

# Living at the Cutting Edge

## Women's Experiences of Protection Orders

### Volume 2: What's To Be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence

A report prepared by

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## Dedication

*Dedicated to the 212 women and children who have died in domestic violence homicides since the enactment of the Domestic Violence Act 1995<sup>1</sup>.*

### 1995

Cherie Hoyle (29 years)  
Chay Grant  
Robert Grant (4 years)  
Stephanie Skidmore (20 years)  
Leonie Newman (26 years)  
Victoria Watson (8 months)  
Charmaine Julian (42 years)  
Veronica Takerei-Mahu (11months)  
Sara Nixon (7 years)

### 1997

Andrea Brander (52 years)  
Child, name not known  
Child, name not known  
Shae Hammond (17 months)  
Anaru Te Wheke Donny Te Moananui Rogers (17 months)  
Rosemary Roberts (27 years)  
Pet Kum Kee (49 years)  
Brittany Crothall (3 years)  
Jamoure Chaney (10 months)  
Casey Albury (17 years)  
Karen Jacobs (26 years)  
Moana King (34 years)  
Stephanie Baker (26 years)  
Andrea Torrey (28 years)  
Wynell Lelievre (15 years)  
Catriona Fettes (33 years)  
Tishena Valentine Crosland (2 years)  
Peti Taihuka Cherie Kokiri (12 years)  
Marcus Te Hira Grey (2 months)  
Kim Ihaka (22 years)  
Deidre Williams (22 years)

### 1998

Alofa Fasavalu (38 years)  
Liam Sullivan (3 months)  
Baby boy, name not known  
Angelina Edwards (25 years)

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<sup>1</sup> This list was supplied by the Family Violence Technical Advisory Unit (PO Box 1219, Hamilton). Because it was compiled from a search of newspapers, some domestic violence deaths may have overlooked.

Nivek Dodunski (17 months)

Fiona Maulolo (31 years)

Shona Bruce (42 years)

Jaydon Perrin (10 months)

Jonelle Tarawera (19 months)

Bavinder Kaur (26 years)

Lauren Runciman (19 years)

Margaret Bennellick (44 years)

Patricia Paniani (33 years)

Kelly Rae McRoberts (6 years)

Lisa Hurrell (21 years)

Lucy Carter (7 years)

Thomas Carter (4 years)

Holly Carter (3 years)

Pirimai Simmonds (17 months)

Jennifer Federici (27 years)

Lisa Hope (8 years)

#### **1999**

Marama Tamati (19 years)

James Whakaruru (4 years)

Simon Tokona (18 months)

Winiata Tokona (3 years)

Roimata Wehi (25 years)

Mereana Edmonds (6 years)

Angela Han

Nicholas Han (4 years)

Christina Han (2 years)

Joanne Van Duyvenbooden (32 years)

River Michael Manawatu-Wright (9 months)

Israel Aporo (3 years)

Jillian Thomas (45 years)

Elizabeth Douglas (51 years)

Keziah Te Huia Smith (11 months)

#### **2000**

Annette Boucher (47 years)

Tangaroa Matiu (3 years)

Alice Perkins (8 years)

Maria Perkins (6 years)

Kamphet Vong Phak Dy (50 years)

Jian Huang (35 years)

Jiang Su

Alison Aris (32 years)

Te Miringa Tipene

Lilybing Hinewaoriki Karaitiana-Matiaha (23 months)

Natasha Tana-Bind (24 years)

Cherie Perkin (23 months)

Baby boy, name unknown (11 months)

Matekino Taylor (25 years)

Christine Lundy (38 years)

Amber Grace Lundy (7 years)

Florence Simpson (82 years)

Liotta Leuta (5 years)

Eliza May Te Hiko (45 years)

Margaret Waterhouse (42 years)

### **2001**

Tracey Patmore (34 years)

Daniel Marshall Loveridge (13 months)

Lauren Shepherd (21 years)

Thomas Lance Darshay Schuman (2 years)

Levi Wright (10 months)

Caleb Moorhead (6 months)

Dominique Hingston (6 years)

Nikita Hingston (5 years)

Ryco Lance Mauri (10 months)

Patricia Burton (49 years)

Helen Wickliffe (22 years)

Te Pare (Polly) Te Kahu (39 years)

Chanel Lambert (21 years)

Karen Nant (16 years)

Janice Kenrick (40 years)

Pamela Hesketh (64 years)

Helen Johns (43 years)

Saliel Aplin (12 years)

Olympia Jetson (11 years)

Wathanak Tea (37 years)

Jaelyn Ariki Ngatai Maxwell (6 years)

### **2002**

Wendy Heaysman (56 years)

Langaola Ahau (23 years)

Tamati Pokaia (3 years)

Barbara Miller (17 years)

Kalin St Michael (2 years)

Brodie Gordon (9 weeks)

Shontelle Marks (4 months)

Kelly Paula Gush (12 years)

Hasnah Hamer (38 years)

Dawn Parrish (65 years)  
Coral-Ellen Burrows (6 years)  
Cheyanne Rongonui (18 years)  
Zhi Ping Yu (22 years)  
Weng Di Dai (10 years)  
Edwina Graham (30 years)  
Jessica Pardoe  
Iris Kathleen Davidson (23 months)

**2003**

Jia Ye (20 years)  
Girl, name not known (11 years)  
Boy, name not known (6 years)  
Bin Lin (Ruby)  
Anahera Ross Lewis (3 years)  
Randwick Aholelei (3 months)  
Caleb Tribble (4 months)  
Donna Hewlett (39 years)  
Seau Luana Ate (51 years)  
Gulshad Hussein (23 years)  
Lorraine Royal (43 years)  
Lisa Blackmore (27 years)  
Rocky Wano (15 years)

**2004**

Ordette Lloyd-Rangiuiia (45 years)  
Gabriel Harrison-Taylor (8 months)  
Asolelei Samuelu (32 years)  
Child, name not known  
Child, name not known  
Raiden Niania(4 months)  
Wendy Mercer (34 years)  
Will Mercer (6 months)  
Pamela Lotze (48 years)  
Baby, name not known (4 months)  
Te Hau Te Horo O'Carroll (10 years)  
Ngamata O'Carroll (2 years)  
Molly Rose McRae (6 years)  
Cheryl Pareanga (33 years)  
Baby girl, name unknown (7 months)  
Cameron Fielding (10 years)  
Kathleen Harris (7 months)  
Krystal Fielding (8 years)  
Mereana Clemments-Matete (14 months)

## 2005

Denise Holmes (27 years)  
Baby boy, name unknown (6 days)  
Sarah Rebekah Haddock-Woodcock (3 months)  
Chitralekha Ramakrishnan (32 years)  
Woman, name not known (36 years)  
Susanna Brown (33 years)  
Hannoraugh Johansen (94 years)  
Nicola Hackell (36 years)  
Britney Angelique Abbott (9 years)  
Eileen Te Oki Puke  
Aaliya Morrissey (2 years)  
Nancy Peterson (Xiukun Feng) (54 years)  
Rosemary Harry (33 years)  
Shunlian Huang (24 years)  
Christine Hindson (45 years)  
Catherine Carter (45 years)  
Thelma Thompson (26 years)  
Woman, name not known (20 years)  
Deborah Rerekura (39 years)  
Moana Kapua (29 years)  
Samantha Mahara-Rangiawha (34 years)  
Teresa Kohu (27 years)  
Karen Oakes (28 years)

## 2006

Ruth Peoples (35 years)  
Ngatikaura Ngati (3 years)  
Staranise Waru (7 months)  
Woman, name not known (34 years)  
Arwen Fletcher (2 years)  
Suzanne McSweeney (50 years)  
Baby girl, name not known (14 months)  
Boy, name not known (3 years)  
Woman, name not known (22 years)  
Mairina Dunn (17 years)  
Ariana Burgess (24 years)  
Verilyn Koia (41 years)  
Lesa Pakau (33 years)  
Denise Brame (41 years)  
Chris Kahui (3 months)  
Cru Kahui (3 months)  
Maureen Matete-Walker (36 years)  
Alyssa Patricia Little-Murphy (7 months)

Aiden Whitfield (15 years)  
Alex McRae (2 years)  
Baby girl, name not known (newborn)  
Woman, name not known (46 years)  
Reipai Joanne Dobson (19 years)

**2007**

Charlene Makaza (10 years)  
Shirley Anne Keith (62 years)  
Denise Simeon (52 years)  
Angela Teresa Dean (55 years)  
Misook Kim (42 years)  
Baby girl, name not known (18 months)  
Babt girl, name not known (newborn)  
Woman, name not known (35 years)  
Rosslene White (35 years)

Judge Ellis, in *Fielder v Hubbard*, the very first case that was decided under section 16B(4) of the Guardianship Act, stated:

It may be that this [is] the first such defended case in the Family Court requiring consideration of the provisions of this amendment, and if that is so, it would be appropriate, since it was in this Court that orders were made affecting the children of the Bristol family whose tragic fate subsequently gave rise to the Commission of Inquiry whose recommendation led to this significant legislative change. It might have been expected that the significance of the event, and of the legislative change, would have made more impression on counsel in this case, some of whom were involved in that other." [1996] NZFLR 769

***LEST WE FORGET***

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The report is published in two volumes:

*Volume 1: The Women’s Stories* (Executive Summary, Chapters 1 – 6)

*Volume 2: What’s To Be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence* (Chapters 7 – 15 and Appendices)

The Executive Summary is also available as separate document.



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## 7: Risk Assessment

Volume 1 presented the stories of Māori, Pākehā, Pasifika and other ethnic minority women respectively. In this volume, we provide a synthesis of the themes emerging from the case studies in relation to the agencies with a statutory responsibility for responding to domestic violence and in relation to other organisations and groups from whom women may seek support and protection. But first, it is useful to consider the general issue of risk assessment. Our rationale is that as the case studies show, there is often a gap between the risks women face in relation to their partners or ex-partners and the way agencies and organisations perceive and respond to those risks. The nature of the gap is such that too often violence is minimised and trivialised or, in some cases, not identified. Thus women who call the police or apply for a protection order are often exposed to continuing violence as a result of the actions, sometimes the inaction, of the very institutions whose role it is to provide protection.

One of the ways in which this gap can be closed, is by the implementation of good risk assessment practices. Risk assessment is central to providing protection. Unfortunately, as is evident from the case studies and will become evident in the following chapters, there is considerable ignorance and confusion about risk assessment, and the purposes to which it can be put. Indeed, as we will argue, often risk assessment is not carried out even though it is required by statute and/or reasonably robust risk assessments are available. Moreover, some risk assessment methods currently in use do not follow published guidelines for good practice, have no scientific foundation, are used inconsistently and/or are used for purposes other than those for which they were designed. In a word, often, risk assessment practices are simply dangerous, needlessly exposing women and their children to further violence.

### ***Risk Assessment or Risk Screening?***

One of the areas of confusion is that risk assessment is sometimes mistaken for screening and vice versa. The recently published New Zealand standard on screening, risk assessment and intervention for family violence defines screening as follows.<sup>2</sup>

Screening – The systematic application of enquiry, either written or verbal, by agencies/services to clients about their personal history with domestic violence to identify individuals who would benefit from further investigation to determine if they would profit from some form of intervention. Enquiry can move from general framing statements such as “Because violence is so common I’ve begun to ask all my clients about it” to direct questions like “Are you in a relationship with a person who physically hurts or threatens you?” Screening can be conducted routinely on all individuals, or specified categories of individuals, or can be indicator-based.

That is, screening is primarily about identifying victims of domestic violence, although it can also be used to identify perpetrators of domestic violence. It can make an important contribution to promoting the safety and autonomy of battered women by identifying women or children who are being victimised and enabling appropriate referrals and/or safety plans to be made. It can be used to ensure that victims of abuse are not exposed to unsafe interventions such as relationship counselling. That is, screening is less relevant to specialist domestic violence services than to “generic” services such as hospitals, maternity carers, general practitioners, gynaecologists, mental health professionals, and social welfare services.

Although we did not specifically ask women about their experiences of being asked screening questions, it is clear that being identified by a generic service as a victim of domestic violence enabled help to be mobilised in several of our case studies For example, Crystal, Lin-Bao, Sonal

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<sup>2</sup> Standards New Zealand. (2006). *Screening, risk assessment and intervention for family violence including child abuse and neglect NZS8006:2006*. Wellington: Standards New Zealand, at p. 72.

and Elizabeth were all identified as victims of domestic violence by health professionals who made useful referrals or helped in other ways. In Chapter 15, we make recommendations about the use of screening in various settings.

Risk assessment is somewhat distinct from screening. Standards New Zealand defines risk assessment as follows.

**Risk assessment** – Assessment of risk to the victim of recurring violence/abuse, particularly an assessment of the dangerousness as well as lethality potential of the offender in order to provide adequate protection to past and future victims. It is generally most helpful to assess risk in terms of various categories, with the highest level of risk (most acute and severe) requiring the most urgent and intensive response. The goal of risk assessment is to provide more information on the level and urgency of response/intervention which is required.<sup>3</sup>

Thus risk assessment is essentially about predicting the future. As we argue below, whether implicitly or explicitly, risk assessment plays a significant part in decision making within institutions with statutory powers, notably the police, the courts, the Department of Corrections, and Child, Youth and Family (CYF). It is also important for non-government organisations (NGOs) working with victims and/or perpetrators of domestic violence.

### What is Being Predicted?

One of the complexities is that there is often confusion about what is being predicted. At one extreme are lethality assessments which estimate the likelihood that a specific victim will be killed or that a specific perpetrator will kill. But predicting the reoccurring of sub-lethal assaults and other forms of abuse is also important if the rights of women and children are to be protected. In relation to children, an additional concern is the risk of their being exposed to domestic violence. Within the criminal justice system, the focus of risk assessment is on reoffending, usually as assessed by either re-arrest or re-conviction, both of which are likely to substantially undercount actual assaults.

### For What Purpose Is Risk Being Assessed?

A further complexity is that the implications of risk assessment vary according to the purpose for which it is being carried out and the sort of decision to which it contributes. In this chapter, we consider three types of statutory decision making for which risk assessment is relevant. These vary in the extent to which a formal risk assessment is mandated and/or the extent to which risk assessment is an explicit part of the decision making process. They are:

- granting protection orders, including decisions whether or not to put applications on notice;
- making determinations regarding parenting orders and contact; and
- sentencing offenders and making related decisions about releasing offenders on bail, home detention or parole.

In addition, risk assessment is obviously very relevant to the exercise of statutory power in relation to child protection. Although this was not formally part of our brief, the state's role in child protection emerged as an important factor in women's attempts to keep themselves and their children safe. That is, one of the reasons some women were reluctant to call the police or apply for a protection order was the fear that they would lose their children to CYF's intervention, which is exactly what happened in some cases (Crystal, Katrina and Elizabeth). As we show in Chapter 15, such outcomes reflect a misalignment between risk assessment as implied in the Domestic Violence Act 1995 and risk assessment as practised by CYF.

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<sup>3</sup> Ibid, at p. 71.

Just as the purpose for carrying out a risk assessment may vary from context to context, what is at stake also varies, as do the implications of underestimating or overestimating the risk. For example, overestimating the risk is not a huge problem if the decision making concerns safety planning. The outcome may be the inefficient use of resources but little more. In contrast, overestimating risk may have major implications if it concerns sentencing an offender to preventive detention. In fact, our case studies and our analysis of decision making in the criminal courts (Chapter 13) suggest that underestimating risk is a much more significant problem than overestimation. Of course, it is generally women and/or their children who are adversely affected when risk is underestimated. This was graphically illustrated when Allan Bristol killed his three daughters, Tiffany, Holly and Claudia, while he had custody of them pursuant to an order of the Family Court. In fact, it was Sir Ronald Davison's inquiry into the Bristol murders which provided the impetus for a well-elaborated risk assessment being mandated in legislation through the Guardianship Amendment Act 1995 (the provisions of which have been incorporated into the Care of Children Act 2004).<sup>4</sup>

It should be noted that there is one type of decision we have not included in our list above, decisions whether to arrest perpetrators or not. As we state in Chapter 12, risk assessment should not enter into arrest decisions, although some of our NGO key informants believe that this is happening (see case study Louise for a possible example). The problem with such an approach would be that if supposedly low-risk offenders are not arrested, then the message is, to both perpetrators and their victims, that domestic violence is inconsequential.

### **Characteristics of Good Risk Assessment**

As Andrews and Bonta have pointed out, in contrast to early optimism, the numerous critiques of risk assessment published during the later part of the twentieth century lead to a growing view that dangerousness cannot be predicted with any accuracy.<sup>5</sup> Some of these critiques focused on the mathematics of predicting infrequent events such as homicide and stranger rape.<sup>6</sup> The problem can be understood from the following scenario.

Assume that 1 of 1,000 persons is dangerous to self or others and that a test identifying these persons is 95% accurate (there are no psychological tests or other methods shown to be anything near this accurate). If 100,000 people were screened, 95 of the 100 who are dangerous would be identified, 5 would be missed, but of the 99,900 who are not dangerous, 4995 would be called dangerous when they are not.<sup>7</sup>

That is, risk assessment has been plagued by the serious problem of a huge number of false positives. In addition, clinicians' judgements of dangerousness have proved to be unreliable and inaccurate. That is, clinicians often disagree with one another when assessing the same information and even composite judgements have proved to be not particularly good predictors.<sup>8</sup> However, recent improvements in research methodology have led to greater enthusiasm for risk assessment. Today, as Dutton and Kropp have pointed out, there are good reasons for being

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<sup>4</sup> Davison, R. (1994). *Report of inquiry into Family Court proceedings involving Christine Madeline Bristol and Alan Robert Bristol*. Wellington: Office of the Minister of Justice.

<sup>5</sup> Andrews, D. A., & Bonta, J. (1994). *The psychology of criminal conduct*. Cincinnati, OH: Anderson, at p. 157.

<sup>6</sup> Rappaport, J. (1977). *Community psychology: Values, research and action*. New York: Holt, Reinhart and Winston, at pp. 336-339.

<sup>7</sup> Ibid, at p. 336.

<sup>8</sup> Quinsey, V. L., Harris, G. T., Rice, M. E., & Cormier, C. A. (1998). *Violent offenders: Appraising and managing risk*. Washington, DC: American Psychological Association.

more optimistic about assessing the risk of reoffending among domestic violence perpetrators.<sup>9</sup> That is, unlike murder and stranger rape, the frequency with which spousal violence reoccurs is relatively high, significantly reducing the problem of false positives. Secondly, in assessing the risk of domestic violence reoffending, assessors usually have access to a really important source of information about the history and personality of the perpetrator, his victim. Thirdly, there is now a growing body of evidence which has identified risk factors uniquely related to domestic violence. We discuss these below.

To identify risk factors, researchers have used actuarial methods. Here, the general approach is to select an outcome of interest and statistically link it to a set of predictor variables, in much the same way as insurance companies link, for example, the risk of death in any one year to factors such as age and cigarette smoking (and adjust premiums accordingly). An important point here is that any one predictor variable is likely to have only a limited influence, but by combining several predictors quite good risk assessment tools can be constructed. Undoubtedly, risk assessment tools based on such actuarial methods have produced rather better predictions of risk than unaided clinical judgement.

It is possible then to set out criteria for judging risk assessment methodologies. According to Andrews and Bonta, it is reasonable to expect of a risk assessment tool:

- (a) Demonstrations of the extent to which the outcome (e.g. re-assault, homicide) is predictable (predictive accuracy).
- (b) Clear statements about how the predictions are made so that the information which is used may be evaluated.
- (c) Demonstrations of the extent to which the prediction facilitates the policy objectives of interest (e.g. victim safety, eliminating children's exposure to domestic violence).
- (d) Predictions and the actions that are taken as a result are recorded, monitored and explored empirically so that theory and practice may be enhanced.<sup>10</sup>

We will return to these points in our discussion of current risk assessment practices below.

### **Domestic Violence Risk Assessment Tools**

There are now several domestic violence risk assessment tools for which validation data are available. These include the Danger Assessment Scale,<sup>11</sup> the Spousal Assault Risk Assessment Guide,<sup>12</sup> the Propensity for Abusiveness Scale,<sup>13</sup> the Domestic Violence Screening Instrument,<sup>14</sup> and the Ontario Domestic Assault Risk Assessment.<sup>15</sup> These vary both in the outcome they

<sup>9</sup> Dutton, D. G., & Kropp, R. R. (2000). A review of domestic violence risk instruments. *Trauma, Violence & Abuse*, 1(2), 171-181.

<sup>10</sup> Andrews, D. A., & Bonta, J. (1994). *The psychology of criminal conduct*. Cincinnati, OH: Anderson, at p. 154. See also Standards New Zealand. (2006). *Screening, risk assessment and intervention for family violence including child abuse and neglect NZS8006:2006*. Wellington: Standards New Zealand.

<sup>11</sup> Campbell, J. C. (1995). Prediction of homicide of and by battered women. In J. C. Campbell (Ed.), *Assessing dangerousness: Violence by sexual offenders, batterers, and child abusers* (pp. 96-113). Thousand Oaks, CA: Sage.

<sup>12</sup> Kropp, P. R., Hart, D. D., Webster, C. W., & Eaves, D. (1995). *Manual for the spousal assault risk assessment guide* (2nd ed.). Vancouver, BC: Institute on Family Violence.

<sup>13</sup> Dutton, D. G. (1995). A scale for measuring the propensity for abusiveness. *Journal of Family Violence*, 10, 203-221.

<sup>14</sup> Williams, K. R., & Houghton, A. B. (2004). Assessing the risk of domestic violence reoffending: a validation study. *Law and Human Behavior*, 28(4), 437-455.

<sup>15</sup> Hilton, N. Z., Harris, G. T., Rice, M. E., Lang, C., Cormier, C. A., & Lines, K. J. (2004). A brief actuarial assessment for the prediction of wife assault recidivism: The Ontario domestic assault risk assessment. *Psychological Assessment*, 16(3), 267-275.

attempt to predict and in the predictive factors they incorporate, but generally the latter include three sorts of factors. Firstly, there are batterer characteristics such as demographic factors (for example, age), his previous use of violence, use of alcohol and drugs, and personality profile. Secondly, there are victim characteristics, of which the most significant is the woman's own perception of risk. And thirdly, there are situational characteristics such as whether or not there are children of the relationship and whether the couple are separated (or are in the process of separating).

Across the various studies examining risk factors for repeat or serious domestic violence, including domestic homicide, three things stand out.

Firstly, separation, anticipated or recent, significantly increases the risk of serious assault and homicide. American studies have indicated that separation increases the risk of homicide for women by as much as four times,<sup>16</sup> with the rate of victimisation among separated women being found to be as much as 25 times the rate among married women.<sup>17</sup> Violence is certainly a common experience among New Zealand women who have separated. The New Zealand Women's Safety Survey showed that 51% of women who had recently (within two years) separated from a male partner reported that he had been violent since the separation.<sup>18</sup> Recent or planned separation is one of the common contexts for domestic violence homicides in New Zealand.<sup>19</sup>

Secondly, and unsurprisingly, past behaviour is a very strong predictor of future behaviour.<sup>20</sup> Sound risk assessment requires the systematic collation of information about previous violence. This can really be done only by talking to the victim. Relying on arrest or conviction data will seriously underestimate the frequency of assaults. It should also be noted here that consideration of prior violence should not be limited to physical violence. Psychological violence, particularly dominance and isolation, have also been found to be useful variables in assessing future risk of physical violence.<sup>21</sup>

Thirdly, a woman's own perception of danger is the single best predictor of future risk.<sup>22</sup> In fact, in one comparison study, women's perceptions **alone** outperformed or closely matched three other risk assessment tools in predicting repeated re-assaults.<sup>23</sup>

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<sup>16</sup> Wilson, M., & Daly, M. (1993). Spousal homicide risk and estrangement. *Violence and Victims*, 8, 3-16.

<sup>17</sup> Bachman, R., & Saltzman, L. E. (1996). *Violence against women: Estimates from the redesigned survey*. (Bureau of Justice Statistics Special Report NCJ No 154348). Rockville, MD: Department of Justice.

<sup>18</sup> Morris, A. (1997). *Women's safety survey 1996*. Wellington: Victoria University, p. 54. Here violence included both physical and psychological violence, the later covering behaviour such as making phone calls when asked not to, threatening women, following women, standing outside the house or workplace, and entering the house uninvited. In addition, 34 of the 36 women with recent partners who reported *post*-separation violence had also reported physical violence *during* the relationship. This last finding provides an interesting perspective on so-called separation violence. That is, while there may well be an escalation of violence associated with separation, it is quite rare that violence occurs *only* at separation.

<sup>19</sup> Information supplied by the Office of the Commissioner of Police, 9 August 2006.

<sup>20</sup> Standards New Zealand. (2006). *Screening, risk assessment and intervention for family violence including child abuse and neglect NZS8006:2006*. Wellington: Standards New Zealand, at p. 45.

<sup>21</sup> Bennett, L., Goodman, L. A., & Dutton, M. A. (2000). Risk assessment among batterers arrested for domestic assault: The salience of psychological abuse. *Violence against Women*, 6(11), 1190-1203.

