearly that they were sick of being studied and analysed."

⁹ *Supra* n. 3, at 13.

¹⁰ *Supra* n. 8.

¹¹ Murchie, E, Maori Women's Welfare League Inc, (1984).

¹² A report prepared for the Justice Department in 1988.

¹³ *Supra* n. 8, at 52.

teams were nominated by Maori community groups as this was a way of using the whanau concept to establish a personal relationship. Similarly, Moana Jackson has always stressed the importance of personal contact of some kind, such as holding hui at local marae and working with the people face to face.¹⁴ This relates to the importance Maori place on the researcher being accountable to the people affected by the research - it is much easier to assess the bona fides of a researcher in person and to exact accountability from those close to one in the community. It is also much more difficult for the researcher to treat the interviewee as an object if the interviewee is someone one knows. Another important feature is that active involvement in the community affected by the research is considered essential. Maori people like to see proof that the good intentions of the researcher are being carried out. Gone are the days when Maori were trusting of researchers.

Another feature of Maori research is that the research scheme must be based on culturally acknowledged practices, so that knowledge of and sensitivity to cultural values is shown. In the Rapuora survey, for example, the researchers considered that "the first and most important move"¹⁵ was to approach kaumatua to tell them about the project and to get their support. The researchers made a point of finding the true leaders in the community and not just the most public Maori. The true leaders were those with mana on the marae, regardless of their occupation in the Pakeha world.¹⁶ Such people are difficult to identify for Pakeha who have no ongoing long term connection with the particular Maori community under study.

The Rapuora survey also identified the need to use appropriate language. In the Rapuora survey a test of the language in the survey was made by first using a small group as a pilot.¹⁷ Maori and English may need to be used depending on what language the interviewee is most comfortable in.

Maori have an aversion to questionnaire type research.¹⁸ This is partly as

¹⁴ In a Maori leadership survey carried out in 1994 for the Wellington Maori Legal Service, the telephone was the medium by which people were surveyed. The telephone is still better to Maori people than being sent a letter or questionnaire.

¹⁵ *Supra* n. 11, at 20.

¹⁶ *Supra* n. 14 where the results of the Maori Legal Service survey indicated that those the participants perceived as their leaders were all virtually unknown outside their own district.

¹⁷ *Supra* n. 11, at 20.

¹⁸ *Supra* n. 8, at 53.

a result of the bad experiences Maori have had with surveys in the past and partly because it indicates a distance between the researcher and the people studied that raises suspicions about the motives of the researcher and their accountability to the interviewees. Sometimes Maori will also object to being taped¹⁹ because of fears about how the information will be used and who will have access to it.

The place where interviews are held should be one in which Maori feel comfortable and it should not be an imposition for them to come there. This could mean interviews being held in the interviewees' home or on a marae. In the Rapuora survey the interviews were carried out at the participant's home.

Underlying all these features is the requirement that Maori have control of the research from inception to the end result and that that control is located in the Maori community being researched, not in the researcher. Just as Maori have called for recognition of their status as tangata whenua, so that recognition must be given by the academic community as well as government. Autonomy must be devolved to the different Maori communities in relation to research affecting them.

3. Appropriate Maori Researchers

Autonomy for Maori means that choice of research personnel should accord with Maori custom. Ideally, interviews should be conducted by members of whanau, meaning whanau in its wider modern sense of support group as well as family. In the context of this project the researcher could be a refuge worker at the refuge where the interviewee is staying or a member of the interviewee's family. If that is not possible, at the very least the interviewee should be able to be accompanied by whanau and be able to call upon kaumatua for support.

The researcher must hold themselves accountable to the interviewees and, ideally, the interviewees should be empowered to enforce that accountability. Where the researcher is a member of the whanau of the interviewee, there may be little difficulty in effecting this, but it is a very different story where a stranger is involved. For a Maori researcher it would be the depths of shame to act in a way which lessened the mana of her whanau. Despite that responsibility, a Maori researcher will also be accountable to the project supervisor, and to others who may have taken a part in the organisation of the project - in this case the Maori women's

¹⁹ Idem.

refuges who allowed the project to be carried out through them.

These responsibilities need not be conflicting provided that those involved in designing the project are aware of them. Will a Pakeha project organiser really be able to balance all these different aspects? Maori experience to date is that Pakeha have rarely done so.

4. Appropriate aims of Maori research

From what was said above, it should be clear that those Maori affected by the research (that is, in this case, battered Maori women, Maori women's refuges and the whanau of the women) should also participate in determining what the aims of the research should be. For example, Maori may choose to use the information primarily for Waitangi Tribunal claims, or to effect law reform, or to determine whether Maori should continue using the existing legal system. These aims then determine the content of the interviews and the appropriate analytical framework for the interpretation of the material. This ensures that only the *necessary* material is gathered, and that those affected can share control of the project with the researcher. True autonomy for Maori would mean that projects would be generated from the Maori community out of the needs perceived by that community, for the purposes of that community.

5. Comparison with methodology, analytical framework and aims of the project

The domestic violence project thus at least partially fulfilled some of the requirements of research involving Maori. The interviews were carried out face to face and because the interviewer was Maori, she was fully aware of cultural values that might come into play. There were no difficulties over taping the interviews and the women were able to ask for the tape to be turned off if they wished. The interviews were held in refuges where the women felt safe and supported by the refuge workers and other women staying at the refuge. Robyn was given questions to be asked of the women but they were intended to be guidelines, a framework, and she was encouraged to ask any other questions she thought appropriate. Some immediate return was made to the participants by giving them new information about obtaining protection orders and clarifying information that they already had. The women were also promised that the report which would be produced using their information would be sent to the refuges so that they could see tangible results. That has been done and the women are entitled to ask that information they have provided be withheld from the report. So there is some Maori control of the project and some accountability to the participants.

Nevertheless, there are some worrying difficulties associated with the Maori part of the project. There were only a small number of interviewees who participated, although this was never meant to be a representative survey. The small number does limit the ability to draw general conclusions which may be valid for all Maori. However, this is less important than the *reasons* why Maori women did not take part in larger numbers. It may relate back to the reticence of Maori to be involved in any surveys because of treatment by other researchers in the past. It may also relate to the reticence of Maori women's refuges to be involved in a research project about the Pakeha legal system when they question having *any* involvement with that legal system. For example, one of the Maori women's' refuges refused to take part in the project or to allow women to be contacted through the refuge.

One of the aspects in which the project did not accord with surveys generated by Maori was that the people carrying out the project were not whanau, even in the wider sense. They were not personally known to the women participants or refuges or actively engaged in that community (meaning the community of the refuge and whanau of the participants). Carrying out that requirement in this project would have meant that a number of different Maori interviewers would have been used, each associated with the particular refuge or whanau through which the contacts with the women were made. It might also have meant that the interviews contained different questions focussed to the particular issues facing the women in that refuge. This project did have a Maori interviewer who gave reports to a Maori lecturer, but in truth the interviewer, although allowed to probe beyond the outline of questions, was working within a framework set by the project initiator and was in no real position to do so. In actuality the project originated with non-Maori women and that set the pattern of control of the project and control of the interviews, despite genuine attempts to transfer that control.

The framework set by the project initiator was based upon feminist theories of methodology. Mies' guidelines for feminist research were used.²⁰ Those guidelines include (1) conscious partiality, (2) the view from below, (3) change of the status quo (4) collectivising experiences and 5) active participation in the women's movement. Clearly the first four guidelines may have some relevance to Maori research, but their interaction with the need for Maori autonomy and control of the research process, a Maori

²⁰ See Mies, M "Towards a Methodology for Feminist Research." in Bowles, G (ed) *Theories of Women's Studies* (1983)117.

analytical framework, and a Maori cultural mindset is an untried, complicated and difficult area.

Another important influence on the project design was that provided by feminist participatory research where the objectives of the research include “empowerment of oppressed people through the development of critical consciousness of both the researcher and the research participants, direct improvement of the lives of those involved in the research and the transformation of power relationships and power structures.”²¹ Again, this accords with some aspects of Maori methodology, such as the requirement that the research be of benefit to the Maori community. However, one does have to question the extent to which “the critical consciousness” Maori should be developing can occur within a project where the need for a personal relationship between the researcher and the interviewee’s refuge community has not been met, and where the critical consciousness developed by the project initiator is from another culture. One must also question the extent to which the power relationships have been transformed for Maori participants when the attempts to transfer power are flawed at the outset. The Maori participants still answered Pakeha questions. If Maori participants really had power, research funding would go to Maori Women’s Refuge and the seat of power would have been with them rather than in academia.

The third influence on the project was Paulo Friere’s methodological framework for emancipatory adult education, which relies on dialogue between all participants in the educational process including the educators.²² This incorporates the idea of an information exchange between the parties - information flowing from the educator to the participant and from the participant to the educator. This has the effect of empowering the “learners” by recognising that they have significant knowledge which the educator does not have, instead of the educator maintaining a position of power as, supposedly, “the knower.” Again the issue of the personal or whanau relationship is raised by this methodology. Where there is a whanau relationship, the participants know in their bones that they can teach and learn from each other, and the dynamics of power within a family or support group are determined by things other than the research relationship.²³

²¹ Seuffert, N “Epistemology, methodology and methods” (Unpublished Paper held by the author).

²² Friere, P *Pedagogy of the Oppressed* (2 ed 1992).

²³ For instance, when I approach kaumatua in my whanau or hapu for information in a Maori setting there is no question that the power and knowledge resides with the kaumatua and that I am the petitioner.

However, sending a researcher, even a Maori researcher, to question those not of her whanau or with whom she has no personal relationship upsets all kinds of delicate balances. The exchange between one of the women participants and the researcher in asking the woman if she would prefer a Maori woman lawyer may help to illustrate what is meant here. Beginning with the question the interviewer asked:

- Q- [I] was really interested in you talking about not going to a Maori woman lawyer and [I was] just wondering did you have a good think about why?
- A- Yeah I did.
- Q- Because I was fascinated in the sense that you had said you really related to the Maori women at the refuge now and you got on with that Pakeha lady and I was thinking if you can put it in words...
- A- ...Well you see these women here in the refuge they do have a tendency to talk down to you, but if you let them know how you feel then they'll come eye to eye with you. But it is only just that they know that's their job, they know just a little bit more than you know...But it's still like that step down. And that's how I feel, ... with a Maori woman lawyer, it is just that I feel whakama because I wouldn't feel important, because they'd be more important than I am.

Perhaps this woman may be saying that she feels able to take power to herself where she knows the other women, but that she cannot do that with an unknown Maori woman lawyer. One then has to question how much better a Maori researcher, who is otherwise unknown to the woman, can do to facilitate a mutual learning experience and to transform the power relationship. Perhaps a very skilled, intuitive, empathetic researcher could. A better solution would be to alter the methodology so that it is less reliant on individual ability by using whanau or refuge women to carry out the interviews.

These are some of the questions raised by adopting a feminist methodology based on non-Maori theorising. Clearly the question is raised whether these methodological theories can be universally applied; whether modifications can be made to them and if so of what kind; and whether it is more appropriate to start from a different theoretical place in circumstances such as exist in New Zealand.

Whanau involvement and Maori autonomy in carrying out such a project, moreover, may appear to conflict with feminist theories based on European culture. This means there may be a shift in emphasis from the good of the individual woman to the good of the whanau. It also means that other perspectives and other interviewees would be drawn into the project. For instance, the project only reached those women who went through Refuge

but did not reach those who may rely on whanau or iwi-based resolutions to the issues.

A Maori researcher bases a methodological and theoretical framework on the imperatives of Maori culture and Maori experience. It is important that Maori not be drawn into adopting available feminist thinking wholesale because such thinking is culture specific.²⁴ Linda Smith refers to this when she says:

[I]n attempting to theorise our own lives we have frequently been caught using [white feminist] concepts as a means of understanding our own. While white feminisms may help to gain insight into “Otherness” at one level, at another level these forms of feminism may perpetuate otherness further. This tension has made it extremely difficult to reconcile the realities of Maori women’s lives with existing feminist theories.²⁵

While some of the ideas from feminist methodological theory have resonances with ideas about Maori methodology (for example the need for real improvement to come from the research), yet there is much that is different.

In fairness to the project initiator it must be acknowledged that in setting up this project there were limitations imposed by outside agencies (the University research grants committee, for example) so that the ideal of a truly Maori methodology could not have been attained. Let’s face it, that is the reality for a lot of research involving Maori because we live in a society where the power culture and the powerholders are Pakeha. Furthermore, the Maori researchers on this project have been specifically trained in the Pakeha tradition, within a framework set by the Pakeha legal system. I find myself blinkered by that training, so that integral aspects of Maori culture may not be explored even by Maori researchers. An example is in regard to spirituality - Maori were and are a spiritual people.

²⁴ In this regard I cannot help but remember Audre Lord’s words: “The master’s tools will never dismantle the master’s house.” For Maori women “the masters” have included Pakeha men and women.

²⁵ “Maori Women: Discourses, Projects and Mana Wahine” in Middleton, S (ed), *Women and Education in Aotearoa* 2 (1992) 34. See also Irwin, K “Towards Theories of Maori Feminisms” in du Plessis (ed), *Feminist Voices* (1992) 5 where she says:

[Maori women] don’t need anyone else developing the tools which will help us to come to terms with who we are. We can and will do this work. Real power lies with those who design the tools - it always has. This power is ours. Through the process of developing such theories we will contribute to our empowerment as Maori women, moving forward in our struggles for our people, our lands, our world, our selves.

Spiritual values play an important part in our conception of the world. In traditional Maori society, for instance, difficulties in a marriage such as adultery might be referred to a *tohunga*. The present legal system and legal education is shorn of spirituality and is supposedly about rationality, objectivity and neutrality. So, it was not until writing the project report that I realised that the element of spirituality was missing from the questions and from my analysis. In these circumstances this project *has* tried to answer a lot of the concerns that research about Maori issues raises.

However, of all the aspects of the methodology, the one which I find most worrying was that the content of the interviews was largely determined by an agenda which lacked a Maori perspective.²⁶ For instance, the participants were never asked, "Do you think this would have been different if you were a Pakeha?", or "How do you think the system should be changed to suit Maori women?" The result is that information that might have been obtained had the project been a Maori project was not obtained, and much information which the interviewer might have given to the women in exchange was not given.

In a Maori project, a lot of information might have been gathered which would be of use to Maori but would not be more generally disseminated at all. In a Maori project the interviewer might have probed into the race issues raised by the legal system more and might have given information about the oppressive effects of colonisation and the role the legal system had to play in that. This would have given the interviewees another way of understanding their experiences.

These concerns do not mean that the research is not useful, regardless of how it might not match the ideal. The legal representation of battered women can always be improved. Therefore, the material could clearly be used to see what improvements could be made to the legal system, improvements which might benefit *all* women.

Moreover, it is important that Maori women have their stories told, even if only partially, if progress towards creating Maori feminist theories is to be made.²⁷ I also believe that the reality for so many abused Maori women is that the legal system and Pakeha systems in general impose themselves on Maori women willy-nilly and so we are forced to engage with those systems in order to research Maori issues or to help Maori women.

²⁶ For an idea of what this might mean see Smith, *ibid.*, 39 where she says that Maori women need to control their own definitions of themselves. This "requires the seeking of knowledge which is *whanau*-, *hapu*-, and *iwi*-specific."

²⁷ Irwin, *supra* n. 25.

III. PART TWO

I. Colonisation and the Legal System

In part one the methodological theory of the project has been discussed. Part two looks more closely at the consequences for a Maori analysis arising out of that methodological approach in relation to the particular issues of colonisation and racism.

Very little research has been done on domestic violence as it affects Maori women,²⁸ and little is known about current Maori concepts of and attitudes towards such violence.²⁹ However, when starting the project I was aware that Maori women's refuges were deeply dissatisfied with the way the system operates for Maori women. One theory for the basis of this dissatisfaction is that it is related, at least in part, to issues around colonisation. Colonisation meant the introduction of a monocultural legal system which was once actively used to oppress Maori and which is still in many ways inappropriate for Maori.³⁰ It also meant that Maori ceased to perceive themselves in a purely traditional Maori way, but to a large extent through the lens of the coloniser.

One clear aim that I had in analysing the interviews was to look for signs that race and colonisation had adversely affected Maori women in the treatment they received from the legal system. However, the interviewees did not themselves analyse their experience in those terms, so there is not much direct material to work with. Indeed, the interviewees do not *think* of themselves as Maori vis-a-vis the system: they just *are* Maori. Yet intuition tells me that the effects of colonisation and racism must play some part in the experiences of the legal system that these women had.

By comparison, some women did recognise the patriarchal nature of the

²⁸ One reason why this project was still worthwhile despite its flaws.

²⁹ See, however, McNeill and von Dadelszen, *supra* n. 8.

³⁰ See the report *Te Whaingā i te Tika :In Search of Justice* Advisory Committee on Legal Services (1986) at para 1.3 where the writers say:

For many, especially Maori, that system embodies institutionalised racism, as recognised in the recent Maori Perspectives Advisory Committee report. 'The most insidious and destructive form of racism, though, is institutionalised racism. It is the outcome of monocultural institutions which simply ignore and freeze out the cultures of those who do not belong to the majority. National structures are evolved which are rooted in the values, systems and viewpoints of one culture only. Participation by minorities is conditional upon their subjugating their own values and systems to those of 'the system' of the power culture.'

legal system and identified it as part of their oppression. For instance, one woman said:

The Police are men, the Judges are men, and most of the lawyers are men and you are very lucky if you find a woman like [S], who is your lawyer that is helpful. Mine...have not been helpful...so what you are looking at is men...But my husband held the reigns of our marriage in that "five minutes down the road, you have got five minutes to get down the road and back again. If you are late, we will see what happens. You are not allowed to go here, you are not allowed to talk to that person." I am talking that kind of control here. When you go into the legal system it's the same thing. Because the lawyer says, well this is what's going to happen to you and then you have got to wait for a man to tell you whether you are going to get your orders, what they are going to do for you and if any of those orders get breached, you have got to go to another man who says, "this is what my man has done" and so I am still being controlled, not only by my husband, who sees his lawyer, but also the legal system itself, the justice system. I am still being controlled.

As a Refugee worker, this interviewee may be in a better position to apply that kind of analysis to her experiences. However, neither she nor any of the other women interviewed mentioned racism or the monoculturalism of the legal system as part of their experiences of the legal system. It may be that the methodology of the project was faulty. However, it may also be that for most Maori a monocultural system is "just the way it is," unnamed, so much a part of life that it passes without comment.

To put the monoculturalism of the legal system in context one cannot help comparing the position of Maori women under the present system to that which they would have enjoyed in traditional Maori society. The traditional Maori view was that violence towards your wife was an affront to her and her whanau, to be punished and compensated accordingly. These values held sway even into this century. In Ruatoki in the 1920s there was an instance of a wife who was beaten by her husband. She returned to her own people to complain of what had happened. They came as a group to Ruatoki and asked for the husband to be given over to them to be dealt with. The people at Ruatoki, who were whanau to the husband, could not give him up because of the familial responsibility that they owed to him. In the end the children of the marriage were given to the woman and her whanau and compensation of 5000 pounds was paid, an absolutely huge sum for a tiny community in those days. The man who had caused all the trouble was then dealt with by the Ruatoki community and required to repay them as best he might.³¹

³¹ This incident is recorded in Maori in the journals of Tamarau Waiari, my great-great-grandfather.

This incident implies a world view and values quite different to those of the current dominant group in society (and the current legal system). In pre-colonial Maori society, a man's home was not his castle. The community intervened to prevent and punish violence against one's partner in a very straightforward way. Different social dynamics operated to those that now operate in society in general, including the Maori community. That change is a direct result of colonisation.

One example of what this means for Maori women is shown in the area of custody and access. In the taua muru story above, custody of the children of the relationship was given to the woman and her whanau. This is because children in traditional Maori society were children *of the whanau* and the woman's people would not have left without them. By the same token, the children were also children of the man's whanau and would continue their relationship with that whanau. Yet under the Pakeha system somehow the violence which women have suffered and which their children have often suffered³² have until recently been given little weight in determining access issues.³³

Colonisation has led to the destruction of the traditional Maori way of life. Yet Maori women are imbued with both the Pakeha system and its values and remnants of their own values, which are now unsupported by the urbanised society in which most Maori now live. The issues that therefore arise for Maori women are complex and difficult. An example of these difficulties came from one of the women interviewed who said:

_____ is basically a Pakeha oriented town, so Maori people here are a minority so they slot into the Pakeha system...so they have learnt to accept it. But at home in _____ it is different there, it's Maori and two different establishments, Maori and Pakeha. And when you go there as a Maori well you take half your whanau there and the thing never gets resolved. And if you do it the Pakeha way, well you are inclined to be ostracised by Maori people, because you have gone against the grain of Maori tradition and gone straight to the Pakeha...At home you sort of confer with your in-laws and with your own family and with your extended family, you know it is quite a drawn out process. But here it is good because it is just straight to the point and you don't have this cultural clash. Treading on toes...

³² See National Collective of Independent Women's Refuges, Inc., *Treasure the Child* (1991) which found that 50% of children in refuge had been physically abused and 85% verbally abused. Of the Maori women interviewed in this project all but one reported that their abuser had also abused the children.

³³ See section 16B of recently enacted Guardianship Amendment Act 1995.

This woman at this point seems to be saying that she prefers the Pakeha system because of her impression that things get over and done with quickly. And yet at another point in her interview she describes the disaster which occurred in relation to the custody of her eldest child. She says:

Cause I only came out with five of my six kids and I wanted my eldest son here, cause he was only 15 then and [her lawyer] said, 'well you know it is not worth it cause in a couple of months time', he was sixteen in September, and he said, 'by that time he will be of an age where he is able to decide for himself whether he wants to come here or stay with his father' and I wanted the orders to cover him so that was one of my...He actually convinced me it was wise to leave _____ where he was. But in the process it was a month later when I saw my son and he came here to visit. But in that time because there had been no communication between us and he was sitting on edge...because he wasn't with his father, he was boarding with friends. It had been arranged through DSW. And because all his fears had come to the surface ... when he got here the next day he beat me up. If I had stood firmly in my decision to bring him here he wouldn't have felt that he had been severed from us all, that link had been broken.

Leaving aside the insensitivity displayed by the woman's lawyer, we should note how the legal system's solution for this woman created terrible pain for her although she blamed herself for what had happened. She does not relate this back to the destruction of Maori forms of social control or the monocultural nature of the system; this could have happened to a Pakeha woman. Yet it is also not inconsistent with an analysis which sees colonisation and the destruction of Maori forms of social control as part of the overall problem for this woman. Her relationships with her abuser, her children and her whanau are laden with values that find no expression in the solutions offered by the existing system.

Maori women's refuges have considered not using the legal system at all,³⁴ although this is not discussed in any of the project interviews. Understandable as a withdrawal from the system might be, the system perpetuates its use in its administration.³⁵ Although the police can arrest

³⁴ They have also recognised the monocultural nature of various analyses of domestic violence such as the Power and Control Wheel, and have altered it to take account of issues facing Maori women.

³⁵ See Smart, C, *Feminism and the Power of Law* (1989) 24 where she says: "...the 'law' that affects women's lives is more likely to be the administration of welfare benefits, the operation of the private law of maintenance, and the formulation of guidelines and decision-making at the level of bureaucratic operation."

an abuser for assault without the need for protection orders, in practice such orders cover a wider range of objectionable behaviour and offer much more protection than the assault law does. Social Welfare may also require protection orders before it will grant priority to a woman seeking to obtain benefits. To obtain her interest in matrimonial property a woman may be forced to go to court. Not using the system all too often requires the cooperation of the abuser.³⁶

The legal system does not and cannot help women with problems arising out of such cultural clashes. The solutions the system applies may not only fail to assist Maori women but may continue the destruction of the culture in that the involvement of other members of the whanau are not included in decisions regarding the children of such a relationship. There are no easy answers.³⁷ There is no prospect in the immediate future that the system will change, but there seems to be no other place but the system for Maori women in abusive relationships to turn.

In relation to all these issues further research developed from a Maori perspective is needed, as at present we do not have the information necessary to assist us to find bicultural legal solutions instead of monocultural ones.

2. Racism

Associated with the monocultural nature of our substantive law, court procedures, and administration is the racism that may be encountered at any level. Most lawyers and judges are white, middle class males and females. They cannot help but have stereotypes of Maori women in their minds and it is difficult for even the most sensitive person not to apply inadvertently those stereotypes (and there are always those who are deliberately offensive). Lawyering is also a profession peculiarly prone to patronising its clients. Nevertheless, none of the women interviewed

³⁶ For instance, section 6 of the Guardianship Act 1968 makes both parents of a child guardians unless the mother was not married to the father and was not living with the father "as husband and wife" at the time of the birth of the child. Effectively, this means both parents are entitled to custody of the children and an abused woman must hope that her partner is not going to contest custody or access through the courts.

³⁷ When discussing Catherine MacKinnon's analysis of the *Martinez* case, Angela Harris refers to similar difficulties. Harris, "Race and Essentialism" (1990) 42 *Stanford Law Review* 593. The conflict of cultures raises many questions of fundamental importance to feminism.

attributed the way they were treated to racism on the part of their lawyer. In fact, only one woman made any comment at all about racism. She said:

I had two good lawyers and they weren't...I never ever felt as if I was a Maori in front of them. I felt like a person, you know. And it was good. And they were both Europeans so...I felt good there.

This kind of statement speaks volumes about the kind of every day racism that comes to be expected (and deeply resented) by Maori as "just the way it is." It is the absence of racism that is commented upon. On the other hand it could also mean that such issues were not fully aired because of the perspective from which the project was designed. If so, it is another reason why Maori need to be empowered to carry out research based on a Maori perspective and Maori imperatives.

IV. CONCLUSION

Nine Maori women were interviewed in the project, and what we have is a collection of women's stories in all their complexity.³⁸ The individual stories of these women are compelling and instructive for those who do not have knowledge, understanding or experience of domestic violence. Stanley and Wise have argued that the standpoint of each woman, located within a specific context, has epistemological value and produces "contextually grounded truths". These stories are also important on their own account simply because they *are* the stories of Maori women, stories which we must recover if Maori women are to "be written back into the records, to make ourselves visible."³⁹

For these reasons the project is a success despite the reservations that must be entered in regard to the methodology adopted for the Maori part

³⁸ See Williams, P, *The Alchemy of Race and Rights* (1993) 10 where she says:

That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths. Acknowledging, challenging, playing with these *as* rhetorical gestures is, it seems to me, necessary for any conception of justice. Such acknowledgment complicates the supposed purity of gender, race, voice, boundary; it allows us to acknowledge the utility of such categorisations for certain purposes and the necessity of their breakdown on other occasions.

See also Minow, "Feminist Reason: Getting It and Losing It" [1990] *Journal of Legal Education* 60.

³⁹ Stanley, L, *Breaking Out: Feminist Consciousness and Feminist Research* (1983) 12-32.

of the project. It was a brave attempt to bridge the gap between feminist research and practice and Maori cultural values. The project has taught everyone involved valuable lessons which can be used to guide us in other projects.

However, there is clearly a lot more research required if the needs of Maori women and their families are to be properly explored. Some of the gaps which are mentioned above could be dealt with if the research were generated from and controlled by the Maori community itself, so that aims, methodology and analysis based on Maori cultural values are used, as is appropriate.

In the meantime one is left to question the ability of the legal system to deal with the needs of Maori women and their children appropriately. Smart⁴⁰ refers to the view of law as “a kind of sovereign with the power to give and withhold rights” with the attendant idea, pervasive in society, that law has the power to right wrongs. She alludes to the difficulties inherent in a British based legal system for those from a culture or class different from that which developed this system when she says:⁴¹

Law is not a free-floating entity, it is grounded in patriarchy, as well as in class and ethnic divisions. Rape should not be isolated in ‘law’, it must be contextualized in the domain of sexuality. Equally, child sexual abuse is not a problem of law, except inasmuch as both sexual abuse and law are exercises of power. But they are both exercised in the masculine mode, so one is not the solution to the other. Finally women’s low pay is not a matter of equality but of segregated labour markets, racism, the division of private and public, and the undervaluation of women’s work. Law cannot resolve these structures of power, least of all when we recognise that its history, and the history of these divisions coincide.

For Maori women the situation is compounded by the operation of a monocultural system. Back in 1986 the Advisory Committee on Legal Services issued a report⁴² in which it called for legal services which reflect our bicultural heritage.⁴³ In the nine years since the report was published there has been little or no change to the legal system to reflect Maori values or concepts of justice. Yet this is the system which Maori women are expected to use to try to obtain the protection they need. Maori women deserve better.

⁴⁰ *Supra* n. 35.

⁴¹ *Ibid.*, 88.

⁴² *Supra* n. 30.

⁴³ *Ibid.*, para 2.1.

CHILDREN OF BATTERED WOMEN

BY TANIA POCOCK* AND FIONA CRAM**

I. INTRODUCTION

Children of battered women are worried, frightened, confused and vulnerable: they are worried about the safety of their mothers, themselves, and their siblings; they are frightened, not just by what they have seen and heard, but by what is yet to come; they are confused about what is happening and all the conflicting emotions they have both around the abuse and the abuser; and they are vulnerable; vulnerable because of their dependence upon and relationship with their mothers, vulnerable because of the lack of stability, security, and protection afforded by their environment, and vulnerable because of the lack of power they have over the onset or outcome of the violence. You do not need to have an intimate knowledge of abuse, or to have grown up in a violent home in order have some understanding or sense of how traumatic and disruptive witnessing the abuse of your mother and living with the myriad forms of fallout, could be, for any child. Common sense alone tells us that the impact is likely to be profound.

II. THE RISKS AND CONSEQUENCES OF LIVING WITH WOMEN ABUSE

The risks posed to children who live and learn within the context of domestic violence are substantial. Indeed, living in a domestically violent home may constitute one of the most serious, frequently encountered, and potentially on-going threats to the health, welfare and safety of many children and young adults. It is of real interest and concern then, that this 'risk' and these children, legally and socially speaking, are hardly visible. This is clearly evident in the distinct lack of guidelines, services, or legislation directed towards addressing the special circumstances and needs of children who witness and live with the abuse of their mothers.

However, perhaps the most poignant indicator of the risk and invisibility of children of battered women lies in the sheer number of children who are believed to live in homes where their mothers are abused. Although we cannot determine with any degree accuracy (there are no

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epidemiological studies either in New Zealand or overseas to document in a precise fashion the incidence or prevalence of children in this country who witness wife abuse, we do know that in 1991, women who sought help from Refuges indicated that 90% of their children had witnessed violence and that 50% of these children had themselves experienced abuse.¹ Based on data recorded as part of the Hamilton Abuse Intervention Pilot Project (HAIPP) we also know that children were present during 87% of the incidents in which their parent was victimised, and that the children themselves were either the accidental or direct targets of violence in almost one in five of all recorded incidents.² These statistics highlight with unmistakable clarity New Zealand children's intimate and inescapable connection with family violence. Indeed, on the basis of these statistics and conservative estimates of the number of women who seek refuge in this country, it appears safe to conclude that when talk about the risk and the impact associated with wife abuse, we are talking about a disturbingly significant number of children in this country.

In this article the literature on the impact of domestic violence on children is reviewed and the implications of this knowledge for children in a legal sense is explored. Risk factors associated with witnessing domestic violence are identified. These include the trauma associated with witnessing violence, the social and behavioural problems evident in many of these children, their vulnerability to physical and psychological abuse within the context of domestic violence, and their ongoing susceptibility to the threat and actuality of violence throughout the dissolution process. Where possible results of research conducted with children of battered women in Aotearoa/New Zealand are included. The implications of our knowledge of these children's experiences and the rationale behind the legal prioritisation of the safety of children of battered women in custody and access decisionmaking is then briefly discussed.

III. THE TRAUMA OF WITNESSING THE ABUSE

Although research has yet to verify on an empirical level the extent to which child witnesses' initial responses to the abuse of their mothers are consistent with the broader concept of traumatic stress, clinical accounts and the findings of related research clearly indicate the traumatising

¹ National Collective of Independent Refuges Inc. *Submission to the Family Court* (Unpublished Paper, 1991).