<sup>22</sup> Goodman, L. A., Dutton, M. A., & Bennett, M. A. (2000). Predicting repeat abuse among arrested batterers: Use of the Danger Assessment Scale in the criminal justice system. *Journal of Interpersonal Violence*, 15, 63-74; Weiss, A. N., Tolman, R. M., & Saunders, D. G. (2000). Assessing the risk of severe domestic violence: The importance of survivors' predictions. *Journal of Interpersonal Violence*, 15(1), 75-90; Campbell, J. C. (2004). Helping women understand their risk in situations of intimate partner violence. *Journal of Interpersonal Violence*, 19(12), 1464-1477.

The science of risk assessment is still developing. There is no single method which can infallibly predict risk, and neither is one likely. Nevertheless, quality risk assessments that are used as part of clinical assessments to broadly classify levels of risk and then to formulate a risk management plan do have an important role to play. In what might be considered a fair reflection of the consensus view of domestic violence researchers, Dutton and Kropp concluded:

Quality risk assessment, instruments that are actuarially based, internally and externally valid and reliable, longitudinally verified, peer reviewed, and based on quality research should be an important part, but not all, of the assessment process.<sup>24</sup>

The emerging consensus about the role of risk assessment and the qualities of good risk assessment procedures can be used to evaluate some current risk assessment processes relevant to decision making in the courts. In the following sections, we consider decisions regarding applications for protection orders and the care of children and the sentencing of perpetrators. To varying degrees, each decision is at least partly a decision about risk.

### **Granting Protection Orders**

The court's power to make a protection order is set out in section 14 of the Domestic Violence Act 1995. Overall, the provisions of section 14 are quite consistent with the research on risk assessment.

Section 14(1) states:

- (1) The Court may make a protection order if it is satisfied that—
- (a) The respondent is using, or has used, domestic violence against the applicant, or a child of the applicant's family, or both; and
  - (b) The making of an order is necessary for the protection of the applicant, or a child of the applicant's family, or both.

Given the significance of previous violence in predicting future violence, together with research relating to both the co-occurrence of violence against women and violence against children, and the deleterious effect of witnessing violence on children, section 14(1) can be said to be supported by empirical research. It is relevant to note here that violence is broadly defined to include, among other things, psychological violence. This too is appropriate given the research showing that psychological violence is a useful predictor of dangerousness.<sup>25</sup>

Section 14(2) states:

- (2) For the purposes of subsection (1)(a) of this section, a respondent who encourages another person to engage in behaviour that, if engaged in by the respondent, would amount to domestic violence against the applicant, or a child of the applicant's family, or both, is regarded as having engaged in that behaviour personally.

Abuse by proxies has not received attention in the risk assessment literature, but section 14(2) is a very useful one and reflects the reality of some women. In our case studies, both Alice and Elizabeth were abused in this way.

Section 14(3) and (4) states:

<sup>23</sup> Heckert, D. A., & Gondolf, E. W. (2004). Battered women's perceptions of risk versus risk factors and instruments in predicting repeat assaults. *Journal of Interpersonal Violence, 19*(7), 778-800.

<sup>24</sup> Dutton, D. G., & Kropp, R. R. (2000). A review of domestic violence risk instruments. *Trauma, Violence & Abuse, 1*(2), 171-181, at p. 178.

<sup>25</sup> Bennett, L., Goodman, L. A., & Dutton, M. A. (2000). Risk assessment among batterers arrested for domestic assault: The salience of psychological abuse. *Violence against Women, 6*(11), 1190-1203.



- (3) Without limiting section 3(4)(b) of this Act or the matters that the Court may consider in determining, for the purposes of subsection (1)(b) of this section, whether the making of an order is necessary for the protection of the applicant, or a child of the applicant's family, or both, where some or all of the behaviour in respect of which the application is made appears to be minor or trivial when viewed in isolation, or appears unlikely to recur, the Court must nevertheless consider whether the behaviour forms part of a pattern of behaviour in respect of which the applicant, or a child of the applicant's family, or both, need protection.
- (4) For the avoidance of doubt, an order may be made under subsection (1) of this section where the need for protection arises from the risk of domestic violence of a different type from the behaviour found to have occurred for the purposes of paragraph (a) of that subsection.

Again, there is sound empirical research supporting the sort of contextualised analysis reflected in these sections. As mentioned, psychological abuse predicts physical dangerousness. The behaviours constitutive of psychological abuse can indeed be seen as trivial when seen in isolation, but when placed in context, take on quite a different meaning. Our case studies include numerous such examples from text messages and gifts of flowers to threats of various kinds.

Section 14(5) states:

- (5) Without limiting the matters that the Court may consider when determining whether to make a protection order, the Court must have regard to—
  - (a) The perception of the applicant, or a child of the applicant's family, or both, of the nature and seriousness of the behaviour in respect of which the application is made; and
  - (b) The effect of that behaviour on the applicant, or a child of the applicant's family, or both.

While the court is not constrained in what it can consider, the language of section 14(5) means that it **must** consider the perception of the applicant (and/or a child of the applicant's family). In this regard too, the law is consistent with empirical research. Women's perceptions are the single best predictor of future risk.

Section 13 of the Act empowers the court to grant a protection order without giving notice to the respondent. Granting without notice applications or requiring them to be put on notice to the respondent is another risk assessment decision facing judges. As noted above, separation is a particularly dangerous time for battered women. Having to give notice of an intention to apply for a protection order is therefore inherently dangerous and fear of perpetrator retaliation has consistently been identified in the international literature as a significant barrier to obtaining protection orders.<sup>26</sup> Parliament recognised this by giving the court the ability to make an order without notice to the respondent (under section 13(1) if it is:

- (1) ... satisfied that the delay that would be caused by proceeding on notice would or might entail—
  - (a) A risk of harm; or
  - (b) Undue hardship—
 to the applicant or a child of the applicant's family, or both.

Again, this provision seems quite consistent with the weight of scientific evidence about the risk of violence at or following separation. In particular, as with section 14, the court is required to

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<sup>26</sup> Logan, T. K., Shannon, L., Walker, R., & Faragher, T. M. (2006). Protective orders: Questions and conundrums. *Trauma, Violence, & Abuse*, 7(3), 175-205.

have regard to the perceptions of the applicant and/or a child of the applicant's family when assessing the risk of harm or undue hardship.

While there is solid empirical evidence justifying the inclusion of the section 13 provision, the way in which this is being implemented is somewhat contested. That is, key informants have told us that the threshold for granting orders without notice has been raised. We discuss this issue in the following two chapters and in Appendix 1, concluding that the evidence supports what our key informants tell us. From a risk assessment point, a relevant question is whether such a change is justified. Raising the threshold could be justified only if it did not increase the number false negatives: that is, if it did not result in denying immediate protection to more women who required it. As we show in Chapters 7 and 8, our analysis of the case studies and other recently decided cases suggests that false negatives are a significant problem. That is, some women whose applications are put on notice are unnecessarily being exposed to further violence.

According to Andrews and Bonta, good risk assessment requires "clear statements about how the predictions are made so that the information which is used may be evaluated."<sup>27</sup> Unfortunately, the implementation of sections 13 and 14 of the Domestic Violence Act 1995 often falls short of this standard. As we show in Chapter 9, handling without notice applications for protection orders has become such a matter of routine that judges are not necessarily giving reasons for their decisions. As Justice Lang has noted,<sup>28</sup> this is not a major issue when orders are granted: the applicant's affidavit has been accepted as providing the basis for the decision. It is a significant problem if the application is put on notice. In such cases, unless the reasons are given, it is quite unclear how the judge has made the prediction that there is little likelihood of harm or undue hardship. We return to this issue in Chapter 9 where we discuss it in terms of natural justice. Here, we point out that the failure to give reasons for declining a without notice application for a protection order also violates good risk assessment practice.

A further problem relates to the third and fourth criteria of Andrews and Bonta. That is, good risk assessment demonstrates the extent to which the prediction facilitates the policy objectives of interest and that "predictions and the actions that are taken as a result are recorded, monitored and explored empirically so that theory and practice may be enhanced."<sup>29</sup> As noted above, the relevant policy objectives are those set out in section 5(1) of the Domestic Violence Act 1995: "to reduce and prevent violence in domestic relationships by ... ensuring that, where domestic violence occurs, there is effective legal protection for victims." To date, there has been no evaluation to assess the extent to which this policy objective is being met. There is no monitoring of outcomes, for either successful or unsuccessful applicants; nor do we know what proportion of protection orders in New Zealand are breached, although international research suggests that up to 75% of protection orders are breached.<sup>30</sup> Neither is there any follow-up of women who do not get orders.

As we noted in Chapter 1, there have been evaluations of the Domestic Violence Act 1995, but these have been limited to a process evaluation and evaluations of programmes for protected persons, respondents and children. Important though programmes are, they are somewhat peripheral to the central policy objectives mentioned in section 5(1). At the moment, there is no

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<sup>27</sup> Andrews, D. A., & Bonta, J. (1994). *The psychology of criminal conduct*. Cincinnati, OH: Anderson, at p. 154.

<sup>28</sup> TLL v PS [protection orders] 2006 NZFLR 897

<sup>29</sup> Andrews, D. A., & Bonta, J. (1994). *The psychology of criminal conduct*. Cincinnati, OH: Anderson, at p. 154.

<sup>30</sup> Logan, T. K., Shannon, L., Walker, R., & Faragher, T. M. (2006). Protective orders: Questions and conundrums. *Trauma, Violence, & Abuse*, 7(3), 175-205. In a review of 32 studies, Spitzberg calculated that protection orders are breached in about 40% of cases (Spitzberg, B. (2002). The tactical typography of stalking, victimization and management. *Trauma, Violence & Abuse*, 3(4), 261-288). In our case studies, all but one woman (Sarah) who got an order had it breached at least once.

systematic data on the extent to which this objective is being achieved. Only by collecting such data can risk assessment practices be enhanced. Evaluation of outcomes for applicants is needed.

It should be noted that there are two types of risk assessment decision which need to be evaluated. That is, evaluations need to be designed not only to assess the efficacy of decisions to grant or decline applications but also the efficacy of proceeding with or without notice. The aim of the evaluations should be to assess the safety of applicants and their children in each of the possible scenarios (granted/declined/withdrawn, without notice/on notice, and so on). To ensure robust evaluations, it will be important that researchers are thorough in recruiting applicants. Women attempting to end violence in their relationship are a highly mobile, difficult-to-reach population. Unless the recruitment of participants is thorough, evaluations will be overly optimistic as the women in the most danger tend to be the most difficult to recruit. Moreover, such evaluations will need to be repeated from time to time to identify any changes in practice and the effects of any such changes.

In summary, the provisions of sections 13 and 14 relating to the granting of protection orders have a solid basis in the risk assessment literature. These provisions are good examples of Parliament being guided by sound research rather than common myths which often minimise domestic violence. However, as we show in Chapters 7 and 8, there are significant problems with the way these provisions are being implemented in judicial decision making. In addition, as we have shown above, the lack of evaluation of decision making violates a crucial principle of good risk assessment practice. Regular evaluation of the outcomes which flow from decisions made under sections 13 and 14 is needed. We call for such evaluations in Chapter 11. (See recommendation 22.)

### ***Risk Assessment and Care of Children Determinations***

As is very evident in the case studies, women with children negotiate their own safety in the context of concerns for their children. In some cases, concerns about what would happen to the children acted as a barrier to leaving or drove women to “reconcile” with their batterer. (See the case studies relating to Marjorie, Tina, Priya, Zaleha, Rachel, Patricia, Amy, Titiana and Lin-Bao.) For these women and their children, as with the other mothers and children in our case studies, the way the courts assessed risk – or failed to assess risk – had major implications for their safety.

Following the Davison inquiry into the killing of the Bristol children, Parliament passed the Guardianship Amendment Act 1995. This reflected concern not only about the risks a violent parent posed to the physical safety of children, but also about the co-occurrence of violence against women and child abuse, and about the deleterious effects on children of witnessing spousal violence. The new provisions, subsequently incorporated into the Care of Children Act 2004, required the court to investigate allegations of violence made in the course of proceedings.<sup>31</sup> Where it is satisfied that “a party to the proceedings [the violent party] has used violence against the child or a child of the family, or against the other party to the proceedings” the child shall be placed in the care of, or have unsupervised contact with, the violent party only if the court is satisfied that the child will be safe (sections 59 and 60). Section 61 sets out the matters which must be taken into consideration in determining whether such care or contact will be safe for the child.

**In considering, for the purposes of section 60(4), whether a child will be safe if a violent party provides day-to-day care for, or has contact (other than supervised**

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<sup>31</sup> Here, violence is taken as referring to only physical and sexual violence (s. 58). This is at odds with the broader view of violence adopted in the Domestic Violence Act 1995. Although judges are free to consider other forms of violence, and often do, it would seem appropriate for the broader view of violence to be written into the Care of Children Act 2004.

contact) with, the child, the Court must, so far as is practicable, have regard to the following matters:

- (a) the nature and seriousness of the violence used:
- (b) how recently the violence occurred:
- (c) the frequency of the violence:
- (d) the likelihood of further violence occurring:
- (e) the physical or emotional harm caused to the child by the violence:
- (f) whether the other party to the proceedings—
  - (i) considers that the child will be safe while the violent party provides day-to-day care for, or has contact with, the child; and
  - (ii) consents to the violent party providing day-to-day care for, or having contact (other than supervised contact) with, the child:
- (g) any views the child expresses on the matter (as required by section 6):
- (h) any steps taken by the violent party to prevent further violence occurring:
- (i) all other matters the Court considers relevant.

### Risks to Children

Section 61 constitutes an explicit risk assessment. Here, the outcome of interest is that the child is “safe”. This is not defined any further, but seems not to be limited to a narrow focus on physical safety, especially given the wider context of decision making in which the court is required to place priority on the “best interests” of the child. Unsupervised contact with the batterer poses a number of risks to the physical and psychological safety of a child. These include the following.

- *The risk of exposure to threats or acts of violence to the mother.* This encompasses the risk of being directly assaulted if children intervene or otherwise get in the way.<sup>32</sup> Such a risk is exacerbated if the changeover from one parent to the other is also unsupervised.
- *The risk of undermining the mother–child relationship.* Recovery from the effects of witnessing violence **depends** heavily on the quality of the child’s relationship with the non-batterer parent. Battering tends to undermine this relationship<sup>33</sup> and this can continue post-separation.<sup>34</sup>
- *The risk of physical and sexual abuse by the batterer.* The co-occurrence of battering and child physical abuse is now reasonably well understood.<sup>35</sup> Less known is the elevated risk of sexual

<sup>32</sup> Kolbo, J., Blakley, E., & Engleman, D. (1996). Children who witness domestic violence: A review of empirical literature. *Journal of Interpersonal Violence, 11*(2), 281-293.

<sup>33</sup> Radford, L., & Hester, M. (2001). Overcoming mother blaming? Future directions for research on mothering and domestic violence. In S. Graham-Bermann & J. Edleson (Eds.), *Domestic violence in the lives of children: The future of research, intervention, and social policy* (pp. 135-155). American Psychological Association; McGee, C. (2000). *Childhood experiences of domestic violence*. Philadelphia, PA: Kingsley; Hughes, H., & Marshall, M. (1995). Advocacy for children of battered women. In E. Peled, P. Jaffe, & J. Edleson (Eds.), *Ending the cycle of violence: Community responses to children of battered women* (pp.121-144). Thousand Oaks, CA: Sage.

<sup>34</sup> Bancroft, L., & Silverman, J.G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage.

<sup>35</sup> For a review, see McGee, C. (2000). *Childhood experiences of domestic violence*. Philadelphia, PA: Kingsley. See also Ross, S. M. (1996). Risk of physical abuse to children of spouse abusing parents, *Child Abuse & Neglect, 20*(7), 589-598. Based on a US national sample of 3,363 parents, the author concluded that the greater the violence against a spouse the greater the likelihood of physical child abuse. This relationship was stronger for men than women, such that the probably of child abuse by a violent husband increased from 5% with one act of marital violence to near certainty with 50 or more such acts.

- abuse posed by men who batter,<sup>36</sup> a risk which may be elevated post-separation when the mother is not present to monitor the batterer's behaviour.<sup>37</sup>
- *The risk of the batterer as a role model.* Sons of batterers have an elevated risk of becoming batterers in adulthood.<sup>38</sup> Daughters of batterers who themselves are victimised as adults are less likely than other abused women to seek help.<sup>39</sup>
  - *The risk of rigid, authoritarian parenting.* Batterers typically use a harsh, rigid disciplinary style and are overly controlling. Such parenting is inconsistent with the nurturing, predictable environment with appropriate structure and limits which best facilitates recovery in traumatised children.<sup>40</sup>
  - *The risk of neglectful or irresponsible parenting.* Because of their selfishness and self-centredness, batterers may have trouble focusing on their children's needs.<sup>41</sup> They may be inconsistent in their parenting, sometimes deliberately failing to impose appropriate guidelines in an effort to win their children's loyalty.<sup>42</sup>
  - *The risk of psychological abuse and manipulation.* Batterers, who often have a verbally aggressive parenting style, commonly use the children as a way of punishing the mother, especially post-separation.<sup>43</sup>
  - *The risk of abduction.* Domestic violence, particularly post-separation, is the most common context for parental abduction.<sup>44</sup>

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<sup>36</sup> McCloskey, L. A., Figuerdo, A. J., & Koss, M. (1995). The effect of systemic family violence on children's mental health. *Child Development, 66*, 1239-1261; Paveza, G. (1988). Risk factors in father-daughter sexual abuse. *Journal of Interpersonal Violence, 3*(3), 290-306; Sirles, E., & Franke, P. (1989). Factors influencing mothers' reactions to intrafamily sexual abuse. *Child Abuse and Neglect, 13*, 131-139.

<sup>37</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage.

<sup>38</sup> Silverman, J., & Williamson, G. (1997). Social ecology and entitlements involved in battering by heterosexual college males: Contributions of family and peers. *Violence and Victims, 12*(2), 147-164.

<sup>39</sup> Doyne, S., Bowermaster, J., Meloy, R., Dutton, D., Jaffe, P., Temko, S., & Mones, P. (1999). Custody disputes Involving domestic violence: Making children's needs a priority. *Juvenile and Family Court Journal, 50*(2), 1-12.

<sup>40</sup> Margolin, G., John, R., Ghosh, C., & Gordis, E. (1996). Family interaction process: An essential tool for exploring abusive relationships. In C. Cahn & S. Lloyd (Eds.), *Family violence from a communication perspective* (pp. 37-58). Thousand Oaks, CA: Sage; Holden, G., & Ritchie, K. (1991). Linking extreme marital discord, child rearing, and child behavior problems: Evidence from battered women. *Child Development, 62*, 311-327; McGee, C. (2000). *Childhood experiences of domestic violence*. Philadelphia, PA: Kingsley.

<sup>41</sup> Jacobson, N., & Gottman, J. (1998). *When men batter women: New insights into ending abusive relationships*. New York: Simon & Schuster.

<sup>42</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage.

<sup>43</sup> McGee, C. (2000). *Childhood experiences of domestic violence*. Philadelphia, PA: Kingsley; Erickson, J., & Henderson, A. (1998). Diverging realities: Abused women and their children. In J. Campbell (Ed.), *Empowering survivors of abuse: Health care for battered women and their children* (pp. 138-155). Thousand Oaks, CA: Sage; McMahon, M., & Pence, E. (1995). Doing more harm than good? Some cautions on visitation centers. In E. Peled, P. Jaffe, & J. Edleson (Eds.), *Ending the cycle of violence: Community responses to children of battered women* (pp. 186-206). Thousand Oaks, CA: Sage; Peled, E. (1998). The experience of living with violence for preadolescent children of battered women. *Youth and Society, 29*(4), 395-430.

<sup>44</sup> Greif, G., & Hegar, R. (1993). *When parents kidnap*. New York: Free Press; Finkelhor, D., Hotaling, G., & Sedlak, A. (1990). *Missing, abducted, runaway, and thrownaway children in America: First report: Numbers and characteristics, national incidence studies*. Washington, DC: Department of Justice.

- *The risk of exposure to violence in the father's new relationship.* Many men who batter do so in more than one relationship. Unless contact is supervised, some children will be exposed to violence in their father's new relationship.<sup>45</sup>

These are substantial risks to the children of men who batter and can seriously undermine children's recovery from exposure to domestic violence. Nevertheless, the risks listed are not determinative of no contact. Unless children have been directly abused by the batterer, physically or sexually, and/or they remain terrified of him, they may derive some benefit from contact with him provided that such contact does not interfere with "the creation of a healing context."<sup>46</sup> Strong protections need to be built in to any contact to ensure the physical and emotional safety of children.

### Empirical Basis for the Section 61 Risk Assessment

The matters the court must take into account in making its assessment of safety mostly reflect accepted risk factors. The nature and seriousness of previous violence (section 61(a)), along with its recency (section 61(b)), commonly appear in risk assessment instruments. There are less compelling reasons for including frequency of the violence, which does not appear in most validated domestic violence risk assessment tools (although escalating violence does). As Bancroft and Silverman have pointed out, most batterers, including those who have committed fatal or near-fatal assaults, do not use violence frequently.<sup>47</sup> As is sometimes observed, one does not have to hit somebody all the time to get them to do as one wishes.

The empirical evidence does support the inclusion of taking into account the views of the "other party", that is, the non-batterer parent (section 61(f)). Women are often in the best position to assess the types of risk listed above. After all, they are uniquely placed as witnesses to the batterer's previous abusive behaviour, which in turn is strongly predictive of future behaviour.

In contrast, there is much less evidence to support the notion that children are able to accurately assess their own safety (section 61(g)). A child's expressed wish to see a parent who has used violence needs to be evaluated within the context of that violence. For example, children may perceive that it is too dangerous to side with the victim and that their best chance of keeping safe will be by aligning themselves with the perpetrator.<sup>48</sup> Risk assessors should also consider the possibility of traumatic bonding.<sup>49</sup> That is, one of the effects of abuse is to "create a potent longing in the victim for kindness and understanding and for relief from the fear or terror experienced."<sup>50</sup> In the context of domestic violence, it is likely that it is the perpetrator who is perceived as having the power to provide such relief. This perception may be reinforced if he apologises and is especially attentive after the violence.<sup>51</sup> Because of the complexity of interpreting children's wishes in the context of domestic violence, it is important that the court

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<sup>45</sup> Dutton, D. (1995). *The domestic assault of women: Psychological and criminal justice perspectives*. Vancouver, BC: UBC Press; Woffordt, S., Mihalic, D. E., & Menard, S. (1994). Continuities in family violence. *Journal of Family Violence*, 9(3), 195-225.

<sup>46</sup> Bancroft, L., & Silverman, J. G. (2000). Assessing risk to children from batterers. Retrieved 4 February 2007 from [http://www.lundybancroft.com/pages/articles\\_sub/JAFFE.htm](http://www.lundybancroft.com/pages/articles_sub/JAFFE.htm).

<sup>47</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage.

<sup>48</sup> Ibid

<sup>49</sup> James, B. (1994). *Handbook for treatment of attachment-trauma problems in children*. New York: Free Press; Herman, J. (1992). *Trauma and recovery*. New York: Basic Books.

<sup>50</sup> Bancroft, L., & Silverman, J.G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage, at p. 40.

<sup>51</sup> Ibid

seeks the advice of psychologists and other qualified people – and that such experts have specialist knowledge of domestic violence and its effects on children. We make such a recommendation in Chapter 11 (see recommendation 8), where this issue is discussed further.

Care also needs to be taken in considering “any steps taken by the violent party to prevent further violence occurring” (section 61(h)). Certainly, risk is not static and can vary according to changes in circumstances or changes within the individual. The extent to which a perpetrator accepts responsibility for his violence, increases his empathy for his victim, reduces his dependency on the relationship and takes steps to ensure the violence is not repeated are collectively predictive of reduced risk.<sup>52</sup> However, the temptation may be to regard participation in a stopping violence programme as indicating that these changes have in fact been achieved. As we show in Chapter 15, there are grounds for cautious optimism that quality stopping violence programmes can make a modest contribution to preventing further violence. However, because some men make no changes as a result of participating in a programme, and some may actually change in a negative direction, programme participation should not of itself be assumed to reduce the risk for any specific individual.

While sections 59 to 61 of the Care of Children Act 2004 address the safety of children, the Act also requires the court to consider the safety of parents when making orders relating to contact. That is, section 51 requires that where a parent has used violence against the other parent or a child, “[t]he Court must consider whether the order should be subject to conditions imposed for the purpose of protecting the safety of [the other parent] while ... contact with the child takes place (including while the child is being collected from, or returned to” the other parent. This provision recognises that contact arrangements can provide a further point of exposure to the perpetrator. Christine Bristol, whose experience led directly to these provisions, was frequently assaulted by her ex-husband during access changeovers.<sup>53</sup> In 1995, Nicola Goodwin was killed by her ex-partner in similar circumstances.<sup>54</sup> In making contact orders, good risk assessment should assess risk not only to children but also to the parent who has their day-to-day care.