² Maxwell, *Children and Family Violence. The Unnoticed Victims*, Report for the Office of the Commissioner for Children (1994).

potential of living with woman abuse for the children of battered women.³ That many children are initially shocked, unsettled and potentially 'overwhelmed' by what they have seen and heard is most evident. Children in Refuges have been noted by staff to experience sleep disturbance, to be disinterested in food, and to show obvious signs of psychosomatic distress (eg. headaches, stomach aches, asthma, and ulcers).⁴ In addition, children in Refuges have consistently been described as distraught, confused, concerned, fearful, untrusting of others, unsettled, anxious, insecure, and emotionally needy.⁵ That children of battered women may experience loss of safety and control during a battering episode is also relatively self-evident.

However, perhaps the most crucial consideration in our efforts to understand the nature of this trauma, is the realisation that, for many children, witnessing the abuse of their mothers is not an isolated incident. Many children, over an indefinite period of time, witness both the physical and psychological victimisation of a caregiver. This understanding raises serious concerns regarding the potential cumulative impact of these experiences. Beyond what children see and hear, the frequency, severity and inescapability of the violence in combination with a consideration and understanding of the child's dependence upon and relationship with both the victim and the perpetrator, are all factors capable of compounding the stress and trauma experienced by these children. During the battering phase and for an indefinite period of time afterwards, many of these children's reactions will no doubt be consistent with the broader concept of traumatic stress. Their world at this point in time is tense and traumatic, fragile and uncertain, and their reactions reflect this

IV. SOCIAL FUNCTIONING AND ADJUSTMENT

From a psychological perspective it follows that children who are experiencing trauma of this magnitude, would concomitantly experience problems in other important social and developmental spheres. Research

³ Arroyo and Eth, "Assessment following violence witnessing trauma" in Peled, E (ed) *Ending the Cycle of Violence: Community Responses to Children of Battered Women* (1995). See also Eth, S and Pynoos, R, *Post Traumatic Stress Disorders in Children* (1985).

⁴ Hilberman and Munson, "Sixty battered women" (1978) 2 *Victimology* 460.

⁵ Hughes, "Psychological and Behavioral Correlates of Family Violence in Child Witnesses and Victims" (1988) 58 *American Journal of Orthopsychiatry* 77.

conducted by Jaffe and colleagues⁶ indicated that child witnesses were below their peers in many areas associated with social competence. Some light was cast on the possible origin of these reported differences by de Lange.⁷ In an observational study, de Lange⁷ described Refugee children as socially isolated and estimated that as many as forty percent of these children were unable to join in the activities of, or relate to the interests of their age mates, and struggled to interact appropriately with either peers or adults. From a different, but still relevant perspective, Rosenberg and Rossman⁸ drew attention to the 'isolationist' and transitional nature of life for many child witnesses of domestic violence, reporting that children of battered women tended to move more often than their peers, were more likely to attend multiple schools, and were the most likely to have poor school attendance records. Clearly, the isolationist and disruptive context conferred by the presence of violence in the family can interfere with the development of social competence in these children. But what about their social networks? Are children of battered women isolated from their peers and/or other important sources of support?

In our first small Aotearoa/New Zealand based study,⁹ we investigated the degree to which children perceived themselves to be isolated from three broad but significant sources of support (their peers, family, and teachers). Our interest in children of battered women's subjective appraisals of how socially supportive their immediate social network is stemmed from two sources: recent findings which indicate that children's perceptions of social support relate directly to their level of psychological wellbeing and adjustment;¹⁰ and concerns regarding the impact abuse has recently been found to have on children of battered women's social network structure and involvement.¹¹ It seems that these children's opportunities to learn, engage in, and access socially supportive responses, may be

⁶ Jaffe, Wolfe, Wilson and Zak, "Similarities in Behavioural and Social Maladjustment Among Child Victims and Witnesses to Family Violence" (1986) 56 *American Journal of Orthopsychiatry* 142.

⁷ "Spousal Violence and Children's Social Competence" (1986) 56 *American Journal of Orthopsychiatry* 255.

⁸ "The Child Witness to Marital Violence" in Ammerman, R and Herson, M (eds), *Treatments of Family Violence: A Sourcebook* (1989).

⁹ Pocock, T and Cram, F *Children of Battered Women: The Forgotten Victims of Domestic Violence* (Unpublished Masters Thesis, University of Auckland, 1994).

¹⁰ Dubow and Ulman, "Assessing Social Support in Elementary School Children: The Survey of Children's Social Support" (1989) 18 *Journal of Clinical Child Psychology* 52.

¹¹ Rosenberg and Rossman, *supra* n. 8.

particularly limited given the social isolation that characterises abusive families in general.

Accordingly, we found significant differences between the Representative Population Subsample and Refuge children's perceptions of peer support, family support, and the quality and availability of support overall. Although children's perceptions cannot be interpreted as a 'true' measure of the responsiveness and availability of children's social network, there is some evidence to suggest that children's perceptions may be the strongest predictor of children's adjustment.¹² This is not very surprising given that, in this instance, when we assessed children's perceptions, we were in effect tapping children's ideas and perceptions about their own isolation, their own 'acceptability' within their social network, and their own expectations or learning experiences regarding the availability and dependability of others.

All the evidence to date indicates that children of battered women are isolated from their social network, in both a situational and perceived sense. However we need to be aware that when we talk about lower levels of 'social competence' among children of battered women, we are in part, talking about the constraints of their environment. The potential tyranny and control so evident in abusive environments has to interfere with, or prevent, children from partaking in such rudimentary social activities as going to someone else's home, or having someone over to play. As well we are talking about how these responsibilities or transient existence could hinder their involvement in school, social, and extracurricular activities. Perceptually speaking, we cannot determine on the basis of these findings the extent to which children of battered women's poor perceptions reveal real limitations in their social networks, or the degree to which those real limitations are influenced by their relational history or ability to both engage in and facilitate socially supportive behaviours. However, these children's perceptions do reflect a lack of confidence in the availability and/or approachability of others; a lack of confidence in the ability of their social network to met their needs; and in part, a sense of themselves as unworthy or undeserving when it comes to receiving help from others.

Whatever the underlying factors, Refuge children's perceived isolation from their peer group raises serious concerns, particularly in light of recent

¹² Sarason, Pierce, Shearin, Sarason, and Waltz, "Perceived Social Support and Working Models of Self and Actual Others" (1991) 60 *Journal of Personality and Social Psychology* 273.

findings which indicate that peer relationship difficulties in childhood are predictive of serious adjustment difficulties later in life.¹³ Children whose behaviour is difficult and whose home life is precarious risk isolating themselves from their peers, especially if their efforts to cope with the overwhelming nature of their situation 'spills over' into their interactions with or perceptions of others. Given the current weight of support lent to the notion of intergenerational transmission of violence,¹⁴ this risk, and the mechanisms by which children's experiences of abuse in the context of the family influence their perceptions of, and approach or access to relationships with others, is of great interest and concern.

V. CHILDREN OF BATTERED WOMEN AND THE INTERGENERATIONAL TRANSMISSION OF VIOLENCE

Children of battered women may be at risk of developing emotional and behavioural problems because of the learning opportunities associated with family violence. Specifically, what is of greatest concern in terms of socialisation is that witnessing violence in the context of the family will teach children that violence is an extremely powerful and effective means of control, and that women and children are both legitimate and deserving victims. So, are child witnesses in danger of learning the same lessons and repeating the same patterns? Children are vulnerable yes, largely because parents are often the most salient and influential models in their young lives. This assertion is supported by retrospective accounts by battered women and their partners which clearly indicate that exposure to family violence predisposes children in general, although male children in particular, to be abusive in their own intimate relationships.¹⁵

The danger, and hence the risk associated with children's learning opportunities and the cycle of violence hypothesis, is however complicated by several factors. While a large body of research¹⁶ has clearly documented the role of modelling in both the acquisition and modification of aggressive behaviour, its unidirectional approach (ie. parents influence their children's

¹³ Parker and Asher, "Peer Relations and Later Personal Adjustment: Are Low Accepted Children at Risk?" (1987) 102 *Psychological Bulletin* 357.

¹⁴ Widom, "Does Violence Beget Violence? A Critical Examination of the Literature" (1989) 106 *Psychological Bulletin* 3.

¹⁵ Forstrom-Cohen and Rosenbaum, "The Effects of Parental Marital Violence on Young Adults: an Adult Exploratory Investigation" (1985) 47 *Journal of Marriage and the Family* 467.

¹⁶ Bandura, A, *Aggression: A Social Learning Analysis* (1973).

behaviour because children model this behaviour on that of their parents) precludes a more sophisticated and comprehensive overview of the developmental progression of aggressiveness. Patterson's¹⁷ social interactional model of aggression has highlighted these limitations by recognising the reciprocal influences of parent and child in the development and expression of aggressive behaviour. The child is an integral part of this system who learns not only to respond in like, but eventually to elicit the kind of aversive interchanges they have witnessed and experienced. In line with the arguments of Patterson, it is argued here that child witnesses have the opportunity to learn more than just the execution and mimicry of behaviours; they have the opportunity to learn rules and regulations regarding the acceptability and appropriateness of behaviour.

Unfortunately we still lack a great deal of information regarding the conditions under which children will adopt observed behavioural and interactional patterns as their own. Retrospective evidence suggests that the personal experience of abuse may be an important or salient factor in determining whether or not individuals are likely to become embroiled in the cycle of violence.¹⁸ But apart from this distinction, there is not at the present time, enough social information available to be able to determine with any degree of accuracy which children, or more specifically what child characteristics are the most susceptible or vulnerable regarding exposure to violent models.¹⁹ Some recent studies²⁰ suggest that the acquisition of antisocial and generally aggressive behavioural patterns may require more subtle cognitive and/or effective changes in addition to the vicarious observational learning presumed to underlie the modelling hypothesis.

It is argued here, as it has recently been argued elsewhere,²¹ that children's social-cognitive appraisals are likely to play an extremely important, although as yet, largely unexplored part. Based upon their own social-cognitive appraisals, and the meaning they attach to their experiences,

¹⁷ *Coercive Family Process* (1982).

¹⁸ Kalmuss, "The Intergenerational Transmission of Marital Aggression" (1984) 46 *Journal of Marriage and the Family* 11.

¹⁹ Jaffe, P, Wolfe, D, and Wilson, S, *Children of Battered Women* (1990).

²⁰ Christopolous, Cohn, Shaw, Joyce, Sullivan-Hansen, Kraft, and Emery "Children of Abused Women: Adjustment at Time of Residence" (1987) 49 *Journal of Marriage and the Family* 611. See also Hertzberger, "Social Cognition and the Transmission of Abuse" in Finkelhor, D (ed), *The dark side of families: Current Family Violence Research* (1983).

²¹ Hertzberger, *ibid.*, 22.

children no doubt begin to form expectations about the roles of themselves and others in relationships, about the appropriateness and acceptability of a whole range of behaviours, and about the nature of responsibility. On a behavioural level, children are more likely to adopt and perceive aggressive and abusive behaviour as appropriate when such behaviour finds support in cultural norms and is accompanied by rationalisations, or under conditions which fail to highlight the irregularity or excessiveness of the behaviour.²²

In light of this, it seemed conceivable to us that the well documented familial experiences acting on children's behavioural development, could also influence their social-cognitive development and social information processing patterns.²³ It also seemed conceivable that children's social-cognitive functioning, specifically their perceptions or interpretations of social situations, could be affected as a function of their family experiences. Accordingly, we tentatively hypothesised that family experiences could influence the quality of children's interpersonal relations and behavioural adjustment via the influence they exert on children's interpersonal problem solving skills.²⁴ Refugee children were indeed found to be significantly less resourceful and behaviourally flexible in their approach to interpersonal problem solving. Refugee males distinguished themselves from children in the representative population subsample by their overly aggressive and often inappropriate responses. Female Refugee children distinguished themselves by the passive and aggressive extremes of their interpersonal problem solving responses.

This, along with findings which indicate that aggressiveness and shyness/withdrawal are significant antecedents of peer rejection, does not bode well for refugee children's sociometric standing among peers²⁵ and suggests that children's perceptions of and approaches to interpersonal problem solving situations may be important determinants of children's peer status. If this is indeed the case we have reason to be concerned, especially given recent findings indicating that disturbed peer relations are predictive of later maladjustment.²⁶ However, even though refugee males were found to be more aggressive with their peers than refugee females, the implications

²² *Idem.*

²³ Smetana, Kelly and Twentyman "Abused, Neglected and Non-maltreated Children's Perceptions of Moral and Social Transgressions" (1984) 55 *Child Development* 277.

²⁴ Pocock and Cram, *supra* n. 9, at 10.

²⁵ Renshaw and Asher, "Children's Goals and Strategies for Social Interaction" (1983) 29 *Merrill-Palmer Quarterly* 353.

²⁶ Parker and Asher, *supra* n. 13.

for the girls are potentially more serious given that the standards for the acceptability of aggressive behaviour within the peer group are harsher for girls than for boys.²⁷ Although children's reactions to wife abuse are likely to vary over time, the fact that violence has already seeped into their relations with peers and has been incorporated as part of their problem solving and behaviour regulating repertoire suggests that there is a distinct possibility that these children have a significant potential to perpetrate the cycle of violence.

VI. BEHAVIOURAL FUNCTIONING AND ADJUSTMENT

The small but steadily growing number of empirical studies undertaken in this area reveal that children who are exposed to such emotionally and anxiety promoting events as wife abuse are more likely, than children who are not, to develop short-term, and possibly long-term adjustment difficulties. On the basis of these undertakings researchers have been able to infer that these children are vulnerable to a host of behavioural and adjustment difficulties ranging from poor concentration and erratic school attendance,²⁸ to such emotional, behavioural and self-concept disturbances as withdrawal, anxiety, and a proness to depression.²⁹ However, in light of the violent, aggressive and antisocial nature of domestic violence, it is of little surprise that the bulk of research on these children has sought to identify and quantify the aggressive and disruptive elements of child witnesses' behaviour in relation to their peers.³⁰ Accordingly, the presence of externalising (aggressive, disruptive, and delinquent) behaviours are widely cited in the literature. Significantly, the vast majority of overseas research has established that the externalising behaviour problems of children of battered women frequently exceed clinical cut-off margins, and borders, in the most severe cases, on delinquency.³¹

²⁷ Cairns, R, Cairns, B, Neckerman, Gest, and Gairiepy, "Social Networks and Aggressive Behavior: Peer Support or Peer Rejection?" (1988) 24 *Developmental Psychology* 815.

²⁸ Goodman and Rosenberg, "The Child Witness to Family Violence: Clinical and Legal Considerations" in Sonkin, D (ed), *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (1987).

²⁹ Davis and Carlson, "Observation of Spouse Abuse: What Happens to the Children?" (1987) 2 *Journal of Interpersonal Violence* 278.

³⁰ Fantuzzo and Lindquist, "The Effects of Observing Conjugal Violence on Children: A Review and Analysis of Research Methodology" (1989) 4 *Journal of Family Violence* 77.

³¹ Christopolous, et. al., *supra* n. 20; Mathias, Mertin, and Murray, "The Psychological Functioning of Children from Backgrounds of Domestic Violence" (1995) 30 *Australian Psychologist* 124; and also Sternberg, Lamb, Greenbaum and Cicchetti, "Effects of Domestic Violence on Children's Behaviour Problems and Depression" (1993) 29 *Developmental Psychology* 44.

These results are clearly indicative of the serious nature of many of these children's adjustment difficulties. Of real concern are recent indications that children of battered women in Aotearoa/New Zealand are experiencing problems of a comparable magnitude.³² In our 1994 study, Refugee children evidenced behavioural difficulties to a far greater degree than Representative Population Subsample children overall, and on each of the assessment tools subscales (ie. hyperactive, anxious, and aggressive). More than three quarters of the Refugee children (88.2%) were reported as having behavioural problems severe enough to fall within the clinical range. In stark contrast, just over one quarter (28.2%) of Representative Population Subsample children were reported by their parents as evidencing behavioural problems of a clinical nature. Notably, the number of children in the Representative Population Subsample identified by their parents as behaviourally problematic (ie. within the clinical range of behavioural problems) is quite comparable to prevalence rates reported by McGee, Silva, and Williams,³³ who sought to investigate the prevalence, nature, and stability of behaviour problems (as measured by the Rutter) in a large sample of seven year old New Zealand children. This compatibility between our findings and theirs strongly suggests that we have found meaningful differences between Refugee children and the representative population subsample in terms of clinically defined behavioural problems.

In many respects, the finding that children of battered women are significantly more behaviourally troubled (particularly with respect to the aggressive and anxious subscales) than a representative sample of their peers is not surprising considering the violent, aggressive, and distressing nature of domestic violence. It seems reasonable to assume that the high level of behavioural problems reported among the children of battered women who participated in this study relates directly back to their family context, and the nature of their stressful circumstances. There are a vast array of broad yet interrelated factors capable, either singly or in combination, of significantly contributing to the severity of behavioural problems identified here. Children of battered women are vulnerable. Their hyperactive and anxious behaviours have the potential to further exacerbate their vulnerability, or at the very least place unwanted strain upon their efforts to develop, grow, and adjust. Indeed, the degree of anxious behaviour evident in this child population suggests that they are troubled emotionally.

³² Pocock and Cram, *supra* n. 9, at 10.

³³ "Behaviour Problems in a Population of Seven-Year-Old Children: Prevalence, Stability and Type of Disorder: A Research Report" (1984) 11 *Australian & New Zealand Journal of Family Therapy* 65.

However, the seriousness of many of these children's difficulties is at the same time complicated both by the questionable cultural appropriateness and relevance of the behavioural measure employed for Aotearoa/New Zealand, and by our understanding of the relationship that exists between maternal wellbeing and child adjustment. It is clear that our use of parental report data to measure child behaviour may be potentially misleading to the extent that the parental reports in this study contained a component of variance which was directly related to parental health. Importantly however, when comparable groups were compared (ie. non-clinical and clinical samples) on the basis of the parents' responses to the General Health Questionnaire, Refuge children still distinguished themselves from their peers on the aggressive subscale. Moreover, for many of the children in this study, exposure to violent and abusive behaviour was not restricted to the mere observation of their mothers' victimisation. Over fifty percent of Refuge children were identified by their mothers as having personally experienced abuse. Not surprisingly, these children were identified as having the most serious behavioural problems.

VII. CHILDREN'S EXPERIENCES OF ABUSE

Not only would a discussion of the behavioural problems evident in child witnesses not be complete without drawing attention to the differential impact of experienced abuse, it would be misleading. There is a very real reason to believe that many child witnesses suffer repeated exposure to violence, both as direct and indirect victims.³⁴ That children of battered women may be 'doubly' exposed to violence has serious implications for their adjustment given that child abuse in and of itself is an extremely traumatic and detrimental experience with its own established socio-emotional and behavioural sequelae.³⁵ To date, personally experienced abuse is the greatest risk factor to have been identified for children of battered women,³⁶ largely because of what these experiences are likely to convey to the child, as well as the sheer number of child witnesses who are thought to experience repeated exposure to violence, both as direct and indirect victims.

³⁴ Hughes, *supra* n. 5.

³⁵ Cicchetti, "How Research on Child Maltreatment Has Informed the Study of Child Development: Perspectives from Developmental Psychopathology" in Cicchetti, D and Carlson, V (eds), *Child Maltreatment* (1989).

³⁶ Pocock and Cram, *supra* n. 9, at 9-38.

However, although children's personal experiences of abuse have emerged as potentially more traumatic, developmentally hazardous, and generally speaking, more detrimental for children (at least one that has more serious implications with regard to children's behavioural functioning), the extent of behavioural problems evident in children who have witnessed but supposedly not experienced abuse suggests that there are important shared similarities and consequences inherent in living in an abusive environment, regardless of who is the direct victim.³⁷ These observed and documented similarities raise several important questions: to what extent are recent attempts in the literature to arbitrarily categorise children as "abused" or "not abused" necessarily partial and over simplistic? To what degree do these similarities reflect similarities in the circumstances that give rise, or contribute to, abuse in the family, regardless of whether the victim is the mother or child? However, perhaps the most pertinent questions are those centring around the as yet unexplored role of emotional abuse in child witnesses' adjustment. Can witnessing the abuse of a caregiver be defined as an abusive experience, ie. does witnessing violence involve "mental or emotional injury"?

Current definitions describe "feeling threatened and living in fear" as an integral part of psychological abuse, wherein the meaning of the word 'threatened' includes "those threats made directly to the child, and those that are made indirectly, for example, where one parent verbally, psychologically, and/or physically abuses or threatens to abuse another in the child's presence."³⁸ On the basis of this definition, children of battered women are clearly highly vulnerable to psychological abuse, and the fear, powerlessness, frustration, anger, low sense of worth, guilt, shame, embarrassment and grief associated with this type of maltreatment.³⁹ Of course we still have some way to go in both defining and explicating the nature and the consequences of witnessing and living with abuse for children. In order to attain a more complete, coherent, and complex picture of both child witnesses and the nature of their adjustment difficulties, we as researchers will need to be sensitive to and start to concentrate our efforts upon exploring and elucidating the more subtle and individual influences or impacts that living with woman abuse has on children's developing view of themselves and their world.⁴⁰ Exploring the degree to which children's reported experiences of woman abuse are consistent with current definitions of emotional abuse will clearly contribute to both

³⁷ Ibid., 20.

³⁸ McDowell, H *Emotional Child Abuse and Resiliency: An Aotearoa/New Zealand Study* (Unpublished Doctoral Thesis, University of Auckland, 1995).

³⁹ Ibid., 43.

⁴⁰ Pocock, T and Cram, F, *Mother-Child Relations in Wife Abusive Homes, Study in progress* (1996).

our understanding of these children's predicament and our ability to intervene in a sensitive and appropriate way. But we also need to explore and understand the link or nexus between domestic violence and child maltreatment.⁴¹ As yet, neither our understanding of the of the dynamics of violent relationships, nor the predicament of battered women and their children, has had a significant impact on how child abuse within the context of these relationships is identified, understood or managed.

VIII. THE LINK BETWEEN WOMEN BATTERING AND CHILD ABUSE

Traditionally, woman abuse and child abuse have been examined and addressed as distinctly separate issues in the field of family violence.⁴² However recent research indicates that we need to seriously question the validity of this prevailing assumption.⁴³ A clear picture of the overlap has yet to emerge, but the link between woman abuse and child abuse certainly represents a significant and important area for research, policy, and intervention.⁴⁴ So, what do we know about the link? We now know that children of battered women may be 'doubly' exposed to violence, either accidentally or intentionally.⁴⁵ Using data from the Hamilton Abuse Intervention Project, Robertson and Busch⁴⁶ reported that fifteen percent of children present during violent episodes may have become the unintended victims of violence either through attempts to intervene or their proximity to their mother at the time of the assault.

But what about the instances of intentionally directed abuse? Unfortunately, the fact these children's mothers are usually the primary targets of abuse, does not mean that these children are less likely to be victimised: quite

⁴¹ Hart, B *Children of Domestic Violence: Risks and Remedies* (Unpublished Paper presented to the Fourth International Conference on Family Violence in Durham, South Carolina, 1995).

⁴² Cappell and Heiner, "The Intergenerational Transmission of Family Aggression" (1990) 5 *Journal of Family Violence* 132.

⁴³ Bowker, Arbitell and McFerron, "On the Relationship between Wife Beating and Child Abuse" in Yllo, K and Bograd, M (eds), *Feminist Perspectives on Wife Abuse* (1988). See also Stark and Flitcraft, "Woman-Battering, Child Abuse and Social Heredity: What is the Relationship in Marital Violence?" in Johnson, N (ed), *Sociological Review Monograph: No. 31* (1988), 147.

⁴⁴ Edleson, J and Schecter, S *Model Initiatives Linking Domestic Violence and Child Welfare* (Briefing paper presented at the conference on Domestic Violence and Child Welfare: Integrating Policy and Practice for Families in Racine, Wisconsin, June 8-10, 1994).

⁴⁵ Hughes, *supra* n.5.

⁴⁶ *Hamilton Abuse Intervention Pilot Project (HAIPP): A Two Year Review*, Report No. 5 (1994).

the contrary.⁴⁷ At present we know that battering is the most common context for child abuse, with children of battered women being fifteen times more likely to be abused than children whose mothers are not battered. We also know that men who abuse their partners are more likely to abuse their children.⁴⁸ From a feminist perspective it is not surprising that where there is woman abuse there is also likely to be child abuse, that the severity of the abuse inflicted upon the mother is predictive of the severity of abuse inflicted upon the child, or that the way in which children are victimised strongly resembles that experienced by their mothers.⁴⁹ These trends indicate that, like their mothers, many of these children may also be abused by their fathers or by the significant male in their mothers' lives. Statistically speaking, child witnesses are in fact three to six times more likely to be abused by their father or father surrogate than any other adult in the family.⁵⁰

However, while children of battered women are approximately three to six times more likely to be abused by their father or father surrogate, there is also evidence to indicate that some of these children are being abused by their mothers. Straus⁵¹ reported that approximately twenty-five percent of battered women recounted abuse towards their children, double the child abuse rate reported by mothers who were not battered. It is worth noting, however, that the number of battered women directly implicated in the abuse of their children arguably remains surprisingly small in light of their own experiences of abuse and their often disproportionate responsibility for child care.⁵²

Even though comparatively only a small percentage of battered women are directly implicated in the abuse of their children, in a social and often professional sense, battered women are held responsible for and treated as complicit in the abuse of their children.⁵³ This is clearly evident in the disproportionate number of children who have been removed from women who are battered⁵⁴ and in a recent American report released by the National Council of Juvenile and Family Court Judges wherein it was declared that

⁴⁷ Roy, M *Children in the Crossfire: Violence in the Home: How does it Affect our Children?* (1988).

⁴⁸ Stark and Flitcraft, *supra* n. 43.

⁴⁹ Stacey, W and Shupe, A *The Family Secret: Domestic Violence in America* (1983).

⁵⁰ Stark and Flitcraft, *supra* n. 43.

⁵¹ Stauss, "Ordinary Violence, Child Abuse and Wife Beating: What do They have in Common?" in Finkelhor, D (ed), *supra* n 20.

⁵² Stark and Flitcraft, *supra* n. 43.

⁵³ *Ibid.* See also Pocock and Cram, *supra* n. 40.

⁵⁴ Stark and Flitcraft, *supra* n. 43.

a double standard is most evident in child protection, 'failure to protect' and custody cases. It is important to note that this report also went on to specifically state that this double standard is, more often than not, exacerbated when the mother is also clearly a victim of abuse. Within the report numerous examples of case law are cited to exemplify how mothers are often prosecuted without full recognition of the issues involved in the abuse of women.⁵⁵

Unfortunately our lack of recognition and our lack of understanding of the issues involved in the co-existence of wife abuse and child abuse has some potentially serious implications: the possibility that battered women will not be identified when their children come to the attention of Child Services and, as a result, may subsequently become inappropriately implicated in the abuse of their children; or that in neglecting to differentiate between abuse and periodic 'unavailability' we will mistakenly assume that battered women's and their children's interests are diametrically opposed, thereby negating the influential and crucial part many battered women have to play in their children's adjustment. Clearly, the abuse of a parent has serious implications for children's relationships with both their parents, and for the security, consistency and stability afforded by these children's environments.

IX. PARENT-CHILD RELATIONSHIP AND MATERNAL STRESS IN THE CONTEXT OF DOMESTIC VIOLENCE

Children of battered women may also be at an increased risk for developing emotional and behavioural problems because of the disruption in familial and parental functioning associated with family conflict and violence. In the first instance, the development of a strong and secure attachment or bond between parent and child could be undermined in an abusive context if the abuser perceives his partner's relationship with a child as threatening, or if the child's mother is abused during her pregnancy, and/or after the birth of her child.⁵⁶ A rather rapidly growing body of research indicates that the ability of parents to provide children with the kind of consistent structure and involvement they need and demand is greatly undermined

⁵⁵ Davis, "Failure to Protect and Its Impact on Battered Mothers" (1995) 1 *Courts and Communities* 6-7.

⁵⁶ Bullock and McFarlane, "A Programme to Prevent Battering of Pregnant Women" (1988) 11 *Response to the Victimization of Women and Children* 18.

in the context of abusive and discordant relationships,⁵⁷ ie. in this context parents have been found to communicate less clearly with their children,⁵⁸ to decrease their use of approval statements whilst increasing their use of disapproval statements,⁵⁹ to attend primarily to the negative behaviour of their children, and generally, to engage in the kind of behaviour that is often likely to facilitate and perpetuate negative parent-child interchanges.⁶⁰

Not surprisingly, changes in parenting practices and parents' relationships with their children constitute the most significant indirect mechanisms to have been identified yet. Unfortunately at present we know very little about children of battered women's relationships with their abuser-fathers, but given findings which indicate that in domestically violent homes the way in which children are victimised strongly resembles that of their mothers,⁶¹ the possibility that these fathers are often punitive, power assertive, and perhaps violent in their relationships with their children is very real. We do however know more about battered women's relationships with their children, and the significant part women's experiences of abuse and maternal stress play in determining both parent and child outcomes.

Indeed three studies have examined the significance of maternal health in relation to behavioural problems evident in children of battered women.⁶² Importantly, in all three studies, a strong relationship was found between mothers' general level of health functioning and children's level of adjustment. The strongest relationship was found by Holden and Ritchie.⁶³ They investigated the relation, or more precisely, the degree of interdependence between extreme marital discord, parenting, and child development and were able to account for an impressive 33% of the

⁵⁷ Emery, "Interparental Conflict and the Children of Discord and Divorce" (1982) 92 *Psychological Bulletin* 310.

⁵⁸ Jouriles, Barling and O'Leary, "Predicting Child Behaviour Problems in Maritally Violent Families" (1987) 15 *Journal of Abnormal Child Psychology* 165.

⁵⁹ Zussman, "Situational Determinants of Parental Behaviour: Effects of Competing Cognitive Activity" (1980) 51 *Child Development* 792.

⁶⁰ Jouriles, Murphy and O'Leary, "Interspousal Aggression, Marital Discord and Child Problems" (1989) 57 *Journal of Consulting and Clinical Psychology* 453.

⁶¹ Stacey and Shupe, *supra* n. 49.

⁶² Wolfe, Jaffe, Wilson and Zak, "Children of Battered Women: The Relation between Child Behaviour, Family Violence, and Maternal Stress" (1985) 53 *Journal of Consulting and Clinical Psychology* 657.

⁶³ "Linking Extreme Marital Discord, Child Rearing, and Child Behaviour Problems: Evidence from battered women" (1991) 62 *Child Development* 311.

variance, with maternal stress and parental irritability emerging as the two most significant predictors of child behaviour problems.

However, given that the data gathered in all three studies was based largely on mothers' reports, it is possible that battered women were more likely to report feeling stressed in their role as parents than comparison mothers, and that their assessments of their children's behaviour were subsequently unduly influenced by the stress and strain they themselves were experiencing at the time. Moreover, on the whole, these studies, due to their correlational nature, tell us very little about the quality of battered women's relationships with their children, the difficulties and complexities of parenting in an abusive relationship, or the specific aspects of parenting that are of particular relevance or concern to battered women and their children. It is easy to see how a women's ability to parent in a consistent, involved, and nurturant manner could be disrupted and undermined by her own responses and reactions to the abuse she is experiencing. So although maternal stress and wellbeing have consistently been identified as "the most important factors in a child's psychological development and wellbeing over the years,"⁶⁴ we know little about how, or the extent to which, women's experience of intimate abuse make 'mothering' a more acutely stressful and potentially hazardous experience.

Research the authors are in the process of undertaking⁶⁵ represents an initial effort to try and explore, elucidate, and make visible, some of the added difficulties and complexities of parenting for women who have, or who are, continuing to experience and endure physical and emotional abuse. Preliminary findings indicate several areas of consensus: that women experience violence as a process of victimisation, that they are acutely aware of how their 'process' impacts directly on their 'availability' to their children, and the regret, guilt, and resentment this evokes; that their children are focal, both in the kinds of decisions they make around the abusive relationship, and in terms of the concerns they have regarding their children's responses and reactions to their abuse; that loyalty, discipline, responsibility and blame are consistently identified as difficult issues and sources of tension between battered women and their children; that the satisfaction these women glean from 'mothering' stems in part from the importance and centrality of their children in their lives, and in part from their ability over time to reconstitute a sense of themselves as worthy, capable, and deserving of the mother role; that women carry with

⁶⁴ Wallerstein, J, and Blakeslee, S *Second Chances* (1989).

⁶⁵ Pocock and Cram, supra n. 40.

them into their relationships with their children an overwhelming sense or need to compensate for their children's experiences; and the ways in which women feel their efforts are undermined by the harsh realities and custody battles many they face when they decide to make a life for themselves and their children, independent of their partners. Although little attention has been directed towards what happens after the immediate crisis, the costs associated with leaving an abusive relationship are often not just high, but ongoing. As women and children seek to re-establish their lives in the community, at home, at work, and at school, many stressors, although slightly different, are still apparent. But perhaps the gravest concern for battered women and their children are those that centre around their safety during the process of separation.

X. WOMEN AND CHILDREN'S ONGOING SUSCEPTIBILITY TO THE THREAT AND ACTUALITY OF SEPARATION VIOLENCE

Despite persistent cultural beliefs that women and children will be safe once they leave an abusive relationship, evidence suggests that women and children are extremely vulnerable at this time. Although, in research terms, data on the incidence of separation violence in New Zealand is not currently available, overseas studies indicate that violence directed towards women and their children, is in fact likely to escalate once women have sought physically and/or legally to end the relationship.⁶⁶ An investigation by Langen and Innes⁶⁷ demonstrated that as many as seventy-five percent of visits to hospital emergency rooms by battered women took place after separation, while Stark and Flitcraft⁶⁸ found that on the whole seventy-five percent of the cases where Police were called upon to intervene involved the victimisation of a women by ex-partner or spouse.

However the seriousness of the ongoing threat posed to women after separation is perhaps best conveyed by the homicide statistics. One study revealed that half of the female homicide cases in that year were committed by their ex-partner or spouse, after separation or divorce.⁶⁹ Another in Philadelphia found that a quarter of the women murdered by their abuser were killed after separation. Several women have also been killed whilst

⁶⁶ Bowker et. al., *supra* n. 43.

⁶⁷ *Preventing Domestic Violence against Women*, Bureau of Justice Statistics Reports (1986).

⁶⁸ *Supra* n. 43.

⁶⁹ Bernard, Vera, H, Vera, M, and Newman, "Till Death Do Us Part: A Study of Spouse Murder" (1982) 10 *Bulletin of the American Academy of Psychiatry & the Law* 271.

attempting to 'leave'.⁷⁰ Sadly, a recent tragedy in New Zealand brought home the risks associated with leaving a violent relationship for women and children in this country. In 1994, three children were murdered by a batterer/father as he exercised his custody rights: rights which their mother had strongly contested in what was a long, losing and, in hindsight, tragic custody battle.

In light of the seriousness of separation violence and the obvious danger that surrounds the dissolution process for women and children, it is imperative that we understand how contesting custody and gaining access privileges can provide batterers the opportunity to continue to exercise, either in a directly abusive or more subtly intimidating way, 'control' over 'their' family. Several overseas studies document this potential. In Canada, Leighton⁷¹ found that as many as a quarter of women involved in custody proceedings received explicit threats against their lives during custody visitations. Similarly Shepard⁷² reported that sixty percent of the women in her study were subject to ongoing psychological abuse in the form of threats; these threats however, usually involved, or centred around the children.

Children, it would seem, not only provide batterers with the opportunity for on-going contact with their mothers.

Recent evidence indicates that the children themselves may become both the source, and in some instances the target, of the batterers ongoing exploitation. Walker and Edwall⁷³ found that abusive men could successfully continue to harass their ex-partners and spouses by returning children late, demanding to see the children at unscheduled times, making unscheduled visits, and removing children from the home without legal authority to do so. Perhaps the most extreme example of such custodial interference is that relating to the abduction of children. It is worth noting that over half of all reported child abductions in the United States occurred within the context of woman abuse.⁷⁴

⁷⁰ Caazenave, N and Zahn, M *Women, Murder and Male Domination: Police Reports of Domestic Homicide in Chicago and Philadelphia* (Unpublished Paper presented at the American Society of Criminology Conference, Atlanta, 1986).

⁷¹ Leighton, B *Spousal Abuse in Metropolitan Toronto: Research Report on the Response of the Criminal Justice System*, Report No. 1989-02 (1989).

⁷² "Child Visiting and Domestic Abuse" (1992) 71 *Child Welfare League of America* 357.

⁷³ "Domestic Violence and Determination of Visitation and Custody in Divorce" in Sonkin, D (ed), *supra* n. 28.

⁷⁴ Grief, G and Hegar, R *When Parents Kidnap* (1992).

Many children then are indirectly, but unmistakably, drawn into the conflict. Unfortunately a woman's efforts to free herself and her children from violence, may be met with a stronger likelihood of the children becoming more focal in the conflict than ever, as their ex-partners or spouses, consciously or not, attempt to undermine, manipulate and control her actions through her concern for the children.⁷⁵ The nature of the impact of these experiences on children has yet to be explored, but the extent of their involvement, the stress, and the lack of security associated with the presence of such an ongoing threat, would undoubtedly jeopardise or place unwanted strain upon their development and adjustment.⁷⁶ These studies clearly highlight the danger the surrounds separation and access. In so doing, they raise some serious concerns: concerns regarding the comprehensiveness of legal protection accorded to women and children throughout the dissolution process; concerns regarding the appropriateness of legal decisions which may directly or indirectly compromise this precarious safety; and concerns regarding the potential deployment of custody as a battering tool.

XI. THE LEGISLATIVE RESPONSE AND THE RATIONALE FOR SUPERVISED ACCESS

The provisions of the 1995 Guardianship Amendment Act are designed to prioritise the safety of the child by mitigating against the risk of further violence by the batterer-father. The implications of our knowledge of these children's experiences and the rationale behind the legal prioritisation of the safety of children of battered women in custody and access decisions will only be discussed briefly as detailed discussions of this issue are available elsewhere. The following discussion centres around contentions we believe establish a firm basis or rationale for supervised access in the context of domestic violence.

Clearly the collective wisdom that both parents are fundamentally equal in the investment they have in promoting their child's wellbeing, and in the decision-making power they have with regard to children in a co-operative joint custody arrangement is rendered meaningless when one parent uses violence to ensure the compliance of the other and, in so doing, jeopardises the physical and emotional wellbeing of their children in the process.⁷⁷ Joint custody and/or 'friendly parent' presumptions are not just untenable, they effectively undercut the safety and autonomy battered

⁷⁵ Bowker, et. al., *supra* n. 43.

⁷⁶ Jaffe, Wolfe, and Wilson, *supra* n. 19.

⁷⁷ Geffener and Pagelow, "Meditation and Child Custody Issues in Abusive Relationships" (1990) 8 Behavioral Sciences and the Law 115.

women seek, both for themselves and their children, when they leave an abusive relationship.⁷⁸

Effectively, the Guardianship Amendment Act provisions offer safeguards for women and children from ongoing violence and harassment. We now know that perpetrators of domestic violence contest physical custody of children more often than non-abusive men, and that their requests for custody are often an attempt to continue to exercise, either in a directly abusive or more subtly intimidating way, control over their partners.⁷⁹ As a society and as professionals, we need to ensure that in the context of domestic violence, the safety of children of battered women is not compromised by a shift in focus to the rights of battering men as parents. The guise of the batterer as a reasonable man/father is no longer tenable, and there are real grounds both legally and psychologically speaking to address requests on the part of battered women to limit and monitor the role of the abusive party in her and her children's lives. Circumstances specific to the abuse of women demand a carefully planned, considered, and cautious approach. The higher the number of precautions, the less the risk that children will have to witness the continuation, and often escalation of violence.

Our third contention concerns the centrality and significance of women's wellbeing in their children's development and adjustment.⁸⁰ A rapidly growing body of evidence now exists which indicates that the 'best interests' of children of battered women are uniquely tied to the wellbeing of their mothers. Jaffe and Austin⁸¹ reported that children whose mothers had been protected by legal sanctions from ongoing violence evidenced a considerable degree of recovery. Conversely Shepard⁸² found that the psychological abuse of mothers during access visits was significantly correlated with children's adjustment problems. Clearly, legal efforts to protect and support the 'psychological parenthood' of battered women are paramount. Instances of severe, clearly defined maternal maltreatment withstanding, what is in the 'best interests' of battered women will almost certainly be in the 'best interests' of their children.

⁷⁸ Shepard, *supra* n. 72.

⁷⁹ Geffner and Pagelow, *supra* n. 77.

⁸⁰ Wallerstein and Blakeslee, *supra* n. 64.

⁸¹ Jaffe, P and Austin, G, *The Impact of Witnessing Violence on Children in Custody and Visitation Disputes* (Unpublished Paper presented at the 4th International Conference on Family Violence, New Hampshire, 1995).

⁸² *Supra* n.72.

Of course last but not least is the contention that the rights and wellbeing of children of battered women have been undermined and threatened in such a way that safeguards and protective measures are necessary.⁸³ These children, as we have seen, are highly vulnerable to both physical and psychological abuse.⁸⁴ This knowledge, coupled with evidence which indicates that the risk of child abuse increases with the advent of divorce⁸⁵ and that children at this time are likely to become more focal in the conflict and hence more vulnerable to coercion and manipulation⁸⁶ indicates that these children's physical and psychological safety is extremely precarious in the access context.

XII. PRIORITISING CHILDREN'S SAFETY: BENEFITS AND REQUIREMENTS

Prioritising children's safety through supervised access will go a long way towards facilitating the physical safety of children.⁸⁷ In this respect the benefits to children are immediately apparent. However children may also benefit in other ways from the legal parameters that regulate their relationships with their fathers. Access to fathers may in some circumstances help children adjust more quickly to their situation, especially when one considers how in the advent of violence, children's separation from both their fathers' and their homes' is often abrupt and dramatic. Children may also experience a degree of security and control they have never known in their relationships with their fathers, and there is a good chance that the time they now spend with their fathers will be better directed towards meeting their relational needs. There is of course also the significance of the message: that their fathers' behaviour is negatively sanctioned by the legal system. In this way children's own feelings regarding their responsibility for, or their role in, the violence will be directly challenged.

For the new legislation to really work in the 'best interests' of children will require more than a legal commitment to upholding these interests. It will require recognition of both the practical and psychological needs that

⁸³ Klosinski, "Psychological Maltreatment in the Context of Separation and Divorce" (1993) 17 *Child Abuse and Neglect* 557.

⁸⁴ McDowell, *supra* n. 38. See also Stark and Flitcraft, *supra* n. 43.

⁸⁵ Finkelhor, *supra* n. 20.

⁸⁶ Walker and Edwall, *supra* n. 73.

⁸⁷ Busch, "Safeguarding the Welfare of Children" (1995) 4 *Butterworths Mental Health & the Law Bulletin* 46.

will, as a matter of course, arise from children's new found situation. From a practical perspective, the dangers inherent in child custody and access within the context of domestic violence will require ongoing court supervision of access arrangements, as well as the implementation and co-ordination of services and safe locations for access exchanges. From a psychological perspective, parenting education and support groups for parents and children will be needed. Supervised access provisions will raise several issues for children. Children will need ongoing assistance in learning how to come to terms with the past, and adjust to their current situation. Essentially supervised access represents a difficult struggle to ensure children's safety, while at the same time addressing in as full a manner as possible children's needs, wishes and concerns.

XIII. A CAUTIONARY NOTE

While prioritising children's safety through supervised access will go a long way towards facilitating the 'physical' safety of children, questions remain regarding the extent to which legal stipulations have adequately addressed the 'psychological' safety of children. Unfortunately, verbal abuse, intimidation, harassment, and manipulation, all of which constitute psychological abuse, are not sufficient to invoke the safety presumption of Subsection 16B.⁸⁸ Given these constraints, supervised access arguably does not, in and of itself, guarantee or ensure children's safety. Indeed the diverse array of abusive behaviours battering men employ in the course of their relations with their partners could very well extend to and continue to play a part in battering men's relations with their children. Clearly, due consideration has in this instance, not been given to the dynamics of family violence and the interconnected nature of various abusive behaviours, their functions, or their consequences.⁸⁹ The potential for children's psychological safety to be undermined within the access context will need to be closely monitored if children are to be extended the kind of comprehensive protection the recent amendments to the Guardianship Act (1968) sought to ensure.

⁸⁸ *Ibid.*

⁸⁹ Hart, *supra* n. 41.

XIV. CONCLUSION

Circumstances specific to the abuse of women demand a carefully planned, considered and cautious approach. Such an approach requires more from the social service and legal communities than a knowledge of the threat posed to women and children both during and after the dissolution process and an understanding that mediation and joint custody are inappropriate in the given circumstances. What it requires is that this knowledge and these considerations are reflected and evident in every decision that is made pertaining to custody and the conditions of access, that the safeguards required to achieve this are firmly in place, and that these checks extend beyond the decision-making process to ensure that the custodial arrangement continues to work 'in the best interests' of the children involved. Providing the protection accorded to battered women and their children is comprehensive enough, these legal stipulations should go some way towards protecting children from being used as pawns in on-going abuse scenarios by batterers whilst ensuring that women and children are safe from the threat of further violence. The success of this new legislation will be conditional, in part, on the ability of the legal and social service communities to continue to review and evaluate the 'legal process' in relation to the health and safety needs of women and their children, the development and implementation of specialised services and procedures (eg. screening protocols, demonstration projects, supervised access centres), and on the strength of our political and social commitment to protecting and upholding the 'best interests' of children.

DOMESTIC VIOLENCE AND THE RESTORATIVE JUSTICE INITIATIVES: THE RISKS OF A NEW PANACEA

BY STEPHEN HOOPER* AND RUTH BUSCH**

I. INTRODUCTION

In the middle of 1995 Waikato Mediation Services began the process of drafting protocols for a restorative justice programme to be piloted in Hamilton, New Zealand. One of the first issues that needed to be addressed was what categories of offences should be included (and/or excluded) from the ambit of the project. A complex debate immediately ensued about whether the programme should deal with cases involving domestic violence.

Because of the similarities in philosophical perspectives and process techniques between mediation and the processes used to implement restorative justice, the controversy about the appropriateness of adopting a restorative justice approach for domestic violence cases is embedded in the more general debate about utilising mediation processes to deal with domestic violence situations.¹ Battered women's advocates have long argued that mediation is inherently unfair and potentially unsafe for their clients. They suggest that women are better served by the traditional adversarial process.² Mediation proponents, on the other hand, contend that in all but the most serious cases, the mediation process is more empowering and more effective for victims than engaging in court proceedings.³ A third view posits that the mediation process may be

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¹ Boshier, J, Beatson, L, Clark, K, Henshall, M, Priestley, J, and Seymour, F, *A Review of the Family Court: Report for the Principal Family Court Judge* (1993) 119. The 1993 Review of the Family Court recognised domestic violence as "a reflection of power" and recommended that wherever it exists, "mediation should be avoided by the judicial process as a legitimate means of dispute resolution."

² Hart, "Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation" (1990) 7 *Mediation Quarterly* 317, 325.

³ Corcoran and Melamed, "From Coercion to Empowerment: Spousal Abuse and Mediation" (1990) 7 *Mediation Quarterly* 303, 314.

helpful but that a case-by-case determination of appropriateness must be made.⁴

Recent restorative justice initiatives in New Zealand and Australia have extended the parameters of this debate from family mediation to the criminal justice arena. It has been suggested that a restorative justice model offers opportunities for victims⁵ and offenders⁶ to effectively address domestic violence situations that have come to the notice of police, community groups and/or the criminal courts.⁷ We suggest, however, that this conclusion should not be reached lightly. The purpose of this paper is to critically evaluate arguments about the use of a restorative justice model for domestic violence cases and to propose specific protocols which we believe should be implemented in the very limited number of domestic violence situations for which restorative justice may be applicable. Our analysis presumes that the primary goals of any intervention in domestic violence situations -including restorative justice programmes - must entail the prioritisation of the safety and autonomy of victims over any other

⁴ Erickson and McKnight, "Mediating Spousal Abuse Divorces" (1990) 7 *Mediation Quarterly* 377, 378 and Girdner, "Mediation Triage: Screening for Spouse Abuse in Divorce Mediation" (1990) 7 *Mediation Quarterly* 365, 375-6.

⁵ In this article, we will refer to the abused spouse as a "victim". We are aware that the term "victim" does not encapsulate the entirety of this person's identity; s/he is clearly more than just a victim. Within the criminal justice context, however, we seek to differentiate between the violent offender and the target of his abuse. "Target of abuse" seems inappropriate because it may mask the fact that *a person* has been the recipient of abuse. The use of the word "complainant" is not always an accurate description as police often lay charges in domestic violence-related offences. So, reluctantly and with full awareness of the debates about this issue, we retain the concept of "victim".

⁶ We use the words "offender," "abuser", and "perpetrator" interchangeably in this article. As well, we adopt the convention of referring to offenders as male and to adult victims as female. We recognise that there are male victims of intimate violence but as Gelles has stated:

"It is categorically false to imply that there are the same number of battered men as there are battered women. Although men and women may hit one another with about the same frequency, women inevitably suffer the greatest physical consequences of such violence. Women victims of intimate violence also suffer more emotional and psychological consequences than do men."

Gelles, RJ, *Violence Toward Men: Fact or Fiction?* (Unpublished Paper presented at the American Mediacal Association Council on Scientific Affairs, September 28, 1994).

⁷ Carbonatto, "Expanding Intervention Options for Spousal Abuse: The use of Restorative Justice" Occasional Paper in Criminology New Series: No. 4, Newsletter of the Institute of Criminology (March 1995) 2, 5.

outcomes, including the reconciliation or conciliation of the parties. Our definition of "safety", moreover, includes freedom from the risk of exposure to further physical and psychological abuse as a result of the utilisation of specific processes.

II. THE MODELS OF RESTORATIVE JUSTICE

In devising the Hamilton restorative justice programme, two existing models were considered, namely victim-offender mediation⁸ and the Family Group Conference model (renamed by the programme "the Community Group Conference")⁹. While a hybrid process was ultimately developed by Waikato Mediation Services, the attempt to decide which aspects of the two approaches would be utilised in the programme involved examining the perceived advantages and drawbacks of these existing models, especially their implications for cases involving domestic violence.

1. *Victim-offender Mediation*

The victim-offender mediation process involves the victim and the offender taking part in a face-to-face meeting. The aim of the process is to enable victims to recover from the effects of crime and to obtain an element of emotional closure. The model endeavours to allow victims to fully articulate the consequences of the offending for them and to have a voice in structuring the response to the offending, which typically takes the form of a restitution agreement.

To date, the victim-offender mediation process has mainly been used for property offences such as burglary¹⁰ and then generally only after the offender has pleaded and been found guilty. While the process has typically been utilised for what may be categorised as minor or non-violent cases, it has at times been used to address the effects of more serious offences,

⁸ This is based both on the VORP (Victim Offender Reconciliation Program) model used in the United States and Canada or the VOM (Victim-Offender Mediation) model used in the United Kingdom and Australia.

⁹ The name comes from the paper by McElrea, F W N, *Restorative Justice in The New Zealand Youth Court: A Model for Development in Other Courts?* (Unpublished Paper prepared for the National Conference of District Court Judges, Rotorua, 6-9 April 1994), 12. Hereafter, Family Group Conferences will be referred to as "FGCs" and Community Group Conferences will be referred to as "CGCs".

¹⁰ The Hamilton programme by contrast has mainly dealt with driving offences (such as careless driving causing death or injury) and cases of stranger assault.

including aggravated assault and murder. The mediation of these more serious crimes has occurred only after extensive case preparation and after a sentence has been imposed.¹¹

In victim-offender mediation, the parties are each encouraged to tell their sides of the story. Both parties get the opportunity to ask questions and discover each other's perspectives about the factors which contributed to the incident and its on-going consequences. Parties are then given the opportunity to negotiate an agreement which provides for restitution by the offender, where appropriate. These agreements may take the form of the payment of money, the completion of work, or a commitment to undergo rehabilitative assistance or counselling. Mediators in the traditional mediation process act as neutral facilitators.

Research findings on existing victim-offender mediation projects have shown that they can deliver high levels of victim and offender satisfaction. Evaluations of these programmes have demonstrated excellent results in terms of both victims' and offenders' perceptions of the fairness of the mediation process relative to the Court process¹² and in relation to the successful performance of restitution agreements by offenders.¹³ The model, moreover, appears to be able to generate satisfactory outcomes for the parties. The Umbreit study, for instance, indicated that those who chose to participate in victim-offender mediation programmes in four different American cities were able to negotiate restitution agreements in 95% of the mediations.¹⁴ Eighty-six percent of the victims found it helpful to talk with the offender. In addition, they reported being significantly less upset

¹¹ The Hamilton Programme deals with offences in the period between conviction and sentencing. The authors believe that mediation might be appropriate in certain cases of domestic violence *after* the victim has had counselling and had an opportunity to deal with the major effects of the violence. Given that this would rarely occur prior to sentencing, this issue is not explored in this paper. For a discussion about the use of mediation for serious offences, see Umbreit, M, *Mediating Homicide Cases: A Journey of the Heart Through Dialogue and Mutual Aid* (Unpublished Paper, March 1994) and Umbreit, "The Development and Impact of Victim-Offender Mediation in the United States" in Galaway, B and Hudson, J (eds), *Criminal Justice, Restitution and Reconciliation* (1990) 263, 273.

¹² Participants in mediation overwhelmingly felt that the restitution agreements were fair to the victim. Nine out of ten victims and 95% of offenders believed that the agreement was fair to the victim. Nine out of ten victims and 88% of offenders felt that the agreement was fair to the offender. Umbreit, M S, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (1994) 19-21.

¹³ *Ibid.*, 18-19.

¹⁴ *Ibid.*, 8.

about the crime and less fearful of being re-victimised by the same offender after having met with him in mediation.¹⁵ The model requires the voluntary participation of both victims and offenders in the process, clearly a crucial factor in maintaining the integrity of the mediation. In a study by Umbreit, a high proportion of victims (91%) and offenders (81%) felt that their participation had indeed been voluntary.¹⁶

2. *The Assumptions and Limitations of the Victim-Offender Mediation Process in Relation to Domestic Violence Offences*

The most commonly used victim-offender mediation process shares a number of basic assumptions with the traditional mediation process.¹⁷ These assumptions include a consensus approach to justice and an emphasis on concepts of neutrality and power balancing. These premises are of major significance to, and limit the impact of, victim-offender mediation in the domestic violence area.

There are, obviously, significant differences in the types and degree of violence used in domestic violence cases. As well, there are important differences in the forms and quality of resources available to victims of such violence. However, the power imbalances and dynamics of control which characterise many domestic violence relationships suggest that, in most instances, the victims of violence do not have the capacity to negotiate freely and fairly with their abusers.¹⁸ To reach a consensus, the parties must have the capacity to negotiate with each other. There must be at least some capacity for accord, a willingness to be honest, a desire to settle the dispute and some capacity for compromise.¹⁹ The relationships between perpetrators and victims in domestic violence situations, moreover, are

¹⁵ Umbreit and Coates, "The Impact of Mediating Victim Offender Conflict: An Analysis of Programs in Three States" [1992] *Juvenile & Family Court Journal* 4.

¹⁶ Umbreit, *supra* n. 12, at 63.

¹⁷ By the term "traditional mediation process" we are referring to problem-solving mediation. The restorative justice models used in other parts of the world, such as the VORP model, have relied heavily on traditional problem-solving approaches. These approaches have been developed from the work of the Harvard Negotiation Project and are reflected in the landmark work of Fisher, R, Ury, W and Patton, B *Getting To Yes* (2nd ed 1991). The narrative mediation model used by Waikato Mediation Services focuses less strongly on the generation of an agreement and attempts to leave behind the problems of neutrality in favour of transparency and client accountability.

¹⁸ Astor, "Swimming Against the Tide: Keeping Violent Men Out of Mediation" in Stubbs J (ed), *Women, Male Violence and the Law* (1994) 147, 151.

¹⁹ *Idem*.

not typically characterised by consensuality, honesty, mutuality and compromise.²⁰

In many cases, the perpetrator's pattern of dispute resolution is characterised by coercion and intimidation. In an attempt to avoid further violence, the victim's responses often involve compliance and placation of his wishes. Mediation in the traditional sense requires victims to assert and negotiate for their own needs and interests.²¹ Mediation carried out against the backdrop of domestic violence, however, requires the victim to negotiate effectively on her own behalf although her experiences have in all likelihood led her to renounce or adapt her needs in an attempt to avoid repetitions of past violence. There is a strong likelihood, therefore, that a battered woman will negotiate for what she thinks she can get, rather than press for more major changes on the part of the offender.²²

In 1994, Newmark, Harrell and Salem carried out a research study in the Family Courts of two centres in the United States, Portland, Oregon and Minneapolis, Minnesota.²³ The purpose of the study was to assess the perceptions of men and women involved in custody and access cases where there had been a history of domestic violence.²⁴ The study found that there were significant differences in the perceptions of women who had been the victims of violence as opposed to those who had not been abused during their relationships.²⁵ Women who had been abused were more likely than women who had not to feel that they could be "out-talked" by their partners.²⁶ They also felt that their partners were more likely to retaliate against them if they held out for what they wanted. Newmark et al reported that abused women were "afraid of openly disagreeing with [their partner] because he might hurt [her] or the children if [she did]".²⁷ This accords with comments made by some New Zealand women interviewed following their involvement in Family Court mediation and counselling.²⁸

²⁰ *Idem.*

²¹ *Ibid.*, 152.

²² *Idem.*

²³ Newmark, L., Harrell, A. and Salem, P, *Domestic Violence and Empowerment in Custody and Visitation Cases An empirical Study on the impact of Domestic Abuse* (Paper published by the Association of Family and Conciliation Courts, 1994), 6.

²⁴ *Ibid.*, 1.

²⁵ *Ibid.*, 15.

²⁶ *Ibid.*, 35-6.

²⁷ *Ibid.*, 14-15.

²⁸ See case study interviews with New Zealand women concerning their experiences in Family Court mediation and counselling in Busch, R, Robertson, N, and Lapsley, H, *Protection From Family Violence* (1992).

In addition, the Newmark study indicated that there were significant differences between the women who had been abused and those who had not in terms of their assessments of their partners' power to control decisions about finances, social and sexual relationships and child rearing. The abused women perceived that their partners had much more decision-making power than did the non-abused women.

Perceived risks of harm and decreased involvement in decision-making indicate a diminished ability on the part of battered women to participate assertively and effectively in the mediation process.²⁹ Fears of future violence clearly exert an intimidating and coercive effect on the willingness of a victim to state her wishes and expectations during the mediation process.³⁰

Two further factors combine to make it unlikely that mediation will be able to provide the answer to the problem of spouse abuse. The first is the apparent passivity and learned helplessness of the battered woman. While acknowledging the inherent limitations of the theory of learned helplessness,³¹ researchers have found that it is often difficult for battered women to believe that they can stop the violence through their own assertive actions.³² They are apt to be more worn down, more suggestible and less able to confront their partners than other disputants in a mediation.³³ Second, negotiation is more difficult for the victim because of her fear of the batterer. Threats of retaliation, whether direct or indirect, may give the batterer an additional advantage in a mediation session. Even in the absence of overt threats, the fact that she may leave the session and go home with her batterer may make a battered woman unwilling to assert her own needs for fear of antagonising her partner.³⁴ The early referrals to

²⁹ Newmark et al, *supra* n. 23, at 22.

³⁰ *Ibid.*, 22.

³¹ Walker, "Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Women's Syndrome" (1991) 28 *Psychotherapy* 21, 24. Lenore Walker has stated that "learned helplessness" should not be taken as meaning that women respond to battering with total helplessness or passivity. Rather, she comments that the history of abuse "narrows battered women's choices...(as they opt)...for those that have the highest predictability of creating successful outcomes." Walker concludes that, for battered women, getting the violence to stop constitutes the most desired 'successful outcome'.

³² Rowe, "Comment: The Limits of the Neighbourhood Justice Center: Why Domestic Violence Cases Should Not be Mediated" (1985) 34 *Emory Law Journal* 855, 863.

³³ *Ibid.*, 864.

³⁴ *Ibid.*, 865.

Waikato Mediation Services highlighted these safety concerns. The mediators met victims briefly and then left the parties to address the issues raised in the mediation.³⁵ The mediators were unable to deal with ongoing issues, such as the distress arising from “reliving” the experience of victimisation. As well, the mediators were unable to guarantee the ongoing protection of the victims in cases of domestic violence. There was no process, for instance, for dealing with the risk of retaliation against the victim for statements made by her during the mediation itself.

The traditional mediation process relies heavily on the judicial model of neutrality and impartiality. Like judges, however, mediators are not exempt from the politics of gender, class, race and culture. Moreover, it is naive to suggest that mediators, even with appropriate training, are immune from the minimising, trivialising and victim-blaming attitudes towards battered women which are so commonly found in judicial and psychological discourses about domestic violence.³⁶ In addition, because mediation techniques are unfamiliar to most parties, there is the danger that a mediator’s own goals will predominate during a mediation session. The parties may tend to rely on the claimed expertise of the mediator and the latter may be tempted to steer the meeting in his or her own direction rather than in that of the parties.³⁷

Another fundamental problem is that violence creates power imbalances between the parties. Violence against women is characterised by intentional measures by the offender to control the actions of the victim. Such control, which may be exerted in a myriad of ways,³⁸ has been described as having the purpose of getting a victim to do what the offender wants her to do, or punishing her for doing what the offender has told her she may not do.³⁹

³⁵ This has been addressed in the Hamilton programme by acquainting victims with the process and the difficulties that may arise. They are urged to have a support person present before, during and after each session to assist them in dealing with the issues raised.

³⁶ See, for example discussions of judicial and psychological discourses in Robertson and Busch, *The Dynamics of Spousal Violence: Paradigms and Priorities* in Seymour, F and Pipe, M (eds), *Psychological perspectives on Family Law in New Zealand* (1996) and in Busch, “Don’t Throw Bouquets at Me: Judges Will Say We’re in Love” in Stubbs, J (ed), *supra* n. 18, at 104.

³⁷ Marshall, T F and Merry, S, *Crime and Accountability: Victim/Offender Mediation in Practice* (1990) 205.

³⁸ See discussion of the range of power and control tactics in Pence, E. and Paymar, M., *Power and Control: Tactics of Men who Batter* (1990).

³⁹ Robertson and Busch, *supra* n. 36, at 84.

A risk entailed in giving the process over to the parties (even if overseen by an impartial third party) is that any decisions will simply reflect the power differences which exist between the parties.⁴⁰ This problem is magnified in the area of domestic violence where power imbalances may be extreme.⁴¹ Unless the process of mediation can compensate for these power imbalances, there is a major risk that the agreements reached will reflect the views of and outcomes desired by the dominant party.

It is claimed that the issue of power balancing can be addressed by process changes, such as dictating who goes first or ensuring that the less dominant party has access to adequate legal advice.⁴² Extensive experience as a mediator has shown one of the authors that while these interventions can compensate for minor differences in power, they are not capable of re-establishing equality where violence has occurred.

Some argue that power imbalances can be addressed through the use of "shuttle" diplomacy or indirect mediation.⁴³ It is suggested that this will contribute to the protection of the victim by ensuring that the parties do not meet. Although the use of shuttle diplomacy is not uncommon in victim-offender mediation, research has shown that such indirect mediation is time consuming and, ultimately, less effective than a face-to-face victim-offender meeting.⁴⁴ This is because a key purpose of the process is to enable the victim and the offender to become directly involved with one another in discussing what response is necessary to "put things right". This is less likely where the parties do not meet. As well, the use of shuttle diplomacy fails to address a very real question. If the parties are unable to negotiate face-to-face because one party fears confronting the other, does the use of shuttle diplomacy merely provide an illusion of safety? For instance, if the perpetrator makes it clear that he desires a specific form of restitution agreement, how can a mediator ensure that a victim's fear of post-mediation retaliation will not affect the outcome of the shuttle mediation?

Shuttle diplomacy can place the mediator in the invidious position of having to make a decision about whether to pass on a threat by one person

⁴⁰ National Committee on Violence Against Women, *Position Paper on Mediation* (December 1991) 10.

⁴¹ *Idem*.

⁴² Moore, C W, *The Mediation Process Practical Strategies for Resolving Conflict* (1991) 271-282.

⁴³ Carbonatto, *supra* n. 7, at 4.