### Evaluating Section 61 Risk Assessments

With the qualifications we have mentioned above, sections 51 and 61 of the Care of Children Act 2004 seem to broadly accord with accepted good practice for domestic violence risk assessment. However, as we show in Chapter 11, this sort of risk assessment is not always implemented or is implemented only partially. Moreover, it has not been subjected to the sort of evaluation recommended by Andrews and Bonta.<sup>55</sup> Consequently, we do not really know to what extent risk assessment is achieving the objective of keeping children safe; nor do we know to what extent contact provisions are protecting custodial parents.

A partial exception is the research conducted by Alison Chetwin and her colleagues.<sup>56</sup> This included key informant interviews, interviews with custodial parents (45 women) and non-

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<sup>52</sup> Scott, K. L., & Wolfe, D. A. (2000). Change among batterers: Examining men’s success stories. *Journal of Interpersonal Violence, 15*(8), 827-842.

<sup>53</sup> Busch, R., & Robertson, N. R. (1994). I didn’t know just how far you could fight: Contextualising the Bristol Inquiry. *Waikato Law Review, 2*, 41-68.

<sup>54</sup> Robertson, N. R. (1996). Reforming institutional responses to violence against women: A comprehensive community intervention project. In D. R. Thomas & A. Veno (Eds.), *Community psychology and social change: Australian and New Zealand perspectives* (2nd ed.) (pp. 81-104). Palmerston North: Dunmore Press.

<sup>55</sup> Andrews, D. A., & Bonta, J. (1994). *The psychology of criminal conduct*. Cincinnati, OH: Anderson, at p. 154. See also Standards New Zealand. (2006). *Screening, risk assessment and intervention for family violence including child abuse and neglect NZS8006:2006*. Wellington: Standards New Zealand.

<sup>56</sup> Chetwin, A., Knaggs, T., & Young, P. T. A. (1999). *The domestic violence legislation and child access in New Zealand*. Wellington: Ministry of Justice.

custodial parents (37 men), and an analysis of 558 Family Court files. The later included protection order applications in which children were mentioned and/or where there was a concurrent custody application, together with a small number of custody applications unaccompanied by an application for a protection order but which included allegations of violence. The file analysis provided a broad picture of decision making. Initial determinations were for supervised access in 18% of the cases (mostly, the nature of supervision was unspecified). Unsupervised access was ordered in 12% of the cases. In a similar number, there was a specific direction that there be no access. The most common outcome, however, was that there was no direction about access (58%).

For at least two reasons this research is not a formal evaluation of the risk assessment decision making of the Family Court. Firstly, no formal assessments of children's wellbeing were conducted. Instead, the researchers relied on parents' reports of children's feelings about contact and on parents' reports of children's behaviour before and after contact. While these reports provide useful insights, they fall short of the sort of assessment of outcomes needed for a sound evaluation of risk assessment decision making.

A second, more significant, limitation is that in reporting parents' views, the research presents neither the actual court determination about contact, nor the information upon which the determination was based. For example, when a parent's views about supervision of contact are reported, it is generally unclear whether the supervision was implemented by order of the court, or was an informal arrangement between the parents. Similarly, when a parent's views about no contact are reported, it is generally unclear whether or not the court specifically directed that there be no access. As is clear from some comments, some access arrangements entered into were contradicted court orders. For these reasons, it is impossible to assess either the process or the outcome of specific risk assessment decisions by the court.

### **Problematic Approach to Risk Assessment in Care of Children Act 2004 Determinations**

In Chapter 11, we examine certain decided cases which throw further light on the risk assessment decision making of the court, but here it is interesting to consider one approach to risk assessment which has important theoretical and practical implications for proceedings under the Care of Children Act 2004, the use of typologies of battering.

Such an approach has been advocated by Judge Jan Doogue in a speech to the Child and Youth Law Conference in New South Wales in 2004.<sup>57</sup> Judge Doogue draws on the work of Janet Johnston and Linda Campbell who proposed five profiles of domestic violence: (a) ongoing and episodic male battering, (b) female-initiated violence, (c) male-controlling interactive violence, (d) separation-engendered and post-divorce trauma, and (e) psychotic and paranoid reactions.<sup>58</sup> Each of these profiles, the authors argue, presents a different level of risk in relation to future parent-child relationships.

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<sup>57</sup> Doogue, J. (2004). *The Domestic Violence Act 1995 and s.16B of the Guardianship Act 1968: The effect on children's relationships with their non-custodial children*. Retrieved 10 August 2006 from <http://justice.govt.nz/family/publications/speeches-papers>.

<sup>58</sup> Johnston, J. R., & Campbell, L. E. G. (1993). Parent-child relationships in domestic violence families disputing custody. *Family and Conciliation Courts Review*, 31(3), 282-298. See also a similar article: Johnston, J. R., & Campbell, L. E. G. (1993). A clinical typology of interparental violence in disputed-custody divorces. *American Journal of Orthopsychiatry*, 63(2), 190-199.



One of the attractions of this typology for Judge Doogue is that it appears to fit her belief that “It is not fair nor just to view all violence as fitting within the classification of the power and control model.”<sup>59</sup> However, this claim needs close evaluation.

Only the third profile, male-controlling interactive violence, is explicitly seen as being about power and control. In the other profiles, the violence is attributable to such things as low tolerance of frustration and poor impulse control (ongoing/episodic male battering), women’s “intolerable internal states of tension” (female-initiated violence), a response to the acute stress of separation (separation/divorce violence) and drug-induced dementia or paranoid psychosis (psychotic/paranoid reactions). Thus the violence is “explained” in terms of presumed causes which precede the violence. At first glance, this has a certain appeal. Causes, common sense would suggest, precede effects. However, a more sophisticated behavioural analysis of battering reveals that what sustains (reinforces) violence are the rewards which follow for the perpetrator.<sup>60</sup> That is, the use of violence results in the source of frustration or stress being addressed by the victim’s fearful compliance (for example, giving in, backing down, agreeing with the batterer, expressing loyalty, abandoning her own plans or avoiding certain topics). From this perspective, to explain violence, it is more fruitful to examine what follows it than what precedes it. In a word, too often violence “works” – and it works, by virtue of the fear it induces, by giving the perpetrator power and control over his victim.

Below, we examine in some detail each of the profiles proposed by Johnston and Campbell and advocated by Judge Doogue. However, it is useful to first examine the general approach in relation to what is known about quality risk assessment.

A crucial point is that the Johnston and Campbell profiles were not created by empirical research. That is, they did not examine a range of possible predictor variables for their ability to predict dangerousness and then create profiles by grouping predictors of high and low risk. Instead, they created their profiles *a priori* and then allocated research participants to them. The logic is circular. The profiles can be seen to exist because the researchers categorised each couple into one of the five profiles, but did so, using the profiles already created. And as the researchers acknowledge, the profiles were not subjected to rigorous testing afterwards.<sup>61</sup>

The profiles were created by arguing, firstly, that violence arises from three sorts of factors, intrapsychic (factors internal to the batterer), interactional (factors to do with the relationship), and external factors, which, for some unstated reason, seem to be limited to factors to do with separation. By dichotomising each of these factors as either being present or absent, they created a two-by-two-by-two matrix to represent the eight theoretical possibilities.<sup>62</sup> These eight theoretical combinations were then grouped into four main types (by ignoring the presence or absence of “separation trauma”), each of which was given one of the first four labels of those listed above. Unfortunately, no rationale for the choice of labels was given. For example, the two

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<sup>59</sup> Doogue, J. (2004). *The Domestic Violence Act 1995 and s.16B of the Guardianship Act 1968: The effect on children’s relationships with their non-custodial children*. Retrieved 10 August 2006 from <http://justice.govt.nz/family/publications/speeches-papers>, paragraph 7.

<sup>60</sup> For an account of contingencies operating for batterers, see Myers, D. L. (1995). Eliminating the battering of women by men: Some considerations for behavior analysis. *Journal of Applied Behavior Analysis*, 28, 493-507. For a parallel behaviour-analytic account of contingencies for battered women, see Bell, K. M., & Naugle, A. E. (2005). Understanding stay/leave decisions in violent relationships: A behavior analytic approach. *Behavior and Social Issues*, 14(1), 21-45.

<sup>61</sup> Johnston, J. R., & Campbell, L. E. G. (1993). A clinical typology of interparental violence in disputed-custody divorces. *American Journal of Orthopsychiatry*, 63(2), 190-199, at p. 193.

<sup>62</sup> In the case of the so-called external factors, these were dichotomised on whether “separation trauma” was present or not. This term was not defined; nor was it explained why it was the only sort of “external” factor of interest.

cells of the matrix characterised by the presence of intra-psychic factors and the absence of interactional factors were labelled “female-initiated violence” while the two cells of the matrix characterised by the absence of intra-psychic factors and the presence of interactional factors were labelled “male-controlled interactive violence.” Why these categories were given gender-specific labels when the theoretical framework made no mention of gender was not explained.<sup>63</sup> The fifth category, “psychotic and paranoid reactions” was created “because they warrant special clinical consideration.”<sup>64</sup>

In the original study, Johnston and Campbell had two clinicians assess 140 couples in samples drawn from two different sources. These clinicians made “consensus” decisions about which of the five profiles each couple fitted. That is, the clinicians did not make independent assessments. That is a pity, for had independent assessments been made, the reliability of the assessment process could have been reported.<sup>65</sup>

But in some ways, this is only the beginning of the problem. Having created these categories, Johnston and Campbell go on to speculate on what sort of custodial and visitation arrangements might be appropriate for each of the profiles. Had the profiles been validated as required by good risk assessment practice, then the typology would indeed be a useful tool for judicial officers faced with making determinations under the Care of Children Act 2004: simply decide which profile a particular case fits and then make the relevant determination. Unfortunately, Johnston and Campbell provided no evidence that their typologies are predictive of risks to children apart from data on children’s emotional and behavioural problems as assessed by the Child Behaviour Checklist. Here, boys in the various groups were found to follow the predicted pattern. That is, the highest problem scores were found among boys whose parents fitted the “ongoing/episodic male battering” profile, followed by the profiles “male-controlling”, “female-initiated”, “separation trauma” and “non-violent” respectively. A roughly similar pattern was evident among the girls, although the order of the two highest scoring profiles was reversed. However, it is important to note that what was reported were small differences in average (mean) problem scores. There were large overlaps between the groups which were much more alike than different. Johnston and Campbell did not report the extent to which children were exposed to domestic violence, nor the extent to which they were the direct victims of violence.

Moreover, the commentaries which accompany the various profiles raise serious concerns about Johnston and Campbell’s understanding of domestic violence. For example, the first profile, ongoing and episodic male batterers, is accompanied by the following comment in relation to younger daughters (defined as aged under seven or eight years) of the batterers. These girls are said to have:

“princesslike” relationships with their fathers, many of whom intermittently lavished attention on their daughters, while at other times being pre-occupied with their own needs. This resulted in a great deal of confusion for the child; many of these girls appeared to have a double image of the father, viewing him both as a loving suitor and as a scary, dangerous man. In general, there were poor boundaries between

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<sup>63</sup> The allocation of gender-specific labels may have something to do with part of the assessment process used in the study. That is, the authors noted that “The balance of power between males and females was assessed.” However, how such an assessment was made is not explained; neither is there any explanation about how power is related to the intra-psychic, interactional and external factors upon which the categories were based. Johnston, J. R., & Campbell, L. E. G. (1993). A clinical typology of interparental violence in disputed-custody divorces. *American Journal of Orthopsychiatry*, 63(2), 190-199, at p. 193.

<sup>64</sup> Ibid, at p. 193.

<sup>65</sup> Reliability is usually reported as the percentage of cases in which independent raters agree.

these men and their daughters, especially among substance abusing men, with mutual seductiveness and provocation of his aggressiveness.<sup>66</sup>

It is of concern that a Family Court judge presents as an exemplar research which suggests that young girls are responsible for seducing and provoking their fathers. Such a position seems far removed from the stated aims of the Domestic Violence Act 1995 of “recognising that domestic violence, in all its forms, is unacceptable behaviour” (section 5(1)(a)).

The second profile, female-initiated violence, is equally problematic. This, according to Johnston and Campbell, involves women who always initiated the physical attack, and whose outbursts were repetitive during the marriage. According to the authors, “Few of these women did much physical damage with their violence: broken cups, torn clothing, and scratched faces were common.”<sup>67</sup> However, as they also note:

In some cases, the man lost control, especially during the separation period, and no longer sought to placate or prevent the outbursts, eventually responding in kind to the woman's attacks. The effects of these physical exchanges were not minor; the majority escalated to high or severe levels of violence.<sup>68</sup>

Here Johnston and Campbell appear to equate hitting first with being the primary aggressor. As Bancroft points out, a woman who hits first cannot be assumed to lack fear of her partner.<sup>69</sup> Given the usual size and strength disparity between men and women, it is likely that the woman involved in “high or severe levels of violence” which is “not minor” will have come off second best. For example, in our case studies, Sally told us that she once slapped Robert lightly on the back of his hand when he persisted, against her repeated requests, to leave the volume control on the radio alone. In retaliation, he elbowed her in the ribs, dislocating one. It is not uncommon for women, who have been ground down psychologically by their partner, to hit first, but this should not be mistaken for them being the predominant aggressor.<sup>70</sup>

Johnston and Campbell's description of their third profile, male-controlling interactive violence, also raises questions about their understanding of the dynamics of battering. Violence in this case was seen as:

... arising primarily out of a conflict of interest or disagreement between the spouses that escalated from mutual verbal provocation and insults into physical struggles ... Generally, conflict would start with a fairly minor altercation and became more and more serious, sometimes culminating in a very violent scene. It was common for the woman to end up by screaming or trying to leave the scene. If she started screaming, her spouse would typically slap her in a misguided effort to quell her “hysteria.” In this sense, he tended to see her as a child who needed to be disciplined “for her own good.” If she tried to leave or refused to communicate with him, this would trigger attempts by the man to control her by pinning her down or blocking the exit. By virtue

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<sup>66</sup> Johnston, J. R., & Campbell, L. E. G. (1993). Parent-child relationships in domestic violence families disputing custody. *Family and Conciliation Courts Review*, 31(3), 282-298, at p. 287.

<sup>67</sup> Johnston, J. R., & Campbell, L. E. G. (1993). A clinical typology of interparental violence in disputed-custody divorces. *American Journal of Orthopsychiatry*, 63(2), 190-199, at p. 195.

<sup>68</sup> Ibid.

<sup>69</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage.

<sup>70</sup> Ibid. See also McMahon, M., & Pence, E. (2003). Making social change: Reflections on individual and institutional advocacy with women arrested for domestic violence. *Violence Against Women*, 9(1), 47-74. and Fisher J in *M v M* [2002] NZFLR 743 (HC)

of their superior strength, these men essentially coerced and dominated their mates and were more likely to inflict injury, whereupon the women became their victims.<sup>71</sup>

It is difficult to understand the authors' construction of this scenario as being one of "mutual" provocation. As Bancroft points out:

Johnston never defines the term, which increases its dangerousness. If a woman says angrily to her partner that he never helps with the children, is she provoking violence? Suppose she yells at him that she is sick of being called names in front of the children? Does a woman invite violence when she swears at her husband for giving her a sexually transmitted disease? These are all common scenarios in the lives of abused women.<sup>72</sup>

Moreover, if attempting to leave the room or refusing to communicate in the face of bullying and threatening behaviour is to be regarded as provocative, then women would appear to have few options. Either agree with one's partner to keep the peace or suffer the consequences meted out by a man, who, in Johnston and Campbell's words, sees "the exercise of physical control as legitimate."<sup>73</sup> It is not explained how provocation differs from standing up for one's legitimate rights. The distinction between this profile and the "true battering" type (profile 1) seems to come down to the two clinicians' personal feelings about the parties.<sup>74</sup> While Johnston and Campbell seem to believe that men who fit the profile of male-controlling interactive violence pose no great threat to their children once emotions have cooled, given the factors indicative of risk to children listed earlier, these men seem poor candidates for unsupervised contact with their children.

There are significant critiques of Johnston and Campbell's fourth profile as well, separation and post-divorce violence. Here it is believed that the abuser becomes violent only as a result of the stress of divorce. As the authors state, "the violence was not ongoing or repetitive. In fact, it was limited to one, two or several incidents, albeit sometimes very serious ones, around the time of separation or divorce."<sup>75</sup> As we have noted earlier, the time of separation and the period after is the time of greatest danger for battered women and their children, including the danger of homicide. However, as the New Zealand Women's Safety Survey reported, men who are violent at and following separation almost invariably were also violent during the relationship.<sup>76</sup> Rather than separation violence being seen as out of character, transient and posing little risk to women and children, it should be seen as the continuation of an established pattern, one which could potentially escalate to the point of homicide. This is particularly true of the sort of men who, in Johnston and Campbell's words, respond to separation with "desperation, helplessness, abandonment, and outrage ... [and who] tried to hold on by physically preventing their spouse from leaving, or scaring ... her into staying."<sup>77</sup>

<sup>71</sup> Johnston, J. R., & Campbell, L. E. G. (1993). A clinical typology of interparental violence in disputed-custody divorces. *American Journal of Orthopsychiatry*, 63(2), 190-199, at pp. 195-196.

<sup>72</sup> Bancroft, L. R. (1998). *A critical look at Janet Johnston's typology of batterers*. Retrieved 5 March 2007 from [http://www.lundybancroft.com/pages/articles\\_sub/JOHNSTON.htm](http://www.lundybancroft.com/pages/articles_sub/JOHNSTON.htm), paragraph 24.

<sup>73</sup> Johnston, J. R., & Campbell, L. E. G. (1993). A clinical typology of interparental violence in disputed-custody divorces. *American Journal of Orthopsychiatry*, 63(2), 190-199, at p. 195.

<sup>74</sup> Bancroft, L. R. (1998). *A critical look at Janet Johnston's typology of batterers*. Retrieved 5 March 2007 from [http://www.lundybancroft.com/pages/articles\\_sub/JOHNSTON.htm](http://www.lundybancroft.com/pages/articles_sub/JOHNSTON.htm), paragraph 31.

<sup>75</sup> Johnston, J. R., & Campbell, L. E. G. (1993). A clinical typology of interparental violence in disputed-custody divorces. *American Journal of Orthopsychiatry*, 63(2), 190-199, at p. 197.

<sup>76</sup> Morris, A. (1997). *Women's safety survey 1996*. Wellington: Victoria University, at p. 54.

<sup>77</sup> Johnston, J. R., & Campbell, L. E. G. (1993). A clinical typology of interparental violence in disputed-custody divorces. *American Journal of Orthopsychiatry*, 63(2), 190-199, at p. 197. As Barbara Hart has pointed out, the centrality

It should be noted that Johnston and Campbell acknowledged important limitations to their work. They commented, for example, that there are considerable overlaps between the profiles and that mixed types are possible.<sup>78</sup> In one of the two articles presenting this work, they acknowledge that it is not known how much the violence reported represented the broad range of violence that occurs before and after separation.<sup>79</sup> Significantly, in the same article they say that their findings “are preliminary and exploratory and require further testing to establish their validity and utility.”<sup>80</sup> We have been unable to find any research which does this.

In summary, this research is not appropriate for use as a risk assessment tool. It constructed a typology on doubtful theoretical grounds. It provided no evidence that perpetrators can be reliably assigned to these profiles. And most importantly in the context of this discussion, there has been no empirical evidence that the profiles are predictive of risk in any meaningful way. Such poorly developed and untested typologies are no substitute for systematic risk assessment.

As we have noted, there are well-developed risk assessment tools available. Such tools are based on empirical research, which, among other things, reveals the huge overlap between violence against women and violence against children and the deleterious effects for children of witnessing domestic violence. It is unfortunate that an experienced Family Court judge has chosen to ignore such reputable research in favour of a deeply flawed, untested model, apparently because it accords with her belief that domestic violence is often not about power and control.<sup>81</sup>

We discuss current risk assessment practices in relation to Care of Children Act determinations in Chapter 11. However, here we note that risk assessment can only improve if practices are evaluated. Usually, the only feedback judicial officers get is when one or other of the parties comes back to court with a new application. In all other cases, judges are unlikely to know if the orders made have kept children and custodial parents safe, have exposed them to further abuse or, indeed, have resulted in clearly unnecessarily restrictive arrangements having been put in place. Evaluation of outcomes is needed. (See recommendation 22 and Chapter 11.)

### **Risk Assessment and Sentencing of Perpetrators**

Risk assessment is relevant to the sentencing of perpetrators. According to the Sentencing Act 2002, there are eight “Purposes of sentencing or otherwise dealing with offenders.” Two of these imply some sort of risk assessment: “to provide for the interests of the victim of the offence” (section 7(1)(c)) and “to protect the community from the offender” (section 7(1)(g)). Neither of these has greater priority than the other six purposes, which include holding the offender accountable, promoting a sense of responsibility, and providing reparation, denouncement, deterrence and rehabilitation.

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of the relationship to the batterer’s life is a significant marker of the risk of homicide (Hart, B. J. (1992). Assessing whether batterers will kill. In B. J. Hart (Ed.), *Accountability: Program standards for batterer intervention services*. Reading, PA: Pennsylvania Coalition against Domestic Violence).

<sup>78</sup> Johnston, J. R., & Campbell, L. E. G. (1993). Parent-child relationships in domestic violence families disputing custody. *Family and Conciliation Courts Review*, 31(3), 282-298. See especially Table 1 at p. 288.

<sup>79</sup> Johnston, J. R., & Campbell, L. E. G. (1993). A clinical typology of interparental violence in disputed-custody divorces. *American Journal of Orthopsychiatry*, 63(2), 190-199, at p. 193.

<sup>80</sup> Ibid, at p. 193.

<sup>81</sup> Doogue, J. The Domestic Violence Act 1995 and s.16b of the Guardianship Act 1968 - the effect on childrens' relationships with their non-custodial parent. (2004) 4 *Battersworths Family Law Journal* at p.243 “The Domestic Violence Act 1995 and s 16B of the Guardianship Act 1968 were based on the classification of violence within the power and control model. In my experience and that of other Judges this model does not fit the profile of many cases coming before the Family Court in New Zealand.”

The sentencing of domestic violence offenders has important implications for the safety of victims. By definition, domestic violence offenders are very familiar with their victims and usually know how to find them. They often have an ongoing relationship with the victim, even if it is limited to being a parent of their victim's children. Serial domestic violence offending is common. Moreover, some sentencing processes and outcomes may directly involve the victim, such as when restorative justice processes are utilised or offenders are directed to undertake treatment. Unfortunately, as our analysis of decided criminal cases shows (Chapter 13), there is little evidence that attention is being given to rigorous risk assessment in sentencing.

On the other hand, risk assessment of a particular kind is being used in the specialist domestic violence courts at Manukau and Waitakere. We discuss these courts in more detail in Chapter 13, but here we wish to evaluate the approach using the criteria developed by Andrews and Bonata.<sup>82</sup> As we show below, the approach falls far short of best practice in risk assessment.

The approach used in the Manukau and Waitakere courts, as described in speeches by several judicial officers, is to use a typology of batterers to guide sentencing decisions. As stated by Judge Russell Johnson, the Principal District Court Judge, the categories are as follows.

1. Isolated, uncharacteristic incident, situational, not indicating a normal violent propensity.
2. Repeated violent incidents but not escalating.
3. Repeated escalating violence.
4. Dangerous psychotic, obsessive or sadistic violence, treating the victim as a possession.<sup>83</sup>

Like the other speeches, Judge Johnson's speech provides no reference for the source of these profiles but one of our key informants told us that he believed that they were based on those promoted by Judge Jan Doogue – who, as we have shown, got them from the work of Johnston and Campbell.

It is not altogether clear but it would appear that category 1 is based on Johnston and Campbell's profile of "separation-engendered and post-divorce trauma", and that category 2 is based on their profile of "ongoing and episodic male battering." It is less clear on what category 3 is based, but category 4 seems to accord with Johnston and Campbell's profile of "psychotic and paranoid reactions." Whatever the origins of these categories, according to Judge Johnson, the first two call for a therapeutic approach to sentencing, while the last two call for a punitive approach, although he allows that there is some overlap between categories 2 and 3.<sup>84</sup> In this context, according to Judge Recordon, a therapeutic approach is seen to involve supervision, "restorative work", anger management, addictions counselling, good behaviour bonds and relationship counselling.<sup>85</sup> No evidence is provided to support the idea that these categories discriminate

<sup>82</sup> Andrews, D. A., & Bonta, J. (1994). *The psychology of criminal conduct*. Cincinnati, OH: Anderson, at p. 154.

<sup>83</sup> The wording here is drawn from Johnson, R. (2005). *The evolution of family violence criminal courts in New Zealand*. Paper presented at the Police Executive Conference, Nelson, New Zealand, 8 November. The same profiles, in slightly different words, also appear in Adams, J. (2005). *Family violence and the courts: changing attitudes: The role of the court*. Speech to Rise above It conference, Masterton, 2 May 2005. Retrieved 16 August 2006 from <http://justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=rise-above-it-conference-masterton-2-may-2005.asp>, and in Recordon, P. (2005). *The family violence (specialist) court*. Speech to Towards a Restorative Society symposium, Wellington, October 2005. Retrieved 22 August 2005 from <http://www.vuw.ac.nz/ips/current-activities/downloads/Recordon%20paper.pdf>.