⁴⁴ Marshall and Merry, *supra* n. 37, at 243.

to another. If the mediator passes the threat on “word for word”, he or she colludes in the re-victimisation of the victim. Moreover, what can one think of a restitution agreement reached as a result of the mediator repeating the perpetrator’s threats verbatim to the victim? If the mediator refuses to pass on the threats, however, the mediator imposes his or her version of the events on the parties. Indeed, in that situation the real danger that the victim may be in (should she refuse to reach an agreement with the offender) may be masked. Finally, the mediator’s influence on the content of the mediation is at its highest during shuttle mediation. This heightens the risk that biases and preferences of the mediators will predominate.

In the area of domestic violence, it is claimed⁴⁵ that mediation enables the parties to focus on relationship issues in a way which is not possible during Court proceedings. Because many women do reconcile with their abusers or, even if not, the relationship between the parties may continue long after the court case has finished, it is said that mediation can help both parties to develop ways of achieving a relationship based on trust and non-violence.⁴⁶ This claim ignores an important fact about domestic violence. It is one of the characteristics of men who are violent towards their partners that their violence often escalates at the time of separation. Indeed, domestic homicides are most likely to occur when the woman first attempts to separate or during the first year after separation.⁴⁷ Mediations occurring during this period, including restorative justice mediations, take place when the perpetrator is often using particularly aggressive efforts to control the target of his violence.⁴⁸ These mediations also have the consequence of suggesting that domestic violence is inherently a “couple problem” which can be addressed by offering conciliation to the parties. The use of violence reflects a serious social problem on the part of the batterer rather than a defect in the relationship.

When establishing the Waikato Mediation Services project, one of the primary goals was the protection and prevention of further harm to both the victim and the offender during -and after- the mediation process. From the past experience of one of the authors, it is clear that some perpetrators

⁴⁵ Carbonatto, *supra* n. 7, at 4.

⁴⁶ *Ibid.*, 8.

⁴⁷ Hart, “The Legal Road to Freedom” in Hansen, M and Harway, M (eds), *Battering and Family Therapy* (1993).

⁴⁸ Astor, *supra* n. 18, at 151, and Liss and Stahly, “Domestic Violence and Child Custody” in Hansen and Harway (eds), *ibid.*

use mediation as an opportunity for further contact with the victim.⁴⁹ Of particular concern in relation to cases of domestic violence was the reality that there were often insufficient resources to guarantee the protection of the victim during the mediation itself, let alone after the session is completed or after she has returned home.⁵⁰

Several final issues about victim-offender mediation need to be mentioned. First, the labelling of crime as “conflict” is an integral part of the restorative justice process. In situations of domestic violence, it can be misleading to define violent acts as simply an escalation in the conflict level. This labelling tends to have the effect of muting the perpetrator’s responsibility for the behaviour. Violence is not an escalation in conflict. It is one thing to have a difference of opinion. It is quite another to attack someone physically.⁵¹ Second, in the past, there had been social acceptance of spousal violence. Such violence has only recently come to be understood or treated as a criminal offence. In the past, there had been a general refusal on the part of the criminal courts to interfere in family matters. The focus had instead been on individual and marital privacy and the desire to preserve the family as an intact unit.⁵² All of these factors have in the past contributed to the trivialisation of domestic violence and the creation of a veil of secrecy which is only now being lifted. There is a danger that these outdated paradigms of secrecy and marital privacy may be legitimised by the confidentiality of the mediation process at a time when they seem to be losing their hold.

3. Family Group Conferences

The Family Group Conference (FGC) model was the second approach considered by Waikato Mediation Services in the formulation of its restorative justice protocols. The FGC approach was adopted in New

⁴⁹ This is referred to as “negative intimacy” and is clearly a factor influencing the appropriateness of mediation. See discussion in National Working Party on Mediation, *Guidelines for Family Mediation: Developing Services in Aotearoa-New Zealand* (1996). In one instance, a party who requested mediation as part of the community mediation project had non-violence, non molestation orders and trespass orders against him. The trespass notice was in respect of his partner’s solicitor’s offices. The mediation did not proceed.

⁵⁰ National Committee on Violence Against Women, *supra* n. 40, at 24.

⁵¹ Zehr, H, *Changing Lenses* (1990) 183.

⁵² Rowe, *supra* n. 32, at 875. For an analysis of domestic-violence related cases in the New Zealand criminal courts, see chapter 13 in Busch et. al., *supra* n. 28.

Zealand in 1989 as the centrepiece of youth justice initiatives codified in the Children, Young Persons and Their Families Act (CYP&F Act). Under that Act, the conferencing process applies to children and young offenders under 17 years of age.

In considering whether to adopt the FGC model, Waikato Mediation Services began by analysing the assumptions underpinning the FGC approach and evaluating whether similar assumptions would be relevant to offences committed by adults. In making this assessment, it needed to consider the implications of the process for the range of possible offences to be dealt with within the programme. Given the number of "male assaults female" prosecutions presently being heard in the Hamilton District Court,⁵³ it was quickly realised that a major issue involved the appropriateness of the conferencing approach for domestic violence offences.

Within the CYP&F Act, there is both a formal and an informal system, with Family Group Conferences having a central role in each process.⁵⁴ In the informal process, once the police have established an intention to charge, they are able to direct a youth justice co-ordinator to convene a Family Group Conference without reference to the Youth Court.⁵⁵ If the family is able to achieve an agreement and the offender completes the plan, the matter may not be referred to court. If agreement is not reached, the matter may be referred back to the court. On the other hand, if a young offender is arrested the formal youth justice process operates. The young offender will appear in court without entering a plea and, if the charge is not denied, the judge will direct the youth justice co-ordinator to convene a Family Group Conference.

Although there is no prescribed conference format, the co-ordinators have developed routine procedures for conducting FGCs.⁵⁶ Once a case has been referred to the conference, the co-ordinator sets up an appointment

⁵³ Accused are charged under section 194 of the Crimes Act. For a discussion of the reasons for the increase in prosecutions under section 194, see Dominick, C, *Overview of the Hamilton Abuse Intervention Pilot Project (HAIPP) Evaluation* (April 1995) 42.

⁵⁴ New Zealand Ministry of Justice, *Restorative Justice: A Discussion Paper* (October 1995) 26.

⁵⁵ Maxwell, G and Morris, A, *Family, Victims and Culture: Youth Justice in New Zealand* (1993) 69.

⁵⁶ *Ibid.*, 87.

to meet with the young person and his or her family.⁵⁷ At this visit the process is explained to the family and to the young person and a determination is made about whether the young person will admit or deny the charges.⁵⁸ The young person's attitude to the offence is assessed and he or she is briefed about the meeting processes, including the issues around meeting with the victim.⁵⁹ On some occasions the co-ordinator will outline the possible outcome results available to the family including the resources, programmes and facilities available.⁶⁰

At the conference itself the co-ordinator welcomes the participants as they arrive and attempts to put them at ease.⁶¹ The co-ordinator will normally check with the family about whether they wish to open with a prayer, blessing or other introductory statement.⁶² When all parties are present, the conference begins with introductions. In some areas this is preceded by a prayer or karakia and a welcome in Maori.⁶³

The co-ordinator then explains the procedure to be followed. It is important that all of the participants have a clear understanding of what will happen during the conference.⁶⁴ In addition to providing a necessary opportunity for the parties to ask questions and settle in, this step allows the co-ordinator to assess the "mood" or atmosphere of the conference.⁶⁵

The Youth Aid Officer then reads a summary of the facts and asks the young offender whether the facts are accurate.⁶⁶ It is rare for him or her to deny the accuracy of the fact summary.⁶⁷ The young person is then asked to state clearly whether he or she accepts responsibility for the offence. This is often the first opportunity for the young offender to assume

⁵⁷ Stewart, T, "Family Group Conferences With Young Offenders in New Zealand" in Hudson, J, Morris, A, Maxwell, G, and Galaway, B (eds), *Family Group Conferences: Perspectives on Policy and Practice* (1996) 75.

⁵⁸ Idem.

⁵⁹ Idem.

⁶⁰ Maxwell, G and Morris, A, "The New Zealand Models of Family Group Conferences" in Alder, C and Wunderersitz, J (eds), *Family Conferencing and Juvenile Justice The way Forward or Misplaced Optimism* (1994) 15, 23.

⁶¹ Stewart, supra n. 57, at 76.

⁶² Ibid., 75.

⁶³ Maxwell and Morris, supra n. 55, at 87.

⁶⁴ Stewart, supra n. 57, at 77.

⁶⁵ Ibid., 75.

⁶⁶ Maxwell and Morris, supra n. 55, at 87.

⁶⁷ Ibid., 87.

responsibility for his or her actions.⁶⁸ If the information in the summary of facts is disputed, it is possible to correct an error at this time.⁶⁹ If, however, the young person denies responsibility for the offence, the FGC is terminated and the matter is referred back to the police.⁷⁰

Once an admission is made, the co-ordinator asks the victim to speak.⁷¹ Alternatively, if the victim is not present, the reported views of the victim are read to the conference.⁷² The purpose of this step is to allow the victim to detail the effects of the offending on her and to raise questions about what happened and why. The young offender is asked to listen to the victim's statement without interruption. The young person's family may, however, ask questions. At the conclusion of the victim's presentation, there is often an emotionally charged silence while conference participants await the response of the young offender⁷³ who is then asked to explain how he or she felt upon hearing the victim's side of the story.⁷⁴

The co-ordinator will then ask whether other members of the family would like to speak. All participants in the process are asked to provide information which may be relevant to the formulation of a decision of the issues. Family members and counsellors may speak about the offender's life in order to paint a total picture of the young person's situation.⁷⁵

Once all of the information has been presented and after a general discussion of possible conference outcomes, the family is left in private to consider and resolve the issues raised in its own unique way.⁷⁶ A plan, in theory generated by the family, is then formulated.⁷⁷ The plan commonly covers three main elements. First, "putting things right" in the form of an

⁶⁸ Stewart, *supra* n. 57, at 75.

⁶⁹ Maxwell and Morris, *supra* n. 60, at 21.

⁷⁰ *Idem*.

⁷¹ *Ibid.*, 27.

⁷² Maxwell and Morris, *supra* n. 55, at 88.

⁷³ Stewart, *supra* n. 57, at 78.

⁷⁴ *Idem*.

⁷⁵ Fraser, S and Norton, J, "Family Group Conferencing in New Zealand Child Protection Work" in Hudson et. al.(eds), *supra* at n. 57, 39.

⁷⁶ *Idem*.

⁷⁷ In some regions, social workers, police and facilitators have not withdrawn from the FGCs. This raises the concern that these professionals may have "construct[ed] the family's decisions" by selecting the issues to be addressed and influencing the outcomes. Maxwell and Morris, *supra* n. 55, at 113-15.

apology.⁷⁸ Second, addressing the issue of reparation.⁷⁹ For example, the family may suggest that there be regular payments to the victim from part-time earnings or the sale of an asset.⁸⁰ The third element of the plan involves a penalty.⁸¹ This may entail the young person engaging in unpaid work either for the benefit of the victim or for an organisation suggested by the victim.

Once the plan is formulated by the family, there may be some negotiation between all the conference participants about the content of the plan. The victim and the police may veto the terms of the proposed plan. In that event, the matter is referred back to the court for resolution. If the plan is accepted by the victim and the police, its exact details are finalised and then recorded by the co-ordinator and a review date is set for one week prior to the young person's fulfilling the plan's requirements.⁸² The participants are asked to make any final comments⁸³ and the meeting is closed with a final statement thanking the parties for participating in the process.⁸⁴

4. Strengths of the conferencing approach over the victim-offender mediation process

One of the advantages of the Family Group Conferencing process is the sharing of information with the extended family. This removes some of the secrecy that can surround offending and enables the family to support the parties in dealing with the effects of the offending. This is a particular problem with the traditional two party victim-offender mediation process with its strong emphasis on confidentiality. Things which have in the past only been "whispered behind closed doors" can now be brought into the open.⁸⁵ A number of families involved in Waikato Mediation Services' programmes who have begun to openly discuss their problems have found that their family and friends have willingly supported and affirmed them.

It is fundamental to the family group conferencing process that the parties

⁷⁸ Stewart, *supra* n. 57, at 79.

⁷⁹ *Idem.*

⁸⁰ *Idem.*

⁸¹ *Idem.*

⁸² Stewart, *supra* n. 57, at 80.

⁸³ *Idem.*

⁸⁴ Maxwell and Morris *supra* n. 55, at 88.

⁸⁵ Barbour "Family Group Conferences: Context and Consequences" (1993) 5 *Social Work Review* 16, 18.

should be able to participate in decisions which affect them.⁸⁶ Since the basis for the FGC is non-adversarial, it encourages the family to find the resources from within rather than to rely on a solution imposed by “experts”. In one of the first of the court referrals to Waikato Mediation Services, the family involved resolved independently to discuss the relevant issues among themselves without the need for mediators to convene a conference. Holding a conference despite the family’s opposition would have said to the family: “Yes, we (the experts) know that you think you are coping fine but we know better”. This respect for the family decision-making remains an important ingredient in the conferencing process used by Waikato Mediation Services.

It has been suggested that the family decision-making process can change the way in which families think and function.⁸⁷ The very fact that participants are able to meet and discuss issues openly can begin the healing of family relationships. In one of the first referrals to the Hamilton restorative justice programme, for instance, a son had repeatedly denied that he had any involvement with alcohol or drugs. This lie was uncovered when his family found a “bong” in his room which he admitted that he had used to smoke marijuana. During the conference, the mediators explored with him what actions he believed were necessary to win back his parents’ trust. By the end of the conference, certain steps were agreed to in order to start him “on the road to self responsibility”. When three weeks later, he was accused of taking things from his father’s garage, he “owned up” to his actions rather than denying them as he had done on numerous previous occasions. He openly discussed with his parents what further steps he could take to remedy this very recent breach of trust. In the context of this young man’s previous behaviour, this acknowledgment represented a positive change. By looking at the agreement he had made during the conference, he re-committed himself to taking responsibility for his actions.

Waikato Mediation Services has adopted a conferencing model which includes not only families as participants but also people drawn from the victim’s and offender’s communities. This community conference approach draws on the wide range of knowledge within the parties’ social networks to support change.⁸⁸ It enables the parties to realise the array of

⁸⁶ “Introduction” in Hudson et. al. (eds), *supra* at note 56, at 2.

⁸⁷ Barbour *supra* n. 85, at 19.

⁸⁸ *Idem*.

resources available to them within their families and communities. Since, in most cases, funding for conferencing allows the offender and victim access to mediators for only a few hours, it is essential that parties utilise the strengths of their on-going family and community networks to complete their rehabilitation work.

The conferencing process enables participants to find wide-ranging options to address the causes of the offending and its effects.⁸⁹ These can include options which were not readily apparent at the time the conference was called. For instance, in the Canadian provinces of Newfoundland and Labrador, the outcomes of community conferences have included dealing with a party's or family's needs for fire wood or a refrigerator as well as more obvious solutions of counselling for substance abuse or sex abuse.⁹⁰

In assessing the appropriateness of the conferencing approach for adult offenders, Waikato Mediation Services has been particularly attracted to its family empowerment and community re-integration aspects. In addition, the conferencing process seems capable of meeting the needs of specific cultural groups because of its commitment to the involvement of extended family groups.⁹¹ These benefits are less evident in the previously discussed two party victim-offender mediation model. The conferencing process that Waikato Mediation Services has recently implemented has, as a key element, a commitment to separate conferences for offenders' and victims' families and communities. This enables victims' support networks to explore the effect of the offending on the victim and on his or her family and friends without the negative dynamics that may arise because of the presence of the offender.

5. Limitations of the Conferencing Approach in relation to domestic violence offences

There are several aspects of the Family Group Conference model which make its use problematic for domestic violence offences. Some issues, like the importance accorded to mediation techniques and consensus

⁸⁹ Ibid., 18.

⁹⁰ Burford, G. and Pennell, J. *Family Group Decision Making Project Implementation Report Summary* (1995) 33.

⁹¹ We are conscious that the conferencing process has at times been accused of being tokenistic, pakeha dominated, and unresponsive to cultural difference. While the use of Maori mediators can ameliorate certain problems inherent in the FGC approach, WMS understood that nothing short of a parallel legal system could address the issues of pakeha gatekeeping and control of the process.

decision-making, are concerns that have already been discussed in terms of the victim-offender mediation model. As in the latter model, the emphasis of the FGC is on consensus decision-making arrived at through mediation between the parties. The conference facilitator fulfils the role of the mediator who negotiates between parties who may have widely differing perspectives on the offending.⁹² A number of the problems already discussed in terms of traditional mediation and its application to domestic violence are, therefore, inherent in the conferencing process. Other problems are specific to the conferencing model itself and involve concerns about community support for victims in domestic violence situations, safety of participants at conferences, and negative research findings that have emerged from recent evaluations of FGCs.

As discussed, the family group conference posits a communitarian approach to offender accountability. It relies on the notion of a family, or community of people, with shared values who are capable of exercising surveillance and control over the offender's future behaviour.⁹³ The conferencing process is a reflection of re-integrative shaming proposed by Braithwaite.⁹⁴

One concern about the conferencing process is the assumption that the offender in a domestic violence situation will be shamed into changing his behaviour. In domestic violence cases, the concept of re-integrative shaming posits the view that each member of the offender's community will accept that domestic violence is unacceptable.⁹⁵ It needs to be acknowledged, however, that in New Zealand at present there is no such societal consensus about domestic violence.⁹⁶ Instead, researchers have found that an offender's abusive behaviour takes place within a social context which often legitimises, condones and even supports his use of violence.⁹⁷ There is no reason to believe that violent men will readily be shamed into accepting that their violent acts are wrong.⁹⁸ As well, the

⁹² Maxwell and Morris *supra* n. 55, at 87.

⁹³ Stubbs, J, "'Communitarian' Conferencing and Violence Against Women: A Cautionary Note" (Unpublished Paper, 1996) 17.

⁹⁴ Braithwaite, J, "*Crime, Shame and Reintegration*" (1989). It is noted that the work of Braithwaite has had a greater influence on the Australian Family Group Conferences than the New Zealand FGC process.

⁹⁵ Stubbs, *supra* n.93, at 17.

⁹⁶ *Idem*.

⁹⁷ *Supra* n. 38.

⁹⁸ Stubbs, *supra* n. 93, at 17.

parties' families or communities may not be supportive of a victim's attempts to hold the perpetrator accountable for his actions.

In order to see the use of the conferencing model as appropriate in domestic violence cases, it is necessary to understand how a family or community seeks to "explain" the occurrence or causes of abuse.⁹⁹ Some of these explanations attribute the responsibility for violence wholly, or in part, to the victim. Others assume that the use of violence may, in certain circumstances, be an acceptable response to a conflict situation. Given that the conferencing model relies heavily on the participation of the victim's and offender's community for the generation of "solutions" or responses to the offending, the discourses of the community will influence the discussion of the causes of and proposals to resolve the abuse.

It is our belief, however, that from the conferencing perspective, the most dangerous explanations are those which site the cause of abuse in the relationship between the partners. If violence is defined as a "symptom of a problem in the relationship"¹⁰⁰ rather than a *real* problem of itself, the conference outcomes will, in all likelihood, reflect commonly held justifications and excuses for violence (eg "she provoked him", "it takes two to tango", "they're a dysfunctional family"). A focus on the relationship as the cause of violence may mask the impact of the violence on the victim and her on-going need for protection. The ways in which social attitudes legitimise the use of power and control tactics ("he's the head of the family"), and the issue of who benefits and loses from the perpetrator's use of violence may also be hidden. Most importantly, a relationship focus often may fail to hold the perpetrator accountable for his violence, and indeed, reconciliation or conciliation may be prioritised over the victim's need (and legal right) to safety.

Another major concern about adopting the conferencing model for adult offenders arises from research which has found that victims or their representatives have attended only 46% of conferences.¹⁰¹ For those victims who have been present, statistics indicate that 38% felt worse after attending the conference.¹⁰² Although there have been attempts to explain these disappointing statistics in terms of inadequate preparation

⁹⁹ Jenkins, A, *Invitations to Responsibility - The therapeutic engagement of men who are violent and abusive* (1990) 25-28.

¹⁰⁰ See discussion of "interactional" theories of domestic violence in Robertson and Busch, *supra* at n. 36.

¹⁰¹ Maxwell and Morris, *supra* n. 55, at 75.

¹⁰² *Ibid.*, 119.

of victims and unrealistic expectations of conference outcomes, victim dissatisfaction may in fact reflect the underlying objects of the FGC which focus primarily on the offender and his family. One can only query whether a victim would be more likely to participate if the offender were an intimate who had a (lengthy and on-going) history of violent behaviour toward her rather than a stranger who had committed a non-violent property offence.

There is also concern about the low levels of actual participation in the FGC process by offenders. Research indicates that 34% of offenders believed that they had been actively involved in the decision-making process while another 11% believed that they had only been partly involved. Forty-five percent of offenders believed that they were not involved in the process at all.¹⁰³ Although these figures may be related to the ages of the offenders involved in FGCs, they suggest an important concern for using this approach with adults. In the area of domestic violence, it is especially important that the real participation of offenders is high in order to ensure their acceptance of responsibility for their violence and of conference outcomes.

A further concern is that two-thirds of FGC facilitators describe hostility being directed either at family members or at Department of Social Welfare staff during the conferences.¹⁰⁴ This hostility has included shouting, verbal abuse, threats and even physical violence.¹⁰⁵ Over half of the facilitators reported that the safety of at least one party had been threatened during Family Group Conferences.¹⁰⁶ Anecdotal evidence also exists to support these views. One facilitator reported to one of the authors that she had had to hurriedly abort a care and protection conference when a husband told his battered wife: "One more f..... word from you and I'll throw you out this bloody window."¹⁰⁷ Another facilitator described how at a FGC held to deal with the effects on the children of witnessing their mother's repeated beatings, the perpetrator was able to force his partner to forego the support of her family by simply snapping his fingers and pointing to the empty chair next to him. The wife had initially sat down with her family but moved "automaton-like to his side" immediately after his

¹⁰³ *Ibid.*, 109-110. Ten percent expressed no opinion about whether or not they had participated.

¹⁰⁴ Robertson, J. "Research on Family Group Conferences in Child Welfare in New Zealand" in Hudson et al (eds), *supra* at n. 57, 54.

¹⁰⁵ *Idem.*

¹⁰⁶ *Idem.*

¹⁰⁷ Personal interview between Ruth Busch and care and protection panel facilitator, February 1996.

gesture. A year later, the woman was killed and her partner has now been found guilty of her murder.

Clearly there is a risk that the safety of participants may be compromised during FGCs. This is of particular concern in cases of domestic violence where there has been a previous history of threats and intimidation and where the perpetrator has used physical violence as a means of getting his own way. This risk may extend beyond the perpetrator's typical targets of violence (eg, his spouse and/or his children) and influence the participation of all family and community members at the conference.

Facilitators themselves may be fearful of challenging abusers' behaviours and belief systems because of worries about their own safety. As an example, one of the authors recently facilitated a mediation involving an assault. When he openly confronted the offender about his use of violence, the mediator immediately began to feel nervous about pressing on with that line of questioning. The offender had a history of explosive episodes of violence and the mediator was concerned about putting himself at risk by continuing to confront him.

What is the message to a perpetrator and his victim if the conference facilitator and participating family members refuse to challenge his use of power and control tactics? Alternatively, if threats are made or violence is used, what should the facilitator do to ensure the safety of the victim and other conference participants? The present approach seems to be for the facilitator to abort the conference, but how does this help to ensure the safety of an abused spouse? Another approach is to omit known batterers from the conference but this calls into question the utility of holding a conference in such circumstances. In informal meetings with CYPS supervisors and co-ordinators, a repeated observation has been that all too often the perpetrator's violence is neither confronted nor dealt with at FGCs, precisely because of this fear factor.¹⁰⁸

6. The Burford and Pennell Conferencing Model

Gale Burford and Joan Pennell are currently trialing the use of the conferencing model for child abuse and family violence cases in Newfoundland and Labrador. Their initial report details some of their findings and outlines in detail the process used by them.¹⁰⁹ Two central

¹⁰⁸ Personal interview between Ruth Busch and social worker, June 1996.

¹⁰⁹ Burford and Pennell, *supra* n. 90.

principles are used to guide the project.¹¹⁰ The first is that family violence does not stop by itself; there must be mandatory intervention by government authorities such as probation or child welfare workers.¹¹¹ Second, the best long range solutions are those which give the affected parties the opportunity to come up with solutions that are appropriate for their families, their communities and their culture.¹¹²

Cases are referred to the project by child welfare workers where abuse against the child is confirmed through investigation.¹¹³ The project appears, therefore, to be initiated by reference to the safety needs of children. Approximately three to four weeks of preparation occurs before the conference takes place. During this period the facilitators contact the parties and discuss steps to protect the safety of participants during the process.¹¹⁴ The conference participants include family members (defined to include extended families), friends, support people or guardians, and other significant social supporters including statutory agency representatives. The process relies heavily on the work of Braithwaite and the use of re-integrative shaming as a method to change the offender's actions.¹¹⁵ Where the conference co-ordinators believe that the victim's (or victims') safety may be at risk, abusers are excluded from the conference.¹¹⁶ Where abusers are excluded, their views are expressed either by letter or through a representative. Cases involving the most serious criminal offences are excluded from the process.¹¹⁷

These conferences follow a similar process to that used in New Zealand FGCs. As with FGCs, the actual decision is made by the family group participants. The co-ordinator emphasises that the conference belongs to the family (rather than to the statutory agencies involved) and this is reinforced by the use of community facilities for the conference venue, circular seating and voluntary participation.¹¹⁸ After advising the family

¹¹⁰ Burford, G. and Pennell, J. "Attending to Context: Family Group Decision Making in Canada" in Hudson et. al. (eds), *supra* at n. 57, 207.

¹¹¹ *Idem*.

¹¹² *Idem*.

¹¹³ *Ibid.*, 206.

¹¹⁴ Burford and Pennell, *supra* n. 90, at 14.

¹¹⁵ Burford and Pennell in Hudson et. al. (eds), *supra* n. 57, at 209.

¹¹⁶ Burford and Pennell, *supra* n. 90, at 13. It was not specified in the interim report, how many times this occurred.

¹¹⁷ *Ibid.*, 14.

¹¹⁸ Burford and Pennell, in Hudson et. al. (eds), *supra* n. 57, at 210.

about the possible plan outcomes, the conference co-ordinators and other professionals withdraw from the room and leave the family to arrive at its decision.¹¹⁹

The initial results of the project show that the majority of family members who were invited came to the conference and participated “responsibly” in the decision-making process.¹²⁰ Based on the results of thirty-seven conferences, the findings indicate that family groups had a commitment to working together to prevent further violence.¹²¹ Family members reported that they were satisfied with the conference process and outcomes.¹²² The project, however, is in its early phases and further evaluations of additional conferences need to be performed.

The Burford and Pennell report does record one instance which causes some concern. The family involved in that conference ended up denying that any violence had occurred. In this case, it appears that the views of the mother and the children were not adequately represented¹²³ and the husband/father was able to intimidate the family into refusing to acknowledge the abuse. In commenting on this case, Burford and Pennell noted: “That experience confirmed a potential worst fear about how families might subordinate the abuse to other concerns”.¹²⁴ They also commented that this was not the only conference where this dynamic surfaced. In other conferences, however, the family and the professionals were able to ensure that things did not get “turned around”.¹²⁵

7. The conferencing process suggested by Carbonatto

In her article outlining the appropriateness of a restorative justice approach for domestic violence, Helene Carbonatto develops a conferencing process to be used in New Zealand.¹²⁶ The conference would involve a trained facilitator, who would be responsible for bringing the parties and their “key network members” together. Participants in the meeting would include family, friends and others whom the spouses respect and who are

¹¹⁹ Burford and Pennell, *supra* n. 90, at 27.

¹²⁰ *Ibid.*, 9. What the term “responsibly” meant was not explained.

¹²¹ *Ibid.*, 24.

¹²² *Ibid.*, 25.

¹²³ *Ibid.*, 28.

¹²⁴ *Idem.*

¹²⁵ *Idem.*

¹²⁶ Carbonatto, *supra* n. 7, at 4.

prepared to assume responsibility for them.¹²⁷ If the situation was potentially explosive the mediations could be conducted on a “shuttle approach”. Referrals would come from statutory and community agencies such as the police, women’s refuge and men’s groups.

The object of the conference is to end domestic violence by addressing the causes of the offending, providing support for the victim, and imposing a sanction on the offender which is decided upon “by a ‘community’ of people who have an interest in the lives of both the offender and the victim”.¹²⁸ The role of the conference participants is to propose sanctions which will “adequately resolve family abuse”.¹²⁹ Plans would be arrived at through consensus decision-making with no express provision for the victim to veto proposed sanctions. If the group’s sanctions did not prevent further violence, police could become involved.

Carbonatto provides examples of the types of sanctions which might be imposed. For instance, the conference group might implement a plan for checking on the victim at “risk times”, such as Friday and Saturday nights “when many incidents occur”.¹³⁰ Alternatively, the plan might require members to provide the perpetrator with a bed to ensure that he stays away from home if he goes out drinking. Where perpetrators are financially secure, the plan could entail putting the family’s bank accounts into the victim’s name to allow her to walk out of the relationship and be financially independent if more violence occurs.

8. Problems with the Carbonatto Approach

This model is clearly only in a developmental phase, however it does cause a great deal of concern. It is a process which can be initiated without referral to the police or the judiciary. It operates under a mantle of confidentiality and there is virtually no external accountability unless further violence occurs. The process creates a situation where the sanction becomes something to be established by the conference participants alone, without reference to the wider community’s interest in addressing the consequences of offending. Conferencing under this model may fail to confront the problems inherent in consensus decision-making within a family or community context.

¹²⁷ *Idem.*

¹²⁸ *Ibid.*, 3.

¹²⁹ *Idem.*

¹³⁰ *Ibid.*, 4.

In the Carbonatto model, the suggested sanctions fail to address the underlying causes of domestic violence and provide superficial responses to issues of victim safety and autonomy. Carbonatto's proposed sanctions perpetuate many of the now discredited myths of domestic violence and do not acknowledge the variety of tactics used by perpetrators to maintain power and control over their partners and children. For instance, few researchers now believe that domestic violence is caused by alcohol consumption or that it occurs only on weekends. As well, while the Carbonatto model recognises that "[the victim] may not even have a meaningful community in [her] geographical area,"¹³¹ the common use of isolation as a tactic of power and control is not discussed. Instead, Carbonatto places the onus on the conference facilitators to manufacture a "community" for one or both of the parties so that a conference can be convened. As Carbonatto states:

The onus is on the facilitators to find such a community. Thus the need for facilitators to be inventive in mobilising key network members. This may, for example, take the form of approaching a neighbour whom the victim has only casually met (obviously with her consent).¹³²

The most significant drawback in the Carbonatto model is that it does not require the perpetrator to take responsibility for his violent behaviour. By asking family and friends to supervise his actions to prevent further violent incidents during "risk periods", the focus shifts from the abuser's accountability for his violence to the adequacy of the restraints put in place by the community. In the face of future violence, the issue may well revolve around whether or not a certain support person failed to carry out the terms of the sanction rather than focus on the abuser's violence and its consequences for the victim. The agreed plan itself may provide the abuser with an excuse or justification for his violence ("If only you had checked up on things on Saturday night like you were supposed to, this would never have happened.")

As opposed to criminal justice interventions which prioritise victim's safety over reconciliation and/or conciliation concerns, the assumptions underlying the Carbonatto model tend to characterise domestic violence as a relationship issue. The sanctions suggested reflect Carbonatto's view that: "The reality is that many women return to their abusive partners and, therefore, it is necessary to develop ways to help both partners achieve

¹³¹ *Ibid.*, 3.

¹³² *Ibid.*, 3-4.

relationships based on trust and non-violence”.¹³³ In fact, it is often the victim’s very inability to obtain adequate legal protection or financial autonomy for herself and her children which leads her to reluctantly reconcile with her abuser. This is especially true in cases of recent separation, when statistics in New Zealand¹³⁴ and overseas¹³⁵ indicate that the risks of serious injury and homicide are heightened.

There is no provision in the Carbonatto model for monitoring the perpetrator’s compliance with the terms and conditions of the agreed plan. Neither is there any follow-up process outlined by which the victim’s concerns and experiences can be compiled and used to further refine or amend the sanctions already in place. In addition, the Carbonatto model relies on the use of “shuttle” mediation for what she characterises as “potentially explosive situations”.¹³⁶ Her definition of this phrase highlights many of the problematic aspects of her model. In an implicitly victim-blaming statement she comments: “[A potentially explosive situation is] one in which the victim does not want reconciliation with the offender but is more intent on securing her protection”. Surely the object of all interventions in the domestic violence area - including mediations and other restorative justice initiatives - must prioritise the safety of the victim.¹³⁷ Moreover, as already discussed, shuttle mediation is the least effective of the mediation processes in terms of its vulnerability to abuse and influence.

9. The Community Group Conference

The process being trialed in Hamilton is a hybrid one based primarily on the victim-offender mediation approach but incorporating elements of the Family Group Conference model. In the Hamilton scheme, the District Court refers offenders to the project during the period between conviction and sentencing. Before individual meetings with any of the parties, referrals are reviewed by a Pilot Review Committee comprising representatives from community and statutory agencies and the legal profession. Presently, the Committee includes appointees from the police, community corrections, victim’s support, the Hamilton Abuse Intervention Pilot

¹³³ *Ibid.*, 4.

¹³⁴ Busch, “Safeguarding the Welfare of Children” (1995) 4 *Butterworths Mental Health & the Law Bulletin* 46, 48.

¹³⁵ *Idem.*

¹³⁶ Carbonatto, *supra* n. 7, at 4.

¹³⁷ *Guidelines for Family Mediation*, *supra* n. 50, at 55.

Programme, Matua Whangai, the Hamilton District Court, church groups, legal academics and criminal barristers. There is special consideration given to the gender balance of this group. The Review Panel may either reject the referral or impose conditions on its acceptance, such as the offender's and/or victim's participation in prior counselling or educational programmes.

After an intake procedure, the parties each meet separately with the mediators and then separate Community Group Conferences are held. The purpose of each separate conference is to address the effects of the offending on the parties and their respective family and friends, and to enlist future support to stop the offending. For the victim, the separate conference allows an exploration of the ways in which her reaction to the offender and the offending have strained her relationships with family and friends. For the offender, it allows conference facilitators to address his specific rehabilitation needs without the victim feeling that her issues are being ignored. One risk of dealing with rehabilitation in the joint session is that the victim will interpret this as indicating that the "real victim" is the offender.

Mutual issues are addressed in a joint session after the separate community group conferences are held. The joint session may involve family and other support people, if requested by the parties. In the Hamilton process, the victim and offender structure the restoration plan; however, they are strongly encouraged to have support people present before, during, and after the joint session. The role of these support people is usually to assist and encourage the parties to generate suitable responses to the offending and to provide an additional level of protection for the victim. In addition, follow-up sessions are built into all restoration plans in order to monitor compliance with the terms of any agreements. Plans are amended where proposals have proven to be unsatisfactory.

10. The process used by the Hamilton project in circumstances involving domestic violence

In the protocols adopted by the Hamilton scheme, mediation is generally deemed to be unsuitable for cases of domestic violence.¹³⁸ Referrals are excluded where there is evidence of domestic violence in all but the most exceptional of circumstances. Such exceptions might include instances where the violence involved an isolated incident, occurred within the

¹³⁸ National Committee on Violence Against Women, *supra* n. 40, at 35.

context of family trauma or highly unusual circumstances, and the risk of further violence was remote. The mediators would have to satisfy themselves that there has been no previous history of physical, sexual, or psychological violence against an offender's (ex) spouse, children, or others with whom either party has a domestic relationship.¹³⁹ Threatening or intimidatory behaviour as well as destruction of property and harassment each constitute "psychological violence" and it is highly unlikely that cases involving such facts would be deemed suitable for the programme. Referrals are also rejected where the offender has made suicide threats, has a psychiatric or substance abuse history, or has abducted or threatened to abduct children.¹⁴⁰

In those rare instances where such referrals are accepted, they are subject to specific process protocols which have been adopted to deal with the power and control dynamics inherent in most battering relationships. The protocols are designed to ensure that the victim is fully informed of her legal rights and the other options available to her before making a decision about whether to proceed with mediation. At our first meeting, the victim is encouraged to formulate a safety plan, is briefed about her legal remedies and advised to get independent legal advice about protection orders. Finally, she is informed about the array of community and government agencies which she might need to contact for further protection (eg the Hamilton Abuse Intervention Project, the local women's refuges).

Identification of domestic violence factors is of utmost concern. Where violence forms the basis for a charge against the offender, there is less opportunity for domestic violence issues to be hidden. Charges involving breaches of protection orders and assault are, therefore, readily identifiable. In some cases, however, it is possible that the type of charge may mask the existence of such violence. For instance, if the offender has been charged with theft or damage to the property of a former partner or assault against her present spouse, it may not be apparent that domestic violence issues are involved. In order to deal with this contingency, parties are always asked whether they know the offender. Where it is revealed that the victim and the offender do know each other, the victim is asked to detail the nature of their relationship and specific questions are asked to ascertain whether there have been any previous violent incidents.

¹³⁹ See definition of "domestic violence" in section 3 of the Domestic Violence Act 1995.

¹⁴⁰ This approach coincides with the definition of "serious violence" found in Magana, and Taylor, "Child Custody Mediation and Spouse Abuse: A Descriptive Study of a Protocol (1993) 31 Family and Conciliation Courts Review 50, at 55.

In those few domestic violence situations where mediation is considered appropriate, a “narrative mediation” process is adopted as opposed to the strictly problem solving approach used in the traditional victim-offender mediation model. One of the advantages of this technique over other forms of mediation and conferencing is that it examines the social discourses which have allowed the offender to avoid responsibility for his violence. Narrative mediation facilitates a deconstruction of the perpetrator’s belief system about gender roles and violence, and allows him to explore the ways that these beliefs are socially constructed and legitimised. For example, the offender in his initial separate session is asked such questions as:¹⁴¹

- If a man wanted to control and dominate another person, what sort of strategies and techniques would he put into place to make this possible?
- If a man desired to dominate another person what sort of attitudes would be necessary to justify this?

These questions allow the offender to consider the implications of violence generally, before examining whether, and how, he has engaged in the use of power and control tactics in his domestic relationships.

A decision to proceed further with the mediation process is conditional on the offender understanding the impact of his actions on the victim and her children and family. He also needs to accept responsibility for his actions, not blame his victim for his use of violence, and agree that it is her decision solely to determine her future involvement (if any) in their relationship. For example, the offender needs to agree to cease all unwanted contact with the victim by not telephoning or writing to her or coming to her home or workplace. In general, the offender needs to stop all behaviours which the victim might consider coercive, controlling or dominating in order to empower her to make her own decisions about her future.

Issues arising during the victim’s separate session mirror the ones addressed with the offender. She is encouraged to discuss the ways in which she has accepted responsibility for his violence and how such acceptance reflects prevailing societal assumptions about gender relations and domestic violence. The session also focuses on issues of self blame, her feelings of despair and worthlessness in being unable to stop the violence, and in general women’s role vis-a-vis their male partners. A primary aim of this separate session is to encourage the victim to place responsibility for the violence squarely on the offender.

¹⁴¹ White M. “Deconstruction and Therapy” in Gilligan, S and Price, R (eds), *Therapeutic Conversations* (1993) 22, 30.

Through the use of community group conferences, the communities of victims and offenders can be mobilised to provide support for dealing with the consequences of violence. The conference also allows participants to more openly address the issue of secrecy which can surround violence in families. Only when mediators and conference participants are satisfied that it is safe and appropriate to meet will the parties meet in a joint session. This protocol has the advantage of prioritising victim safety and offender accountability over all other issues in the mediation process.

III. CONCLUSION

The restorative justice process opens up new opportunities for victims and offenders to actively participate in the criminal justice system. However, the desire for change should not be allowed to blind us to the limitations of the process. These limitations arise from the dynamics of mediation and conferencing and are clearly exemplified in cases of domestic violence. In this early trial period of restorative justice initiatives in New Zealand, great care and thought should be given to whether domestic violence cases should be referred to these programmes. In our view this decision should not be taken lightly. The process should only be attempted in rare cases and then only after special protocols are followed to ensure a victim's free and informed consent and safety. It must be remembered that in most cases, an abuse victim turns to the criminal justice system for protection from on-going violence. She should not be asked to participate in any process which may compromise her safety and risk exposing her to further violence. At the very least, the system which a victim turns to for protection should not be complicit in her further victimisation.

VIOLENCE AGAINST FILIPINO WOMEN IN AUSTRALIA: RACE, CLASS AND GENDER

BY CHRIS CUNNEEN* AND JULIE STUBBS**

I. INTRODUCTION

This article provides preliminary findings from research currently being undertaken concerning violence against Filipino women in Australia. For some time Filipino community groups, and particularly Filipino women's organisations, have been campaigning to promote greater public awareness of the vulnerability of Filipino women to violence, in all its manifestations. They have challenged both the Australian and the Philippine governments to provide an adequate response to violence, including that practised by Australian citizens in the Philippines, and in Australia. Whilst violence against Filipino women and children has a number of manifestations, including aspects of sex tourism, prostitution and the full spectrum of forms of domestic violence, it was the extent to which Filipino women in Australia were the victims of homicide which provided the impetus for this study.

The authors were asked by the Human Rights and Equal Opportunity Commission (HREOC) to undertake this research, which had been specifically sought by the Centre for Philippine Concerns - Australia (CPCA). In addition to a specific concern about the high number of homicides of Filipino women in Australia, the CPCA raised the following concerns: the resettlement of Filipinos in Australia who are sponsored migrants and their increased vulnerability due to a lack of access to, and absence of information about, their legal rights; the treatment of Filipino women in violent situations by law enforcement agencies; and the role of the media in shaping images about Filipino women and the impact these images have on encouraging Australian men to travel overseas to meet Filipino women for marriage or relationships, and in ultimately moulding the community's attitudes to Filipino women. HREOC sought submissions from key organisations, service providers and individuals throughout Australia regarding: the existence and use of services by Filipino women in domestic violence situations; the adequacy of legal provisions for

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protecting Filipino women against domestic violence; Filipino women and access and equal treatment before the law; resettlement issues for Filipino women and social, economic and cultural factors that impact on resettlement experiences; and immigration issues impacting on Filipino women (including sponsorship). Community consultations were also undertaken in a number of locations across Australia where there are significant numbers of Filipino women.

II. FRAMING THE RESEARCH

This project seeks to understand the complex set of factors which have made Filipino women particularly vulnerable to violence in Australia. This vulnerability arises in part from, and is shaped by, their post-immigration experience in Australia. However, it is not sufficient to focus only on that experience. In beginning to examine the incidence and patterns of homicide and violence against Filipino women in Australia more generally, this analysis needed to be placed in a broader context and with reference to a number of inter-twined themes. At the broadest level there are two key themes that both reflect profound imbalances of power. The first key theme concerns the relations between so called “developing countries” and “developed countries” and the second focuses on gender relations, in particular the social construction and representation of particular forms of masculinity and femininity. These hierarchies (ie, of “developed” countries over “developing” countries and of men over women) need to be examined through the lens of hierarchies based in racism, ethnocentrism and neo-colonialism. Such factors have shaped the contemporary position of Filipino women in the Philippines and help explain the readiness with which Filipino women seek emigration. As well, these factors underscore the vulnerability of Filipino women to exploitation by men from “developed” countries, including but certainly not limited to Australian men.

This ongoing research adopts an intersectional analysis which examines the manner in which Filipino women are constituted with respect to race/ethnicity, class and gender, and with respect to other axes of social location such as age. The work draws on the theoretical insights of others who have explicitly addressed such intersectionality in their work, such as feminist criminologists Kathy Daly and Deborah Stephens,¹ and Marcia

¹ “The ‘Dark’ Figure of Criminology: Towards a Black and Multi-Ethnic Feminist Agenda for Theory and Research” in Rafter, N and Heidensohn, F (eds), *International Feminist Perspectives in Criminology: Engendering a Discipline* (1995).

Rice,² and of feminist legal theorist Kimberle Crenshaw.³

These introductory comments should not be construed as casting all relationships between Filipino women and men from “developed” countries as exploitative. Nor do we wish to reinforce the depiction of Filipino women as hapless victims. On the contrary Filipino women within Australia, as in the Philippines, have been active and effective political actors in a broad range of issues including forcing constitutional change in the Philippines; ousting the US military from the Philippines; in the peace movement; and in a range of feminist campaigns around sex tourism and the victimisation of women and children. To recognise the broad structural factors which make Filipino women vulnerable to violence is not to deny their considerable agency in resisting that violence, and in seeking to redress it.

III. THE MIGRATION OF FILIPINO WOMEN TO AUSTRALIA

The vulnerability of Filipino women to violence within Australia cannot be seen in isolation from those factors which bring them to Australia as immigrants in the first instance. And since both the violence that they are subject to, and the process of migration that brings them to Australia are profoundly gendered, a consideration of gender relations is crucial.

The majority of those migrating from rural to urban areas within the Philippines, and from the Philippines to other countries are women. This pattern is explained by a complex of economic, social and cultural factors which in turn reflect both gender relations within the Philippines, and international relations between the Philippines and the “developed world”. These factors include:

- the poor economic conditions within the Philippines;⁴
- the demise of women’s opportunities for work in the rural sector due to mechanisation, and the push to develop export oriented crops;⁵

² “Challenging Orthodoxies in Feminist Theory: A Black Feminist Critique” in Gelsthorpe, L and Morris, A (eds), *Feminist Perspectives in Criminology* (1990).

³ “Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color” (1991) 43 *Stanford LR* 1241.

⁴ Boer, C, *Are you looking for a Filipino wife? A study of Filipina - Australian Marriages* (Report published by the Anglican General Synod Social Responsibilities Commission and the International Affairs Commission, 1988) 4.

⁵ *Idem*.

- the development of agricultural land for resorts and other non-agricultural purposes;⁶
- the pull of the former US military bases in providing the opportunity for employment in legal and extra-legal forms and in encouraging migration to the areas around Subic Bay and Angeles City,⁷ and the withdrawal of these bases, which although actively sought by feminists, and by a broad coalition of Filipino people, has not been well managed and has had a very negative impact on women's employment opportunities within the Philippines;⁸
- Philippines government policy which focuses on the short term means of dealing with unemployment and the poor state of the economy through encouraging emigration, overseas contract work, and tourism and ensuring the earning of foreign exchange, including through remittances sent home by Filipinos living overseas;⁹
- gender relations and cultural factors within the Philippines place particular obligations on the eldest daughter, which place great emphasis on the need to marry, and reinforce the need for family members to provide material support for each other;¹⁰ and
- the positive perception within the Philippines of migration and the opportunities that it brings for the migrating woman and for her family.¹¹

Large numbers of Filipino women migrate throughout the world as domestic workers, sex workers and for the purpose of marriage. At the 1991 census there were 47,692 Filipino women living in Australia.¹² A large proportion of Filipino women migrating to Australia (approximately 70%) have been sponsored as the fiancées or spouses of Australian men. In part this reflects immigration policies in Australia which reveal a profoundly gendered understanding of categories of skill which might

⁶ Larsen, S, *Lucky Country* (Paper presented to the conference "Stopping violence against Filipino women in Australia: A government and community responsibility" in Abbotsford, Victoria, 6-7 October, 1994).

⁷ Boer, supra n. 4, at 11; Enloe, C *Bananas, Beaches and Bases: Making feminist Sense of International Politics* (1989) 67, 81-89.

⁸ Sommerville, "Report from Aotearoa: Australasian Women's Delegation Confronts Flesh Merchants" (1995) 9 *Kasama* 5.

⁹ Wall, D (1995) *Submission to HREOC* (Unpublished paper on file with the authors).

¹⁰ Ripinskis, "Filipino Women and Domestic Violence" in Bertram, C (ed), *Service Providers' Consultations on Domestic Violence and Non-English Background Communities* (1992) 32; Larsen supra n. 6.

¹¹ Larsen, *idem*.

¹² Bureau of Immigration and Population Research, *Community Profiles, 1991 Census: Philippines Born* (1994) 7.

qualify a person for migration. By undervaluing women's skills, such policies have had the effect of qualifying a woman for migration on the basis of her relationship with a male partner.¹³ However, patterns of migration to Australia also reflect factors operating within the Philippines.

Patterns of migration from the Philippines to Australia are distinctive in that unlike immigration from any other source country, immigration from the Philippines has been significantly gender biased in the favour of women, such that at the last census there were twice as many women as men who had been born in the Philippines residing in Australia. However, it should be noted that this characteristic is consistent with Filipino emigration patterns - females significantly outnumber males among Filipino immigrants to a range of destinations including Australia, Japan, USA, Canada, New Zealand, Hong Kong, Singapore and parts of Europe.¹⁴

The influx of Filipino women into Australia also reflects the desire by men who are resident in Australia to seek partners from the Philippines, and from other countries, particularly within Asia and the Pacific. Many of the concerns expressed about the potential for the exploitation of Filipino women in their relations with men from "developed" countries also arise with respect to women from Thailand, Indonesia, Fiji and other "developing" countries in Asia and the Pacific.

IV. DOMESTIC VIOLENCE AGAINST FILIPINAS IN AUSTRALIA

The measurement of domestic violence in Australia, whether for the population as a whole or for particular groups, is fraught with difficulty.¹⁵ There is no direct data available concerning the prevalence and incidence of domestic violence in Australia.¹⁶ Various sets of data, such as from police, hospitals, refuges, homicide statistics and, or small scale studies provide some indirect indication of the nature and size of reported domestic violence, and provide evidence that domestic violence is both widespread and serious in its consequences.¹⁷ However, much of the available data does not provide detail concerning ethnicity. It has been recommended

¹³ Fincher, Foster and Wilmot, *Gender Equity in Australian Immigration Policy* (1994).

¹⁴ Jackson, "Recent migration to Australia from the Philippines" in Iletto, R and Sullivan, R (eds), *Discovering Australasia: Essays on Phillipine Australian Interactions* (1993) 136.

¹⁵ Ferrante, Morgan, Indermaur and Harding, *Measuring the Extent of Domestic Violence* (1996).

¹⁶ Although a small scale survey of the prevalence of domestic violence in Perth has been reported by Ferrante et. al., *ibid.*, at chapter 3. However this study did not measure ethnicity.

¹⁷ Stubbs, J and Powell, D, *Domestic Violence: The Impact of Legal Reform in NSW* (1989).

that the collection of such data be undertaken by all community and government agencies.¹⁸

The examination of the incidence of domestic violence for different ethnic or racial groups raises a number of important methodological, political and ethical questions. There are very valid concerns that such data might be put to racist uses. There are also significant problems to be faced in determining how to define and measure constructs such as race and ethnicity.¹⁹ Since crime is a relatively infrequent event, detailed analysis of crime incidence by country of birth is methodologically problematic. Although not necessarily specifically concerning domestic violence, some crime victimisation data is available internationally which purports to measure race or ethnicity. However, often the categories used are so broad as to have questionable utility. Much of the British data for example uses the categorisation "Black", "white" and "Asian", while American data tends to use categories such as "Black", "white", "Hispanic" or "Asian". An analysis of the National Crime Victimization Survey data in the US for the years 1992-3 found no significant differences in domestic violence incidence rates by "race", or for Hispanics as compared with non-Hispanics.²⁰

While Filipino women in Australia share many of the experiences of other immigrant women - such as settlement problems, isolation, high unemployment, the under-valuing of their skills, and a lack of knowledge about and access to legal rights and social services - there are particular features which operate to make them especially vulnerable. Their experiences and needs are distinctive.²¹ Their vulnerability arises both from those factors which provide the context for, and the impetus towards their emigration from the Philippines, and the stereotyped misrepresentation of Filipino women, and of Asian women more generally, as compliant, ultra-feminine and servile.

¹⁸ Submission of Migrant Women's Emergency Support Service, and the Domestic Violence Resource Centre, Brisbane (*hereafter MWESS & DVRC submission*).

¹⁹ After detailed debate about such questions, Statistics Canada (the government agency fulfilling a similar function to the Australian Bureau of Statistics) has determined that data should not be collected on race/ethnicity.

²⁰ Bachman, R and Saltzman, L, *Violence Against Women: Estimates from the Redesigned Survey, August 1995*, NCJ-154348 (Special Report, Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 1995).

²¹ Women's Legal Resources Centre, *Quarter Way to Equal* (1994) 24-6.

Women from developing countries like the Philippines are seen by a lot of men from developed countries as “objects” to be easily sold and traded, with no dignity or feeling. Domestic violence, in general, is characterized by such attitudes but the global issue of economic and political power between “developed and developing” or “rich and poor” countries give further power and control to the male in this imbalanced relationship.²²

The Filipina-Australian Marriages and Domestic Violence Working Party have stressed that:

Filipinas married to Australian men may be particularly vulnerable to domestic violence, not because they are Filipinas, but because of the ways in which many of these marriages are contracted and the mythology about submissive, infinitely tolerant women from that country which still prevails in some quarters of the Australian community...and we would expect to find the same problems facing women from other cultures who were contracting marriages with Australian men under the same circumstances. The problem, specifically stated, is one of abuse of women perpetrated by men whose attitudes and behaviour towards women are properly the focus of concern.²³

Concerns have also been raised about domestic violence against other groups such as Thai, Indonesian, Fijian and Malaysian women in Australia.²⁴

The submissions presented to HREOC for this study, the case studies of homicides, and the literature more generally suggest that Filipino women who experience violence by their partners or ex-partners may face particular obstacles in getting assistance from the legal system or other agencies.

Research suggests that some Filipino women may be unfamiliar with the language used to discuss domestic violence, and/or do not realise that such behaviour may constitute a crime in Australia.²⁵ Filipino women may also be unaware of the available services, or reluctant to seek services to assist them to deal with the violence through concerns that services are

²² MWESS & DVRC Submission, *supra* n. 18, at 6.

²³ South Australian Department of Community Welfare, Domestic Violence Working Party, *Filipina-Australian Marriages and Domestic Violence* (1988) 14.

²⁴ MWESS & DVRC Submission, *supra* n. 18.

²⁵ Antonio, A and Escartin, M, *Breaking Down Barriers: A Survey of Filipino and Spanish speaking Women in Domestic Violence and Proposed Service Models* (1994) 51.

culturally inappropriate or in some instances racist. Consultations with Filipino women in Wollongong found that they were reluctant to use some services such as counselling because their misunderstandings of what those services offered were based on their experiences with services in the Philippines.²⁶ Research also suggests that the shame which speaking of domestic violence would bring to them and their families acts as a significant obstacle to seeking help for some Filipino women. The fact that separation and divorce are not acceptable within the Philippines, and may lead to the ostracising of the women, were acknowledged to be real impediments to women seeking assistance.²⁷

Women who do not have permanent residency within Australia are also vulnerable to abuse, and often reluctant to seek assistance. As noted by the Filipina-Australian Marriages and Domestic Violence Working Party, many of the women who have been sponsored to Australia as brides or fiancées have relied on the men who have sponsored them for information about their legal entitlements generally, and specifically about their immigration status.²⁸ In such cases the women tend to be poorly informed, or deliberately misinformed by their sponsor about their entitlements, and they may not realise that they need to specifically apply for permanent residence.²⁹ One of the submissions to the Australian Law Reform Commission inquiry on *Equality Before the Law* powerfully illustrates the vulnerability of women who do not have permanent residency:

...this threat of possible deportation provides a strong incentive for women to stay in an abusive marriage. Frequently, this lack of permanency forms the basis of blackmail and threats by an abusing partner to get the women to stay with him. Or he tells her that if she doesn't do what he wants or tells anyone about the abuse, he will throw her out and tell Immigration that the marriage has 'broken down' and she will be deported. In most of these cases, of course the woman lacks the 'documentation' to substantiate her case, that is even assuming she has the personal power or information to do so.³⁰

The practice of serial sponsorship, that is

²⁶ Community consultations with Filipino women undertaken for this project.

²⁷ Antonio and Escartin, *supra* n. 25.

²⁸ South Australian Department of Community Welfare, *supra* n. 23, at 14: see also Fincher *et. al.*, *supra* n. 13.

²⁹ Women's Legal Resources Centre, *supra* n. 21, at 65-6.

³⁰ Australian Law Reform Commission, *Equality Before the Law: Justice For Women: Part I* (1994) 219.

the situation whereby a person sponsors a spouse or fiancée from overseas on more than one occasion in situations where at least one of the relationships has resulted in some form of abuse or exploitation of the sponsored party.³¹

has also been of particular concern to Filipino organisations, and human rights activists in Australia. A study undertaken in 1992 found evidence of 110 serial sponsors who had sponsored more than one woman from a range of countries. These relationships were found to be characterised by high levels of marriage breakdown, domestic violence, and the failure of the sponsor to provide financial support for the woman and her children.³² A recent report has provided a number of case studies of serial sponsorship of Filipino women in which the women have been subject to physical, sexual and emotional abuse.³³

V. HOMICIDE OF FILIPINAS IN AUSTRALIA

While the incidence of violence against Filipinas living in Australia is difficult to measure for a range of methodological, practical and political reasons, data concerning the deaths of Filipinas are more readily available. The Centre for Philippine Concerns has been carefully researching and documenting the cases which come to their attention. Deaths which are suspicious are also likely to be investigated and recorded in several official sources. While it remains the case that some homicides go undetected, official data concerning homicide are likely to be more accurate than data for other forms of violence, or for other crimes.³⁴ However, not all sources of data concerning homicide record details concerning the country of birth of the victim, or the offender, or in fact other pertinent information such as the relationship between the victim and the offender (where the offender has been identified).

Homicide in Australia is a relatively rare event, and thus one needs to be cautious in interpreting the available data. What might appear as important patterns in the data may well represent short term fluctuations when viewed

³¹ Department of Immigration and Ethnic Affairs, *Serial Sponsorship: Immigration Policy and Human Rights* (1992) iv; see also Evatt, "Serial sponsorship and abuse of Filipino women in Australia" in Ethnic Affairs Commission of NSW, *Serial sponsorship: Perspectives for Policy Options* (1992)9.

³² Department of Immigration and Ethnic Affairs, *ibid.*

³³ New South Wales Ministry of Women, *Serial Sponsorship: A Background Paper* (1994) 12-4.

³⁴ Wallace, *A Homicide: The Social Reality* (1986).

over a longer time period.

Wallace's study of New South Wales homicides over the period 1968-1981 provides details concerning the country of birth of offenders, but not of the victims.³⁵ Some information concerning country of birth of victim and offender is available from the Australian Institute of Criminology homicide data base. However, the data covers a limited time frame.

An analysis of the data collected by the Centre for Filipino Concerns together with data held on the national homicide database of the Australian Institute of Criminology, both for crude victimisation rates and age specific rates, indicates that Filipino women in Australia are significantly over-represented as victims of homicide. While for 1989-1992 the annualised rate of homicide for all women in Australia aged between 20 and 39 was found to be 1.0 per 100,000, the rate for women born in the Philippines was 5.6 per 100,000.³⁶

A New South Wales study based on the Australian Bureau of Statistics *Causes of Death* database has reached similar conclusions concerning the over-representation of Filipino women as victims of homicide. Guevarra and Churches³⁷ analysed the country of birth of the victim for all recorded homicide cases in New South Wales over the period 1980-1991. Using age, sex and country of birth specific population rates, they calculated expected homicide rates using the Australian born rates as the standard. They found that two groups of women experienced significantly higher death rates from homicide than might be expected: Filipino women and Vietnamese women. Both groups were about three times higher than expected. However, while Vietnamese men also had higher than expected homicide rates, Filipino men actually had lower rates than expected. The heightened risk apparently experienced by Filipino women is not shared by Filipino men, while both men and women of Vietnamese origin experience a heightened risk.³⁸ Other research has found that immigrant groups in Australia tend to have higher rates of homicide victimisation

³⁵ *Idem.*

³⁶ Census Applications Pty Ltd, *Technical advice Provided to the HREOC* (1994) (Unpublished paper on file with the authors).

³⁷ Guevarra, V and Churches, T, *Variations in the rates of death due to violent causes amongst migrants in NSW* (Paper presented to the Public Health Association National Conference, Adelaide, 1994).

³⁸ Note that the analysis does not look at the risks for Aboriginal Australians. Aboriginal women in Australia are over-represented as victims of homicide by a factor of ten Strang, H, *Homicides in Australia 1990-91* (1992).

than exist in their countries of origin. Kliewer has found that male homicide rates are typically higher than female rates, both in Australia and in the country of origin. However, for Southeast Asian communities in Australia the homicide rates for women are higher than for men. He speculates that the higher rates may be related to the high levels of intermarriage for some Southeast Asian women.³⁹

VI. OVERVIEW OF THE HOMICIDE CASES

1. Background

The Human Rights and Equal Opportunity Commission and the Centre for Philippine Concerns - Australia provided the authors with 19 separate files. The files covered specific incidents throughout Australia between 1980 and 1994, and referred to the deaths or disappearances of some 26 Filipino women and/or their children during the fifteen year period. Further research has indicated that these files are not comprehensive on the issue. They simply reflect information which has come to the attention of the CPCA. In particular, the lack of any deaths or disappearances between the one listed for 1980 and the next in 1987 suggests that there may be omissions.⁴⁰

There is also considerable variation in the quality and quantity of information available in relation to the nature of the various deaths and disappearances. In some cases where persons have been charged and convicted of manslaughter or murder there is considerable data available arising from the results of police investigations and subsequent trials. In other cases there is by their nature virtually no information available. Indeed, there were three disappearances of Filipino women in 1987 about which there is very little information but which are of concern to the CPCA.

Table 1 below shows in summary an outline of the cases involving Filipino women and children. The three disappearances which have been listed in Table 1 are excluded from further discussion in this paper because of the current lack of details. There are also more recent deaths of Filipino women, such as the homicide of Priscilla Squires in Darwin in 1995, which are

³⁹ No specific data is provided concerning this issue for the Philippines, which is included in the category Southeast Asian: Kliewer, "Homicide victims among Australian Immigrants" (1994) 18 *Australian J of Public Health* 304, 308.

⁴⁰ Guevarra and Churches, *supra* n 36. These authors list the homicides of eight Filipino women from NSW alone during the period 1980-91, which provides further reason to suspect that the list provided in Table 1 is not comprehensive.

not referred to in Table 1. These deaths are currently being researched further.

Excluding the 3 disappearances, Table 1 refers to a total of 23 deaths of Filipino women and children. The 23 deaths comprised 18 Filipino women and five children (three girls and two boys). The children were either born in the Philippines or were the Australian-born children from a Filipino-Australian marriage. Table 1 shows that the causes of death in the 23 cases were as follows: seventeen deaths were homicides (13 women and four children); in two cases the cause of death was unknown; in two cases death was by suicide; and in two cases (involving one woman and one child) the coroner determined the deaths to be accidental.

Table 1
Deaths and Disappearances of Filipino Women and Children
Australia 1980-1994

Year	Name	Age	Cause	State
1980	TA	21	Homicide	Qld
1987	RS	17	Homicide	NSW
1987	NW	33	Homicide	Qld
1987	CG	1	Homicide	NSW
1987	AP	33	Homicide	NSW
1987	HJP	3	Homicide	NSW
1987	NE	33	Disappeared	Vic
1987	BS	u/k	Disappeared	Vic
1987	SN	u/k	Disappeared	Tas
1988	BE	28	Homicide	WA
1989	JH	37	Homicide	NSW
1989	GB	34	Homicide	Vic
1989	NV	34	u/k	Vic
1989	MD	39	Homicide	Vic
1991	ER	44	Homicide	NSW
1991	TG	34	Suicide	NSW
1991	NG	36	Suicide	NSW
1991	RK	34	Homicide	NSW
1991	PN	38	u/k	NSW
1992	MO	31	Homicide	Vic
1993	MW	36	Homicide	Qld
1993	EH	5	Homicide	NSW
1993	YR	12	Homicide	NSW
1993	RD	29	Accidental	NSW
1993	RD	4	Accidental	NSW
1994	EY	42	Homicide	Qld

2. Homicide and Intimate Relationships

Seventeen homicides are identified in Table 1. In each case the perpetrator was an adult male, who was also usually older than the female victim. A further analysis of the homicides showed clearly that in the majority of the cases the perpetrator was in some form of intimate relationship with the victim, being either the spouse, ex-spouse, defacto or father. The breakdown of information on the offenders in the 17 homicides showed that in eleven deaths the person found to have committed the offence was in an intimate relationship with the victim. In a further three cases the suspect in the case was either the spouse or defacto. In the other three cases there were no suspects, although in one of these the husband had been tried and acquitted of murder. In summary, there were no cases where the *known* offender or suspect was not in an intimate relationship with the victim.