<sup>84</sup> Johnson, R. (2005). *The evolution of family violence criminal courts in New Zealand*. Paper presented at the Police Executive Conference, Nelson, New Zealand, 8 November, at p. 10.

<sup>85</sup> Recordon, P. (2005). *The family violence (specialist) court*. Speech to Towards a Restorative Society symposium, Wellington, October 2005. Retrieved 22 August 2005 from <http://www.vuw.ac.nz/ips/current-activities/downloads/Recordon%20paper.pdf>, at p. 5.

between those offenders, and their victims, who might benefit from therapeutic approaches and those who might benefit from punitive approaches. But even if there was such evidence, there is no information about the reliability by which offenders could be categorised. Instead, we are told, the cases are categorised “by negotiated agreement in Court (police/lawyers/victim adviser/Judge).”<sup>86</sup>

As we have noted, the Sentencing Act 2002 sets out multiple purposes for sentencing besides the interests of victims and the protection of the community, but it is difficult to see how the use of these categories can help achieve either of the two purposes we have mentioned. These categories meet none of the criteria for good risk assessment set out by Andrews and Bonta.<sup>87</sup> They are clearly deficient in terms of official New Zealand standards for risk assessment.<sup>88</sup> They certainly are not “actuarially based, internally and externally valid and reliable, longitudinally verified, peer reviewed, and based on quality research.”<sup>89</sup> As we show in Chapter 13, the use of these typologies has serious implications for the safety of victims of domestic violence and fails to give perpetrators clear and unambiguous messages about the unacceptability of violence.

### **Death Reviews**

So far, we have called for periodic evaluations of risk assessment decision making. Such research has the potential to enhance risk assessment. There is one other form of research which can be very helpful: a routine review of domestic homicides. We understand that a review mechanism is being planned for New Zealand.<sup>90</sup>

Here, it is worth noting that the Canadian province of Ontario has established such a system. The Domestic Violence Death Review Committee is a “multidisciplinary advisory committee of experts” which investigates all deaths resulting from domestic violence with the aim of contributing to “the reduction of domestic violence generally, and domestic homicides in particular.”<sup>91</sup> It does this by reviewing cases, identifying systemic problems and helping to identify trends and risk factors. So far the committee has produced three annual reports, each with numerous recommendations aimed at addressing gaps and improving risk assessment processes.

We think that this is a model which could be adopted here. Two features seem particularly useful. Firstly, the committee is multidisciplinary, encompassing medicine, law, policing, social work, psychology, sociology, victim services child protection and women’s advocacy. Each of these disciplines has an important role to play in deepening our understanding of domestic violence. Secondly, it commissions investigators who can conduct thorough reviews of individual cases. Thirdly, the committee is located in the Coroner’s Office. As such, it is independent of the services and institutions whose practices may come under scrutiny in its investigations. To be effective, independence and multidisciplinary should be incorporated into the New Zealand model.

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<sup>86</sup> Ibid, at p. 4.

<sup>87</sup> Andrews, D. A., & Bonta, J. (1994). *The psychology of criminal conduct*. Cincinnati, OH: Anderson, at p. 154.

<sup>88</sup> Standards New Zealand. (2006). *Screening, risk assessment and intervention for family violence including child abuse and neglect NZS8006:2006*. Wellington: Standards New Zealand.

<sup>89</sup> Dutton, D. G., & Kropp, R. R. (2000). A review of domestic violence risk instruments. *Trauma, Violence & Abuse*, 1(2), 171-181, at p. 178.

<sup>90</sup> Taskforce for Action on Violence within Families. (2006). *Taskforce for action on violence within families: The first report* Wellington: Ministry of Social Development, at p. 18.

<sup>91</sup> Domestic Violence Death Review Committee. (2006). *Annual Report to the Chief Coroner, 2005*. Ontario: Office of the Chief Coroner. Retrieved 23 August 2006 from [http://www.mpss.jus.gov.on.ca/English/publications/comm\\_safety/DVDRC\\_2005.pdf](http://www.mpss.jus.gov.on.ca/English/publications/comm_safety/DVDRC_2005.pdf).

**Summary**

In this chapter, we have reviewed the literature on risk assessment in relation to domestic violence. Despite earlier pessimism, there is a growing consensus that quality risk assessment can make a useful contribution to decision making both in relation to perpetrators and victims. There is also some agreement about the criteria for determining good risk assessment processes. We then applied what is known about risk assessment to four forms of judicial decision making in which the assessment of risk is either implicitly or explicitly required by legislation. Both the granting of protection orders, with or without notice, and making determinations relating to the care of children require explicit risk assessment decisions. We have also argued that risk assessment is implied in sentencing perpetrators of domestic violence in the criminal courts. In our view, the relevant provisions of both the Domestic Violence Act 1995 and the Care of Children Act 2004 are broadly consistent with good risk assessment practices. However, our discussion here and in the following chapters raises serious questions about the way judicial officers are implementing, or are failing to implement, risk assessment considerations in their decision making. Moreover, it is very clear that we lack good evaluations of risk assessment as practised by the courts. Accordingly, we have recommended such evaluations be conducted periodically, and support the establishment of a system of domestic violence death reviews. Such research and reviews are needed so that risk assessment can be enhanced.



## 8: Seeking Protection Orders: Women's Experiences

New Zealand research indicates that applying for a protection order is often one of the most frightening experiences in an abused woman's life.<sup>92</sup> Rather than obtaining protection orders as "weapons" to use against men for parenting order purposes<sup>93</sup> what we know from our research is that women are often re-victimised again and again before they reach out for help. Not one of our case study interviewees, for instance, left their abusers the first time abuse occurred. This chapter examines our women's experiences of learning about protection orders and their decisions whether or not to apply for them. It discusses in detail the experiences of the four women in our study whose applications for protection orders were put on notice. Moreover, we look at the variety of pressure tactics that some of the women were subjected to by their abusers after protection orders were granted to withdraw these orders. Finally, we look at women's experiences of defended hearings and the circumstances in which they obtained (or did not) final protection orders.

Throughout this chapter, and again in Chapter 10, we will focus on our women's lived experiences of Family Court processes and discuss how these processes might be changed if safety and natural justice issues for applicants were primary concerns. Given that domestic violence represents the most serious threat to New Zealand women's fundamental rights and freedoms as defined by the New Zealand Bill of Rights Act 1990, this chapter and Chapter 9 focus on how effectively the various approaches to domestic violence currently being utilised by our Family Court carry out these safety and natural justice requirements.

It is important to note that during the ten years following the implementation of the Domestic Violence Act 1995, the number of family violence incidents recorded by the police has doubled (from 31,654 in 1996 to 63,685 in 2005), with a corresponding increase in the number of arrests for family violence offences (from 9,311 to 18,305).<sup>94</sup> Murders involving domestic violence represent more than half of the murders in New Zealand, and, startlingly, 19 children were orphaned in New Zealand as a result of domestic violence over the 2005–06 Christmas period.<sup>95</sup> However, the number of applications for protection orders made over the last few years has steadily decreased. Specifically, the number of applications has decreased from 6,970 in 1998/99 to 4,560 in 2004/05. The number of temporary orders made has correspondingly declined from

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<sup>92</sup> See, for example, Lesorgen, L. (2001). *The experience of protection orders* (Research report presented in partial fulfilment of the requirements for the degree of Master of Social Work (Applied)), Massey University, Auckland, and Hand, J., Elizabeth, V., Rauwhero, H., Selby, S., Burton, M., Falanitule, L., & Martin, B. (2002). *Free from abuse: What women say and what can be done*. Auckland: Auckland Healthcare Services, at pp. 152-161.

<sup>93</sup> In Doogue, J. (2004). The Domestic Violence Act 1995 and s 16B of the Guardianship Act 1968: the effect on children's relationships with their non-custodial parent. *Butterworths Family Law Journal*, 4(10), 243-248, Judge Jan Doogue argues: "There is no doubt in my mind as a Judge who has been sitting since before Sir Ronald's report was written and the subsequent law reforms were made that there are a good number of cases where delay means that women are the arbiters of access that men have to their children and that in some cases the Temporary Protection Order is in fact used as a weapon against the father."<sup>94</sup> *Police family violence figures double over the last 10 years*. New Zealand Family Violence Clearing House News Archive. Retrieved 19 December 2006 from <http://www.nzfvc.org.nz/NewsItem.aspx?id=67>.

<sup>94</sup> *Police family violence figures double over the last 10 years*. New Zealand Family Violence Clearing House News Archive. Retrieved 19 December 2006 from <http://www.nzfvc.org.nz/NewsItem.aspx?id=67>.

<sup>95</sup> Boshier, P. (2006). *The Domestic Violence Act ten years on*. Speech at Te Unga Waka Marae, Epsom, 27 March. Retrieved 19 December 2006 from <http://www.justice.govt.nz/family/publications/speeches-papers/default.asp?inline=domestic-violence-act-ten-years-on-march-2006.asp>.

5,247 in 1998/99 to 3,107 in 2004/05, with a similar decline in the number of final orders made (4,322 to 2,601).<sup>96</sup>

The decrease in the numbers of applications and orders, when viewed against increases in other indices of domestic violence, raises concerns about women's access to justice under the operation of the Domestic Violence Act 1995. As we mentioned in Chapter 1, some of these concerns were canvassed in a report published by the National Collective of Independent Women's Refuges in 2004.<sup>97</sup> That report pointed to evidence suggesting women were losing faith in protection orders and that the bar for granting temporary orders without notice had been raised.<sup>98</sup>

### **Overview of Women's Applications for Protection Orders**

Figure 1 provides an overview of the case studies in terms of the applications made and the outcomes of those applications.

We do not know the extent to which the experiences of the women in our case studies are representative of those of the population of women who apply for protection orders, but the overall pattern reflected in Figure 1 quite closely matches national statistics in several respects.

Firstly, all the applications reported in the case studies were made without notice. Nationally, 87% of applications for protection orders during the 2004/05 year were made without notice.<sup>99</sup>

Secondly, 28 of the 32 women (that is, 88%) who made applications for protection orders were granted temporary orders. This is slightly more than the national figure of 78% for the 2004/05 year.<sup>100</sup>

Thirdly, of the four women who had applications put on notice, only one had had a permanent order granted when we interviewed her, two had had their applications declined, and two were still awaiting a determination. This too is broadly similar to national patterns. As we note in Appendix 1, fewer than 30% of applications put on notice result in a permanent order being made.

While for the most part the case studies overall are reflective of national trends in these respects, there are some interesting differences between the four streams.

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<sup>96</sup> Ibid.

<sup>97</sup> Hann, S. (2004). *The implementation of the Domestic Violence Act 1995*. Wellington: National Collective of Independent Women's Refuges. Retrieved 7 June 2006 from <http://www.nzfvc.org.nz/PublicationDetails.aspx?publication=12835>.

<sup>98</sup> Our analysis of statistics relating to applications and orders made suggests that the bar has indeed been raised. See Appendix 1.

<sup>99</sup> Boshier, P. (2006). *The Domestic Violence Act ten years on*. Speech at Te Unga Waka Marae, Epsom, 27 March. Retrieved 19 December 2006 from <http://www.justice.govt.nz/family/publications/speeches-papers/default.aspx?inline=domestic-violence-act-ten-years-on-march-2006.asp>.

<sup>100</sup> Ibid.

Figure 1: Summary of women's applications for protection orders

	Applied	Granted temporary order	Granted permanent order	Comments
<b>Māori Women (Chapter 2)</b>				
Crystal	✓	✓	✓	
Halle	✓	✗	✓	Application put on notice but permanent order granted
Katrina	✓	✓	✓	
Lyla	✓✓	✓✓	✓✓	Different respondents
Marama	✓	✓	✓	
Maria	✗	-	-	
Roimata	✓	✓	✓	
Te Rina	✓	✓	✓	
<b>Subtotal (n=8)</b>	<b>7</b>	<b>6</b>	<b>7</b>	
<b>Pākehā Women (Chapter 3)</b>				
Amanda	✓	✓	✗	Withdraws application after notice to oppose.
Caitlyn	✗	-	-	
Claire	✓	✓	✓	Permanent order after defended hearing. Later discharged.
Elizabeth	✓	✓	✓	
Hilda	✓	✓	✓	Permanent order made after defended hearing.
Jess	✓	✓	✓	Respondent evaded service for three months.
Louise	✓	✓	✓	Respondent withdrew opposition.
Marjorie	✗	-	-	
Patricia	✓	✓	✓	
Patti	✓	✓	✓	
Rachel	✓	✓	✓	
Sarah	✓	✓	✓	
Trudy	✓	✓	✓	
<b>Subtotal (n=13)</b>	<b>11</b>	<b>11</b>	<b>10</b>	

	Applied	Granted temporary order	Granted permanent order	Comments
<b><i>Pasifika Women (Chapter 4)</i></b>				
Alofa	x	-	-	
Mele (Lily)	x	-	-	
Priya	✓	✓	✓	Lawyer's delays means it takes one month to get order.
Rasela	x	-	-	
Rowena	✓	✓	x	Application dismissed in defended hearing.
Tessa	✓	✓	✓	
Tiare	x	-	-	
Titiana	x	-	-	
<b>Sub total (n=8)</b>	<b>3</b>	<b>3</b>	<b>2</b>	
<b><i>Other Ethnic Minority Women (Chapter 5)</i></b>				
Alice	✓	✓	?	Respondent opposed final order. Pending.
Amira	✓	x	x	
Amy	✓	✓	x	Application dismissed in defended hearing.
Annie	✓	✓	✓	
Eve	✓	✓	x	Withdrew application when respondent opposed it.
Laura	x	-	-	
Lee-Mei	✓	x	-	Withdrew application on lawyer's advice.
Lin-Bao	x	-	-	
Nusrat	x	-	-	
Pinky	✓	✓	✓	Had order discharged.
Sonal	✓	✓	✓	
Sripai	✓✓	xx	x?	Same respondent. Second application pending.
Tina	✓x	✓	x	Had order discharged. Decided against second application.
Zaleha	✓	✓	✓	
<b>Sub total (n=14)</b>	<b>11</b>	<b>8</b>	<b>4-6</b>	
<b>Total (n=43)</b>	<b>32</b>	<b>28</b>	<b>23-25</b>	

Firstly, it seems noteworthy that while the majority of Māori, Pākehā and other ethnic minority women applied for protection orders (7 of 8, 11 of 13 and 11 of 14 respectively), fewer than half the Pasifika women did so (3 of 8).<sup>101</sup> As we discuss below, Pasifika women seem to face particular barriers to making applications for protection orders.

Secondly, the applications by other ethnic minority women were less likely to be successful than were applications by other women. That is, all seven Māori women who made applications got a permanent order (even if Halle's application was put on notice). All but one of the Pākehā women who made applications got a permanent order; the one exception, Amanda, got a temporary order but subsequently withdrew her application. Two of the 3 Pasifika women who applied got permanent orders. On the other hand, at the time we interviewed them, just 4 of the 11 other ethnic minority women who applied had been granted permanent orders. Moreover, of these 4, 2 have subsequently had that order discharged, leaving just 2 of the 14 participants with a protection order in place.

### **Barriers to Applying for Protection Orders**

Deciding to make an application for a protection order is not an easy thing to do. As one of our key informants said, "It is like making a declaration of war." The simile is only partly appropriate. As is evident in each of our case studies, "war" had already broken out in the form of repeated assaults and/or serious psychological violence. In other respects, the simile is appropriate: applying for a protection order was, to all intents and purposes, a declaration that the relationship was over. That is, although protection orders are available to applicants living with the respondent (in which case the "non-contact" provisions of section 19(2) are suspended<sup>102</sup>), every woman in our research who applied for a protection order did so when she separated from her partner, albeit that in several cases the separations did not last.

Thus, the first set of barriers to applying for a protection order are those economic, social and psychological factors which tend to prevent battered women from leaving their violent partners. Financial dependency, the aptly named "feminisation of poverty",<sup>103</sup> ongoing fears of the abuser, the victim blaming and shame associated with being a battered woman, the community's historical and present day experiences of police and other government agencies like Child, Youth and Family – these factors and more represent barriers to applying for protection orders. The issue of isolation, especially for immigrant women, is discussed in detail in Chapter 15. One commonality, however, that our case studies share is that all the women thought long and hard before trying to end their relationships and four (Maria, Alofa, Priya and Nusrat) were living with their partners at the time we interviewed them.

### **Lack of Information**

For women who were considering leaving their abuser, one of the most obvious barriers to obtaining a protection order was not knowing about them. When we interviewed them, Tiare, Titiana and Nusrat seemed not to know much about protection orders; it was hardly surprising that none had applied for one. Moreover, several of the women who did apply for protection

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<sup>101</sup> This is only partly accounted for by the particular circumstances of one of the Pasifika women, Rasela. Protection orders are most commonly sought against male heterosexual partners, but this was not the case for Rasela who was being abused by her parents.

<sup>102</sup> Domestic Violence Act 1995, s. 20(1).

<sup>103</sup> See discussions of the feminisation of poverty in Parker, W. (1999). Family violence and matrimonial property. *New Zealand Family Law Journal* 151 and *Z v Z (No 2)* [1997] 2 NZFLR 258. See discussion of the inequities of the now s. 18A of the Property (Relationships) Act 1976 in the Parker article as well.

orders learned about them only after calling the police, when they were informed by either the police officers who attended (as in the case of Crystal and Claire) or by women's advocates who followed up the police call-out (as in the case of Roimata and Amy). In the case of Amanda, Pinky and Lee-Mei, the first real information they had about protection orders came from the lawyers they consulted about their relationship difficulties. Amanda, who consulted a lawyer about retaining the day-to-day care of Katie, told us that she had not initially considered applying for a protection order. As she said, "I knew they existed but I didn't think they applied to me." Amanda's experience, like that of other women (for example, Crystal and Lyla) demonstrates a distinction between knowing about protection orders and understanding them. That is, women are unlikely to apply for protection orders unless they know enough about them to recognise them as applicable to their own situation. Part of the difficulty involves seeing oneself as a "victim", with all the negative connotations, lack of agency, and victim blaming that such a label carries.<sup>104</sup>

The importance of proper information is highlighted by two cases of women who did not apply for protection orders. Alofa called the police when Fetu was intimidating her by destroying her property. The police told her that because he had not physically harmed her, there was nothing that they could do for her. No doubt the police were thinking narrowly in terms of a prosecution for assault<sup>105</sup> but they could easily have advised Alofa that Fetu's behaviour came within the definition of psychological violence under the Domestic Violence Act 1995 and that she could apply for a protection order. Similarly, Caitlyn was wrongly told that she could not obtain a protection order against Bernard because she was still living with him. Like Alofa, Caitlyn did not apply for a protection order.

A lack of information was a particularly common barrier for immigrant women. This is not surprising, but it is worth noting that immigrant and refugee women are multiply disadvantaged in this regard. That is, compared with English-speaking New Zealanders, they are less likely to know about protection orders. Secondly, compared with New Zealand-born women, they are less likely to know to whom they can go for information and advice. Thirdly, for many immigrant women, even if they do locate a source of information, language difficulties may mean that they cannot take full advantage of the information provided.

We note that the Ministry of Justice has published an introduction to the Care of Children Act 2004 in 14 languages and made these versions available on the internet.<sup>106</sup> However, its guides to the Domestic Violence Act 1995, protection orders and protected persons programmes are available in English only. We recommend:

**THAT the Ministry of Justice ensures information about the Domestic Violence Act 1995 and protection orders, including how to apply for them and how to have them enforced, is translated into the various languages common in New Zealand, makes that information available on its website and disseminates that information widely through community networks. (#20)<sup>107</sup>**

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<sup>104</sup> See, for example, Mahoney, M. (1991). Legal images of battered women: Redefining the issue of separation. *Michigan Law Review*, 90(1), 1.

<sup>105</sup> Although, as we argue in Chapter 12, Fetu could well have been charged for a threatening act (Crimes Act 1961, s. 308).

<sup>106</sup> These are available at <http://www.justice.govt.nz/family/publications/pamphlets/default.asp>.

<sup>107</sup> The number in parentheses following a recommendation refers to its number in the list of recommendations in the Executive Summary.

### Lack of Faith in Protection Orders

The stories of the 11 women who did not apply for a protection order reveal other barriers to accessing orders. Chief among these was a belief that a protection order would not improve their situations. For example, previous experiences of the police by Maria, Alofa, Lily and Tiare, shaped their negative views of protection orders. Each had called the police when they had been assaulted, and each found the police response to have been inadequate. Maria called the police just once and was told what a great man her partner was and that she must have done something to trigger the assault. Although she left her partner that night, the response of the police meant that she had little faith in official intervention.

Similarly, Alofa was not convinced by the advocates who suggested that she apply for a protection order because her earlier experience of calling the police left her feeling that they would not be effective in enforcing a protection order. Both Tiare and Lily (Mele's mother) had also found the police to be ineffective, despite calling them several times, and, in Lily's case, already having a non-molestation order. Tiare's experiences of the police were, moreover, confirmed when her son began to beat her; he was never arrested either. While we discuss the performance of the police in more detail in Chapter 12, here it is important to emphasise the crucial role of police in shaping battered women's views of the efficacy of protection orders. Without effective police interventions, they are literally just pieces of paper.

While beliefs about the ineffectiveness of protection orders seemed to be particularly important, most women who did not apply for an order faced multiple barriers.<sup>108</sup> No one single factor was ever decisive. Rather, women weighed up their options in the light of changing circumstances. The complexity of decision making is illustrated by Te Rina and Patricia. Each of whom eventually obtained a protection order despite having serious misgivings about its effectiveness. Te Rina, who lived in a part of town known as "the Bronx", knew from the experience of her neighbour that she could not count on a timely response by the police to enforce her order. Despite advice from a lawyer, Patricia had decided that it "Seemed safer to be where I was ... than to leave and [face] a greater chance of getting hurt." Only George's threat to kill their daughter made Patricia re-evaluate her situation.

Rasela never applied for a protection order despite support and knowledge about protection orders. She thought that obtaining a protection order:

... would motivate my father, just make him more angry and make him want to look for me more. Applying is probably another way of him finding out where I am. The protection order couldn't help me. How was a piece of paper going to help me? How is it going to stop my father from dragging me on a plane? He does not care about a piece of paper ... It would make me more afraid than actually make me feel protected.

Because of her fears of his reactions, Rasela was sure she did not want a protection order served on her father. Indeed because she felt that she was letting down her support person by not applying for an order, Rasela had to lie to her. She told her that she felt safe, though she did not, but she knew not taking out the order was the safest thing for her to do.

I know my father and I know my mother and that would guarantee it, they would see it was as an insult; they would need to punish me for doing that. My parents when they set their minds, they are going to do it. They don't care about a piece of paper or your legal system. Our ways have [a] much bigger effect than any piece of paper can have on them.

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<sup>108</sup> For a discussion of the intersectionality of race and gender, see Crenshaw, K. (1994). Mapping the margins: Intersectionality, identity politics, and violence against women of color. In M. A. Fineman and R. Mykitiuk (Eds.), *The public nature of private violence*. New York: Routledge. Also, Wurtzburg, S. (2003). Domestic violence and Polynesian families: Providing appropriate interventions. In K. McMaster & A. Wells (Eds.), *Innovative approaches to stopping family violence*. Wellington: Steele Roberts.

### Cost and Availability of Legal Aid

The cost of applying for protection orders was frequently mentioned by the women in our case studies. Laura, who was “totally without money”, did not get legal aid when she applied. She was amazed that, unlike the situation in South Africa, women in New Zealand are expected to pay to get a protection order, if they do not qualify for legal aid. Mele reported that cost was one of the reasons her mother did not take advocates’ advice to apply for a protection order. Claire, who also did not qualify for legal aid, initially balked at the cost of making an application, although she later did apply after Robert continued to stalk and harass her. Tina initially did apply for a protection order, spending \$1,000 in the process. She later withdrew the application “because being a solo mother was something I couldn’t handle.” When Tony resumed his abuse, she considered making a second application but decided against it because of the cost. She told us that she had been advised that as she had an annual after-tax income of \$17,000 and two dependent children she was “unlikely” to qualify for legal aid.<sup>109</sup> As Tina remarked, “Even a teenager makes that money.”

While these four women specifically decided against applying for a protection order because of the cost, legal costs had major implications for others. Eve and Lee-Mei both applied for orders but later abandoned their applications as the cost of their defended applications began to mount. Claire told us that the cost of proceedings played a role in her decision to agree to certain undertakings proposed by Robert’s lawyer. As we shall see at the end of this chapter, these undertakings – entered into to save Claire mounting legal bills – have now resulted in her sense of safety and autonomy being severely eroded. Louise and Tessa both ended up representing themselves because of the costs they were incurring in Family Court proceedings. So did Amanda who estimated that she had spent \$10,000 in legal fees in relation to proceedings under the Domestic Violence Act 1995 and the Guardianship Act 1968. Lee-Mei too had spent more than \$5,000 by the time she abandoned her application for a protection order.