We noted above that four of the homicides involved children. In one of those cases the woman and her child had disappeared. A coronial inquiry had found that death had occurred and that there was a prima facie case against the husband. The Director of Public Prosecutions has decided not to proceed with the matter. In another case, the husband attempted to murder both the wife and their eleven month old child. After the attack the male committed suicide. The child died of head injuries, the woman survived. According to the statement made subsequently by the woman, there had been previous episodes of domestic violence, although there was no evidence of any previous apprehended violence orders or other legal intervention. Finally, two children aged five and twelve were strangled by their father during an access visit. There had been previous threats of violence and an apprehended violence order had been applied for but not served.

Some further comment can be made on those deaths which were not classified as homicide. The two suicides listed in Table 1 were a single "mass" suicide involving two Australian brothers and their Filipino partners. The reason for the mass suicide was the apparent terminal illness of one of the brothers. The two Filipino women were both 20 years younger than their partners. It is unclear whether the marriages had been arranged in the Philippines. It is reasonable to raise suspicion as to the voluntariness of the suicides of the women in these circumstances.

3. The Nature of the Relationship between the Filipino Women and their Partners

We have indicated above the importance of recognising that the perpetrator

in the majority of cases was in some form of intimate relationship with the victim. Some detailed information was available concerning the nature of the relationship between Filipino women and their partners in most cases. These included the 18 Filipino women who died,⁴¹ as well as a further two Filipino women who were the mothers of children killed by their spouse or ex-spouse. A number of factors seem pertinent in understanding the nature of the relationship.

First, the age difference between Filipino women and their partners appears to be a significant issue. In 17 cases the age of the woman and her partner was identified. The age difference between partners ranged from no difference (0 years) to 26 years. The *average* age difference between partners was 13 years, and in five of the 17 cases the age difference was 20 years or greater. It is clear from the evidence that there were significant age differences between the generally younger women and older men.⁴²

Secondly, the issue of sponsorship of spouses and fiancées is significant. In 12 cases, details were available concerning where the male met their partners and where the marriage took place. In nine of the 12 cases, the male met the woman in the Philippines; in three other cases the two people met in Australia, the USA and England. Thus, in only one case of the 12 where information was available did the male and female meet locally.

Of the nine cases of meeting in the Philippines, there was direct evidence of the involvement of some type of “marriage”, “pen pal” or “domestic help” agency in four cases. It should also be noted that recent literature suggests that family and social networks may also be influential in making arrangements for young Filipino women to meet older foreign males. There was some suggestion that such was the case in some of the other meetings in the Philippines.

In all cases the spouse, ex-spouse or partner was a non-Filipino man. Although this was a common factor, the men came from a variety of ethnic/cultural backgrounds other than Filipino. Two of the men convicted of murder were American and Spanish nationals. Of those who were

⁴¹ That is, 13 homicide victims, 2 suicides, 2 cause of death unknown and 1 accidental death.

⁴² A number of studies have found that Australian men sponsoring Filipino women as spouses or fiancées tend to be much older than the women, and over half of the men have been married previously: Tan and Davidson, “Filipina-Australian Marriages: Further Perspectives on Spousal Violence” in Davidson G (ed), *Applying psychology: Lessons from Asia-Oceania* (1994) 122-4.

Australian, a significant number were born elsewhere including England, Poland, Malta, Holland and Italy. Others came from Anglo/Irish Australian backgrounds.

There was also some difference in the socio-economic background of the males involved. At least two of the men came from what could be described as middle class backgrounds. Significantly, there appears to have been a primary economic motive in the murder of Filipino women in these two cases. In one of these cases the Australian male made contact with the 21 year old woman through a housekeeper/domestic help agency in the Philippines. The man brought the woman to Australia and promised to marry her. Meanwhile he took out a number of insurance policies before drowning her. In the second case, the male had taken out three life insurance policies in the year prior to drowning his wife.

4. Sentencing Issues

A total of ten men were found to have committed eleven of the murders. In eight cases we have details on the sentence imposed. In five cases a term of life imprisonment was imposed after a conviction of murder. In three cases the defendant pleaded guilty to manslaughter. The sentencing outcomes in the cases of manslaughter have been raised as an issue of concern. Two of the three cases resulted in a minimum term/non-parole period of 6 years, the other in a minimum term of five and a half years.

One of the six year minimum terms was imposed for the manslaughter of two children aged 5 and 12 years. The CPCA and the Filipino woman who was the mother of the two children were highly critical of the sentence handed down. Ivor Haynes pleaded guilty to manslaughter after admitting to suffocating and strangling the children.⁴³ A plea of diminished responsibility was accepted on the basis of psychiatric evidence strongly suggesting profound depression at the time. The mother of the two children had previously applied for an apprehended domestic violence order against her ex-husband.

In the case of *Schembri*,⁴⁴ a five and a half year minimum term was imposed after a guilty plea to manslaughter. Schembri had married Generosa Bongcodin in the Philippines. They were later separated after the birth of their child. Schembri had custody of the child after the divorce. He killed

⁴³ *R v Haynes*, unreported, Supreme Court of New South Wales, 25 March 1994. Studdert J.

⁴⁴ *R v Schembri*, unreported, Supreme Court of Victoria, 9 July 1990, Vincent J.

Bongcodin during a visit to discuss custody arrangements. Justice Vincent accepted that there were mitigating circumstances including the background of the accused, his separation from his daughter during the term of imprisonment and the good prospects of rehabilitation. The CPCA publicly demonstrated against the sentence imposed by the Supreme Court. This case will be discussed further below.

In the case of *Sokol*,⁴⁵ a minimum term of six years was imposed after a guilty plea to manslaughter. Sokol had shot and killed his 17 year old wife. There had been previous instances of domestic violence. Prior to her death, Rowena Sokol had sought from the Court an apprehended domestic violence order. A hearing date for the matter had been set down. Sokol's previous wife also had an apprehended violence order against the accused. The plea of manslaughter was accepted by the Court on the basis of diminished responsibility. It was accepted that Sokol was suffering from a significant personality disorder at the time of the offence. This case will also be discussed further below.

VII. MASCULINITY AND FANTASY

One key to unpacking the dynamics around the use of extreme violence against Filipino women in Australia is through a consideration of masculinity and the relationship between masculinity and fantasies of power, desire and sexuality. Within this dynamic there is a particular construction of Filipino women as perfectly accommodating to male fantasy. The commodification, marketing and sale of "Asian" and Filipino women provides an insight into this process.⁴⁶ We have explored this issue particularly through the marketing schemes currently available on the Internet. Since the banning of introduction agencies in the Philippines,⁴⁷ and with the growth in use of the Internet, the Internet now represents perhaps the most significant mechanism through which women, and particularly Filipino women, are marketed.

The first point that was striking in looking at the systematic representation of Asian women as "perfect partners" is that the sex tours and the marriage introduction agencies are in fact different sides to the same phenomenon.⁴⁸

⁴⁵ *R v Sokol*, unreported, Supreme Court of New South Wales, 19 February 1988. Finlay J.

⁴⁶ Cooke, F, *Australian-Filipino Marriages in the 1980s: The Myth and the Reality* (1986) 3.

⁴⁷ We note that some introduction agencies are still listed in Australian telephone directories.

⁴⁸ Cahill, D, *Intermarriages in International Context: a Study of Filipina Women Married to Australian, Japanese and Swiss Men* (1990) 65.

In a logistical sense this interdependency is reinforced on the Internet through interlinking and cross referencing of Internet sites. Sites which offer introductions to women seeking marriage partners also have links to other sites offering "erotica" and sex tour information. Some sites offer both sex and marriage introductions. For instance one site has four categories of tours to the Philippines: general sightseeing, wife seeking, x-rated, and diving tours. This service promises that the "wife-seeking tour" will ensure that "the new women you meet will be generally 'good' girls but there will be plenty of bar girls there too and you will surely encounter some".⁴⁹ At a deeper level the phenomenon is also one which both constructs and caters for particular male fantasies about women.

One fantasy is about the perfect wife: loving, caring, compliant. The other fantasy (or perhaps more accurately, the other side to the same fantasy) is about a woman for perfect sex: compliant and completely accommodating. These fantasies position women as a subservient subject for male power/desire.

They [Filipino women] were always asking if I had friends back in the U.S. who were interested in them. I wished I could help them. I knew there were thousands of lonely guys back in the U.S. who'd love them... women who know how to take care of a man, who're playful, passionate, sincere and dedicated.⁵⁰

Age is also an important component in this male fantasy. Indeed the advertising continually suggests that a "15 to 20 year age difference is not a big factor" and explicitly focuses on older men looking for young women. The "Philippines: Girls -Travel-Business-Penpals" site notes the following.

Send me your age, if you are single, divorced, etc; Include what you are seeking in your girl. A 15 to 20 year difference in age is not a big factor. Remember that beauty is in the eye of the beholder...

New Sweet Sixteen List! \$10.00 for 16 names of teenage girls from 15 to 18 years old!

New Hot List #1 - \$15.00 for 38 names of YOUNG girls 18 to 23 who are seeking older men!

New Hot List #2 - Girls who are 24 to 26 years old (30 names). Want older men. Send \$12.00!

⁴⁹ http://www.conline.com/dad/phil_wif.html

⁵⁰ Fantasy Islands: A Man's Guide to Exotic Woman and International Travel, <http://www.slip.net/wade/order/htm>

New Hot List #3 - Girls who are 28 to 39 years of age (31 names) Send \$12.00! All seeking older men!⁵¹

The commodification of women through various types of commercial agencies extends around the world and includes women from Russia, former Eastern bloc countries, the Pacific, South America and south east Asia. Typically though there are more listings on women from the Philippines on Internet sites. It is also apparent that Asian women and Filipino women in particular are constructed as perfectly fulfilling these fantastic needs of youth, compliance, love and sex.

Asian women are also constructed as fulfilling these fantasised needs in the context of, and in contrast to, Western women's independence. The literature selling Filipino women strongly argues that the reason western men cannot find suitable partners at home is because of the breakdown of the family unit caused by feminism. This aspect of the male fantasy appeals to an image of a "traditional" woman whose goal in life is to serve her husband.

Consider the following examples from the Internet.

[t]oday, many American men are very unhappy with American women. It's not that they want some meek submissive thing they can lead around by the nose. What they want is a woman who will be a more "traditional" kind of wife, who is probably more oriented toward being a wife than being a career woman. Often these are middle aged men who want a woman significantly younger than themselves. In any case, they are men who have decided, as I did, that they are unlikely to find what they want in the U.S...

In fact, the bride-by-mail movement is a rapidly growing phenomenon. More and more American men are getting fed up with the feminist inspired bullshit they keep getting from American women.⁵²

Of course, we cannot guarantee that any particular girl (sic) will want to marry any particular correspondent. But it is a fact that you will have a much better chance of marrying a much better wife this way, than by hassling with Modern Western women.⁵³

If you are tired of sitting around... or if you are just tired of the hoops American

⁵¹ Philippines: Girls -Travel-Business-Penpals.

⁵² An Introduction to the "Penpal Bride" or so-called "Mail Order Bride" Movement, Clark, 1995.

⁵³ Mail Order Brides from the Philippines. <http://www.best.co/batf/>.

women make you jump through then read on. These women are looking for a man who will care for them and they will respond to every (sic) and kindness, no matter how small. Take your choice. Each of these women are looking to meet men from around the world. They are not concerned about age, appearance or wealth. Just so long as you work (or have a regular income) and do not hit them (which is common in their country) then they will want to meet you.⁵⁴

These images and references are racist and sexist in their construction of Filipino and other Asian peoples. Yet it is precisely this intersection of 'race' and sex that results in such a powerful fantasised construction of (first world?) male desire. This male fantasy about Asian women incorporates exotic sex, the promise of a relationship with complete security and compliance, and a fantasy about love which transcends age difference. The final aspect of this fantasy is that the relationship can be bought cheaply through an agency or arranged simply through the use of informal networks. In other words, it is a completely commodified fantasy that requires nothing more than money.

VIII. MASCULINITY AND VIOLENCE

What happens when we integrate the fantasised images of Filipino women back into the relationships that resulted in the deaths and disappearances of women outlined in the earlier parts of this paper? What happens when men attempt to live out these fantasised relationships and the women involved refuse to comply, refuse to be treated as a commodity?

Two interwoven processes become apparent in some of the case studies. First, violence emerges as a resolution to conflict for the male when he attempts to assert absolute dominance and authority. Secondly, the Filipino women who simply marry western men to leave the Philippines become re-invented as manipulative and self-seeking. In other words, the women are seen as complicit in the violence against them and the men are constructed as victims.

Two of the case studies are illustrative of these issues. Rowena Sokol was a 17 year old Filipino teenager when she was killed by her 41 year old husband, Joseph Sokol. She was shot several times and received head injuries from being beaten with a rifle butt. She was in the driveway of a house owned by a Filipino female friend with whom she was living at the time. The young woman had left her husband after significant incidents of domestic violence.

⁵⁴ Overseas Ladies. <http://www.conline.com.dad/>.

Rowena Sokol was 15 years of age when she met and married Sokol in the Philippines in January 1985.⁵⁵ They were introduced through the “Philippine Connection” agency. There was a 23 year age difference. She immigrated to Australia as Sokol’s wife when she was 16 years old and had a child shortly afterwards. She was murdered by Sokol on 23 February 1987.

As we noted previously, Sokol pleaded guilty to manslaughter with diminished responsibility under s23A of the New South Wales Crimes Act. He was sentenced to a minimum term of six years. What is of particular importance for the current discussion is that the sentencing comments by and large accept the depiction of the young Filipino woman as being at fault in her own death.⁵⁶ She was presented as a bad mother. “To a large extent his wife had left the care of their small child to the prisoner.”⁵⁷ She was presented as manipulative. “He is said to have worked at a second job in order to earn enough money to send a monthly sum... to her family in the Philippines. He sometimes took the child with him to cleaning work.”⁵⁸ She was presented as self-seeking. A friend of Sokol’s gave evidence, referred to in the sentencing comments, that “Joe told me of how he had to sell a lot of his assets in order to keep Rowena happy.”⁵⁹ She is presented as unfaithful, unloving and uncaring. The sentencing comments refer to Sokol’s friend’s statement. “[Joe] told me on numerous occasions of how Rowena had left him and was with another man. He told me that Rowena had told him he was too old and boring.”⁶⁰ Sokol’s statement to the psychiatrist while remanded in prison is also referred to. “He craved warmth and security but did not get much of that from her.”⁶¹

In contrast, Joseph Sokol is presented as a victim. Consider the following sentencing comments.

The prisoner was born in Germany of Polish parents. He came to Australia when he was very young. His father was a most hard-working man but was also harsh,

⁵⁵ Sokol had been previously married and had divorced his first wife one month earlier, in December 1984. His first wife had an apprehended domestic violence order taken out against him. Sokol had also been receiving psychiatric treatment.

⁵⁶ *R v Sokol*, supra n 45.

⁵⁷ *Ibid.*, 3.

⁵⁸ *Ibid.*, 4.

⁵⁹ *Idem.*

⁶⁰ *Idem.*

⁶¹ *Ibid.*, 5.

demanding and authoritarian. His mother died when he was seven in sad circumstances. There was no-one else to fill her place.⁶²

While remanded in prison, Sokol was diagnosed with a longstanding personality disorder characterised by intense feelings of insecurity and loneliness, and a craving for closeness and intimacy. He was described as having immense emotional and maternal needs. Prior to his visit to the Philippines in 1985 he had spent 35 days as an in-patient in a psychiatric hospital with severe depression and suicidal tendencies. There was the development of a significant depressive illness prior to the killing.

What is of interest here is not the clinical assessment per se, but rather the gendered nature of the response to the illness, both in terms of the desire for a Filipino bride and all that such a relationship promised, as well as the resort to violence in an attempt to maintain the relationship when it began to fail. There is little in the sentencing comments which identify the escalation of violence by Sokol against the young woman. It is apparent that Rowena Sokol left her husband as the violence intensified. A Filipino friend of Rowena's made a statement to police which indicated she had witnessed assaults by Sokol on a number of occasions in the weeks prior to the murder which included grabbing Rowena around the throat and attempting to choke her, grabbing her by the hair and throwing her on the floor. One week before the killing Rowena Sokol had sought an apprehended violence order. She also attended the local police station for assistance. Police had escorted her to the house so she could retrieve some belongings. According to the police statement the perpetrator had remarked, "So much for Filipino women being faithful and looking after you."

The killing itself certainly appeared premeditated. The day before Sokol murdered his wife, he contacted the same introduction agency to see if he might start another relationship with a Filipino woman and made an appointment for the following week. According to the psychiatrist's report, he then took out his rifle. The following day Sokol made the arrangements to meet Rowena outside of the house where she was staying. He then took the rifle from the boot of the car with a magazine already in position and placed it on the front seat. Sokol drove to the house, argued with Rowena and then shot and beat her.

According to the psychiatric assessments the violence itself arose in an

⁶² *Ibid.*, 6.

attempt to maintain the “security” offered by the relationship. Yet that promise of security was one which was constructed within the parameters of what introduction agencies offer specifically in relation to the fantasised versions of Filipino women. It is clear that Sokol accepted the constructed image of Filipino women being devoted and faithful. The statement to police referred to above, “So much for Filipino women being faithful and looking after you,” indicates that the belief was held. Indeed, shortly before the death of the young woman, Sokol was making arrangements for another “Filipino bride.”

On the one hand we can categorise Sokol as suffering from a mental illness. Yet the satisfaction of the “immense emotional needs” of Sokol is precisely the promise which the introduction agencies make to all men. There is a promise of security, love and intimacy with a younger woman who will not be too particular about the age, appearance or faults of the prospective man.

The second case involved a 34 year old Filipino woman who was strangled to death by her 40 year old ex-husband. The perpetrator, Charles Schembri, pleaded guilty to manslaughter and was sentenced to a minimum of 5.5 years.

Schembri had gone to the Philippines in the early 1980s with three “mates” to find brides. A 60 Minutes television program was the inspiration for the trip because it implied that there were young attractive Filipino women ready to marry Australian men. Schembri met his future wife within 3 days of arrival and was married within a matter of weeks. The couple had a child and then were separated and later divorced. The husband had custody of the child after the divorce and prior to her murder, he had denied the deceased access to their child. On the day of the murder the deceased had been told she could have access to the child and had arrived at the house for this purpose. The child was not at the house, an argument ensued, and Schembri strangled his ex-wife.

What is of particular interest is the way in which the search for the “Filipino wife” became a mitigating factor in the sentencing process. The Filipino woman was presented as “corrupt” and as only interested in securing money for her family and a “passport” to Australia. On the other hand, the perpetrator was presented as being “unsophisticated and naive” to believe that he could find a suitable marriage partner in the way that he attempted. Ultimately Schembri was recast as the victim. For instance, Vincent, J made the following comments.

Your wife, you claim, had been more interested in securing money for her apparently impoverished family and a passport to this country than she was in the development and maintenance of a marital relationship with you. This may well be the case. In expressing myself as I have done on this aspect, I do not wish to convey any impression of disapproval or moral judgment concerning her conduct.⁶³

Ultimately, Schembri is recast as a victim in a number of areas. He is seen as a victim to the earlier circumstances of his life as a child in a large immigrant family, as a victim to a fairly "stereotypical" view of marriage which he held, and, finally, as a victim to the manipulations of the Filipino woman he had married. Importantly, Schembri casts himself in a victim's role. He stated the following in a police record of interview. "[The] first five months, couldn't ask for a better woman in the whole world. And I thought my dreams came true. I had found the ideal woman. After the five months were up, you know, she was demanding things".

The Court accepted and reinforced the same interpretation of motives. Vincent, J stated the following:

I have no reason to doubt that you tried your best to make this unlikely alliance work, but viewed objectively, and with the clarity of hindsight, the barriers between you appear to have been insurmountable. You wanted to establish for yourself what might be regarded as a stereotypical relationship with your wife and family. She, it would appear, grasped at the opportunity of securing freedom in a new country.⁶⁴

In both the *Sokol* and *Schembri* cases, violence against women becomes a way of enforcing compliance with what is, in the end, a masculine construction about appropriate female behaviour. In these cases the image of women is overladen with racialised and sexualised fantasies about Filipino women as perfect partners. The women who are murdered are recast as being complicit in their own demise when they fail to fulfil the requirements of male fantasy. A new racialised and sexualised image then emerges: Filipino women are seen as permissive and grasping "gold diggers." The men themselves become reconstructed as doubly victimised because they are naive or unstable enough to believe in the possibility of fulfilling their desires through these marriages, and because they are the victims of women who are able to manipulate their desire.

⁶³ *R v Schembri*, supra n 44, at 50.

⁶⁴ *Ibid.*, 51.

IX. CONCLUSION

This paper represents preliminary findings and arguments of a larger work on violence against Filipino women in Australia.

The research is framed within the context of the relations between “developing” and “developed” countries. In particular, it is the exploitative nature of that relationship in general political economy terms, as well as the specific gendered form of the relationship between first world men and third world women that forms the substance of our understanding of the issue.

Such empirical evidence that is available shows that homicide is a specific issue for Filipino women in Australia. It is our argument that the specific vulnerability of Filipino women to homicide can only be understood within the broader framework we have outlined above. Filipino women seek emigration to Australia, thus increasing their vulnerability to Australian men. The reason behind the need to emigrate reflects poor conditions in the Philippines which, in itself, is the result of particular exploitative international relations. The form of immigration is gendered with the majority of Filipino women arriving in Australia as sponsored fiancees or spouses. This type of immigration, by its nature, facilitates the possibility of greater exploitation and abuse.

The nature of the abuse can be understood within a general context of male violence; however the particularised image of Filipino women within first world male fantasy is equally important. First world men construct third world women within the framework of *racialised* femininities. Images of Filipino women have been constructed around racialised notions of “Asian” women’s sexuality and personal characteristics displaying compliance and loyalty to the male.

At a theoretical level the explanation shows the utility of employing intersectional analysis in specific research. In relation to “class” analysis, we have interpreted this more broadly to look at international relations within a global capitalist economy, rather than specific class relations within a particular nation state. The gendered nature of those global relations becomes apparent in the first world male/ third world female hierarchy. We have also avoided a restricted view of gender and considered the question of masculinity and the connections between male power/ desire and violence. Finally, the racialised construction of Filipino women is fundamental to understanding their positioning within male fantasy.

MEMORY AND CHILDHOOD ABUSE: THE PSYCHOLOGICAL EVIDENCE

BY FRED W. SEYMOUR*

I. INTRODUCTION

Dealing with child sexual abuse allegations in the courts presents special difficulties. These relate in large part to the nature of sexual abuse. It is rare for there to have been any witnesses. Secrecy is enforced by physical threat and/or psychological coercion. This process is aided by the huge power imbalance between the perpetrator and victim: adult versus child, trusted authority figure (typically) versus dependant. This results in delayed and hesitant disclosures, if disclosure occurs at all. Medical evidence is rarely available, either because there is none or because by the time disclosure occurs healing has occurred. Thus concerns are raised about the believability of witnesses.

Sexual abuse allegations are also difficult because of the community's response to the offence. It involves an "unnatural" sexual act. It is often conducted by a family member (father, stepfather, older sibling), family friend, or person responsible for a child's supervision or care. Only 10% of child abuse is conducted by strangers. Disbelief and denial are typical responses. Furthermore, the state has traditionally been reluctant to intervene in situations involving family members since it challenges familial boundaries and beliefs favouring the sanctity of the family.¹

Awareness of sexual abuse has been effectively suppressed over hundreds of years.² The mental health professions have played their part in that. In this century, Freud's shift from sexual abuse as real to sexual abuse as fantasy denied generations of victims, and perpetrators, responsible help. It took the efforts of feminists and rape trauma specialists, therapists and social workers, to raise awareness. Systematic studies of the prevalence and effects of abuse did not take place until the late 1970s and 1980s. The facts emerging from these studies show that approximately one in four

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¹ Sale, Schuman, and O'Connor, "In a Dim Light: Admissibility of Child Sexual Abuse Memories" (1994) 8 *Applied Cognitive Psychology* 399.

² Olafson, Corwin, and Summit, "Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression" (1993) 7 *Child Abuse and Neglect* 7.

females and one in seven males have experienced at least one sexual abuse event before the age of 16, and that the impact of abuse for many of these people is considerable.³ These studies confirmed the early claims of feminists and mental health workers.

The legal response to emerging awareness of child sexual abuse has initially been characterised by the same responses seen earlier in the mental health profession and general community: disbelief and denial. In the 1980s, these responses were enacted in courtrooms through attacks on the credibility of child witnesses. Defence lawyers portrayed children as inherently unreliable (because they were children), as subject to suggestion (by parents or mental health professionals), as having poor memory, and/or as confusing fantasy with reality.

Yet a growing body of research has established that children, on the whole, are reliable witnesses. False allegations of sexual abuse by children, are rare.⁴ Even very young children can provide accurate recall about central events they have experienced, or which were personally significant to them, although they may not remember peripheral events so well. Children may be more influenced by suggestible information than adults. Suggestibility is minimised when the information being recalled is central and personally significant, when memory of the event is good, when leading questions are avoided, and when social pressure to give particular answers to an authority figure is controlled.⁵ The Evidence Amendment Act 1989 was a practical and reasonable response to these concerns about children's memory, and in the light of the research evidence on children's testimony.

In the 1990's the controversy in the courts has shifted from the credibility of child witnesses to the credibility of adult witnesses who allege they were abused as children. This controversy is focused particularly on those cases where memory for the abuse was purportedly forgotten for a period

³ Browne and Finkelhor, "Impact of Child Sexual Abuse: A Review of the Research" (1986) 99 *Psychological Bulletin* 66. See also Finkelhor, "Early and Long-Term Effects of Child Sexual Abuse: An Update" (1990) 21 *Professional Psychology: Research and Practice* 325.

⁴ Jones and McGraw, "Reliable and Fictitious Accounts of Sexual Abuse to Children" (1987) 2 *Journal of Interpersonal Violence*, 27.

⁵ Ceci and Bruck, "Suggestibility of the Child Witness: A Historical Review and Synthesis" (1993) 113 *Psychological Bulletin*, 403. See also Pipe, "Children's Testimony: Current Issues and Research" in *Butterworths Family Law in New Zealand* (7th ed 1995) 522.

- often many years - then subsequently remembered. On one side there is the argument that childhood trauma cannot be forgotten (or 'repressed') but is always remembered, and so called 'recovered memory' is typically the result of suggestions made to clients in therapy. Organisations that include lawyers and psychologists in prominent positions have been established in USA (False Memory Syndrome Foundation) and more recently in Britain and Australia, specifically to promote this argument and to lobby government agencies in the belief that many are being falsely accused and wrongly convicted for sexual abuse. On the other hand, many psychologists and other mental health professionals are providing the argument and evidence that memories for childhood trauma *can* be forgotten and later recalled. They have defended themselves against what is perceived as a misrepresentation of what psychologists believe about memory.

The first position in this controversy is well represented in a recent paper by Nigel Hampton, QC.⁶ He states his belief that there is "inadequate" or "no" evidence to support the "repression" of childhood sexual abuse,⁷ and that there are "increasing numbers" of wrongly convicted people in our prisons.⁸ He blatantly attacks therapists and counsellors for what he sees as the "ease" with which they are paid by ACC⁹ and accuses them of often being poor note takers. He refers to them in this context as "charlatans".¹⁰ He inaccurately portrays therapy practice and refers to counsellors as, "often self-appointed and often self-trained zealots- and worse- trading in the ever seductive currency of guilt and blame - and of revenge".¹¹ Not surprisingly he then introduces the *Ellis* case, which is irrelevant to the recovered memory issue. The issues in *Ellis* concern delayed disclosure not memory repression. He misrepresents Ceci both in terms of the authority he bestows on him as "the leading US child memory researcher"¹² and in terms of his conclusions about the reliability of children's evidence. The paper is a polemic, fuelled by prejudice rather than a careful analysis of the facts. As such it is typical of the line taken by the "False Memory Syndrome" organisations.

⁶ "Recovered Memory Syndrome v False Memory Syndrome or in repression and revenge, where resides justice?" [May 1995] New Zealand Law Journal 154 .

⁷ *Idem*.

⁸ *Ibid.*, 154-155.

⁹ This comment displays total ignorance of ACC procedures.

¹⁰ Hampton, *supra* n. 6, at 155.

¹¹ *Idem*.

¹² *Idem*.

In the remainder of this paper the psychological evidence in relation to the various issues associated with recovered memory are presented. This is now an active area of research so we can expect much more information in the coming years. However, a body of data exists already from which some conclusions can be drawn. In presenting this commentary, I am mindful of the statement by Banks and Pezdek that the most difficult part of the discussion is to keep the emotional power of the issues from clouding the scientific questions.¹³

II. DOES FORGETTING OF CHILDHOOD SEXUAL ABUSE OCCUR?

Before considering the forgetting of sexual abuse, it is important to state that it has long been accepted in the mental health professions that traumatic events can and do produce forgetting, for a period at least, of the traumatic event, and indeed in some cases, forgetting of a more pervasive type. Usually referred to as amnesia, this has been reported in studies of combat veterans¹⁴ and has also been observed in other victims of Post Traumatic Stress Syndrome. In the Diagnostic and Statistical Manual produced by the American Psychiatric Association (DSM)¹⁵ and used internationally for the classification of mental disorders, this was previously called Psychogenic Amnesia, although more recently in DSM IV, this is called Dissociative Amnesia. It is observed as a phenomena on its own; alternatively, amnesia for a traumatic event may occur in Post-traumatic Stress Disorder, Acute Stress Disorder as well as Dissociative Disorders.¹⁶

Many practising psychologists and counsellors report they have had clients who, at one stage forgot (or were amnesic for) childhood sexual abuse. Over half of 810 British Chartered Psychologists surveyed recently reported that they had at some time had a client who had recovered memories (not necessarily in therapy) for childhood sexual abuse. Often those memories are corroborated by existing records or other family members, including in some cases the admission by the perpetrator of the abuse. Some case studies, with corroboration, have been reported in the

¹³ "The Recovered Memory/False Memory Debate" (1994) 3 *Consciousness and cognition* 265.

¹⁴ See, for instance, Bremner et. al., "Dissociation and Post-Traumatic Stress Disorder in Vietnam Combat Veterans" (1992) 149 *American Journal of Psychiatry* 328.

¹⁵ American Psychiatric Association *Diagnostic and statistical manual of mental disorders* (4th ed 1994).

¹⁶ *Ibid.*, 480.

literature.¹⁷

Several systematic group studies have involved interviewing or giving questionnaires to clients of a sexual abuse treatment programme¹⁸ or of a substance abuse clinic containing individuals who reported having been sexually abused.¹⁹ Overall rates of total and partial “forgetting” of abuse ranged from 31%²⁰ to 64%.²¹ Of those studies that distinguished between degrees of forgetting, “severe memory losses” occurred in 28%²² and “complete forgetting” in 19%²³ and 30%.²⁴

In a study of a non-clinical sample, Feldman-Summers and Pope²⁵ asked a national sample of psychologists whether they had been abused as children, and if so whether they had ever forgotten some or all of the abuse. Almost a quarter said they had been abused (sexual and/or physical) and of those, 40% reported a period of some form of forgetting. In two of these studies individuals were asked whether there was subsequent corroboration of their recovered memories of abuse. In Herman and Schatzow’s²⁶ study 74% were able to obtain corroboration of the sexual abuse from another source (the perpetrator, other family members, or physical evidence such as diaries or photographs).

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- ¹⁷ Nash, “Memory Distortion and Sexual Trauma” (1994) 42 *International Journal of Clinical and Experimental Hypnosis* 346. See also Schooler, “Seeking the Core: The Issues and Evidence Surrounding Recovered Accounts of Sexual Trauma” (1994) 3 *Consciousness and Cognition* 452.
- ¹⁸ Brier and Conte, “Self-reported Amnesia for Abuse in Adults Molested as Children” (1993) 6 *Journal of Traumatic Stress* 21-31; Gold, Hughes and Hohnacker, “Degrees of Repression of Sexual Abuse Memories” (1994) 49 *American Psychologist* 441; and Herman and Schatzow, “Recovery and Verification of Memories of Childhood Sexual Trauma” (1987) 4 *Psychoanalytic Psychology* 1.
- ¹⁹ Loftus, Polonsky and Fullilove, “Memories of Childhood Sexual Abuse: Remembering and Repressing” (1994) *Psychology of Women Quarterly*.
- ²⁰ Banks and Pezdek, *supra n.* 13.
- ²¹ Herman and Schatzow, *supra n.* 18.
- ²² *Idem.*
- ²³ Loftus et al., *supra n.* 19.
- ²⁴ Gold et al., *supra n.* 18.
- ²⁵ “The Experience of ‘Forgetting’ Childhood Abuse” (1994) 62 *Journal of Consulting and Clinical Psychology* 636.
- ²⁶ *Supra n.* 18.

In a more direct study of forgetting of childhood sexual abuse, Williams²⁷ interviewed 129 women who were known to be victims of sexual abuse from reports to authorities 17 years earlier. In interviews they were asked detailed questions about their abuse history. Of the women, 38% did not recall the reported instance of abuse, and of these 12% denied ever being sexually abused during childhood.

Do these studies constitute proof that forgetting of childhood sexual abuse can and does occur? While there are some methodological flaws with individual studies, collectively they provide evidence that has convinced even the most sceptical amongst psychologists. For example, Ceci and Loftus²⁸ write “we too believe it is possible to lose contact with memories for long periods of time,” although they dispute that the process is one of “repression,” preferring to consider the phenomenon as “ordinary forgetting.”

Furthermore, the American Psychological Association Working Group on investigation of memories of childhood abuse concluded in an interim report of November 1994, “it is possible for memories of abuse that have been forgotten for a long time to be remembered.”²⁹ The British Psychological Panel on the same subject concluded:

“Complete or partial memory loss is a frequently reported consequence of experiencing certain kinds of psychological traumas including childhood sexual abuse. These memories are sometimes fully or partially recovered after a gap of many years.”³⁰

III. ARE MEMORIES “REPPRESSED”?

Much confusion, deliberate and accidental, has been caused by referring to the central process of memory loss as “repression”. The history of this concept lies with Freud and psychoanalysis. It implies that the memory becomes inaccessible because of its traumatic or emotionally unpleasant nature. It is taken to mean absolute memory loss for the event, and does not allow for partial or vague memories to exist.

²⁷ Williams, “Recall of Childhood Trauma: A Prospective Study of Women’s Memories of Child Sexual Abuse” (1994) 62 *Journal of Consulting and Clinical Psychology*, 1167.

²⁸ ‘Memory Work’: A Royal Road to False Memories?’ (1994) 8 *Applied Cognitive Psychology*, 351.

²⁹ *Press release 11.11.94*.

³⁰ Andrews et al., “The Recovery of Memories in Clinical Practice: Experiences and Beliefs of British Psychological Society Practitioners” (May 1995) *The Psychologist* 209.

Most of the criticism and disbelief of memory loss for childhood trauma has focused on "repression".³¹ The statement "there is no evidence for the repression of childhood trauma" denies the fact there is ample evidence for the *forgetting* of childhood trauma, as described above. Furthermore, the statement "there is no evidence for repression" is itself misleading. Such a statement can mean that there has been research that has disproved the phenomenon or it can mean that positive experimental research does not yet exist. In this case, there is no research yet that disproves repression of child sexual abuse. Experimental or laboratory research cannot replicate the circumstances of sexual abuse so there is as yet no experimental research that proves it either. Observation of the phenomenon in real victims of abuse with associated corroboration is the only available evidence at this point. It is interesting to remember there was once no proof that the world was round. Observation of ships disappearing over the horizon established it was. Observation of real events can and should constitute proof.

This statement that there is "no proof of the repression of childhood sexual abuse" has been used by defence counsel in recent trials both here and overseas - to good effect it seems - even when the complainants claim to always have had some memory of the events. The problems related to the concept of repression have helped to promote doubt and confusion in juries.

In all likelihood, several processes of forgetting will be shown in time to be relevant. Furthermore, memory loss is not an all or nothing phenomena. As noted in the group studies earlier, individuals may have periods of complete forgetting of the abuse event or partial forgetting. Harvey and Herman³² identified three general patterns of traumatic recall from studies of their clients: (1) relatively continuous and complete recall of childhood abuse experiences coupled with changing interpretations (delayed understanding), (2) partial amnesia for abuse events, accompanied by a mixture of delayed recall and delayed understanding, and (3) delayed recall following a period of profound and pervasive amnesia. Total or extensive forgetting appears to be more likely if the abuse began when the individual was a young child, and if the acts were overtly violent or sadistic.³³

³¹ Loftus, "The Reality of Repressed Memories" (1993) 48 *American Psychologist* 518.

³² "Amnesia, Partial Amnesia, and Delayed Recall among Adult Survivors of Childhood Trauma" (1994) 3 *Consciousness and Cognition* 295.

³³ Herman and Schatzow, *supra* n. 18.

Loss of memory, partial or total, may be more common in cases of sexual abuse than for example, in combat situations. The reasons for this include the younger age at which the trauma occurred, the isolation of the sexual abuse victim compared with trauma experienced in the company of others, the likelihood that trauma was from the deliberate acts of a person close and known to the sexual abuse victim compared with chance events of war carried out by strangers, the production of shame, and the differences in the time lapse between the event and being able to talk about it.³⁴ The literature that exists on Post Traumatic Stress Disorder for other groups may not apply directly to the victims of childhood sexual abuse.

More research with sexual abuse victims is needed in order to gain understanding of why and how memory loss occurs. The absence of knowledge about process does not however negate the fact memory loss does occur.

IV. ARE FAKE MEMORIES OF CHILDHOOD SEXUAL ABUSE POSSIBLE?

There are as yet no systematic studies of this, yet individual reports are in existence. These reports are largely those of individuals who alleged abuse and then recanted. At best this proves that individuals may at one time say that they were abused and at another that they were not. There are reasons other than truth for changing positions.

Yet it is widely accepted in mental health surveys that false memories may occur. Three surveys³⁵ found a high proportion of practitioners endorsing the belief that recovered memories can be false. This was also the opinion of the American Psychological Association and British Psychological Association panels of experts.

This should give comfort to those who believe that mental health professionals accept as necessarily true their clients' accounts of childhood sexual abuse.

³⁴ Cameron, "Veterans of a Secret War: Survivors of Childhood Sexual Trauma compared to Vietnam War Veterans with PTSD" (1994) 9 *Journal of Interpersonal Violence* 117.

³⁵ *Supra* n. 30; Poole, Lindsay, Memon and Bull, "Psychotherapy and the Recovery of Memories of Childhood Sexual Abuse: US and British Practitioners' Opinions, Practices and Experiences" (1995) 63 *Journal of Consulting and Clinical Psychology* 426; Yapko, "Suggestibility and Repressed Memories of Abuse: A Survey of Psychotherapists' Beliefs" (1994) 36 *American Journal of Clinical Hypnosis*, 163.

V. IS THERE EVIDENCE THAT FALSE MEMORIES ARE PRODUCED IN THERAPY?

The term "false memory syndrome" was coined by the American False Memory Syndrome Foundation as part of an effort to undermine the credibility of complainants and to discredit therapists. Not one professional body, anywhere, has endorsed "false memory syndrome" as a legitimate syndrome. This is not to deny that false memories may occur in some individuals. The related argument that false memories are the product of therapy, and particularly some therapeutic procedures, is also without direct evidence.

Firstly, therapy is not the only occasion for remembering. In Feldman-Summer's and Pope's study,³⁶ one-fourth of the participants identified therapy alone as the sole factor associated with recall. Forty-four percent stated that memory recovery had been triggered exclusively in other contexts. Therapists surveyed by Andrews et al.³⁷ reported thirty-one percent of their clients recovered child sexual abuse memories prior to any therapy. People often go to therapy *because* they are recovering memories (in the form of flashbacks, vague memories or suspicions, or complete recall of events) in order to gain help and understanding of the events. Therapy often provides the first opportunity ever to discuss sexual abuse memories and suspicions.

Secondly, concerns from cognitive/experimental psychologists that therapy may produce false memories are based on experiments which show that in certain conditions false memories can be produced.³⁸ It is important, however, to remember that laboratory experiments can never replicate the conditions of traumatic events. Furthermore, many of the experiments relate to memory for associated circumstances to a central event in which the subject is an observer rather than a central participant. Whether memory is as suggestible as is feared when the event is of high emotional content, involves the individuals directly in the action, and concerns a common taboo (sexual abuse) is less certain, and some would claim absolutely unproven.³⁹

³⁶ *Supra* n. 25.

³⁷ *Supra* n. 35.

³⁸ Lindsay and Read, "Psychotherapy and Memories of Childhood Abuse: A Cognitive Perspective" (1994) 8 *Applied Cognitive Psychology*, 281; Loftus, *supra* n. 31.

³⁹ Pezdek, "The Illusion of Illusory Memory" (1994) 8 *Applied Cognitive Psychology* 339.

Thirdly, in the most comprehensive review of the experimental research on suggestibility, Lindsay and Read are quite specific in what their concerns relate to: not all therapy but some specific techniques. They state, "There is little reason to fear that a few suggestive questions will lead psychotherapy clients to conjure up vivid and compelling illusory memory of childhood sexual abuse"⁴⁰ and "not all or even most memories recovered in therapy are false...our comments focused exclusively on approaches that make extensive use of suggestive memory recovery techniques."⁴¹ The techniques they are concerned about include hypnosis, guided imagery, journaling, dream interpretation, body memories and survivor groups.

Fourthly, if memory recovery techniques are used, this does not mean that the memories so recovered will inevitably be false. To quote cognitive psychologists, Ceci and Loftus, "There is no theoretical reason why true memories cannot be recovered using memory work techniques." And, "The point is not that suggestive memory techniques unalterably lead to false memory but merely that they *may* do so."⁴² What is argued by the critics of memory recovery techniques such as those listed above, is that there is an increased *risk* of false memories with their use, and their concerns are that therapists therefore acquaint themselves with the issues and exercise the appropriate level of caution.

Thus the evidence that therapy is at significant fault does not exist. There is a reasonable concern raised by cognitive psychologists about some recovered memory techniques, but it is acknowledged that there is "a paucity of direct evidence."⁴³ Practitioners have long been aware of the pitfalls of hypnosis. This, and other techniques listed by Lindsay and Read, are appropriately regarded with caution in the guidelines produced by the British Psychological Association and the Australian Psychological Society.⁴⁴ Therapists who are appropriately trained and belong to appropriate professional bodies that provide education and oversight through admission and complaint procedures, are likely to be mindful of appropriate practice.

⁴⁰ *Supra* n. 38, at 359.

⁴¹ Read and Lindsay, "Moving Toward a Middle Ground on the False Memory Debate" (1994) 8 *Applied Cognitive Psychology* 407.

⁴² *Supra* n. 28, at 359.

⁴³ Read and Lindsay, *supra* n. 41, at 417.

⁴⁴ See *Bulletin of the NZ Psychological Society* (March, 1994).

VI. DO THERAPISTS USE MEMORY RECOVERY TECHNIQUES?

If the concerns of cognitive psychologists are to be regarded as significant, it must be shown not only that the procedures they are concerned about *do* produce false memories in therapy, but also, that psychologists and counsellors actually use these techniques. And if they do, in what context? In particular, are they used in forensic work, as distinct from psychotherapy.

Poole et al.⁴⁵ showed that of 145 American and 57 British psychologists, a high percentage had used at least one memory recovery technique to help clients remember child sexual abuse. Evidence of widescale use of these techniques, in combination, was lacking. No such data exists for New Zealand therapists.

In any case, cautious use of these techniques is not without justification in a psychotherapy context, at least in the hands of competent clinicians. It can provide a hypothesis as to what may account for a client's condition; data can then be re-evaluated in subsequent sessions. This approach to clinical decision-making is widely accepted. It supposes an ongoing relationship with the client, and a purpose of treatment. In the court context, however, there is no ongoing relationship in which to later re-evaluate false conclusions. Given the increased risk that these techniques may produce inaccurate memories the use of them in a forensic context is potentially problematic; at the least, an individual's process of memory recovery needs to be reported fully in the courtroom.⁴⁶

VII. CAN PSYCHOLOGISTS ASSIST IN CRIMINAL TRIALS RELATED TO SEXUAL ABUSE ALLEGATIONS?

Given the widespread misinformation on the status of memory loss for childhood trauma, the status of recovered memory, and the role of therapists in memory recovery, expert psychological evidence should be of value for judges and juries in decision-making. There is now a body of knowledge on these topics, much of which I have reviewed in this paper. The opinions on these matters professed by Nigel Hampton in his recent paper are clearly at variance with the facts. Given the historical attractiveness of such opinions (ie disbelief, denial, "shooting the messengers" who bring the bad news - psychologists and counsellors), the placement of expert evidence before a court seems especially relevant.

⁴⁵ *Supra* n. 35.

⁴⁶ Sale et al., *supra* n. 1.

Outside of a relationship to particular cases, psychologists and others in the mental health profession need to enter more actively into the discussion of these issues. This paper is an effort to do just that. I have argued that there is ample evidence that childhood psychological abuse can be forgotten (although the majority of people will retain complete or partial memory) and that accurate memory recovery is common. It is possible that some recovered memories will be false. The allegation that psychologists and counsellors are responsible for creating false allegations of sexual abuse is without research support. The mostly reasonable concerns of cognitive psychologists about *some* recovered memory techniques have been misrepresented as being more critical of practitioners than is the case. An interest in accuracy is important to our profession. It is even more important for clients, present and future, who turn to therapists for assistance. For those clients who take action in the courtroom there is a similar need for accuracy and fairness from those who will represent them and cross-examine them.

HOW PSYCHOLOGISTS CAN ASSIST IN THE RECOVERED MEMORY ARENA

BY BRENDA MIDSON*

I. INTRODUCTION

Fred Seymour's article has discussed the psychological evidence supporting recovered memory theory. It raises the important issue of how psychologists can assist in recovered memory trials. This article also reflects on that issue and will discuss, from a legal perspective, the areas in which psychologists, psychiatrists and other mental health professionals can provide necessary guidance to lawyers working with clients who have recovered memories of childhood sexual abuse.

Law and psychology are two disciplines directly concerned with the consequences of adults recovering memories of child sexual abuse. As well, many of the solutions to the problems encountered by these adults can be found in a collaboration between psychology and law. However, the convergence of psychology and law is not without its difficulties:

The law demands precision, concise answers, and prefers yes or no formulations. Psychology, on the other hand, emphasizes process, behaviour and change over time, prefers to review all relevant hypotheses and rule out irrelevant alternatives. The legal focus is on rule and order, concrete facts, on maintaining rights, and doing justice. In clinical practice, the focus is on the person or the group of persons in all their diversity, on abstract theory, on achieving health, and doing good.¹

The focus of this article is on how psychology can assist law in recovered memory cases. This can occur in two ways. First, psychology *informs* law by providing information that is useful to the courts, both in specific cases and in general. Second, psychology can attempt to *influence* law and policy.² The following discussion will focus on how these methods of assistance can work in practice.

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¹ Hall, "The Role of Psychologists as Experts in Cases Involving Allegations of Child Sexual Abuse" (1989) 23 FLQ 3, 451.

² Small, "Legal Psychology and Therapeutic Jurisprudence" (1993) 37 St. Louis LJ 675.

II. PSYCHOLOGY INFORMING LAW

1. *Expert evidence*

Arguably, the most visible role that mental health professionals play in the legal arena is that of expert witness for either the prosecution or the defence. It is beyond doubt that such experts are a necessity in sexual abuse cases. Jurors and judges are unlikely to be aware of common behaviours exhibited by sexual abuse victims or of the dynamics of child abuse which explain many complainants' seemingly inconsistent behaviour. In cases involving adult complainants of childhood sexual abuse, expert evidence is necessary to explain the long-term effects of child sexual abuse which the complainant may exhibit and to explain why the offences went unreported for so long. In recovered memory cases, expert evidence is also necessary to explain how memory functions, the effects of trauma on memory, the processes of repression and dissociation, and specifically how and why some people have amnesia for traumatic events for long periods of time.

A. *Evidence on the effects of trauma on memory*

Expert evidence on the concepts of repression and dissociation is necessary in recovered memory cases. The jury is unlikely to understand how it is possible for a complainant to have previously had no conscious recollection of the abuse. However, problems associated with novel scientific evidence currently surround the admission of this type of evidence.

In New Zealand, admissibility of novel scientific evidence was based on the common-law rule requiring "general acceptance" of a scientific theory or technique before it could form the basis of an expert's opinion. Specifically, there had to be general acceptance of the theory in the particular discipline to which it belonged. This principle was first enunciated in *Frye v. United States*.³ The *Frye* test has since been adopted in other jurisdictions as a test for admissibility of, inter alia, psychiatric and psychological evidence. There has been a great deal of argument about what type of evidence satisfies the *Frye* test. When dealing with recovered memories, this debate is of critical importance because there is no decisive viewpoint on the issue of repressed memory within the field of psychology.

In 1991 the New Zealand Law Commission questioned whether the *Frye* rule formed part of the law in this country. The Commission referred to

³ *Frye v United States* (1923) 293 F 1013.

the possible New Zealand counterpart of the *Frye* test in the judgment of McMullin J in *R v B*,⁴ stating that scientific evidence must be from a “recognised branch of science”.

A recent American case appears to have moved away from the *Frye* test of admissibility. In *Daubert v Merrell Dow Pharmaceuticals, Inc.*,⁵ the evidence under consideration was based on pharmacological studies and animal studies which showed a link between an anti-nausea drug taken during pregnancy, and birth defects. In *Daubert*, although the Court recognised the importance of general acceptance as a factor, it rejected this standard as the exclusive test of admissibility for expert scientific testimony. Instead, the Court adopted a more systematic approach that inquires into the extent to which the expert’s methodology or reasoning is grounded in the procedures of science. Specifically, the Court set out a non-exhaustive list of facts that would bear on the inquiry. These factors include:

1. The “falsifiability” of the theory or technique, i.e. whether the technique has been tested to determine the extent to which results can be “rigged”.
2. Its known or potential error rate and the existence and maintenance of standards controlling its operation.
3. The extent to which it has been subjected to peer review and publication.
4. The extent to which it has been “generally accepted” within the relevant scientific community.

Daubert has been reviewed in a recent New Zealand High Court decision,⁶ where the evidence in question was from a forensic scientist. Tipping J considered *Daubert* together with other authorities in formulating the test for admissibility of expert evidence. It was held that the proponent of the evidence had to show that the evidence was relevant, “helpful” (the assessment of this factor included a threshold test of reliability which had to be met), and more probative than prejudicial. It has yet to be seen whether later courts will adopt this formulation in recovered memory cases. Neither *Daubert* nor *Calder* specifically deal with psychological evidence.

Another avenue which could be pursued by psychologists wishing to circumvent the novel scientific theory problems is to testify as to the memory disorder known as Dissociative Amnesia.

⁴ *R v B* [1987] 1 NZLR 362 at 367.

⁵ *Daubert v Merrell Dow Pharmaceuticals* (1993) 113 S. Ct. 2786; 1993 U.S. LEXIS 4408.

⁶ *R v Calder*, High Court, Christchurch. 12 April 1995 (T154/94). Tipping J.

The essential feature of Dissociative Amnesia is an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness.⁷

Dissociative Amnesia most commonly presents in the form of retrospectively reported gaps in recall for aspects of the individual's life history. These gaps are normally related to traumatic events. Dissociative Amnesia has been associated with depressive symptoms, depersonalisation, trance states, spontaneous age regression and an inability to feel pain.⁸

Admitting evidence on Dissociative Amnesia will have the effect of educating the jury that traumatic events can be lost from consciousness and later retrieved.

In New Zealand, to date, the issue of recovered memories of sexual abuse has been raised in four reported decisions and four unreported decisions. Only one of these cases has dealt specifically with the admissibility of expert testimony on repression and dissociation in relation to sexual abuse complainants.⁹ A further case has considered expert testimony on the "forgetting" of trauma generally.¹⁰ The writer will briefly outline the decisions in these two cases. The other New Zealand cases involving recovered memories have dealt with the issue of whether *complainants* should be permitted to testify as to their recovered memories and, therefore, do not fall within the scope of this article.

The expert testimony proffered in *R v R*¹¹ consisted of distinguishing between declarative and non-declarative memory and explaining how non-declarative memory may not be retrieved in words but as a repetition of the original experience such as a bodily sensation. The expert also proposed to describe how the mind constructs psychological defences against trauma; about the concepts of repression, dissociation and denial; and about "false memory syndrome". The High Court held that the proffered evidence was admissible because it was relevant to the central issue of the credibility and reliability of the complainants' evidence; the subject-matter was well outside the ordinary experience and knowledge of a jury; it was not intended to endorse the reliability of the complainant's

⁷ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (4th ed 1994) 478.

⁸ *Ibid.*

⁹ *R v R* (1994) 11 CRNZ 402.

¹⁰ *R v Bain (No. 6)*, High Court, Dunedin. 23 May 1995 (T 1/95). Williamson J.

¹¹ *R v R*, *supra* n. 9.

evidence; and the probative value of the evidence outweighed the possible prejudice to the accused. In this case, the High Court did not even consider the question of whether the basis for the evidence was “novel scientific evidence”.

In *R v Bain (No. 6)*¹² the accused was charged with murdering five members of his family. The defence raised was that the accused’s father had killed the remainder of the family before killing himself. The defence sought to admit evidence from a psychiatrist on the ability of persons who have seen or experienced horrific events to block them from their mind, but later be able to regain some or all memory of these events. This evidence related to the accused’s state of mind at the time he was alleged by the defence to have discovered the bodies of his family, and also to his memories of that event. The High Court admitted the evidence on the basis that the behaviours referred to in the evidence were outside the limits of “normality” and the expert evidence might therefore assist the jury.

If future courts were to follow the approach adopted in these two cases, it would not appear to be difficult to have expert testimony on the effects of trauma on memory admitted in court. However, it may be that given the wide-ranging debate in the area, a Court of Appeal decision is required to settle this matter.

B. The complainant’s behavioural characteristics and history

There is a growing body of research suggesting that sexual abuse can have enduring negative outcomes for those who survive it. The fact that any such negative outcomes are evident in a complainant is vital evidence in recovered memory cases for three reasons:

1. Such evidence has an educative purpose in relation to typical reactions to sexual abuse trauma. Such testimony would assist the jury in understanding the behaviour of the complainant.
2. The negative outcomes of sexual trauma may profoundly affect the complainant’s manner and interaction with people and events, and therefore have a negative effect on his or her credibility. Therefore, evidence explaining that such outcomes are common responses to sexual abuse is necessary.

¹² *R v Bain (No. 6)*, supra n. 10.

3. The existence of any such behavioural characteristics in a complainant can be seen as supporting a conclusion that the complainant has been sexually abused.

With regard to initial effects of child sexual abuse, empirical studies have indicated reactions in at least some portion of the victim population which include fear, anxiety, depression, anger and hostility, aggression, and sexually inappropriate behaviour.¹³ Cavaiola and Schiff report a clear correlation between substance abuse in adolescents and physical and/or sexual abuse.¹⁴

Browne and Finkelhor have found that empirical studies carried out on adults support the effects mentioned in clinical literature.¹⁵ These effects include depression, self-destructive behaviour (including suicidality), anxiety, substance abuse,¹⁶ dissociation, sleep disturbances, post-traumatic symptoms,¹⁷ eating disorders, difficulties in forming and sustaining intimate relationships, and sexual dysfunction.¹⁸ What is particularly noteworthy is that sexual difficulties have been found to be most often associated with sexual abuse, rather than physical or emotional abuse.¹⁹ Briere and Runtz found that female university students with a sexual abuse history reported higher levels of, inter alia, acute and chronic dissociation and somatisation, than did a comparison group of non-abused women.²⁰

The 1989 Amendment to the Evidence Act 1908 inserted section 23G, allowing evidence to be given on whether a complainant's behaviour is consistent or inconsistent with other sexually abused *children* of the same age as the complainant. This enactment implies that the legislature has recognised that there is a body of knowledge concerning certain characteristics which are concomitants of sexual abuse. There is no reason

¹³ Browne and Finkelhor, "Impact of Child Sexual Abuse: A Review of the Research" (1986) 99 *Psychological Bulletin* 1, 66.

¹⁴ Cavaiola and Schiff, "Behavioural Sequelae of Physical and/or Sexual Abuse in Adolescents" (1988) 12 *Child Abuse & Neglect* 181.

¹⁵ Browne and Finkelhor (1986), supra n. 13.

¹⁶ *Ibid.*

¹⁷ Elliott and Briere, "Sexual Abuse Trauma Among Professional Women" (1992) 16 *Child Abuse & Neglect* 391.

¹⁸ Briere, J.N. *Child Abuse Trauma: Theory and Treatment of the Lasting Effects* (1992) 48-77.

¹⁹ *Ibid.*, 34.

²⁰ Briere and Runtz, "Symptomatology Associated with Childhood Sexual Victimization in a Nonclinical Adult Sample" (1988) 12 *Child Abuse & Neglect* 51.

why section 23G should not be expanded to apply to *adult* complainants also.

While it has been argued that the list of symptoms described as typical of sexual abuse victims is broad enough to encompass the experience of nearly all children who endure the turbulence of growing up, whether or not that turbulence entails sexual abuse,²¹ there is another area of expert testimony which can assist courts in determining the source of trauma. This area is the psychological evaluation of objective data such as documented family history, and school and medical records.²² Once it is established that the complainant has experienced some form of trauma, then an evaluation of family history can bring to light what other trauma-inducing factors existed which would have been likely to cause the trauma symptoms. It then may become a process of elimination. If the family history, school and medical records reveal no other possible sources of trauma, weight is added to the complainant's allegations of sexual abuse.

There is a wide range of mental health professionals in New Zealand, including counsellors specialising in child sexual abuse, who have the necessary skill and experience to provide expert testimony on matters relating to sexual abuse victims. These may not be registered psychiatrists or psychologists as required by section 23G of the Evidence Act 1908. It is submitted that the people most well-equipped to provide reliable testimony in the area of sexual abuse are the people who deal with this issue every day. In New Zealand, Department of Social Welfare social workers are presumably skilled in this area. They work extensively with adult complainants, and therefore are extremely well qualified to give expert evidence on the effects of child sexual abuse.

C. Court appointed experts?

One difficulty associated with the use of experts in adversarial proceedings is that they are inevitably aligned with either the defence or the prosecution.

It is difficult for experts to play the role of advocate for their client while also maintaining the objectivity of a scientist. Experts may feel pressured to misrepresent the scientific literature by not discussing specific findings or by not acknowledging the limitations of studies.²³ While most experts

²¹ See for example Cohen, "The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims" (1985) 74 *Georgetown Law Journal* 429.

²² Hall, *supra* n. 1.

²³ Cutler, B. and Penrod, S., *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995) 243.

do their best to testify accurately, lawyers who are interested in obtaining as much favourable testimony as possible may ask questions of the expert that invite the expert to exceed the bounds of existing knowledge.²⁴ More cynically, experts may have hidden agendas, and may use their position as an opportunity to expound their personal views:

Some mental health professionals, in their normal role of zealous child advocate, may blindly testify to whatever the prosecution desires.²⁵

Another difficulty that results from the adversarial system is that expert testimony on any subject is met with expert testimony which contradicts it.²⁶ This can be illustrated in the recovered memory context: for every expert who testifies as to the ability of individuals to recover reasonably accurate memories of abuse, another expert will testify as to the likelihood of false memories.

From these disparate views a “battle of experts” often results, leaving the jury more confused than ever. It may also raise doubts in the minds of jurors as to the value of expert testimony altogether.²⁷ Furthermore, a “battle of experts” diverts attention away from the real issues in the case, which are whether the alleged offences occurred and whether the accused committed them.

A possible solution to these problems is for the courts to appoint their own expert in the role of *amicus curiae* (friend of the court), who is not aligned with any party to the proceedings. Court-appointed experts would presumably be under less pressure to present a one-sided view. In France, all experts are court-appointed. Spencer outlines the benefits of such a system:

In France, the court in each area has an official list of experts, membership of which is controlled by a committee and is something of a professional honour. A serious case will be handled from an early stage by a *juge d'instruction*, and when the need for an expert becomes apparent he will select one from the list. If either side does not like his report it can ask the Judge to obtain a supplementary report; and in a really

²⁴ Myers, “The Tendency of the Legal System to Distort Scientific and Clinical Innovations: Facilitated Communication as a Case Study” (1994) 18 *Child Abuse & Neglect* 6, 505.

²⁵ Askowitz and Graham, “The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions” (1994) 15 *Cardozo L Rev* 2027.

²⁶ Cutler and Penrod, *supra* n. 23, at 245.

²⁷ *Ibid.*, 246.

difficult case a panel of neutral experts will be appointed to produce a joint report. This system, on the fact of it, solves at once the problem of bias, quality control and inequality of arms."²⁸

As a general rule under the adversarial system, judges may not of their own accord summon witnesses of fact who are not called by either of the parties, although the court's overwhelming duty to do justice gives it the power to call witnesses.²⁹ Hodgkinson suggests that similar rules apply with regard to the calling of experts.³⁰ Civil courts in many jurisdictions, including the Family Court in New Zealand, have the power to appoint experts, and the same applies in Continental criminal and civil proceedings. In England and the United States the judge has a discretion to invite independent expert testimony on behalf of the court, but this power is rarely used.³¹ It would seem that this position also applies in New Zealand.

The writer suggests that courts could take more advantage of the discretion to call their own neutral experts. The adversarial system is thought to be self-correcting: if one expert offers unreliable information, the opposing expert corrects the error and a balanced picture results.³² However, the rhetoric does not always match the reality, and confusion and inaccuracies can often result from opposing expert testimony.

The use of court-appointed experts is not without its problems. Despite not being aligned with any particular party and being required to objectively state the scientific research, what the court-appointed expert offers as an opinion will be coloured by his or her own subjective biases. There are no safeguards that a court-appointed expert does not have a political agenda to pursue. However, court-appointed experts are not subject to pressure from defence or prosecution to present only one side of the story.

Any guidance which seeks to ensure objectivity in an expert's report is to be welcomed since it may engender in the court greater trust for the expert, and this in turn may lead to a less restrictive attitude towards the admissibility of expert evidence.³³

²⁸ Cited in Graham-Hall, J. and Smith, G., *The Expert Witness* (1992) 72.

²⁹ Hodgkinson, T., *Expert Evidence: Law and Practice* (1990) 66.

³⁰ *Ibid.*, 67.

³¹ Cutler and Penrod, *supra* n. 23, at 243; Hodgkinson, *supra* n. 29, at 66.

³² Myers, *supra* n. 24.

³³ Ormerod, "Expert Witnesses in Children's Cases" (1992) *Journal of Child Law* 122.

Court-appointed experts can also be used as an adjunct to the use of experts called by the prosecution and defence. In this regard, however, they should be called not to give a third opinion, but rather to present a neutral review of the research and literature and assess the reliability of the underlying principles and methods at issue. The court-appointed expert could also assist the court in evaluating the qualifications and expertise of the prosecution and defence witnesses.³⁴

2. An interdisciplinary approach to teaching law

Another way in which psychology can inform the law in recovered memory cases is by an interdisciplinary approach to teaching law. The Domestic Violence Advocacy Project (the DVAP) is such an approach which has been implemented at the George Washington University National Law Center.³⁵ This project is specifically structured around giving law students insights into working with battered women. The DVAP teaches students to be strong advocates for battered women by providing the students with a wider substantive understanding of the dynamics of domestic violence and exposing them first hand to the use of social science experts.³⁶ An interdisciplinary approach similar to the DVAP would be of great assistance in the wider context of domestic violence, including the area of sexual abuse. A project such as the DVAP in the context of sexual abuse would contribute to educating lawyers about the reality of recovered memories, and teach them how to be advocates for adult complainants of childhood sexual abuse.

The goal of what the DVAP terms “psychosocial” classes is to develop law students’ understanding of the battered woman’s participation in the legal process in light of her personal history, the social and psychological context in which she lives, and the interpersonal context which defines the lawyer-client relationship. This perspective enables the student to deal with potentially difficult aspects of acting for a battered woman, such as a perceived lack of co-operation, ambivalence about proceeding with the complaint, and ambiguity in their communications.³⁷ These difficulties also arise for lawyers when dealing with adult complainants of sexual abuse. Generally, lawyers may be unaware of family dynamics which

³⁴ Milich, “Controversial Science in the Courtroom: Daubert and the Law’s Hubris” (1994) 43 Emory LJ 913.