A further significant point to emerge from the case studies is that the cost of making an application for a protection order is almost never the only cost facing women leaving an abusive partner. The case studies include examples of women having to pay for medical treatment, counselling, installing security lights, changing locks, and relocating themselves and their children. Some women lost their bond money or did not have enough bond money for suitable accommodation. Some had to pay for replacing appliances and furniture taken by the perpetrator, repairing damage he had caused to rental property and replacing household goods he had destroyed. Commonly, perpetrators left women with significant unpaid phone and power bills, large hire purchase commitments and rent arrears. Some women were effectively asset-stripped by their perpetrators. Others, like Hilda, had to change jobs, taking a major drop in income and seniority in the process.

Concerns about legal costs confirmed what key informants told us: that eligibility for legal aid has been very restrictive, with many women exceeding the income limits for eligibility but still not having sufficient resources to pay legal fees themselves. Some of this has been remedied by regulation 5 of the Legal Services Regulations 2006, which came into effect on 1 March 2007. Regulation 5 has increased the gross annual income eligibility limit to allow applicants to qualify for legal aid even if their income is well above that received by a beneficiary.<sup>110</sup>

<sup>109</sup> Although eligibility rules for legal aid have since been changed, the advice given to Tina was probably correct at the time.

<sup>110</sup> Specifically, reg. 5 states: “Legal aid for civil matters: maximum levels of income ... (1) The maximum levels of income for the purposes of determining an applicant’s eligibility for legal aid in respect of a civil matter are—(a) \$19,741 per year for a single applicant; (b) \$31,225 per year for an applicant with—(i) a spouse or partner; or (ii) 1 dependent child; (c) \$36,371 per year for an applicant with—(i) a spouse or partner, and 1 dependent child; or (ii) 2



However, there are several caveats that limit what at first sight appears to be a generous reform enabling increased access to justice for battered women. First, the income figures set out in regulation 5 represent the **gross** annual income of the applicant; the after-tax net figures reduce these figures substantially. For example a woman who has one dependent child will not qualify for legal aid if her net income is more than approximately \$26,000. For a woman who has four dependent children, her net annual income must be less than approximately \$36,600.

Secondly, eligibility criteria also include an asset test. If a battered woman does not own her own home **and** meets the gross annual income test, she cannot have a combination of savings and personal assets in excess of \$3,500 if she is on her own or \$5,000 if she has one or more dependent children. Her household goods and car are not included in these totals. But, as opposed to the gross annual income figure, there is no incremental asset allowance for each additional child. Moreover, if she does own a home **and** she meets the annual gross income eligibility test **and** she is paying off a mortgage, she must be able to demonstrate that the mortgagee or bank would not lend her more money to enable her to meet her own legal fees. Only after the bank has rejected her application for an increased mortgage to cover her legal fees will she be eligible. Moreover, the maximum equity that a legal aid applicant is allowed to have in her home is \$80,000.

Thirdly, while legal aid grants under the Domestic Violence Act 1995 are not repayable, except in exceptional circumstances, the legal costs of applications under the Care of Children Act 2004 must be repaid by the applicant, typically through a statutory land charge being placed on the title of her home. This accords with the view that legal aid is a loan, not a gift. Once the statutory land charge is in place, she will not be able to remortgage or sell her home (for example, in order to relocate to an area with greater family or whānau support or better job opportunities) without the statutory land charge being discharged or at least the Legal Services Agency consent. We agree with Laura's comment that domestic violence represents "a gross violation" of human rights. In our opinion, victims of abuse should not have to pay to obtain protection remedies for such violations, whatever their annual gross income. We recommend:

**THAT the eligibility criteria for legal aid be revised so that all bona fide applications<sup>111</sup> for protection orders are free. (#25)**

A related problem, not evident in our case studies but often raised in discussions with key informants, is that the ceilings applied to legal fees for legally aided Domestic Violence Act 1995 work are so low that only the most junior solicitors are allocated the work. Thus, lawyers with the least legal experience are often dealing with the most dangerous cases. As well, in some regions, we were told, there is a serious shortage of solicitors prepared to do domestic violence work on a legal aid basis. As one family law practitioner told us:

[The Legal Services Agency does] not seem to understand how time-consuming these matters are to do well – and to deal with often distressed and confused people.

While this might be considered to be a self-serving comment, the problem of a lack of lawyers, especially experienced lawyers, doing legal aid work was confirmed by a diverse range of key

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dependent children: (d) \$41,517 per year for an applicant with—(i) a spouse or partner, and 2 dependent children; or (ii) 3 dependent children: (e) \$46,665 per year for an applicant with (i) a spouse or partner, and 3 dependent children; or (ii) 4 dependent children: (f) \$51,813 per year for an applicant with (i) a spouse or partner, and 4 dependent children; or (ii) 5 dependent children. (2) If an applicant has more than 5 dependent children, or has a spouse or partner and more than 4 dependent children, the maximum level of income for that applicant is calculated by adding to the amount specified in subclause (1)(f) is a further \$4,840 for each additional child."

<sup>111</sup> The solicitor's certificate required for applications for temporary orders protects against misuse of s. 13. It could serve a similar purpose in relation to legal aid.

informants: Ministry of Justice personnel, refuge advocates, stopping violence workers and police officers. While the scale of the problem varies from district to district, it was widely reported in the key informant discussions we held around the country. The Domestic Violence Standing Committee of the New Zealand Law Society, for example, has recently requested that the base maximum guidelines be increased from four hours to six hours for applications for temporary protection orders (with the additional extensions left as they are), and, in support of this, they identified 15 critical matters that had to be uniformly completed with standard Domestic Violence Act applications within the current four-hour time limit.<sup>112</sup>

We recommend:

**THAT fee ceilings for legally aided temporary protection order applications and other Domestic Violence Act 1995 proceedings be increased so that senior family law practitioners can be encouraged to accept this type of work. (#26)**

### ***Encouragement and Support to Make Applications***

Thirty-two of the women in our case studies did make applications for protection orders. Often, their case studies included stories about things people did or said which encouraged them to apply. Often Women's Refuge advocates played a key role in informing women about protection orders, encouraging them to apply, referring them to lawyers and, in some instances, accompanying women to lawyers appointments. Just over half the women who applied for orders specifically mentioned refuge workers playing such roles.<sup>113</sup> While many of the women in our case studies were admitted to safe houses, three of those who mentioned refuge workers supporting them in making applications for protection orders were never refuge residents. This highlights the important role of the "community" casework undertaken by refuges, a theme further discussed in Chapter 15.

While some of the women who had help from Women's Refuge contacted refuge directly, others were referred by the police. Typically, such referrals occurred in the context of interagency collaborations whereby police notified refuge advocates of domestic violence call-outs. That is, women were visited or phoned by advocates within a day or two – often within a few hours – of the police attendance. Developing such referral channels is consistent with the police Family Violence Policy, the implementation of which is discussed in Chapter 12. Here, the experience of

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<sup>112</sup> The Domestic Violence Standing Committee of the New Zealand Law Society states that standard applications for temporary orders entail lawyers performing the following work: (a) initial attendance (often protracted due to the difficult and emotional circumstances and frequent attendance of support people); (b) completing the application for legal aid (made more difficult by the fact applicants have often left their homes with no documents and have no independent income); (c) obtaining information from authorities (involving often lengthy correspondence with the police for POL400s, lengthy correspondence with doctors for medical reports, and so on); (d) attendances on any additional witnesses; (e) considering the issues; (f) advising clients as to their options; (g) explaining the legal threshold for obtaining a protection order, the terms and conditions of an order (including consequences of a breach) and the legal process for obtaining an order; (h) drafting (often as a matter of urgency) the appropriate documents (for example, an application for protection order, supporting affidavit(s), information sheet); (i) second attendance to execute the documents (sometimes three attendances are required for various reasons); (j) filing the documents; (k) receiving the court's response; (l) advising the client of the orders made (or not as the case may be) and the process therein; (m) discussing with the client counselling for them (and their children if appropriate); (n) discussing with the client the ramifications if there is a reconciliation once the allegations of violence have been put before the court; and (o) discussions with court regarding service.

<sup>113</sup> Crystal, Halle, Katrina, Lyla, Roimata, Hilda, Patricia, Patti, Priya, Tessa, Amira, Amy, Lee-Mei, Pinky, Sonal (twice), Sripai and Zaleha. Note, however, that Women's Refuge helped other women in various ways. See the discussion in Chapter 15.

five of the women<sup>114</sup> shows the contribution interagency collaboration can play in facilitating women's access to protection orders, a topic further explored in Chapter 12.

Other agencies were specifically mentioned as encouraging women to get protection orders and/or making referrals which eventually resulted in women making applications. Mentioned in this regard were Victim Support (Te Rina and Amira) and the Citizens Advice Bureau (Amy). Some of the women (Halle, Rachel, Annie, Eve and Zaleha) mentioned friends and family in their networks who encouraged them to apply for protection orders. (See Chapter 15 for a fuller discussion of the role of family and friends in providing support.)

Child, Youth and Family did play a key role in Elizabeth applying for a protection order, but this was experienced as unhelpful pressure rather than support.<sup>115</sup> Lyla was another woman who felt some pressure to get a protection order, but in her case, things turned out rather better – eventually. With the help of Women's Refuge, she got a protection order when Steve was sentenced to a term of imprisonment. As she told us, "It was the Women's Refuge that was pushing it. A part of me didn't want to do it." Describing herself as "like an alcoholic" who couldn't "let go", she recalled advocates telling her in no uncertain terms that getting a protection order was in her best interests. In retrospect, she told us:

They [Women's Refuge] pushed me even though I didn't want to, but lucky they did, because that was my backup.

### ***Making Applications for Protection Orders***

As noted at the beginning of this chapter, 32 of the women whose stories feature in our case studies applied for protection orders. In every case, the application was made without notice, and 28 of the women in our case studies got a temporary protection order.

None of the women attended court for the hearing of her application. This accords with standard practice as it was described to us by key informants, and is discussed in detail in the next chapter. That is, without notice applications for protection orders go before one of several duty judges and are considered solely on the basis of the papers. In many instances, particularly smaller "cluster" courts which do not sit every day, this requires the applications to be faxed to a court where there is a duty judge sitting. Applications which are deemed not to reach the section 13 threshold are placed on notice,<sup>116</sup> which is what happened to Halle, Amira, Lee-Mei and Sripai.

Key informants from the Ministry of Justice supported the practice of without notice applications being determined without applicants being required to attend in person. The practice was adopted, they said, because women found it onerous and potentially intimidating to have to attend in person. This may well be true, and certainly women who got their protection orders without notice mostly found the current practice relatively straightforward. However, as we discuss in Chapter 9, the practice becomes problematic when without notice applications are put on notice without the applicant or her counsel having the opportunity to make further submissions to the court. This is because there is a delay of three months or more between the judge putting an application on notice and the substantive hearing of the protection order application. During those three months, the respondent has been served with the application and accompanying affidavits, but the woman has no legal protection in place.

Although our focus here is on protection orders, it should be noted that most women who applied for a protection order made a concurrent application for the day-to-day care of their

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<sup>114</sup> Crystal, Patricia, Patti, Sonal and Sripai.

<sup>115</sup> This is discussed in more detail in Chapter 15.

<sup>116</sup> Towns, A., & Scott, H. (2006). Accountability, natural justice and safety: The protection order pilot study (POPS) of the Domestic Violence Act 1995. *New Zealand Family Law Journal*, 5(7), 157-168.

children. (Two also made applications for occupation orders (Tiare and Tina).) Just as their concerns for children play a central role in women's decisions to leave or remain in a relationship, proceedings relating to their children become inextricably interwoven with proceedings relating to protection from domestic violence. As is evident in our case studies, women with children have to negotiate their safety in the context of concerns about their children. Leaving a violent relationship with children places a woman in the highest possible risk category for further serious violence or homicide.<sup>117</sup> A full analysis of women's experiences applying for protection orders requires consideration of their experiences with concurrent proceedings under the Care of Children Act 2004. We consider these issues in detail in Chapters 9 and 10.

### **Women's Experiences of Protection Order Processes**

#### **Obtaining a Temporary Protection Order**

Unsurprisingly, the 28 women who obtained a temporary protection order generally reported being quite happy with that part of the process. For example, when Crystal was admitted to hospital after one assault, staff called in Women's Refuge and the police. A police sergeant took down some information and rang a lawyer. The lawyer came to the hospital to complete the application, which was filed and granted the same day. Indeed, quick turnaround times meant that most orders were granted within two days of the applicant going to her lawyer. However, for unknown reasons, it took a month for Priya's temporary order to be granted.

An important part of obtaining a protection order is understanding what it means. Women appreciated lawyers who explained the conditions clearly. For example, Pinky described the lawyer who helped her get her first protection order as very helpful, explaining how the order worked, informing her of her rights, and discussing the implications of residing with the respondent. Similarly, Te Rina reported that her lawyer "broke it all down for me. She spoke with big words at first, till I asked her what she was talking about." Helpful though such explanations are, they may not be enough. Crystal's experience is relevant here. In attempting to explain the order to her, a police officer:

... prettied it up. [But] it sounded totally different – the speech that he's recited, to what's really on paper. And he said something about it being in two parts, and that just got me totally confused. The part of being able to live together and he not touch you, and if you ask him to leave he has to go. That kind of thing.

Despite what sounded like a reasonably good attempt to explain the suspension and revival of the non-contact conditions, Crystal remained "totally confused." This was hardly surprising. The order's language is reasonably complex, and not easily understood by readers unfamiliar with legal text, even under the best of conditions, let alone reading it in the middle of a crisis while recovering from injuries. Crystal and Rachel, for example, had often been attacked around the head, making cognitive impairment a real possibility. Rachel was also diagnosed with suffering from post-traumatic stress disorder, which can also impact on cognition. In these circumstances, being able to refer back to the document is crucial. Unfortunately, for Crystal, there was such a gap between the police officer's explanation and what was "really on paper" that it was impossible for her to work out what the true meaning was. A plain language order is needed. We recommend:

**THAT a plain-English order be developed. (#21)**

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<sup>117</sup> Websdale, N., Sheeran, M., & Johnson, B. (2006). *Reviewing domestic violence fatalities: Summarizing national developments*. Retrieved 19 December 2006 from <http://www.mincava.umn.edu>.

## Information on Enforcement

Understanding the order is not the same as knowing how to have it enforced. For example, when Tessa got her protection order, she was only 17 and coping with a new-born baby. She told us, "I don't think my brain at the time could conceptualise what it meant." In hindsight, she thinks she didn't use her order at first as well as she could have. Later, having done a lot of research, she became quite assertive in her attempts to have her order enforced, albeit, with only limited success. When we spoke to her, she described her feelings about the value of a protection order.

I think a protection order is a good thing. It's a good start. But it needs to be explained – how you use it. I could not understand the big picture, like, what would get him arrested? I remember him going on a rampage and breaking stuff in the house and I thought I couldn't ring the police because he had not hurt me, and I thought it wasn't serious enough. But if I'd known I could ring the police about that, I would have done that so many times.

Patti also reflected on the inadequacy of the information she had.

They just sort of gave it to me and said, "Read through it all" ... I do know how to use it, but I mean, when somebody is totally like overpowering you and bashing you, a piece of paper isn't going to save you ... and when they've got you so isolated ... that you can't even phone, you can't use a cellphone, ... they keep you as far away from your family as they can.

Jess, too, has thought quite a lot about what information applicants need. Like Tessa, her experience was that it took a great deal of persistence to get the police to take action, including repeated visits to the police station and providing police with detailed information about the breaches. Other women in our case studies had to learn, through trial and error, to keep detailed records of phone calls, to retain text messages, to keep copies of their protection orders with them at all times, to make notes of threats and other harassment, and to collect other evidence which could corroborate breaches. They learnt that they needed to: anticipate their partner's behaviour; avoid issues and situations in which violence was likely to result; change their phone numbers; hang up on unwanted calls and/or unplug their phones; move house; have their details removed from publicly available registers; not go out alone; plan an escape route out of the house; make sure that they were never alone at night; install a panic alarm; keep alert; always have their cellphones with them; vary the routes they travelled; advise schools, childcare centres, child support officials, and electricity and phone companies about their situation, the protection order, and the need to maintain privacy; prepare material ahead of lawyers appointments; keep passports and other important documents in a safe place; keep the house quiet so that they could hear approaching cars; anticipate the mood of their children's father; and prepare their children for access visits.

As Jess told us, what is needed is an "in-depth booklet" explaining:

How they [protection orders] work, what to do if the order is breached, how to deal with police, what others have experienced and how they have dealt with it, a list of helpful support people and organisations ... ideas on how to safeguard oneself from further abuse, a list of organisations that provide counselling for the trauma suffered from abuse, the court process and procedure, other difficulties within the system and how to navigate them, and so on.

For Jess, some of these information gaps were filled when she attended a protected persons programme. We consider such programmes in Chapter 15, and recommend that they be more actively promoted to applicants (recommendations 12 and 27). The point here is that user-friendly information needs to be made available at the time of applying for a protection order: information not only about the conditions of the protection order, but also about how to have it

enforced effectively, and information about keeping safe in general.<sup>118</sup> For example, courts could provide applicants with generic safety plans which could be individualised for specific situations. Better even, victim advocates attached to the Family Court would work with the woman and her children to devise safety plans to avoid serious injury and escape violence, as well as to think about long-term safety needs after separation.

Many of the sorts of problems outlined above suggest a need for victim advocacy. Leaving an abusive partner and getting a protection order are major, often dangerous, steps. They involve complex legal issues and can pose significant social, familial, psychological, economic and practical challenges. Helping women navigate their way through such matters requires specialist knowledge and skills. It is best done by people independent of the institutions with which battered women have to deal. Certainly, the women in our case studies who had help from domestic violence advocates appreciated that help. It needs to be more widely available, both outside and inside the court. Accordingly, we recommend:

**THAT specialist domestic violence victim advocacy be provided for victims of domestic violence within both the criminal and family jurisdictions. This should be a free service provided by approved community-based domestic violence services, with advocates having speaking rights in court. Advocates should be available to assist victims of domestic violence by:**

- (a) helping women file applications for protection orders;**
- (b) explaining protection orders and their enforcement;**
- (c) helping women make safety plans;**
- (d) encouraging women to attend protected persons programmes;**
- (e) preparing women for any hearings in both the criminal and family courts, as well as any mediation which may be part of proceedings under the Care of Children Act 2004, and supporting them through such hearings and mediation;**
- (f) advising non-resident women about the Victims of Domestic Violence Policy; and**
- (g) helping women access other relevant services. (#12)**

We expand on functions (d) to (g) in subsequent chapters.

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<sup>118</sup> For example, see the personalised safety plan produced by Tip Toe Through the Clover Patch. This includes the following on enforcement. Step 4. Order of Protection. The following steps will help enforce the order of protection: (a) I will keep the protection order \_\_\_\_\_ (the location). Always keep it with you. (b) I will give my protection order to police departments in the areas that I visit my friends, family, where I live, and where I work. (c) If I visit other counties, I will register my protection order with those counties. (d) I can call the local domestic violence agency if I am not sure how to register my protection order with the police departments. (e) I will tell my employer, my church leader, my friends, my family and others that I have a protection order. (f) If my protection order gets destroyed, I know I can go to the County Courthouse and get another copy. (g) If my partner violates the protection order, I will call the police and report it. I will call my lawyer, my advocate, counselor, and/or tell the courts about the violation. (h) If the police do not help, I will call my advocate or my attorney AND I will file a complaint with the Chief of the Police Department. (i) I can file a private criminal complaint with the district judge in the jurisdiction that the violation took place or with the District Attorney. A domestic violence advocate will help me do this. (Tip Toe Through the Clover Patch. *Personalized Safety Plan*. Retrieved 27 January 2007 from <http://www.geocities.com/Wellesley/3059/dv3.html>. For a local example of a generic safety plan, see Preventing Violence in the Home. (2007). *Safety planning*. Retrieved 26 January 2007 from <http://www.dvc.org.nz/index.php?section>.

## Service Issues

Protection orders need to be served to be effective. Until an order is served on a respondent, he cannot breach the order, even if he engages in conduct which contravenes the order's provisions. Three women had problems with the service of their protection orders: Marama, Claire and Jess. Marama's experience shows, firstly, how difficult it is to obtain a protection order during the Christmas holidays, a significant period when women and children are at risk of abuse and even death. For example, as previously mentioned, during the 2005–06 Christmas period, 19 New Zealand children were orphaned as a result of their fathers killing their mothers.<sup>119</sup>

In her case, Marama applied for a protection order during the Christmas period after being physically assaulted by Patrick on Boxing Day. There were no lawyers in town at the time. She left messages for every lawyer listed in the *Yellow pages*, but only one returned her call. Indeed, he came back early from his holiday to help her apply for a protection order and custody of the children.

Marama hand delivered her application to the court. She was later rung and informed that her protection order had been granted, but that her parenting order had not. Even though Marama's children were covered by her protection order, the police told Marama that they would not uplift her children because Patrick had not been served yet. Despite Patrick knowing about the existence of the protection order from the police, they felt he was "calm", and therefore allowed him to take the children away with him on holiday.

The police told Marama that once Patrick was served with the protection order, he would return the children and that that would happen in a couple of days. Until their return, Marama was frightened that Patrick would put the girls into hiding.

I said to the police, "Patrick will put them into hiding and I won't see them again." And the police officer said, "You can't. How can you go into hiding with two children?" and I said, "It's easy. How many children are there that you haven't found, mate?"

The constable assured Marama that Patrick "wouldn't do anything silly as he is fully aware what will happen if he should divert from what is expected after a protection order is served."

Constable X tells me that Patrick will return the girls the moment he receives the protection order, that he knows that if he does anything silly with the children, he will be up on all these other charges in High Court. I said to him, "Can I hold you responsible?" And he said, "Yep, you can hold me personally responsible for it."

In the days that followed, Patrick placed the girls in his sister's care. Then Patrick called into a police station and requested a copy of the protection order. The court faxed a copy to the station, so Patrick was finally formally served with the protection order. Soon after that, Marama went to her local police station and asked to see her file.

I went down to the police station and told them about my protection order, but they couldn't find it in my file there. They have to take a copy of my copy [of the protection order] and put it into my file. However, I saw that there was a copy of the confirmation fax to the courthouse that said the police station had already received the order.

This text confirmed Marama's worst fears and really panicked her. The following day, Marama went to the police station to speak with the constable that gave his personal guarantee about Patrick returning the girls to Marama once he was served with the protection order.

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<sup>119</sup> Boshier, P. (2007). *Dealing with family violence in New Zealand*. Speech delivered at the Waikato Domestic Violence Hui, Keswick Christian Camp, Lake Rotorua, 1 March.

So I go to Constable X and I said, "I told you that this would happen and it has happened", and he said, "Well [Patrick] knew what would happen if he did it", and I said, "Well he has done it", and then he said, "Well you know he is very silly." And that was it.

There were no consequences for Patrick continuing to hold the girls in breach of the provisions of Marama's protection order. Being construed as "very silly" by the police did not present much of a deterrent to his illegal behaviour.

In Jess's case, it was three months before Bruce was served with her protection order. He had left town and there was no address at which he could be served. Bruce rang Jess repeatedly during this time. She talked to him, she says:

So I could find out his address to pass on to the lawyer to pass on to the courts so he'd get served. It made it really hard for me because on the telephone he was all full of stories about how terrible things were for him, how he wanted to commit suicide, how he would be different this time because he realised what he had lost, and him trying to talk me into reconsidering getting back together with him because life was so much better with me.

At the same time, Bruce was running Jess down to others. He told them she was a liar, that she had taken his money, and that she had been violent to him. Some people began to shun her as a result. On the other hand, Jess told us, "It was good to hear from a few people that this was happening as I found it easier to resist Bruce's pleas to get back together."

Jess took her protection order with her everywhere. On one occasion, she encountered Bruce at a healing festival. He had known Jess was attending and had got work there looking after children. Jess went to the organisers, explained the situation and asked for help in getting the order served. They declined, instead suggesting that this would be a "great opportunity for Jess to heal her relationship with Bruce."

When the protection order was finally served, Bruce immediately breached it by writing to Jess, explaining that he pretty much agreed with all that she had said but that he had burnt the order and Jess's affidavit.

Claire believes Robert deliberately tried to avoid being served with the protection order. Although it was made without notice, Robert did know about the application. He rang Claire's cellphone while she was meeting with her lawyer. Claire recognised the number of the caller and initially ignored the phone. When she told her lawyer who was calling, he took the phone and spoke to Robert, telling him that an application for a protection order was being prepared. But it took a couple of weeks for the bailiffs to find Robert. In the meantime, Robert stalked Claire around an agricultural show, never speaking to her but constantly hovering nearby. He also left a letter suggestive of suicide with a friend, who then wrote a very accusatory letter to Claire, blaming her for the fact that Robert had disappeared and that no one knew where he was. Thus, despite knowledge of her application, Robert was able to continue to exert pressure on her for weeks, free from any risk of being deemed to have breached the order.

In Trudy's case, the Family Court judge followed a very victim-centred practice in respect of the service of her affidavit in support of her application. He gave Trudy leave to "file an affidavit omitting information she wants excluded from the service copy." Trudy's lawyer duly filed a new affidavit without references to Shane's criminal activities. In her mind, she would have been especially vulnerable to Shane's "pay back" if his gang affiliations and criminal connections had been left in the affidavit.

We think this is an excellent practice which can help ensure women's safety. We recommend:

**THAT the Family Court follows the practice of allowing affidavits in support of applications for temporary protection orders to be amended to omit information**



**which might identify the applicant's whereabouts or which might endanger the applicant, the children of the relationship, and any other people supporting the applicant. (#14)**

### **Pressure to Drop Protection Orders**

Pressure to withdraw an application for a protection order or to apply for a protection order to be discharged can be exerted in many different forms, not only by the abuser but also by the woman's community. For example, Pinky got a without notice protection order within 48 hours of applying. She lived in a refuge for three months with her two young sons and her widowed mother because of her ongoing fear of Jatinder. Throughout this period and afterwards, Jatinder put pressure on Pinky to have the protection order discharged. He brought many people from their community to tell her that her duty as a wife was to reconcile with her husband. One day during an argument about her unwillingness to withdraw the order, he told her that if he wanted to harm her, he could do it regardless of her protection order. Pinky became very fearful; she and the children and her mother again moved into a women's refuge.

After Pinky left the refuge the second time, she faced the wrath of her community. Pinky told us that the community felt she had let them down and "shamed" them in the eyes of the wider New Zealand society by going to the refuge and obtaining a protection order against Jatinder. In the community's opinion, she was a disgraced woman. The pressure to abandon the protection order and reconcile increased significantly once Jatinder was given weekly unsupervised access to their boys. He suggested that the access changeover should occur at the Temple. Probably not understanding the hostile reception Pinky and the boys would face at the Temple, the Pākehā counsel for the child agreed that it was "the best arrangement". Pinky, however, was totally opposed to the arrangement. She knew that twice a week she and the boys would be forced to face the opprobrium of their community.

The pressure on Pinky was exacerbated when her elderly mother (herself beaten and threatened by Jatinder) eventually took Jatinder's side. Pinky's mother had also faced the wrath of the community for months for supporting her daughter. One day, however, Jatinder approached Pinky's mother in the Temple and cried and begged for her forgiveness. He promised Pinky's mother that he would live by all of Pinky's rules. Her mother, who because of her age was even more vulnerable to community pressures than Pinky, started urging Pinky to reconcile with Jatinder. Pinky capitulated; she reconciled but Jatinder returned to his violent and abusive behaviours as soon as she was back. When we last heard from her, the protection order had been discharged because, in the judge's view, it might have weakened Jatinder's application for citizenship.

Sonal also experienced her family's pressure to reconcile with Ranjit after he made a dramatic gesture of apology. After she got her first protection order, Sonal went to live with her sister. Ranjit came to her sister's house with his brother and 100 red roses. Her family thought that that was such a significant gesture of apology that she was being selfish to reject his affections. No sooner, however, had Sonal gone home than she got one of the worst hidings she ever experienced. Sonal separated again, obtained a second protection order, and was living in a refuge when Ranjit sent her a card via her sister. She did not want to open it but her sister insisted. It was written in his blood.

Sonal realised that she could not stay in the refuge forever. Without any family or other support, she went back to Ranjit again and got the protection order discharged. Ranjit promised that he would undergo counselling and anger management. However, things only got worse after the order was discharged.

Alice's partner Harry also responded dramatically when he learned about her protection order. He sent some people to ransack her shop and threaten her. They told Alice that if she did not

withdraw her application for a permanent protection order, she would face the consequences. Then one morning, when she came to open the shop, she found two dead rabbits, shot in the head, lying in front of the shop. She was terrified and on the advice of a friend, went to the police station to report what had happened. Because of her limited English, the police officer could not follow what she was saying. As conveyed by Alice's interpreter to us:

They told me that I have [a] mental illness as they cannot understand me.

The same day, a bullet hole was found in the door to her lawyer's office. Alice reported this too. This time, the police officer she spoke to seemed to understand, for he commented that there was no evidence as to who had fired the gun.

Because of language difficulties, not only do immigrant women have a much harder time having their protection orders granted (for example, Amira), but as we will see in the police chapter (Chapter 12), the efficacy of the order is limited.

Katrina came under pressure from her partner, Tony, to have the protection order against him discharged. In a manner not uncommon among respondents, he appropriated the language of the stopping violence programme to argue that, in retaining the protection order, Katrina was using power and control tactics over him. Katrina refused, saying:

[The protection order] is keeping my daughter and me safe. You want to use violence and you think violence is only physical. It is not. Violence is when you verbally abuse me, [when] you emotionally play your silly mind games to control me, [when] you take the keys off me or you lock us in the house. You even go and hide things from us or take my handbag away so that I can't leave you, when I want to go home to my house. What kind of a person does that? You come home, you press redial on the phone, to see who I've rung. You even ring Telecom to see if there's been toll calls made from the phone. You go to the neighbours and ask if any cars have been here. If I've been out in the community you try to snuggle up to me and make out, and you're smelling me – if I go for a shower, you're sniffing my under clothes, looking through my pockets for whatever. You read through my diary, you go through my cellphone. That is all power and control. And that's abuse. You've got no right to do that.

He said, "Yes I have – I'm your partner, I'm your fiancé. I can do what I like."

Tim initially used his sister (who lived near Patti) to try to get Patti to drop her protection order. He used his sister to get a cellphone to Patti and to relay a message. He also exerted pressure by placing another cellphone in the bag of belongings that he gave to Patti's lawyer. Patti turned on the phone, and then responded to his text. Within two weeks, she had moved in with him and his sister but things only got worse.

Tim didn't oppose the protection order becoming final but he later sent Patti to her lawyer:

"I want you to go into those lawyers and get [the protection order] dropped." And I went into the lawyers and I said, "Look, I want this dropped" ... and the lawyer said, "I'm not going to do it for you. No way!"

With the lawyer's refusal, Patti went outside to tell Tim that the lawyer would not follow her instructions to have the protection order discharged. He responded by saying:

"You didn't know, harden up" ... and [he] just started bashing me in the middle of [town].

Patti was eight and a half months' pregnant at the time.

Richard too was furious when Eve got her protection order against him, but he responded in a different way. As part of trying to get Eve to drop the order, he threatened Eve's lawyer and her translator. As well:

Richard said if I withdrew the protection order, then everything would be okay.

Once the protection order was granted, Richard stopped coming to see Eve, but he sent his brother instead to convince her to drop the order. He also consulted a lawyer. At the time of our interview, Richard had filed a notice to defend against Eve's application for a final protection order. Eve showed us a letter written by Richard's lawyer. It said, in part:

Even in the unlikely event that your client's evidence is accepted regarding so called allegations of verbal abuse and so forth [which our client rejects outright], we are firmly of the view that the Court would exercise its discretion and not make a final protection order in any event.

Your client's safety is in no way at risk and there is clearly no need for a protection order to be in place.

With all due respect to your client, we would suggest that she should think very carefully before proceeding through with a fully defended hearing seeking a final protection order. We are of the view that her credibility will clearly be in issue at the hearing.

If your client has not been granted legal aid, then it would be our intention to seek costs at the conclusion of any defended hearing if the application is dismissed, and even if your client is legally aided we will be seeking a direction from the Court under s40 and then make an application under s41 of the Legal Services Act.

Eve found the contents of the letter intimidating, and as a result withdrew her application for a final order, despite the fact that she still fears for the safety of herself and her family.

By the time that Amanda obtained her protection order, Raymond had already begun his pattern of utilising court proceedings about the day-to-day care of Katie as a way of controlling Amanda. His aggressive, litigious responses seemed to intimidate not only Amanda but also her lawyer. The lawyer, for example, told Amanda that Raymond exhibited a level of aggressiveness that she had not encountered before. Indeed, when Raymond filed his notice of defence against Amanda's protection order, the lawyer recommended that Amanda drop the protection order rather than participate in a defended hearing. The lawyer suggested that the protection order was infuriating Raymond and that since Amanda was now back in her hometown, she was safe.

On her lawyer's advice, Amanda consented to Raymond's application to have the protection order discharged. In her supporting affidavit, Amanda stated:

... that the respondent [Raymond] is feeling so pressured over the threat of the domestic protection order being made final that this fear is blocking his willingness to negotiate a suitable custody and access arrangement between us ... There are times when I still feel frightened of the respondent but since our separation he has not behaved in a physically threatening manner towards me.

This idea that protection orders are commonly used as "weapons" or "threats" against men by women is a common discourse found these days. This ill-founded view<sup>120</sup> is discussed in more detail in Chapter 11. At this point, we simply want to note that the construction of a protection order as a "threat" or "weapon" contradicts the evidence in our case studies. Battered women themselves tend to minimise the violence used against them; it's a survival mechanism.<sup>121</sup> Moreover, constructing the protection order as a "weapon" is a dangerous example of Orwellian doublespeak.<sup>122</sup> It transforms the abuser into a victim and the victim into a weapon wielder. It seems to see a protection order as a powerful instrument that enables the woman to hold the

<sup>120</sup> See, for example, Carolyn Harris Johnson's research on Australian child homicides: Harris Johnson, C. (2006). Familicide and family law: A study of filicide-suicide following separation. *Family Court Review*, 44, 448-463.

<sup>121</sup> See, for example, Busch, R., & Robertson, N. (1994). I didn't know just how far you could fight: Contextualising the Bristol Inquiry. *Waikato Law Review*, 2, 41-68.

<sup>122</sup> Orwell, George. (1949). *Nineteen eighty four*. London: Martin Secker.

power in the relationship. In our case studies, however, the protection order commonly represented an often unsuccessful attempt to level the playing field.

In Amanda's case, she consented to drop her protection order even though she (and her lawyer) was still afraid of Raymond. It was done in the hope that he would agree to her having day-to-day care of Katie and to her being able relocate to live near the support of her family and friends. However, as Amanda's case study shows, her attempt to defuse Raymond's sense of threat by consenting to have the protection order withdrawn did not stop the litigation. Amanda continues to participate in litigation about Katie with Raymond. One significant difference, however, is that he henceforth repeatedly has construed himself as a "victim".

Furthermore, Amanda's affidavit refers to concerns Raymond was believed to have about negotiating a suitable custody and access agreement. The "threat" of a protection order was held out as an obstacle to such negotiation. Clearly, it was no such thing. Raymond had already made several applications to the court (including one *ex parte* application for interim custody) and his lawyer had been active on his behalf. Moreover, he exercised access to Katie several times while the temporary protection order was in place. Any "obstacle" to negotiation was in Raymond's mind. His construction of the protection order as a block was, in reality, an ultimatum to withdraw the protection order or there would be no negotiation.

When we asked Amanda how she felt now about the discharge of the order, she told us that she felt angry with her lawyer.

She didn't do her job in protecting me ... Yeah, I was trusting her advice. She was concerned about his employment and getting jobs, something to that effect. [She said] "You are safe now, aren't you? There is distance between you. You are not in immediate physical threat."

But Amanda is clear that she felt safer with the protection order in place. To illustrate why, she described an incident which happened not long after the order was discharged.

One instance that was very difficult was when I had a friend visiting, and [Raymond] wanted to pick up Katie. I had a little gate thing at the door [to keep Katie safe] and he came to the door and I said "I need to confirm a time for when you will bring her back." He refused to organise it, wouldn't communicate, got really aggro. And I said, "No, you can't have her – you need to organise this with me." [Katie] was less than one at the time but he just marched in and grabbed her.

[Question: What did you do?]

There were just two of us, and [so] what do you do? He just went – with her. It was frightening. You can't do anything ... he would just come back when it suited him.

Without the protection order, Amanda felt there was little she could do to stop Raymond's domineering behaviour. And it seems that dropping the protection order had significant implications for subsequent custody and access proceedings. For the next two and a half years, Amanda faced what she described to us as "One of those top 10% of most aggressive legal battles."

In Chapters 10 and 11, we consider in some detail the dangers of using mediation to resolve issues concerning children in cases of domestic violence. As we show in those chapters, the international literature has for some time recognised the dangers of accepting consent orders in such cases. In New Zealand, those dangers were tragically illustrated in the Bristol case in which Allan Bristol killed his three children while they were in his care pursuant to an order of the Family Court made with the consent of the parties.<sup>123</sup> Here, Amanda's case raises similar issues in

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<sup>123</sup> Davison, R. (1994). *Report of inquiry into Family Court proceedings involving Christine Madeline Bristol and Alan Robert Bristol*. Wellington: Office of the Minister of Justice.

relation to “consent” applications for the discharge of a protection order in which children are included. Accepting such applications without further inquiry risks collusion with batterers and exposing their victims – women and children – to further abuse and intimidation.

Amanda’s case might have had a different outcome had the court adopted the approach of (now) Principal Family Court Judge Peter Boshier in *Hogan v Russell*.<sup>124</sup> In that case, it was held that protection orders should not be discharged, even by consent of the parties:

... unless the Court is convinced, even against the longstanding patterns ... that a protection order should be discharged. What would need to be demonstrated would be a changed pattern of behaviour between the parties which could give the Court confidence that it will endure. I am not satisfied that it is appropriate to discharge the protection order at this time.

In *Hogan v Russell*, Judge Boshier specifically focused on the needs of the children (covered by their mother’s protection order) not to witness domestic violence or otherwise become involved in such violence. We agree. A protection order is “necessary” until children can be protected from witnessing or becoming the targets of the abuser’s violence. Such an approach is consistent with the “Principles relevant to child’s welfare and best interests” of the Care of Children Act 2004, specifically, section 5(e).<sup>125</sup> We recommend incorporating that principle into the provisions of the Domestic Violence Act 1995 relating to the discharge of protection orders. We recommend:

**THAT section 47 of the Domestic Violence Act 1995 be amended to prevent the court from discharging a protection order without first being satisfied that the protected person and any child of the protected person will be safe from all forms of the respondent’s violence. (#3)**

### ***Having Applications for Protection Orders Placed on Notice***

Four of the women in the case studies had their applications for temporary protection orders put on notice (Halle, Lei-Mei, Amira and Sripai). Only Halle eventually obtained a protection order. While Michael was physically violent to Halle, he primarily used psychological violence against her. As well, sometimes when Michael assaulted her, Halle fought back. She gave us an example:

I kind of caught my breath because it was quite a forceful push. He didn’t care, and there was no sign of remorse ... I was really scared but I was not going to let him get the better of me. When he got closer, I threw [a tea cup Michael had thrown at her] back at him and it smashed on his arm and it started to bleed.

Perhaps these are the reasons that the application was put on notice. Perhaps the judge saw Michael and Halle as engaged in “mutual violence”<sup>126</sup> or agreed with some earlier judgments that temporary protection orders should not be given when the violence is primarily psychological.<sup>127</sup> There is no way to know because, as in Amira’s case, no reasons were given by the Family Court judge for not granting Halle a protection order on a without notice basis.

<sup>124</sup> *Hogan v Russell* [1997] NZFLR 792, at p. 795.

<sup>125</sup> Section 5(e) of the Domestic Violence Act 1995 states: “The child’s safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whanau, hapu, or iwi, or by other persons).”

<sup>126</sup> See Chapter 7 for our analysis of the Johnston and Campbell typology.

<sup>127</sup> See the discussion of recent case law about putting temporary protection order applications on notice, as well as discussion about judicial reasons and natural justice for s. 13 applicants in Chapter 9.

Months later, Halle's protection order application was heard and was granted. Interestingly, she reported her lawyer as telling her:

The usual judges that sit in this Family Court would not grant you a protection order on the information you supplied. But this second judge – he was new to the district and what he said was that he was quite surprised that the protection order wasn't granted earlier.

In the period between applying for the protection order and having it granted, Michael did not stop his harassment and intimidation. He widened his scope and started to harass Halle's family. The family safety team got involved. These incidents were recorded and yet another affidavit was added to Halle's application.

Halle shared with us what getting a protection order was like for her.

It's an exhausting process, mentally an exhausting process and recalling bits from your relationship that were abusive ... wanting a protection order was a really hard decision ... you get to the point when you have had enough.

Had her family and her employer not been so supportive, things might have been much worse.

Halle was successful. She did obtain a final protection order but the other three women whose applications were put on notice did not. For example, Lee-Mei's application was put on notice despite the fact that her husband, John, fought with her nearly every day. He screamed and yelled at her and called her names. He told their young daughter that her mother was "a prostitute". He eventually stopped hitting her but the verbal abuse and intimidation continued. One of his friends had told him that he could be sent to jail if he continued to use physical violence against Lee-Mei. As Lee-Mei told us about her decision to get a protection order:

I had no choice. I wanted to apply for a protection order to protect myself and my unborn child. And my daughter ... I thought if I get a protection order, John will realise that he has done something wrong and he will change ... I wanted him to go for counselling so he could change. I did not want to leave my home.

One day when John began to throw things at her. Lee-Mei became very frightened and called the police. John wasn't charged; he was just walked off the property and returned to their home an hour later. The second time that she phoned the police, she knew that John would never forgive her.

Lee-Mei had not realised what would happen to her and her daughter if her application for a protection order were put on notice. While time was abridged to 48 hours, there was no substantive hearing on her application for five weeks. Some of our key informants have noted that it can take up to three months or more to have a substantive hearing, once an application for a protection order is put on notice; for example, Amy's took four months. Moreover, if the judge reserves judgment, the delay in getting a decision about whether or not a protection order has been granted will be extended even further.

Lee-Mei and her daughter spent the intervening five weeks residing in a women's refuge. She describes the consequences for her and her daughter.

Everything changed. When I left home, I did not take anything and thought it would take a few days. I stayed with my mum temporarily, But my daughter and I became homeless I cannot get anything from home. I never thought that we would be homeless from this. This encouraged my husband and his abusive power. We lived in the women's refuge and that hurt my daughter so much. She became school-less for five weeks. I felt so failed by the system because I am the victim but I live in the refuge. If I knew what would happen, I would never [have applied] for the protection order. I felt it was not fair ... I did not understand. I was told that what is happening to me and my family is serious and I was thinking, "In my situation if I cannot get protection order, who can get one?"

Lee-Mei asked her lawyer to explain the reasons why the temporary protection order was declined. As with Halle, Lee-Mei's lawyer told her she did not understand why Lee-Mei's application had been put on notice. Indeed, her lawyer said she had been confident that since Lee-Mei was heavily pregnant and being subjected to physical and verbal abuse (corroborated by police call-outs, medical evidence and supporting affidavits from family and friends), Lee-Mei had a clear case for a temporary protection order.

Because she had left her home without any of her or her child's possessions, Lee-Mei needed some basic personal effects like clothing and toiletries as well as toys and school books. She contacted the police but they declined to help her. They told her incorrectly that because she did not have a temporary protection order, she could not return to her home. Lee-Mei asked the police why she could not go to her own home when John did not have any orders from any court stopping her from entering her own home. They advised her to see her lawyer. Lee-Mei told us:

I realised I had lost everything. I don't know how many women are forced out of their homes like that, pregnant.

Eventually John suggested through his lawyer that Lee-Mei withdraw her application for a protection order. His lawyer approached her through her lawyer. John was prepared to pay her lawyer's fees if she withdrew her application. At that stage, Lee-Mei's legal bill was already \$5,000. She sought advice from her lawyer. She told us:

I wanted justice. My lawyer told me if I did not get final protection orders I would be even more upset. She said sometimes there is no justice in the court. She suggested I withdraw the protection orders and take the money for legal costs ... I thought I could give my relationship another chance. I wanted the violence to end and some programme to help me and help him.

Lee-Mei took her lawyer's advice and withdrew her application for a protection order. She told us over and over again how much she regretted this decision. She then changed her lawyer. Her new lawyer advised her to focus on property matters. The lawyer put a caveat on the relationship property on learning that John was attempting to put it all into a family trust over which he would have total control.

Lee-Mei's experiences have left her disillusioned with the New Zealand justice system. She told us:

I thought women in New Zealand had protection of the law. This shouldn't happen in New Zealand ... I don't know what's wrong with the system. A woman like me who is pregnant should be careful about using protection orders. What did the judge think? What would John have lost by me getting a temporary protection order?

Sripai's application for a temporary protection order was also put on notice. In her case, the judge may have misconstrued the significant impact on Sripai of the mostly psychological abuse to which she was subjected. Again, however, there were no reasons given by the Family Court judge when Sripai's application was put on notice which would allow us to know if that was the case. While we will discuss Sripai's case in detail in the following section on defended hearings for protection orders, it is important to note that Sripai waited for two months before the court substantively dealt with her protection order application.

Amira applied without notice for a temporary protection order, an interim custody order and a warrant to enforce custody. All of these applications were put on notice. In her supporting affidavits, Amira canvassed Barry's violent and controlling behaviours. It outlined her concerns about Zola, and included the facts that Barry was sharing a bed with Zola and the axe.

In support of her application for a protection order, Amira's affidavit argued that the delay which would be caused by proceeding on notice would entail:

... undue hardship to me and my daughter as follows: My husband is an angry, controlling and violent man. He will be very angry that I now have support. I have been helped so that I have a benefit for myself which will mean his benefit will be reduced. This will make him even angrier. He will be very, very angry that I have gone to the law and that I am standing up for our daughter. I believe that I need an urgent protection order for my physical safety. I also need it emotionally. I am worn down. I am depressed and tired. I also believe that our daughter needs to be protected from the respondent urgently and that an order needs to be made urgently placing her in my care. I believe that she is at risk of my husband's anger while she remains with him. She is scared of her father. My husband has made it very clear that he will never stop his control over our daughter. I don't believe he would even hand her over to the police if I got a custody order and asked them to help me collect her. I am certain that I will need a warrant to enforce any interim custody order made.

The Victim Support worker who had known Amira and her husband somewhat also swore an affidavit in support of Amira's applications. This affidavit provided corroborative evidence about the domestic violence and about Barry's controlling tactics. In particular, the affidavit recorded Barry's response when he found out that the Victim Support worker had been helping Amira.

Barry said, "I see my wife is on the move." He then proceeded to tell me that the only place his wife was going was out of here in a plane and that when she got back to [country], she would be shot for adultery. He made it clear he would have her deported to [country]. He was laughing in a very menacing way. The parties' young daughter, Zola, was present throughout this incident. I could see that she was feeling very uncomfortable and she created some distance between herself and the respondent by walking to the back of the shop. The respondent was very intimidating in his manner. I think this is very damaging for Zola. Personally, I have serious concerns for the safety of not only the applicant but also of the daughter, Zola. I have previously worried about his parenting and it concerns me greatly that Zola is now in his sole care. He seems to have no idea of how his behaviour affects Zola emotionally. I believe that the applicant needs the urgent protection of a Court order and that the child is at risk in the care of her father and that an urgent custody order should be made in the applicant's favour.

It would appear from the evidence provided by Amira that she and her daughter had met the requirements of section 13 of the Domestic Violence Act 1995 that they needed to be protected without delay. However, Amira's application was put on notice without judicial reasons being given. Perhaps readers unfamiliar with the realities of domestic violence might wonder whether Amira was putting forward false allegations, but subsequently Barry himself did not dispute her evidence that he slept in bed with their 11-year-old daughter, Zola, with an axe between them. He gave the facts a different spin. In an affidavit prepared the day after he was given notice of the Amira's applications, Barry said:

Because of the Applicant's depressive state, I did not feel safe with the axe around and I was worried about what she would do, so I was keeping the axe in a safe place. My daughter was sleeping in the same bed because she was scared. She is still scared, I have to lie down with her until she goes to sleep, otherwise she is too scared to go to sleep. She is not scared of me, she is scared of her mother.

In one of Amira's affidavits in the custody case, she recalled:

Our daughter has remained with my husband since he made me leave. I saw her on the street [recently]. She was crying. She said that she is too tired, that her daddy is making her do all the work. She said her daddy stresses her out too much. She told me her puppy had died when it swallowed a fishing hook and her daddy did not take it to the vet.

Amira never obtained a protection order. Barry filed a notice to defend and the couple was sent to mediation about the Care of Children Act matters. We will pick up her story in the counselling and mediation section of Chapter 10 and then again when we look at our women's experiences of Family Court parenting order proceedings. In Amira's case, a so-called "consent order" was made



18 months after she filed for her without notice protection order. It was along the lines of the “agreement” made by Amira during mediation. It gave Barry day-to-day care and control of Zola, and Amira unsupervised contact with Zola two weekends out of three. It also ordered that Zola could not be removed from New Zealand. The consent order also withdrew Amira’s application for a protection order. Of course, by then, Barry had unilaterally withdrawn his support for Amira’s application for residence. Without his support, she did not meet the criteria for New Zealand residence and she was removed. As her lawyer sees it:

Once we didn’t get the protection order or interim custody, it was downhill from there. I was blown away. I’ve done zillions of these and I know when one is border line.

### ***Women’s Experiences of Defended Hearings on Protection Orders***

Five of our women faced defended hearings in respect of protection orders. Two of the women successfully obtained final orders (Hilda and Claire) but three others (Amy, Sripai and Rowena) did not. Even the women who were successful in their applications after the defended hearings felt the process had been gruelling. Moreover, because of an ambiguous agreement Claire made to avoid mounting legal fees, she has just advised that Robert has succeeded in having her protection order discharged.