³⁵ Meier, “Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice” (1993) 21 Hofstra L Rev 1295.

³⁶ Ibid.

³⁷ Ibid.

might pressure a complainant to retract allegations. A client may also be suffering from the long-term effects of sexual abuse, such as PTSD, which a lawyer may translate as flighty, inconsistent, or “crazy” behaviour. Therefore, basic psychological concepts such as the nature and reasons for ambivalence, denial, and PTSD can be helpful as part of a lawyer’s basic training.³⁸

Law students also need to learn about memory. The study of memory is of vital importance for lawyers working in the sexual abuse field. Knowledge of the ability of both children and adults to remember and report details is a vital lawyering tool. In recovered memory cases, knowledge of the effects of trauma on memory is also an important step in a lawyer’s understanding of their client’s dilemma, and being able to be a strong advocate for their client’s case in court. It is important for lawyers to understand that a client claiming to have recovered memories of sexual abuse that they had previously “forgotten” is not delusional. Because of the negative publicity about recovered memories, many lawyers may automatically assume that their client is suffering from “False Memory Syndrome”!

Another way of educating law students in this area is to develop their awareness of sexual crimes generally. For example, at the Waikato School of Law, sexual violation (including recovered memory issues) is taught as part of the Crimes course.

An interdisciplinary approach to teaching law students will need to socialise students into a new way of thinking. Teaching students how to understand their own and others’ psychological responses requires a degree of willingness to risk the vulnerability inherent in dealing with personal feelings.³⁹ This may not pose a large problem if law students are taught the interdisciplinary approach from year one. However, it is a huge step for those who have already been schooled in the importance of setting aside their own feelings to become lawyers.⁴⁰ Law students must be able to empathise with their client, but not allow their own feelings to dictate the outcome of the relationship. A lawyer who becomes submerged in their client’s problems will not be helpful, nor will a lawyer who maintains total distance. A balance needs to be maintained at all times.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

II. PSYCHOLOGY USING LAW TO INFLUENCE LAW AND POLICY

Psychology can use the legal system to influence law and policy by submitting *amicus curiae* briefs to the courts in cases involving recovered memories.⁴¹ It has been argued that *amicus curiae* briefs are not appropriate because there is no cross-examination to ensure the reliability of the research.⁴² However, this problem is minimised if the brief is submitted by a recognised, reputable psychological body. As Small points out, the process of writing briefs is still a relatively new phenomenon to most psychologists.⁴³ However, this is a relatively minor issue which can be solved by lawyers assisting psychologists in the process of writing briefs.

Herzberger suggests that written opinions could be consulted by the courts as persuasive or binding authority.⁴⁴ One way in which psychologists can influence the law in the recovered memory context is by submitting briefs on the recent research on memory generally and the effects of trauma on memory, and whether this evidence is reliable enough to be admissible in court.

Walker and Monahan have also suggested that some social science research methodology should have precedential value. These authors suggest that in determining what social science findings should be treated as authoritative, the key is whether the methodology controls for competing hypotheses which might account for an observed state of affairs.⁴⁵ Presumably this could involve psychologists providing the legal system with methodologically sound examples of studies used to obtain data on, for example, the effects of child sexual abuse. This could provide the courts with a standard by which they could measure the reliability of the evidence in any given case. The provision of this type of information, while helping the courts in their task, enables the psychological community to influence law and policy, by ensuring that laws and policies are supported by the empirical literature.⁴⁶

⁴¹ Small, *supra* n. 2, discussing the use of *amicus curiae* briefs in general.

⁴² Etlinger, "Social Science Research in Domestic Violence Law: A Proposal to Focus on Evidentiary Use" (1995) 58 Alb L Rev 1259.

⁴³ Small, *supra* n. 2.

⁴⁴ Herzberger, "Social Science Contributions to the Law: Understanding and Predicting Behaviour" (1993) 25 Conn L Rev 1067.

⁴⁵ Walker & Monahan, "Social Facts: Scientific Methodology as Legal Precedent" (1988) 76 Calif L Rev 877; Monahan & Walker, "Social Authority: Obtaining, Evaluating, & Establishing Social Science in Law" (1986) 134 U Pa L Rev 477.

⁴⁶ Small, *supra* n. 2.

Psychologists can also influence law in the recovered memory context by having greater control in establishing the admissibility standards for expert testimony on repression and dissociation.⁴⁷ For example, proceedings could be held within the psychological community to identify and denounce scientifically inadequate testimony,⁴⁸ and to identify sound research.

III. CONCLUSION

It is beyond doubt that recovered memory cases cannot adequately be dealt with by the legal system working in isolation. Fred Seymour has outlined the psychological research in this area and the resulting evidence such research has produced. The writer suggests that more regard needs to be taken of this evidence. In particular cases, expert psychological evidence would assist juries by enabling them to assess the facts of each case in light of the current psychological evidence concerning recovered memories. For example, evidence that amnesia is a possible outcome of childhood sexual trauma will hopefully prevent the jury from necessarily concluding that the complainant is lying, or confused, or has a "false memory". In general, psychologists and other mental health professionals can have an impact on the way the legal system deals with the recovered memory issue, by educating legal workers who work with recovered memory complainants, by developing sound research techniques and by assisting in the formulation of law and policy in this area.

⁴⁷ Etlinger, *supra* n. 42.

⁴⁸ *Ibid.*

COMMENT: THINKING ABOUT DOMESTIC VIOLENCE IN GAY MALE RELATIONSHIPS

BY NIGEL C. CHRISTIE *

1. Introduction

On 1 July 1996, the Domestic Violence Act 1995 came into effect. Under this Act, homosexuals in New Zealand are able to obtain protection orders against their intimate partners for the first time. This comment is a brief introduction into issues of gay male domestic violence and will hopefully serve as a catalyst for further discussion and research into these issues. It is also hoped that it will encourage lesbians and others to research and theorise about violence within the wide spectrum of same sex relationships in New Zealand.

While this comment does not provide any definitive answers for solving the problems inherent in gay male domestic violence, it attempts to outline tactics of power and control which may arise within a specifically gay male context. It then discusses the question of whether gay men are likely to turn to the law for protection, given the history of homophobia that has pervaded much of the legal jurisprudence to date. This comment is meant to be a tool both for family lawyers and for members of the gay men's community concerned about domestic violence. It is, therefore, purposely written in an informal style to ensure its accessibility to non-legally trained readers.

2. The Dominant Paradigm of Domestic Violence

There has been little writing about same-sex domestic violence in any jurisdiction. To date, domestic violence has been viewed primarily as a social ill perpetrated predominantly against women by men and occurring within adult heterosexual relationships. Other forms of domestic violence (ie elder abuse, teen dating abuse, and same sex abuse) have largely been ignored, partly because few, if any, legal remedies have existed to afford protection to those victims not involved in live-in, marriage-like relationships. The awareness of violence within other domestic settings is only now beginning to surface.

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While it has been estimated that violence between gay male domestic partners occurs at about the same rate as in heterosexual domestic relationships,¹ there appear to be two main reasons for the paucity of legal scholarship on this subject. First, recent theories of domestic violence have focussed on heterosexual relationships where the batterers are male and the victims female.² These theories have suggested that individual power and control tactics are legitimised by social constructs which support male dominance, especially where those tactics are displayed by a man in his role as the head of the family.³ It is clear, however, that such theories with their emphasis on gender power imbalances cannot provide an explanation for domestic violence within gay male relationships.

Second, and probably most importantly, there are historical and social factors which have worked to invisibilise the experiences of gay men and the very existence of committed gay relationships. There have been various attempts to relate or compare gay male relationships with heterosexual relationships by attributing "gender-equivalent" roles to gay male partners.⁴ This approach, however, attempts to force gay relationships into heterosexual moulds. To say that all gay male relationships consist of a "masculine-dominant" partner and a "feminine-subservient" partner is to artificially caricature those relationships and impose homophobic stereotypes which imply that homosexual relationships simply mimic heterosexuality. In reality, there is a diversity of gay male relationships, and much evidence to support Peplau's contention that most homosexual couples "actively reject heterosexual sex roles as models for their own relationships."⁵

3. *The Invisibilisation of Gay Male Relationships*

Until the last decade, the law itself functioned to keep gay men "invisible". It punished gay men for their sexual behaviour and allowed discrimination based on sexual orientation. For instance, until 1986 in New Zealand,

¹ Dutton, "Patriarchy and Wife Assault: the Ecological Fallacy" [1994] 9 *Violence and Victims* 167, 172. Dutton uses the figures of 27.8% for "any kind of violence occurring at any time in their [heterosexual] marriage" and 26% for gay male relationships.

² Letellier, "Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence," (1994) 9 *Violence and Victims* 95, 97.

³ Pence and Paymar, *Power and Control: Tactics of Men Who Batter* (1990).

⁴ Peplau, "Lesbian and Gay Relationships", in Gonsiorek, J and Weinrich, J (eds.), *Homosexuality: Implications For Public Policy* (1991): cited in Letellier, supra n. 2, at 97.

⁵ Idem.

sexual acts between consenting adult males were criminal per se. The New Zealand Criminal Code Act 1893 made sodomy punishable by life imprisonment and indecency between males punishable by 10 years imprisonment with flogging or whipping. Under the Crimes Act 1961, the punishment for consensual sexual contact between men was “reduced” to seven years for sodomy and five years for homosexual indecencies. With the passage of the Homosexual Law Reform Act in 1986, sexual behaviour between gay men was de-criminalised but it was only in 1993, with the passage of the Human Rights Amendment Act, that discrimination against gays in terms of access to public services, housing, and employment was outlawed.

Lack of legal recognition has contributed to the invisibilisation of domestic violence in gay relationships. I believe that there is still a widespread misconception that intimate relationships among gays are only about casual and frequent sex, and not about committed relationships worthy of recognition. For example, the majority of family law statutes do not provide for the legal rights of gay partners. Same sex relationships are not included under the counselling provisions of the Family Proceedings Act and there is no provision for gays to enter into property agreements under section 40A of the Property Law Act. The High Court has recently held that despite section 19 of the Bill of Rights Act, gays cannot marry.⁶ Most relevant in terms of domestic violence law, while the long title of the Domestic Protection Act stated that it was an Act “to mitigate the effects of violence within the domestic sphere,” the definition of “the domestic sphere” was specifically limited to married couples or cohabiting heterosexual de facto ones. The idea that gay couples could live together in relationships in the nature of marriage was a virtual oxymoron until the recent passage of the Domestic Violence Act 1995.

In my opinion, gay men as well have tended to pretend (or hope) that somehow gay relationships were different and violence-free. We ourselves had a stake in the male/female intimate violence paradigm and the view that violence was an incident of traditional patriarchally based power dynamics. As well, I believe that homophobic societal discourses have led gay men to hide the incidence of domestic violence in our communities. As a result of all too prevalent forms of anti-homosexual discrimination, we wanted to present only positive images of ourselves to the wider community. We feared that an acknowledgment of domestic violence in

⁶ *Quilter v. Attorney-General* [1996] NZFLR 481. The High Court decision is currently under appeal.

our relationships might be used by anti-gay decision-makers to subvert our attempts to gain increased civil rights.

An education theorist of the mid 20th century, Maslow,⁷ states that so long as we are striving to deal with matters of survival and basic need, we are unable to deal with higher-level concerns. For homosexuals this means that where homosexual activity is criminalised, or where discrimination against homosexuals is still sanctioned (either legally or in fact), then energies must firstly go into remedying these matters. Gays are constantly bombarded with negative descriptions of themselves and their “lifestyles” by other disapproving groups in society. Gays in relationships generally remain hidden behind closed doors. So long as homophobic responses by the dominant culture continue to exist, there is no accurate frame of reference within which the gay victim of domestic violence is able to evaluate the dynamics of his own relationship in the context of gay relationships in general.

It is clear that many victims of heterosexual domestic violence do not come forward and report the occurrence of such violence. They may have many good reasons for not doing so, such as the fear that their partner will become even more violent, the shame of admitting that they have “got themselves” into a violent situation, the lack of knowledge about or fear of facing “the system”, among others. It can be assumed that if a partner in a gay relationship becomes a victim of domestic violence these reasons may also subsist. There may as well be other reasons, unique to gay relationships, for why a gay victim may not come forward.

The gay victim of domestic violence may not actually see himself as a victim. Much of the information that has been circulated about domestic violence is that it involves male control of female partners, reinforced by social constructs privileging men’s power over women in many areas. A gay relationship is more likely, but not necessarily accurately, to be seen as a relationship of equals. This view is often one held not only by the partners to the relationship, but also by agencies called upon in a time of crisis. But as Island and Letellier state, “[d]omestic violence is not a gender issue. It is a power issue, a legal issue, and a mental health issue. The truth is that men can be victims of domestic violence.”⁸

⁷ Maslow, A, *Toward a Psychology of Being* (1962).

⁸ Island, D, and Letellier, P, *Men Who Beat The Men Who Love Them: Battered Gay Men and Domestic Violence*, (1991), 16.

Many battered women in heterosexual relationships do not see themselves as abuse victims because they do not see themselves as lacking in free will.⁹ Just as the paradigm of “the poor victim” keeps women from identifying themselves as battered, this is no less true of men. A man may not see himself as a victim because he does not want to see himself in that way. To admit to being a victim is to admit that one is “less of a man”. This is as true of the gay male as it is of the heterosexual male. Given the pejorative stereotype which paints a picture of gay men as being, by virtue of their sexuality, less masculine and more feminine than heterosexual men, perceived vulnerability is not a trait that many gay men would ordinarily strive to achieve.

4. “Outing”

I suggest that another reason why gay male victims of domestic violence may not come forward is that they may carry a fear of being “outed”. “Coming out” is the process whereby a gay person acknowledges his gayness, usually “coming out” firstly to himself and subsequently to others. “Coming out” to others can take a tremendous build up of courage and determination and is usually the end result of a good deal of thinking and planning. To be put in a position whereby one has to admit that one is both gay and in a violent relationship can have significant consequences for one’s personal interactions with family, workmates and friends. To be put in this situation at a time of crisis is even less attractive. Not only does seeking help mean that one is going to be forced into coming out to police or to family or criminal court personnel, it may mean that employers, clients, and colleagues may all get to know.

In an ideal society, this should not be an issue. New Zealand has laws which state that it is illegal to discriminate against a person on the grounds of sexual orientation. However, while the theory is that there should be no discrimination, the reality is that homophobic attitudes are still prevalent. “People who have been stigmatized as deviant all of their lives do not immediately get over it ... nor is society willing at once to abandon past attitudes”.¹⁰ Were an employer determined to rid the workplace of a gay employee, it is likely that a way could be found without actually breaching the anti-discrimination laws. As importantly, domestic violence may accentuate a gay victim’s feelings of internalised homophobia.

⁹ Mahoney, “Legal Images of Battered Women: Redefining the Issue of Separation” (1991) 90 Mich LR 1.

¹⁰ Bullough, V., *Homosexuality: A History* (1979), 150-1.

5. *Partners as Equals*

Gay domestic violence has often been characterised by gays as well as the heterosexual community as disagreements, nothing more than “lovers’ tiffs”. This is analogous to the view that domestic violence in the heterosexual context is a relationship problem, a two-to-tango scenario. There are three major problems with this concept. First, the misconception that domestic violence is only physical violence ignores the existence of emotional, psychological and verbal violence which can be equally destructive, as recognised in the Domestic Violence Act 1995.¹¹ Second, while it is important to accept that disagreements can be healthy within a relationship and can be the means of correcting misunderstandings, it is equally important to understand that violence is not an acceptable way to resolve a quarrel, no matter how severe or intense the disagreement. Third, the “lovers’ tiffs” concept perpetuates a stereotypical image of gays as being argumentative and “bitchy”.

It has been mooted by Island and Letellier¹² that gay domestic violence is often seen as no more than an extension of sexual play. Unfortunately, in my experience this is a belief held not only by people outside the gay community but also within. However, whatever one’s sexual orientation, there is a vast difference between taking part in consensual sexual behaviour such as sado-masochism and being the victim of domestic violence. Unlike consensual sexual acts, “domestic violence is abuse, manipulation and control that is *unwanted* by the victim.”¹³

6. *Shortcomings in the Procedures for Seeking Help*

Avenues available for dealing with domestic violence have been overwhelmingly directed at heterosexual communities. In spite of the recognition of homosexual violence in the Domestic Violence Act, there is no reason to expect that this situation will change markedly in the near future. As well, governmental agencies like the police have historically been distrusted by gay men. Despite the efforts that are now being made by police organisations to improve the attitudes of their officers,¹⁴ legacy police departments are generally viewed as repositories of

¹¹ Section 3.

¹² *Supra* n. 8, at 19.

¹³ *Idem*.

¹⁴ For example, the Police in Wellington, New Zealand have appointed a Liaison Officer whose role it is to work with gays as victims, and with Police Officers dealing with these cases. The role is thus seen as being supportive and educative.

“institutionalized homophobia and heterosexism.”¹⁵ Many gays would not willingly call the police for assistance in a domestic violence situation and consequently, the invisibilisation of gay domestic violence cases (or at least its under-reporting) is likely to continue.

If a gay male victim of domestic violence should wish to call the police, and proceed to prosecution, the next step is to face the criminal court system. Unfortunately, the ways in which these courts have historically dealt with issues relating to homosexuality does not necessarily inspire confidence.¹⁶ It may be that gay domestic violence victims will be more willing to apply to the Family Court for protection orders because of the confidentiality of its proceedings. Fears about “outing” may be diminished by the Family Court’s emphasis on the privacy of the parties. However, even in the Family Court, judicial education about gay relationships and power and control tactics will be necessary if gay applicants are to achieve protection under the provisions of the Domestic Violence Act.

It is not merely police officers or judges who have a role to play in the development of appropriate methods of providing protection in gay domestic violence cases. From Family Court Counsellors to probation officers, there is a range of people who will be challenged to implement the new Act with sensitivity and balance.

¹⁵ Herek, G M, “The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism” [1990] 5 *Journal of Interpersonal Violence* 315: cited by Letellier, *supra* n. 2, at 102. “According to studies on anti-gay violence, the median number of gay men and lesbians who experienced anti-gay victimization by the police was 20%”.

¹⁶ For example, in his recent decision on the same-sex marriage issue (*supra* n. 6), Judge Kerr reviewed what he characterised as “the modern view” about homosexuality. He stated:

The starting point is probably the Homosexual Law Reform Act 1986 which amended the Crimes Act 1961 provisions relating to indecencies between males. It is still an offence to indecently assault a boy under 12. It is still an offence to indecently assault a boy between the ages of 12 and 16. It is no longer an offence for males of 16 years or over *to commit indecencies with each other* which are consensual, consent not being obtained by false or fraudulent representations. (at 491, emphasis added).

The fact that the Judge considers gay sex between consenting adults to involve “indecencies” is remarkable. As well, it is against the law for men to indecently assault girls under the age of 16 but this is not mentioned. To a gay person, the Judge’s comments reflect and reinforce the homophobic belief that many gay men are paedophiles, a belief which is demonstrably untrue from the literature on child sexual abuse .

Assuming gays utilise the statutory provisions available to them, the next problem is the lack of appropriate counselling and support services. Because to date gay domestic violence has not been acknowledged as a problem, such services have yet to be put in place.¹⁷ There are no refuges for gay men. There are few, if any, counsellors qualified specifically to deal with gay domestic violence as an issue in its own right. There are no gay men's "stopping violence" programmes. There are no gay victims' advocacy programmes. There may be counselling services which offer, as part of an over-all service, counselling for men as victims, or counselling for gays as victims of anti-gay violence, but not for gay men as victims of domestic violence in same-sex relationships.

As well, it is difficult to see the power and control analysis as being totally appropriate to an analysis of gay male domestic violence. While many of the tactics of power and control (eg intimidation, denial and victim-blaming) may be apparent in gay male relationships, other tactics (like the use of male privilege) seem irrelevant. More importantly, it is difficult to see how societal discourses operate to legitimise a gay male batterer's use of violence against his partner. The social constructs which reinforce and justify (or at least excuse) domestic violence in heterosexual intimate violence situations are less apparent, except for the "two-to-tango" relationship formulation. On the other hand, it may be that the gay domestic violence victim may be even more likely than his heterosexual counterpart to experience the systemic use of the tactics of trivialisation, minimisation and victim blaming.

Conclusion

Domestic violence does occur in gay male relationships. Estimates put the level of this violence at about the same as that in heterosexual relationships.¹⁸ However, because gay male relationships have not been recognised as valid relationships within society generally, few resources have been put in place to deal with this form of domestic violence.

If it is to take advantage of newly available legal remedies, it is essential that gay communities are shown that the implementation and interpretation of these provisions will not reflect the homophobia of the dominant culture.

¹⁷ While gay counselling is apparently excluded under the Family Proceedings Act, Hamilton Family Court, e.g., does provide state-funded counselling for parties in gay and lesbian relationships.

¹⁸ See *supra* n. 1.

As well the gay community is becoming more mainstream. While not ignoring the role that generalised homophobia and institutionalised discrimination can play in terms of individual self-worth, gays must accept responsibility for the violence that is perpetrated within their communities and take initiatives to ensure that appropriate steps are taken to deal with that violence.

BOOK REVIEW

OUT OF CONTROL: Stories of Men who are Leaving Violence and Partner Abuse Behind, compiled by Colin Iles (Wellington, Pacific Education Resources Trust, 1996) 160 pp.

Section 32(1) of the Domestic Violence Act 1995 states that in the absence of a good reason, the Court must direct a respondent (or associated respondent) to attend a stopping domestic violence programme on the making of a protection order. A direction to such a programme is a condition of a protection order and failure to attend constitutes a breach of that order, punishable by a maximum penalty of 6 months in jail or a \$5,000 fine. The recently decided case of *C v P*,¹ moreover, demonstrates that attendance at a stopping violence programme is a factor that may be considered by the Court in deciding issues of custody and access under section 16B of the Guardianship Act 1968. In *C v P*, a father supported his application for custody by leading evidence that he had “undergone counselling and attended 80 per cent of a stopping violence course which he claims has resulted in a changed attitude to women and violence.”² A psychologist testifying for the father, moreover, stated that “the ability to understand and empathise with the effects of violent behaviour are an important goal in stopping violen[ce] programmes.”³

The implementation of the Domestic Violence Act on 1 July 1996 has highlighted the importance of stopping violence groups as a tool for decreasing the incidence of intimate partner violence in New Zealand. It has also underscored concerns about the content of such programmes and their effectiveness. One of the oldest ongoing New Zealand stopping violence programmes, the Hamilton Abuse Intervention Project (or HAIP),⁴ is an education course based on a power and control analysis of domestic

¹ [1996] NZFLR 415.

² *Ibid.*, 421. Despite his participation in the stopping violence programme and the testimony of his current partner that he was not abusive to her, the Court found that the father was still engaging in psychologically abusive behaviour to his former partner and rejected his custody application and ordered supervised access.

³ *Ibid.*, 425.

⁴ For a discussion of the various men’s and women’s programmes offered by HAIP, an analysis of the protocols entered into between HAIP and statutory and community agencies working in domestic violence related areas, and a presentation of the HAIP interagency approach, see Busch and Robertson, “What’s Love Got to Do With It: An Analysis of an Intervention Approach to Domestic Violence” (1993) 1 Waikato Law Review 109.

violence. It does not utilise anger management or therapeutic techniques but instead focusses on the self-defeating nature of men's violence for themselves (including arrest and conviction), their partners and their children. Participants are introduced to an alternative model of relationships based on equality and respect.

A 1995 evaluation of HAIP stopping violence groups suggested that unless men were compelled to attend such programmes (through the imposition of Court sanctions for non-compliance), they would usually drop out prior to completion.⁵ For example, more than 70% of men who self-referred themselves to HAIP, typically as a result of pressure from their partners or alternatively because they are facing impending court proceedings, failed to complete their 26 week education course. Even for those men ordered to attend HAIP programmes by the courts, approximately one-third managed to avoid attending the entire programme.⁶

In terms of an evaluation of "success" of the programme, the 1995 survey of programme participants⁷ reported that 88% of them stated that they had been motivated by the programme to make changes in their behaviours. Nearly all of them (93%) stated that they were behaving in less violent ways since participating in the programme. Significantly, however, questioning these men's partners highlighted concerns about the veracity and/or ability of programme participants to realistically assess changes in their behaviour. Only 28% of the women whose partners attended the men's programmes felt that their partners had in fact reduced their violence. Another 26% stated that they had experienced both negative and positive changes as a result of their (ex) partners' participation, 33% said that they had not experienced any change and 13% of the women, stated that the course had resulted in negative changes only.⁸

The results of the HAIP survey together with the Domestic Violence Act's emphasis on respondents' programmes make *Out of Control* a timely and important book. The aim of the book is stated in its introduction:

This book has been written primarily as a resource for men who abuse their partners. I hope it will encourage them to seek help by showing them how other men have successfully dealt with similar problems. I hope too it will assist women in abusive

⁵ Dominick, C, *Overview of the Hamilton Abuse Intervention Pilot Project Evaluation* (April 1995) 45.

⁶ Idem.

⁷ Ibid., 50.

⁸ Ibid., 49.

relationships to recognise exactly what is happening to them, and give them strategies to escape the abuse.⁹

The main strengths of *Out of Control* are its optimistic approach, the interest value of the stories told, and the informative discussion about theories of domestic violence. Strategies to avoid violence are provided together with a discussion of key concepts such as “anger” and “equality.” The book includes the “Power and Control Wheel”¹⁰ alongside the “Equality Wheel,” underscoring the idea that domestic violence exists alongside avenues for change. “The cycle of male domestic violence” is diagrammatically explained and there is a welcome description of the cycle from the abused woman’s perspective, highlighting how different her reality is from that of her partner’s. Throughout the book, difficult terms are explained and simplified, making the book accessible to the general reader. The book is also interesting for those with a legal or psychological background. A list of men’s groups in New Zealand is included, providing a practical source of help for men reading this book.

Colin Iles purposely focuses on “success stories” in this book. It is, therefore, an optimistic book, so hopeful in fact that one wonders whether his approach may cloud the actual reality of how many men do stop their violent behaviours. Iles courageously includes a chapter on his own experiences. His final words are indicative of the tone of the book: “My hope is that abusive men will find inspiration for change from the stories in this book.”¹¹

The stories range from details of extreme physical violence to patterns of seemingly minor psychological abuse. The incidents are often shocking and keep the reader aware of the gravity of the issues involved. Though the stories are told by men from various socio-economic backgrounds, all include the use of similar tactics of power and control, including isolation and the withdrawal of emotional support. The ways in which women managed to leave the abusive situations and the effect this had on their male partners are also enlightening. Many provide insights into how perpetrators can act from fear, jealousy and ignorance.

The introduction by Iles gives an explanation of the research methodology used. The stories are from men who attended stopping-violence and anger

⁹ Iles, *Out of Control* (1996) 9.

¹⁰ See supra this volume.

¹¹ *Ibid.*, 34.

management courses at least one year before the interviews. Strict criteria were applied to those stories that would be included:

- a) The story had to be corroborated by the abuser's current partner and
- b) the man had to be presently living in a relationship without physical violence and with a "manageable level" of other forms of abuse. Problematically, this "manageability" judgment was made by the man and his current partner.

Iles discusses the cultural make-up of the interviewees in the introduction. All the men included are tauiwi, the majority Pakeha. An excellent interview with a Samoan man who facilitates stopping-violence courses for Pacific Islander men is included but that is the only story from a Pacific Island perspective and there are no stories from Maori men. Iles justifies this by explaining that invitations were given, but that non-Pakeha preferred to work within their own cultural frameworks. These omissions highlight the need for a similar book (or books) dealing with male Maori and Pacific Island abusers. They also highlight a major difference between the HAIP model and the one used by Iles, namely HAIP's commitment to running culturally appropriate programmes for Maori men which, along with a power and control focus, deal with issues of colonisation and institutional racism and the ways in which these factors impact on Maori perpetrators' attitudes towards women.

The structure of the reported interviews consists of short, open-ended questions from Iles (in bold type), long statements from the men, and comments from their partners (in italics). As most of the interviews are conducted in the presence of both the abuser and his partner (often the victim), I have concerns about how candid the women are in their comments. Will a woman who has been subjected to repeated instances of domestic violence be willing to comment openly and truthfully about the perpetrator's story when he is in the same room? The following statement by a battered woman excerpted from the story of "David and Sue" might well have been different if David had not been present. As mentioned, Sue's comments are in italics:

I'd take pride in saying 'Don't give me a hard time or I'll bury you fifty feet down, alive.'

*It sounds silly now, but believe me, it was scary.*¹²

¹² Ibid., 30.

In an individual interview, would Sue have been so ready to describe threats of violence as “silly”? There are limits as to how much an abused partner can put fear behind her and also about whether a violent relationship can be transformed into one where the victim feels safe to disagree with her partner, especially in his presence.¹³

While the atmosphere of optimism created by *Out of Control* should not be undermined, questions must be asked about the sincerity of some of the male participants. Are they telling the whole story, even as *they* know it? What details have they chosen to leave out in their recollections? Are they likely to give a full and honest account of their violence? Given what is known about the ways in which perpetrators use minimisation and trivialisation of their violence as tactics of abuse¹⁴ as well as the ways in which they tend to see themselves as having “reformed” despite their partners’ reports of continuing abuse,¹⁵ one can only be sceptical about Iles’ methodology and findings.

Lionel’s story is a reminder of the risk of recidivism. Lionel, who we learn has subsequently “relapsed” into violence after his interview, is questioned about his progress:

In what ways have you changed, Lionel?

There have been so many changes: the put-downs of Barbara; my self-esteem has grown; and I’m actually beginning to like myself...I am picking up on things quicker, I am not doing all this abusive stuff now. I say to myself ‘Now go away and have a think about it.’ In the old days I would immediately lash out at someone.

*So it’s much easier to live with him, pleasant.*¹⁶

The fact that Lionel begins to abuse his partner soon after making these claims of change casts doubt on his veracity and on his (and many other abusers’) ability to evaluate changes in their own behaviour. Lionel’s interview is prefaced by a letter received after the interview took place. The letter is from his partner and tells of Lionel’s “return to unacceptable levels of abuse”.¹⁷ She reports that he has begun drinking heavily,

¹³ Interview with Neville Robertson, Lecturer in Psychology, University of Waikato, 27 May 1996.

¹⁴ Pence and Paymar, *Power and Control: Tactics of Men who Batter* (1986).

¹⁵ Dominick, *supra* n. 5, 49-50.

¹⁶ Iles, *supra* n. 9, at 105.

¹⁷ *Ibid.*, 10.

psychologically abusing her, and demanding \$100,000 before he would move out of their house. She comments:

I have become hurt, bitter and angry, and I think it is easier to remain this way than to ever hope or trust again, only to risk it being destroyed. I now believe all men are abusers and no matter how many courses they attend and how much work they do, no permanent changes will ever take place.¹⁸

Out of Control reminds us that new approaches to helping violent men change are being developed and implemented by men's groups throughout New Zealand. It is positive to have a book which focuses on the fact that some violent men have indeed changed their behaviour as a result of their participation in stopping violence programmes. However, the book also highlights weaknesses in some of these programmes. For instance, in contrast to the HAIP programme where the safety and autonomy of battered women is seen as of utmost importance, the joint interviewing structure adopted in *Out of Control* appears problematic. Again, in contrast to the HAIP model, there is no monitoring of the men's claims about behaviour changes from the perspectives of the women they abused in cases where the partners are no longer together. Only the current spouse of the man is involved in the interview with him. It should be noted that the lack of such monitoring was also a problem mentioned by Judge Robinson in the *C v P* case.¹⁹ Finally, the lack of Maori and Pacific Island stories is a disappointment. HAIPP shows that provision can be made for Maori and non-Maori through adaptation of the basic programme format to incorporate cultural differences.

I believe that the optimism found in *Out of Control* can help certain men to change, namely, those whose abuse is on a lesser scale, those who are younger and open to change and those who feel true guilt about their actions. But there is another group of men, namely those who believe in the subjugation of women, those who refuse to admit to their abuse older men stuck in the habits of many decades. I am not convinced that many of these men can be reformed, although we must still try.

GRANT MORRIS*

¹⁸ Ibid., 101.

¹⁹ Supra n. 1, at

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