In Sripai’s case, she was not only abused by Kevin. His family would also gang up on her, always taking Kevin’s side. They repeatedly threatened to send her back to Thailand without her daughter, Alana. Kevin’s father frequently physically and verbally abused her. He called her a liar and threatened her saying: “shut up, be quiet or the police will come and take your daughter away.” Sripai told us:

So I was always scared of the police because I thought they would take her away from me and I believed them because I do not know the law in New Zealand. If I was in Thailand, it would be different.

In the end, Sripai did call the police during a fight over her travel documents. Kevin had told her that he needed her and Alana’s passports to buy air tickets for a planned trip to Thailand. He told her they would be safe with him. Later, they had a big fight over the whereabouts of her passport and their other travel documents. Kevin told Sripai that she would have to get the papers from his father if she wanted them.

When the police came, they took Sripai to a women’s refuge where she remained for four months. During that time, her lawyer filed an application for a protection order on her behalf.

The court put the application on notice and a defended hearing occurred two months later. On every contested issue, the court accepted Kevin’s version of the facts. Moreover, the court interpreted what Sripai considered to be psychological violence as differences in opinion between Sripai and Kevin. For example, on the question of taking away Sripai’s passport and travel documents, the court said:

For Kevin it was a matter of security while Sripai saw it as a matter of control. The evidence does not go far enough to indicate a desire or wish by Kevin other than to ensure he knew the whereabouts of the documentation.

As our ethnic key informants have advised, the court does not appear to appreciate the powerlessness of foreigners without New Zealand residence left without travel documents.

The court observed further:

I believe that suspicion of Kevin’s conduct resulted from the fragility of the relationship rather than from any intent seen objectively by Kevin to psychologically abuse Sripai.

As we will discuss in Chapter 13, the High Court has repeatedly held that a respondent need not intend to cause psychological abuse<sup>128</sup> for a protection order to be granted or breached; it is sufficient that psychological abuse to the applicant results. Moreover, and more importantly, the court did not see the repeated threats to remove Sripai's daughter from her as psychological abuse against Sripai. It is another clear-cut example of "the gap"; for Sripai, fears about losing her daughter were the most important factors that dictated her actions in the couple's relationship.

On the issue of Sripai's objections to Kevin taking nude photos of Alana, the court dismissed Sripai's concerns saying: "They were photos taken by a proud father of his daughter". The reasons for Sripai's objections, the comments made about Alana's "beautiful, clean white pussy – isn't she just beautiful?" were mentioned but not discussed in the judgment. Neither was the remark that Kevin made to his brother on another occasion, "When she grows up, she will have big tits and a nice ass."

The court seems to have characterised Sripai and Kevin's relationship as one of mutual violence, one of the categories of the flawed Johnston and Campbell typology currently being utilised in the Family Court and in the specialist family violence courts. We discuss this typology further in chapters 6, 10 and 12.

In Sripai's case, the court gives a clear example of so-called mutual violence when the judge states:

Each party was at times aggressive to the other but in the end each appeared to do what they wished at various times of the relationship and neither was so controlled by the other's action as to be dependent to an extent of not having free will or choice.

The court rejected Sripai's application for a protection order. In the custody proceeding, the court granted Sripai interim custody of Alana on the condition the child was not to be removed from New Zealand.

The court's comment about free will and choice requires further exploration. Sripai is in a foreign country where she is not a permanent resident. She does not have her or her daughter's passport or travel documents. She does not speak English very well; she spoke through an interpreter throughout the various Family Court proceedings. She is not educated. Her child is a foreign national governed by New Zealand law on custody and family matters. She has no friends or family in New Zealand. She cannot return to her home country because she cannot take her child with her. She cannot meet the residence requirements to remain in New Zealand without Kevin's support. Her "choices" would appear to be very limited. How can she exercise her "free will" to stay in New Zealand so that she can maintain contact with her daughter when Kevin can unilaterally withdraw his sponsorship?

Rowena also faced a defended hearing. Despite section 16(1) of the Domestic Violence Act 1995, the protection order did not include Rowena's daughter. We do not know the reason for this

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<sup>128</sup>See, for example, *A v B* [1998] NZFLR 783 (HC), where Hammond J states: "There is nothing in s 3 or s 14(1)(a) to require any such 'intention' as is contended for ... And, as a matter of policy, why should the subsection be read down, as if it were a criminal law provision? I suppose it would be true to say that — to *some* extent — an allegation under this provision carries *some* element of moral obloquy. But the underlying philosophy of the Act is to provide a greater measure of protection from domestic violence in *all* its forms. To read down the Act in the suggested manner is to drive a large hole through it. For, if correct, it enables a male or female to come into Court, precisely as this respondent has done, and say, 'I had no intention of causing harm', or even, 'I had no realisation of what would occur.'" Furthermore, there is no necessity for the Crown to prove an intent on the part of the accused for him to be convicted of a breach of a protection order. For example, in *P v Police* [2006] NZFLR 725 (HC), the accused intended to and did send a letter to his ex partner, which constituted a breach of the ex partner's protection order. The Crown did not need further to prove that P intended to breach the protection order.

exclusion since section 16(1) provides that the protection order applies “for the benefit of any child of the applicant’s family.” Rowena’s daughter has always lived with her mother since birth.

At the family court hearing, Rowena felt that the judge consistently sided with Paul. As well, she felt that her own lawyer did not get her side of the story right. No comments were directed to her during the hearing but Paul was consulted throughout. In Rowena’s words:

I felt I was only there for formality’s sake, but I knew that the outcome was not going to be in my favour. This was so disheartening for me. I was very scared because I had no support whatsoever. Even the photos of physical abuse marks that I showed to my lawyer did not make any difference. They were in fact never used during the hearings. I felt really let down at that time.

Rowena contrasts her position with Paul’s:

On the other hand, Paul was white and had the support of his girlfriend. He knew about the systems and how they work. English is his first language. It was easy for him to discredit me because they did listen to him but not to me.

Indeed, a friend who went with her to one of the Family Court hearings told Rowena that her own lawyer had said that she found Rowena difficult to talk to as well as difficult to approach. Not only was Rowena’s application for a protection order dismissed, she was very offended by her lawyer’s statements and case management.

Amy obtained a temporary protection order, which Peter defended. As the Family Court hearing drew closer, however, Amy’s lawyer suggested that she withdraw her protection order application and instead accept Peter’s undertaking that he would not be violent to her again and would leave her alone. Her mother-in-law (with whom Amy was living and who was her principal support) also tried to convince Amy to accept the undertaking.<sup>129</sup> Similar to Amanda’s experience, Amy states:

My lawyer was saying, “I never saw a case like this.” Peter just seemed to work on affidavits all the time. And I just didn’t have that time; I had my daughter to take care of. And I kept wanting to get a job so I could get off the benefit. But answering all these affidavits took so much time.

After first proposing the undertaking, Peter later changed his mind and said they should go to a hearing. There was a defended hearing and Amy’s application for a protection order was dismissed. Amy’s lawyer said it was because the judge found that the order was no longer “necessary” for Amy’s protection. She had not been beaten by Peter for four months and she had the support of her mother-in-law and her teenage brother-in-law. Even though she was still frightened of Peter, the court discharged Amy’s protection order. As Amy recalled:

**It took four months to get a hearing. Then – case dismissed!**

We will discuss Amy again in the parenting orders discussion in Chapter 10. Not only did she not obtain a protection order, but she and her mother-in-law began to notice the effects of Amy’s young daughter witnessing Peter’s sexual behaviour with other women. Joy had begun to regularly “hump” her teddy bear.

As one of our legal key informants recently said: “We need to train lawyers in domestic violence issues, not just how to fill out forms to comply with the tick box approach to granting temporary

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<sup>129</sup> Given their use in the Family Court, we will discuss undertakings in more detail in Chapter 9. We will conclude that having an undertaking is probably less safe than not having a protection order because undertakings convey an illusion that they can provide protection when they offer no protection at all. Moreover, as one of our Stopping Violence key informants advised us, even though most undertakings include a promise to complete a stopping violence programme, he has never seen one man who has come more than once or twice to such a group. The only remedy for breach of an undertaking is for the woman to commence civil proceedings. Police cannot enforce an undertaking.

protection orders.” We advocate annual multidisciplinary domestic violence training for all lawyers who appear in the Family Court (see Chapter 15 and recommendation 13). Furthermore, as we have already mentioned, all too often the most junior lawyers in a firm’s family section will do the domestic violence work because of legal aid ceilings. No wonder so many of our women appear to have had lawyers who were afraid of their client’s abuser and bamboozled by their aggressive litigation tactics.

Like Amy’s ex-partner, Peter, Hilda’s ex-partner filed voluminous affidavits when he opposed her temporary protection order becoming permanent. The affidavits made various allegations against Hilda: that she was aggressive, that she was a drunkard, that she was mentally unstable. Reflecting on the process later, Hilda said:

Receiving these many affidavits was very traumatic for me and my family and I was the person who was put in a position of constantly having to defend myself on a personal level while still trying to hold together my family and my job.

Hilda had to prepare another affidavit. Because John’s affidavit had completely minimised the assault for which he had been charged, Hilda submitted relevant police job sheets and detailed medical reports, including an assessment showing that she was suffering from post-traumatic stress disorder. Several friends submitted affidavits in support of her, as did one of her daughters. They did this because they were concerned about the negative, incorrect impression that John was trying to create about her. John’s lawyer insisted that all of these people be available for cross-examination, a request which delayed the hearing. They, and Hilda, were extensively cross-examined. As Hilda recalls:

His lawyer questioned me ninety percent of the time about incorrect personal traits of mine which were reported by the judge in his report to be blatantly untrue and made up. I found the questioning to be abrasive and personally interrogatory, and not about the physical attack or chain of events. This was brought up by my lawyer in her summing up but the fact that we were in court for two days for the protection order case and I was not questioned on the assault but was grilled about my personality was bizarre and ludicrous. My teenage daughter was also grilled in this way.

Being cross-examined and having to defend herself was not the only the challenge. Hilda found the hearing intimidating in other ways.

John kept on winking at me, showing how clever he is, that he could get away with that. Every time the judge turned away [to talk to the lawyers], he would turn around and wink at me. I felt completely intimidated. The victim support person was fabulous. She did offer for us to go and wait in a safe room. My daughter said “No way – I’m not hiding from anybody.”

A week after the hearing, the judge delivered his decision. Hilda got a permanent protection order. Costs were ordered against John. Although the outcome of the hearing was positive, the process had been, in Hilda’s words, “gruelling”.

Claire obtained a temporary protection order, but shortly after being served with the order, Robert filed an objection to the direction to attend a programme, a defence against the protection order itself, and a counter-application seeking a protection order against Claire. In his affidavits, Robert attempted to paint Claire as not knowing her own mind. He alleged that Claire had been “manipulative and emotionally abusive” and that she used physical violence against him.

Claire filed a second affidavit in response to Robert’s applications and went to court, ready for the hearing. However, the hearing did not go ahead. While she sat in the waiting room, her lawyer and Robert’s lawyer negotiated between themselves. The outcome was that the judge made the following consent orders: a final protection order was made in favour of Claire; Robert’s application for a protection order was dismissed; the direction for Robert to attend a respondents programme was discharged, on the understanding that he was voluntarily attending individual

counselling (which was not domestic violence related);<sup>130</sup> the standard condition of the protection order as to firearms was varied to allow Robert to retain his firearms licence. Claire also consented to providing two undertakings. One was to not approach Robert and the second was to not oppose the discharge of the protection order in 12 months' time if Robert had not breached it within that time.

While pleased to have a permanent protection order, Claire felt "despondent" after the hearing. With the exception of his application for a protection order, she felt Robert had got his way. He had certainly won significant concessions, each of which had important future implications for Claire.

The undertakings Claire was manoeuvred into making deserve closer attention. The first was that she would not contact or approach Robert. There was no evidence at all that she had been trying to contact him. As Claire stated, "Robert was once again using his power and control to suggest that I undertake not to approach him." Claire was concerned that she was agreeing to something that made it look as if she was pursuing Robert, but her solicitor's advice was to "Give him what he wants." However, this undertaking has been a boon for Robert. For example, Claire has received reports of him telling people that the court had ordered Claire to stay away from him, again enabling him to position himself as the victim.

The second undertaking was that Claire would not oppose an application for discharge of the order if Robert did not contact her in the following 12 months. This undertaking has also come back to haunt her. Robert has breached the order – repeatedly – but by being able to shift the goal posts, Robert and his lawyer have recently succeeded in having Claire's final protection order discharged.

These outcomes bring into sharp relief the problems of making orders by consent in the context of domestic violence.<sup>131</sup> Certainly, Claire feels that she was pressured into agreeing to the proposals developed by counsel. Some of this pressure came directly from Robert, who was able to draw on the fact that her former husband had lost his firearms licence to portray her as vindictive and punitive.<sup>132</sup> Part of the pressure came from her solicitor, who, she feels, was keen to settle because of the capped legal aid grant. She was also beginning to feel quite uncomfortable with her solicitor who, she felt, was behaving quite inappropriately towards her, using ribald language and sitting very close to her. He also seemed inappropriately flippant. When Claire asked him after the hearing what she should do with the list of Robert's telephone messages, he said that it might be a good idea to keep them for the police, "in case there was ever blood on the floor."

Robert has been convicted of five protection order breach charges but he has recently been able to have Claire's protection order against him discharged on the basis of her second undertaking. Robert was able to argue that she had promised not to oppose his application for discharge if Robert did not contact her in the months following the order. He did not keep to his undertaking, the most compelling evidence being his five convictions for breaching Claire's

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<sup>130</sup> This aspect of Claire's case study is discussed in the counselling and mediation section of Chapter 10.

<sup>131</sup> These problems have been canvassed locally by former Chief Justice Sir Ronald Davidson in his enquiry into the deaths of the Bristol children, and, more recently, in the UK, by Lord Justice Nicholas Wall. Although both judges were reporting on consent orders in relation to children, the basic caution against judicial acceptance of consent memorandum in cases of domestic violence applies more widely. See Davison, R. (1994). *Report of the inquiry into Family Court proceedings involving Christine Marion Bristol and Alan Robert Bristol*. Wellington: Office of the Minister of Justice. See also Wall, N. (2006). *A report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement*. London: Royal Courts of Justice.

<sup>132</sup> Claire's former husband had been the subject of an Armed Offenders Squad call-out.

protection order. Those breaches were acknowledged in a letter from Robert's solicitor, who nevertheless argued:

Having regard to the fact that approximately ten months have expired [since the breaches], and that by the time the proceedings are filed and served and a date of obtained from the court, it will be at least one year from those breaches.

Therefore, an undertaking – made under pressure – not to oppose discharge of the order if it was not breached within following 12 months had now been reconstrued by Robert's lawyer as an obligation to consent to the discharge if there were no further convictions for breaching the order in **any** 12-month period. The solicitor's letter continued:

The effect of the protection order makes life extremely uncomfortable for Robert. As your client will no doubt inform you, they have a similar social group of friends and similar interests involving public events ... it is therefore inevitable that some form of contact comes about when our respective clients are attending community activities or social events. Our client should not be precluded from living his life as he has done in the past ... the existence of the protection order means that there is no "closure" for him.

This is not an uncommon line of argument. In our experience of respondents programmes, men often complain about having protection orders "hanging over" them. In response, Claire's new solicitor had responded:

... we can see no reason why your client needs to have the protection order removed bearing in mind that he now has his gun licence back. If he keeps away from Claire then of course the order will never need to be used.

Robert's lawyer persisted in his efforts to have Claire's order discharged. He wrote a letter stating:

We invite your client to reconsider her position. Contested proceedings will be stressful for both the parties. Our client accepts that if he did ever behave again in a manner which would give your client the right to apply for a protection order, that he would not defend any further application by your client.

Robert's solicitor did not need to mention the fact the proceedings would also be expensive for Claire. She had already incurred costs in these preliminary "negotiations". An unenforceable undertaking not to oppose an application for a new order seems a very inadequate outcome for Claire, who had to face the stress and expense of once again arguing for what many of us take for granted, her personal safety. (We discuss the issue of undertakings further in Chapter 15, recommending that they not be used (recommendation 23).)

Even though the police have recently offered to arrange the loan of a video camera so that Claire's home can be under 24-hour surveillance, the Family Court judge has, within the last two weeks of this writing, discharged Claire's final protection order.<sup>133</sup>

In her decision, the judge commented favourably on Robert's completing "intensive counselling" (although she stated that it was not focused on his use of violence) and stated that he had moved on now with his life. In the judge's view, the psychological abuse had only been "situational". She commented:

Robert's behaviour was psychologically abusive of Claire. It is my view that **his behaviour was a situational response** to the breakdown and the messy break down of their relationship – that is the bad behaviour which lasted for some time. It took Robert some considerable time to deal with the break down of his relationship with Claire. [Emphasis added]<sup>134</sup>

<sup>133</sup> Unreported Family Court judgment in possession of the authors. In order to protect Claire's identity, the citation of this unreported judgement has with-held.

<sup>134</sup> Ibid, at paragraph 25.

Despite stating that Claire would like the protection order to remain in place, the judge concluded that because Robert's violence was "a situational response", the order was no longer necessary for Claire's protection. In a judgment very reminiscent of *W v M*<sup>135</sup> (which is discussed in detail in Chapter 9) the judge demonstrated what we have in our previous work called "learned hopefulness"<sup>136</sup> in decision makers. She states that she has taken Robert "at his word" and although she is satisfied that Claire is still "disturbed by Robert's actions and breaches", there had been no substantiated evidence of his abuse in 18 months. There had been lots of hang-up calls and numerous occasions when the security lights around her house had been triggered, but no evidence that Robert was responsible.

Indeed, just as in *W v M*, the judge concluded that if she were wrong in giving Robert the benefit of any doubts that might exist, then Claire could reapply for a protection order again. The judge ended her reasons by stating:

I want to say however to Robert and this will be recorded at the bottom of my decision, that if he were foolish enough to think that this now meant that he could contact Claire in any way at all or relay messages to her via her family or friends, then Claire would have immediate grounds to make an application for a further protection order.<sup>137</sup>

In our last discussion with Claire, she found the judge's admonition to Robert cold comfort. Whether she would apply for another protection order after the gruelling experiences she has been through in the Family Court is a moot point. It is quite likely that the judge would never get to hear about the impact of her decision to discharge the order. This is a specific example of a general problem. Judges very seldom get feedback on the impact of their decisions. The judges mentioned in our case studies who put applications on notice (Halle, Amira, Lee-Mei and Sripai), dismissed applications (Rowena and Amy), discharged orders (Claire, Pinky and Tina) or accepted without further enquiry the withdrawal of applications (Amanda, Eve and Lee-Mei) are unlikely to receive any feedback about the problems arising from their decisions. This is contrary to good risk assessment practice, which requires that predictions and the actions based on them are monitored and subjected to empirical evaluation. Such monitoring and evaluation are needed to assess the extent to which those predictions and actions facilitate relevant policy objectives,<sup>138</sup> in this case, the provision of effective protection to victims of domestic violence. (See recommendation 22.)

### **Experiences of Family Court Counselling**

The women featured in the case studies became involved in relationship counselling with their abusive partners. Some went to private (non-Family Court referred) counselling to try to salvage their relationships. Others initiated counselling under section 9 of the Family Proceedings Act 1980. For other women, it was their estranged partners who initiated requests for counselling.

In almost all cases, the women in our case studies were dissatisfied with the counselling they participated in through the Family Court. Pinky, however, thought that she benefited because the counselling made her more aware of her situation and the options she had. However, she also felt

<sup>135</sup> *W v M* [2004] NZFLR 1057.

<sup>136</sup> See Robertson, N., & Busch, R. (1998). The dynamics of spousal violence: Paradigms and priorities. In F. Seymour & M. Pipe (Eds.), *Psychology and family law: A New Zealand perspective*. Dunedin: Otago University Press.

<sup>137</sup> Unreported Family Court judgment, judgment in possession of the authors, paragraph 35. In order to protect Claire's identity, the citation of this unreported judgement is with-held.

<sup>138</sup> Andrews, D. A., & Bonta, J. (1994). *The psychology of criminal conduct*. Cincinnati, OH: Anderson, p 154. See also Standards New Zealand. (2006). *Screening, risk assessment and intervention for family violence including child abuse and neglect NZS8006:2006*. Wellington: Standards New Zealand.

manipulated by Jatinder during counselling. At one of their sessions, the counsellor emphasised that Jatinder was very keen for Pinky to withdraw her protection order against him.

Other women who sought out Family Court counselling often found the counselling unhelpful. Amanda applied for Family Court counselling but found that it made no difference in terms of Raymond's controlling behaviours. In Jess's case, Bruce was the one who applied for Family Court counselling. When Jess went to see the counsellor, the counsellor asked her what she would need to consider reconciling with Bruce. Jess responded that Bruce had told so many lies, she could no longer believe anything he said. She also said she felt so unsafe that she wanted nothing to more do with him. Upon hearing Jess's response, the counsellor stated that she would recommend to Bruce that he "needed to build trust" with Jess if reconciliation were ever to occur. Jess does not know whether this erroneous message was ever communicated to Bruce but it was definitely not the one that she wanted to convey. She did not go back for another session.

The case studies also describe the ways in which attendance at counselling with an abusive partner can lead to manipulation by the abuser.<sup>139</sup> Caitlyn's experience of counselling was that it was just another arena which Bernard manipulated for his own ends. When Caitlyn first applied for relationship counselling, Bernard was not happy. On the day the session was scheduled, he called Caitlyn to tell her that he would not be there. Caitlyn went by herself and found the session very helpful. Bernard then attended the second session alone and they jointly attended the remaining session. At the third session the counsellor suggested that they needed to decide whether to try to work out their relationship or terminate it.

Over the course of the next weekend, Caitlyn and Bernard discussed their relationship and both decided that it was not going to work and that they should separate. Caitlyn told us that it was an amicable decision but Bernard told his friends a very different version, one in which he was depicted as the victim in the break-up: As Caitlyn describes it:

He spent the afternoon crying to his friends that "Caitlyn is kicking me out and doesn't want me here anymore." It was really frustrating that he didn't take ownership of a decision we had made together.

In Hilda's case, John made the application to the court for counselling. He did so after a temporary protection order had been made against him. Hilda, who had previously consulted a counsellor herself, was clear that she wanted the relationship to end and did not attend Family Court counselling.

Claire too refused to engage in the section 9 counselling which Robert initiated. Like Hilda, she knew that she did not want to reconcile. The counselling which Robert attended alone provided fertile ground for his manipulation. After four sessions, the counsellor wrote a report addressed "To whom it may concern." It said, in part:

Robert first presented in a state of extreme reactive anxiety coupled with confusion, hopelessness and extremely low self-worth. His physical body language plus his verbal account displayed helplessness and a strong sense of disempowerment. Robert conveyed strong positive statements about his partner, their relationship and an intense need to have an understanding of what he had done wrong. Affect response was high. The response pattern presenting was consistent with what would normally be observed as a response to recent or historical trauma; a "learned helplessness" or "battered person" type response. Within all sessions Robert has

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<sup>139</sup> In previous research of ours, the counselling centre itself provided the abuser with a place where he could locate his former partner. For example, the young mother we called Roslyn was shot down emerging from a Family Court counselling session. Her husband had apparently wanted to reconcile with her and when relationship counselling did not produce that outcome, he chose the counselling centre as the place to kill Roslyn and himself. Busch, R., Robertson, N. R., & Lapsley, H. (1992). *Protection from family violence: A study of breaches of protection orders*. Wellington: Victims Task Force.



appeared to be very genuine, speaking openly and honestly about his behaviours while exhibiting in language and demeanour a deep sense of caring for his “friend” ... At no point in any sessions with Robert has any anger or controlling behaviours been observed. Robert in contrast, displays a passive, non defensive response pattern. Counselling is now being used to understand intense unfamiliar affect and cognitive responses and thus allow a sense of management and control over these. Robert's work in this area appears to be feeding back positively into safer responses for Robert, thus empowering Robert to remain free of self harming behaviours and situations.

It should again be underscored that this report was prepared without any consultation with Claire. Had there been such consultation, the counsellor might have re-evaluated her assessment of Robert as “disempowered”, “battered” and “traumatised”. She would almost certainly not have described him as “open and honest”.

This counselling report helped Robert get the direction for him to attend a respondent's stopping violence programme discharged; the court appeared to believe that individual counselling was a better option, despite the counsellor's obvious lack of expertise in the domestic violence area. As well, the counselling report also helped him get the standard condition as to firearms under the Domestic Violence Act 1995 discharged, much to Claire's dismay and increased sense of fear: As she told us:

Now that he has his firearms back I have taken different routes than I normally take. The counsellor said, “Claire, it's about you taking control and putting safety measures in place.” So I don't go bush walking anymore and [I] think everything through, and now it's becoming a part of my life. I had to learn to lock the house, lock my car, take my cellphone everywhere ... I carry a hand-held alarm ... The counsellor said to lock my bedroom door and pull the curtains, which I never used to do ... I don't go to cafes that I used to go to, I go to different ones. I [ask] people to pick me up if I have to go out at night – we don't have taxis in [this town].

In Claire's case, the counsellor's report highlights the dangers inherent in Family Court-accredited and other counsellors dealing with domestic violence cases without the requisite specialist knowledge and skills. One of the major risks is that counsellors respond to the abuser entirely out of their own experiences of him as a client – Robert was unlikely to have posed any threat to the counsellor – rather than ensuring that their assessments are cross-referenced with the experiences of victims. A counsellor with domestic violence expertise would certainly have recognised the dangers not only of providing such a report but the significant ways in which the report's contents could be used by Robert to further intimidate Claire. (See recommendation 13 regarding training for counsellors and other professionals associated with the Family Court.)

We are concerned that key informant lawyers have advised us that many more couples are now being sent to relationship counselling than in the past. This is, in part, a result of the specialist family violence courts' approaches (see Chapter 13 for a detailed discussion of these courts) but also because Family Court judges are insisting on relationship counselling before permitting a matter to be set down for hearing. Indeed, key informants told us that there are many cases in which counselling would have been waived in the past by a Family Court judge because of domestic violence (and its flow-on effects for many women of fear and intimidation during joint counselling sessions). Now, however, similar cases are directed to relationship counselling. Given that a primary desired outcome of counselling is an agreement between the parties which will then be made into a consent order, it is highly likely that at least some of the consent orders arising from counselling agreements are products of intimidation and coercion. We return to these themes in Chapter 10.

Finally, we note that, with the exceptions of Pinky and Amy, all the women who accessed counselling through the Family Court were Pākehā. We did not routinely ask women whether they had considered seeking Family Court counselling but the disproportionately low numbers of

Māori, Pasifika and other ethnic women accessing counselling this way broadly reflects what key informants told us: that there is a significant shortage of Family Court–accredited counsellors from other than Pākehā backgrounds. Moreover, as Amy's case shows (discussed further in Chapter 10 in relation to counselling in the context of applications for parenting orders), there are questions about the ability of some counsellors to provide an adequate service to culturally and linguistically diverse women. We recommend:

**THAT the Family Court encourages counsellors from across the wide range of linguistic and cultural communities within New Zealand to become accredited so that culturally appropriate counselling can be provided as frequently as possible, and that it ensures that interpreters are available to assist parties in court who have limited facility with English. (#22)**

## 9: The Legal Context of Seeking Protection Orders

Much concern has been expressed recently about the granting of protection orders under the Domestic Violence Act 1995 and natural justice for respondents. Fathers' rights groups, for example, have complained vociferously about the supposed lack of natural justice when temporary protection orders are made under section 13 of the Domestic Violence Act.<sup>140</sup> They assert that such orders are unfairly granted because they are made without first giving the respondent a chance to be heard. As well, case law has developed which suggests that these concerns about natural justice for respondents may be justified.<sup>141</sup> The case law raises significant questions about what tests should be used in granting without notice and final protection orders.

In this chapter, we will analyse Domestic Violence Act case law and judicial practice in respect of protection order applications. We do this firstly to contribute to the legal debate about protection orders that is now occurring. We are specialists in the area of domestic violence practice and it is our view that concerns about current judicial practice from the perspective of battered women have not been adequately addressed to date. As well, we want to set out the legal context within which our women applied for protection orders. This needs to be done to clarify issues in our case studies which may seem strange or anomalous. For example, in Halle's case, it may seem odd that we cannot tell why her application for a temporary protection order was put on notice – and therefore not decided for two long and frightening months. However, when we look at Justice Priestley's decision in *D v D*,<sup>142</sup> we realise that having Halle's application dealt with "on the papers" and declined in the absence of any judicial reasons for the outcome is standard Family Court practice for battered women these days.

It is interesting that there has been very little discussion or commentary about natural justice issues for applicants for temporary protection orders, the overwhelming majority of whom are women. The focus of discussion to date appears to have been almost entirely on natural justice in respect of the male respondents. We would, therefore, like to consider this issue on behalf of applicants: does the way the Family Court currently deals with temporary protection order applications raise natural justice concerns for applicants? Additionally: are the objects of the Domestic Violence Act 1995 – to reduce and prevent violence in domestic relationships – being achieved through the processes by which the Family Court is "hearing" without notice protection order applications?<sup>143</sup> We would like, furthermore, to expand the scope of those questions to the following other groups of applicants: what would natural justice and/or fulfilling the statutorily mandated approach of section 5(3) of the Domestic Violence Act 1995 entail for applicants whose without notice applications have been put on notice and for applicants for final protection orders?

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<sup>140</sup> New Zealand Law Commission. (2003). *Dispute resolution in the Family Court* (NZLC R82). Wellington: New Zealand Law Commission. Retrieved from <http://www.lawcom.govt.nz>.

<sup>141</sup> See, for example discussions, below, of *D v D* [2004] NZFLR 320 (HC) and *W v W* (Family Court, New Plymouth, FP043/001/01, 30 May 2001, Judge Inglis).

<sup>142</sup> *D v D* [2004] NZFLR 320 (HC).

<sup>143</sup> As Judge Boshier states (Boshier, P. (2006). *Domestic violence: A comparative New Zealand perspective*. Speech to the Queensland Law Society, Family Law Residential, Sunshine Coast, Queensland, 19 August): "Where an applicant makes a 'without notice' application for a protection order, the application is usually determined on affidavit only, so that there is no 'hearing' as such. This allows for a protection order to be made available immediately, in situations of urgency. We allocate Duty Judges so as to ensure that these applications are able to be dealt with speedily. The respondent is then served with the order, advised of its effect, and given the opportunity to have the order removed at a later hearing."

### **Current Legislative Framework**

It is important to understand what domestic violence is, in order to understand what natural justice or due process for victims of domestic violence might involve. Section 3 of the Domestic Violence Act 1995 defines “violence” as physical, sexual or psychological abuse. Section 3(2) defines “psychological abuse” as including, but not being limited to intimidation, harassment, damage to property and threats of physical abuse. Section 3(4) then states that a single act may amount to abuse (for example, a gun to the head), but in addition, “a number of acts that form part of a pattern of behaviour may amount to abuse ... even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.”

While this is the statutory definition, Roberta Valente, the staff director of the American Bar Association Commission on Domestic Violence, reminds us:<sup>144</sup>

Although the details of the assaults are shocking, their meaning lies beyond the deadening statistics documenting the severity and frequency of violence. Violence signifies crossing a boundary in which violation and degradation, previously unacceptable in a loving relationship, are now used as tools of power and coercion. Battering is far more than a single event, even for the woman who is hit once, because it teaches a profound lesson about who controls a relationship and how that control will be exercised. Self-consciously exercised violence temporarily brings a man what he wants – his wife acquiesces, placates him, or stops her demands.

Section 3 of the Domestic Violence Act 1995 specifically acknowledges as “psychological abuse” threats and behaviours that induce fear, humiliation, harassment and intimidation. However, the definition of psychological abuse is a non-exhaustive one. From our case studies we can also include: social isolation, financial deprivation as well as discrediting the woman’s moral character, her parenting skills, and her mental health to her friends, her community, the police and other service agencies. In terms of the latter, Valente reminds us, “Abusers develop a convincing repertoire of reasons to justify their violent and coercive controls.”<sup>145</sup>

In order to understand the statutory grounds on which temporary orders can be granted, section 13 of the Domestic Violence Act 1995 states that:

- (1) A protection order may be made on an application without notice if the Court is satisfied that the delay that would be caused by proceeding on notice would or might entail—
  - (a) A risk of harm; or
  - (b) Undue hardship—
 to the applicant or a child of the applicant’s family, or both.
- (2) Without limiting the matters to which the Court may have regard when determining whether to grant a protection order on an application without notice, the Court must have regard to—
  - (a) The perception of the applicant or a child of the applicant’s family, or both, of the nature and seriousness of the respondent’s behaviour; and
  - (b) The effect of that behaviour on the applicant or a child of the applicant’s family, or both.

The test for granting without notice protection orders under the Domestic Protection Act 1982 was quite different. For instance, under the Domestic Protection Act, there was no mandatory requirement for the judge to consider the applicant’s and/or the child’s perspectives about the

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<sup>144</sup> Valente, R., & Farney, A. (2003). Creating justice through balance: Integrating domestic violence law into Family Court practice. *Juvenile and Family Court Journal*, 54(4), 35-55.

<sup>145</sup> Ibid.

nature and seriousness and effects of the violence when deciding whether to make a without notice order or not. As discussed in Chapter 7, empirical research shows that women's views are the single best predictor of the dangerousness of their partners or ex-partners.

More importantly, the Domestic Protection Act 1982 stated that the court could grant a without notice (ex parte) protection order only if the delay that would result in placing the application on notice "would or might entail risk to the personal safety" of the applicant or a child of the family, or where the delay "would or might entail serious injury or undue hardship."<sup>146</sup>

As the head of the New Zealand Law Society's Standing Committee on Domestic Violence has stated, the threshold for without notice orders was "deliberately and significantly lowered" by Parliament in the Domestic Violence Act 1995. She notes, moreover, that the Department of Justice report to the Justice and Law Reform Select Committee<sup>147</sup> commented, prior to the Domestic Violence Act's passage, that an increase in the numbers of without notice protection orders might indeed result from this express lowering of the threshold. The report stated:<sup>148</sup>

Under the Domestic Violence Bill, the threshold is reduced to either a risk of harm or undue hardship because in this context it was thought necessary to err on the side of providing more, rather than less, protection from as early a point in the process as possible. We acknowledge, however that a consequence of this is a likely increase in the number of protection orders that can be made without notice first being given to the respondent.

### ***The Process for Deciding Without Notice Protection Order Applications***

We return to the issue of the threshold below, but first it is important to understand the processes for considering without notice applications. As mentioned earlier, standard practice is for the judge to read the application and affidavits in support in chambers. There is no "hearing" in any sense of the meaning of that word. The judge sees neither the applicant nor her lawyer.

According to our key informants, if any issues arise which the judge is unclear about or which were not covered in the papers to the judge's satisfaction, then the application will usually be put on notice, often with time abridged, or, less frequently, dismissed or struck out.<sup>149</sup> For example, in Amira's case, her solicitor believes that the Family Court judge put her application on notice because he was unsure that whether Amira fully understood the meaning of her sworn affidavit. Her problems with English fluency had been noted on her solicitor's certificate. The judge, however, did not give instructions to her lawyer to have Amira re-swear her affidavit in front of an interpreter who reviewed its contents with her in her native language. He also did not send the papers back to her solicitor so that she could clarify any language issues prior to resubmitting the application to court. Instead, the judge directed that the application be put on notice.<sup>150</sup>

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<sup>146</sup> Domestic Protection Act 1982, s. 14(1).

<sup>147</sup> Davis, W. (2004). Gender bias, fathers' rights, domestic violence and the Family Court. *Butterworths Family Law Journal*, 4(12), 299-312, at p. 303.

<sup>148</sup> Department of Justice. (1995). *Report to the Justice and Law Reform Select Committee on the Domestic Violence Bill*. Wellington.

<sup>149</sup> As Figure A2 in Appendix 1 shows, in March 2005, the latest month for which published data are available, this was the outcome in approximately 17% of cases (here we are using the moving average – monthly figures can fluctuate by as much as 5% on either side of this). A smaller number of without notice applications are declined outright. In an analysis of applications filed in the six months between 1 October 2003 and 31 March 2004 supplied to us by the Ministry of Justice, 9% of without notice applications were dismissed (7%) or struck out (2%).

<sup>150</sup> See *Zhang v Jiang* (Family Court, Auckland, FP586/99, Judge Boshier) for another decision in which the presiding judge raised concerns about the applicant's ability to comprehend what was in her affidavit. In that case, a temporary order had been made but this was discharged after a defended hearing in which the judge raised concerns about an affidavit made on behalf of the non-English speaking applicant.

As an interesting aside, we first learned about the way without notice protection order applications are determined from an editorial staff member at a legal publisher. When we went looking for unreported protection order cases, we were told there was nothing worth looking at in them. The publisher no longer puts these unreported cases on their database. The reason: the temporary protection order minutes or “judgments” were so perfunctory that there was nothing in them worthy of retrieval. An ironic offshoot of the process by which these without notice applications are being handled is that development of the jurisprudence in this significant area of the law is being truncated because decision making is non-transparent and judgments unavailable for critique and discussion.

As well as the application for a temporary protection order being dealt with summarily on the papers by the judge, no Family Court time is actually allotted to deal with these applications. Alison Towns and Hazel Scott describe the decision-making process:<sup>151</sup>

The legal process of seeking a temporary order was depicted by judges as rational in law, requiring essentially a tick box approach to the provision of orders in which certain requirements must be met under the [Domestic Violence] Act and if these requirements were represented in the documentation received by the judge, orders would be granted. If the requirements were not met the judge might turn the application down, send the documentation back to the lawyer for further information or put the request for orders on notice. Lawyer 1 noted the variability among judges, referring to one judge who he constituted as never giving temporary orders, and advised against going to that court for such orders. He portrayed the courts as influenced by prevailing beliefs stating that when the Act first came out temporary protection orders were handed out “like lollies” in order for judges to avoid being “seen as chauvinistic”. Judge 2 noted that reading documentation and making important decisions about issuing of temporary orders often occurred during a 15-minute tea break.<sup>152</sup>

Our key informants described a similar process being used throughout the country to determine temporary protection order applications. One key informant mentioned the “tick box” approach and stated that temporary protection order applications were almost invariably dealt with in her region after 4 pm. “That’s why lawyers are told to get their applications to the Court by 2.30 or 3 pm”, she said, noting that the time that the Family Court judge gave to each application depended on things like whether he had a dinner engagement that evening or had some other reason to get away before 6 pm. She also told us that the Family Court staff were not allowed to help legally unrepresented women fill out the “25-page document” necessary for filing for a temporary protection order.<sup>153</sup> She said that “the Court staff need to be seen as neutral as between the applicant and the respondent and that extends to providing assistance to complete the forms.” And she mentioned, with a certain degree of sarcasm, “And if that application is handwritten, [the applicant] doesn’t have a chance!” Among other things, her comment underlines the need for victim advocacy of the kind we recommended in the previous chapter (recommendation 12).

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<sup>151</sup> Towns, A., & Scott, H. (2006). Accountability, natural justice and safety: The protection order pilot study (POPS) of the Domestic Violence Act 1995. *New Zealand Family Law Journal*, 5(7), 157-168.

<sup>152</sup> In terms of the “lollies” allegation, it needs to be noted that Christopher Perry, in an empirical study of 208 protection order applications made to the Christchurch Family Court in 1997, expressed concern that 61% of the without notice applications that were directed to proceed on notice involved severe abuse. See Perry, C. (2000). An empirical study of protection orders made to the Christchurch Family Court. *Butterworths Family Law Journal*, 3, 139-145.

<sup>153</sup> Our key informant significantly underestimated the number of pages. There are in fact 35 pages of forms (viz, DV1, 1 page; DV3, 10 pages; DV4, 19 pages; DV5, 2 pages; and DV6, 3 pages). These forms are available at <http://www.justice.govt.nz/family/forms/list/default.asp?inline=domestic-violence.asp>.

Whether treating without notice applications in the manner described is driven by a desire to spare women the stress of having to appear before a judge, as suggested by some key informants – or is a pragmatic response to the large increase in applications following the implementation of the Domestic Violence Act 1995, as suggested by other key informants, is a moot point. Either way, we think this routinisation of handling without notice applications has not served applicant women well, as we discuss below. First, however, we review the operation of section 13 in terms of protecting the respondent’s right to natural justice.

### **Natural Justice Protections for Respondents and Section 13(1)**

A good deal of case law follows what might be called a “plain meaning/purposive interpretation” of section 13(1). That is, the section is interpreted widely to provide protection to the largest number of possible applicants. For example, in *van Rijn v van Rijn*, Judge MacCormick stated:<sup>154</sup>

The basis on which a temporary order can be made in terms of the provisions of this Act and certainly compared with the requirements for other orders to be made on an ex parte basis, is not high. The behaviours complained of need only be such as might entail undue hardship for a temporary order to be made on a without notice basis if the delay that would be caused by proceedings on notice would or might cause that.

Judge MacCormick went on to comment that there were protective measures built into the requirements of the Domestic Violence Act 1995, primarily the solicitor’s certificate testifying to the legal advice given to the applicant to fully disclose all material facts and the 42-day rule.<sup>155</sup> Because of these “protective measures”, Judge MacCormick held that there were no issues of natural justice that had to be addressed. In the judge’s words:<sup>156</sup>

The relative ease with which the statute permits a temporary order to be made – relative to a final order – is offset by the requirement that every solicitor acting for an applicant must certify pursuant to Rule 26 of the Domestic Violence Rules.

This means that any lawyer acting for an applicant must personally sign a solicitor’s certificate stating, *inter alia*, that the lawyer is satisfied that full and frank disclosure of all relevant circumstances has been made to the court and that she or he is also satisfied “that the (without notice protection) order sought is one that ought to be made.”<sup>157</sup> Indeed, Rule 26 provides much greater protection to respondents than is found in other types of ex parte proceedings, for instance, those under the Care of Children Act 2004 or the Property (Relationships) Act 1976.

Clark, in his recent article “Ex parte orders in the Family Court and natural justice court and the New Zealand Bill of Rights Act 1990”, concurs with Judge MacCormick’s analysis. He specifically concludes:<sup>158</sup>

The system deferring the respondent’s right to be heard as set out in the Domestic Violence Act accommodates a reasonable construction of natural justice in the

<sup>154</sup> *Van Rijn v van Rijn* (Family Court, Auckland, FP004/1068 D/01, Judge MacCormick), at p. 2.

<sup>155</sup> The 42-day rule is set out in s. 76 of the Domestic Violence Act 1995. Section 76(1) states: “Where the Court makes a temporary order under this Act, 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 the temporary order.” Section 76(3) states: “Where the respondent notifies the Court, in accordance with subsection (1) of this section, that he or she wishes to be heard, the Registrar must assign a hearing date, which must be—(a) As soon as practicable; and (b) Unless there are special circumstances, in no case later than 42 days after the receipt of the respondent’s notice.”

<sup>156</sup> *Van Rijn v van Rijn* (Family Court, Auckland, FP004/1068 D/01, Judge MacCormick).

<sup>157</sup> See Rule 26 of the Domestic Violence Rules 1996 (certificate of lawyer to be included in applications without notice).

<sup>158</sup> Clark, E. (2003). Ex parte orders in the Family Court and the New Zealand Bill of Rights Act. *Butterworths Family Law Journal*, 4, 205-212, at p. 213.

circumstances. The availability of protection orders without notice is an essential tool in preventing violence but this interest must be balanced against the respondent's right to be heard. The system mandated by the Domestic Violence Act does this adequately by requiring a high standard of proof and by including a statutory direction that the respondent must be heard as soon as practicable and within 42 days.

Clark discusses in detail the reasons why the solicitor's certificate and the 42-day rule meet the standards of natural justice. In terms of the solicitor's certificate, Clark emphasises:<sup>159</sup>

Such a duty of candour means that for a protection order to be granted without notice under the Domestic Violence Act, there must at least be a credible prima facie case put before a Judge. This would seem to significantly reduce the risk of respondents being disadvantaged by protection orders which are later found to be totally without merit. It also means that the applicants granted without notice orders are more likely to genuinely need them.

In terms of the 42-day rule, he comments:<sup>160</sup>

Also relevant is the fact that the Domestic Violence Act specifies the maximum time that should be taken before the respondent is given an opportunity to be heard. Defences against a temporary protection order being made final and applications for discharge or variation must be held as soon as practicable and in not more than 42 days. This time frame seems to be what the Act envisions as the longest delay that fairness will allow on the respondent's right to be heard.

It is clear that the Family Court does not in many cases comply with the natural justice protection of 42 days.<sup>161</sup> However, as Clark succinctly puts it:<sup>162</sup>

A lack of resources then pervades both the system of issuing without notice orders and the system for applying for discharges. A shortfall in funding, however, has never been accepted as an excuse for breaching rights in New Zealand, especially with respect to the provision of Court services. It is incumbent upon the Executive to allocate sufficient resources for the Courts to comply with their obligations under the Domestic Violence Act and the [New Zealand Bill of Rights Act 1990].

We will return to this later in our report but for now underscore that if there are natural justice issues that arise because the Family Court is inadequately resourced, then any such funding inadequacies should be remedied.

There is also clear High Court authority which supports Clark's and Judge MacCormick's analyses. For example, *TLL v PS*<sup>163</sup> is an appeal by the respondent against whom a temporary protection order has been made. No reasons had been given by the Family Court judge for his decision and the appellant argued that the lack of reasons together with the without notice procedure had violated his natural rights. Justice Lang in this recent High Court decision canvasses many of the issues, and concludes that there is no natural justice flaw inherent in the granting of without notice protection orders under section 13. After repeating the general statement about how the making of a temporary protection order without notice under the

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<sup>159</sup> Ibid, at p. 209.

<sup>160</sup> Ibid, at p. 210.

<sup>161</sup> See, for example, Barwick, H., Gray, A., & Macky, R. (2000). *Domestic Violence Act 1995: Process evaluation* Wellington: Ministry of Justice. At p. 72, the authors state: "Approximately two fifths of the hearings in the file study were actually held within 42 days."

<sup>162</sup> Clark, E. (2003). Ex parte orders in the Family Court and the New Zealand Bill of Rights Act. *Butterworths Family Law Journal*, 4, 205-212, at p. 211.

<sup>163</sup> *TLL v PS [Protection orders]* [2006] NZFLR 897 (HC).



Domestic Violence Act 1995 represents an exception to the rule of having the opposing party heard, Justice Lang states:<sup>164</sup>

The Act anticipates that applications will often be made in circumstances involving domestic volatility, with physical and emotional harm, or undue hardship likely to occur to the applicant if the orders are not made immediately. In some cases the very fact that proceedings are served on the other party may cause that party to react violently. In those circumstances the Act recognises that the exigencies of the situation justify orders being made without notice to the other party.

This concept is not new. The law has always recognised that orders can be made without notice being given to the opposing party in an emergency, or where proceedings on notice would be likely to cause serious harm to the applicant.

After a lengthy discussion about the ability to obtain interim *ex parte* orders in certain circumstances even under the High Court Rules,<sup>165</sup> Justice Lang comments (as we have already seen in the MacCormick judgment and in the Clark article) that the Domestic Violence Act 1995 contains “built-in safeguards” for people in the position of the appellant husband. He specifically, for instance, mentions the 42-day rule and also the ability of the appellant to challenge the orders made in the High Court by way of appeal or judicial review. After referring to the New Zealand Law Commission’s comments about respondents’ grievances about without notice protection orders being made, Justice Lang states:<sup>166</sup>

Any regime permitting orders to be made without notice to the opposing party is likely to produce cases of perceived, if not actual injustice, to the person against whom the orders are made. That is always a matter of regret, but the hardship that the making of temporary protection orders may produce is a by-product of the overarching need to ensure that protection is provided to those in violent domestic relationships.

### Raising the Bar Judicially

The leading Family Court case which stands for a more stringent test being applied when without notice orders are granted is found in *W v W*, a decision of Judge Inglis on 30 May 2001. Natural justice concerns for respondents provide a central focus for his decision. For example, Judge Inglis states:<sup>167</sup>

No one needs to be reminded that to invite any Court to act on a without notice application is to invite the Court to depart from the basic principle of natural justice which demands that there be no decision without a fair hearing of both sides of the case. It might therefore be seen as obvious that any departure from that principle can never be treated as a matter of routine and can be justified only in a situation of true emergency to avoid irreparable harm. When section 13 authorises a protection application without notice when the delay caused by proceeding on notice “would or might” entail a risk of harm or undue hardship to the applicant or a child of the applicant’s family, what is meant is that the risk of harm or undue hardship must not only be of a kind that demands instant action but also be real as distinct from purely speculative. All that is elementary.

There are several important observations to be made about this case. First, Judge Inglis clearly adds a “gloss” to the language used in section 13(1). Otherwise, how can “risk of harm” or “undue hardship” be read as equating with “a situation of true emergency to avoid irreparable harm”? Rather than using a plain meaning/purposive interpretation to carry out the objects of

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<sup>164</sup> Ibid, at paragraph 29.

<sup>165</sup> Which embody neither the 42-day rule or the requirement of Rule 26 of the Domestic Violence Rules 1996 (certificate of lawyer to be included in applications without notice).

<sup>166</sup> *TLL v PS [Protection orders]* [2006] NZFLR 897 (HC), at paragraph 64.

<sup>167</sup> *W v W* (Family Court, New Plymouth, FP043/001/01, 30 May 2001, Judge Inglis), at paragraph 3.

the Domestic Violence Act 1995 as required of him by section 5(3),<sup>168</sup> Judge Inglis appears to set the threshold test for section 13(1) at an even higher level than section 14 of the previous Domestic Protection Act 1982 had required. Nowhere, even in the Domestic Protection Act, was there any requirement for “irreparable harm” or a “true emergency” for an ex parte protection order to be granted.

Judge Inglis states that the “risk of harm or undue hardship” must be “real as distinct from purely speculative”. A plain English interpretation of the word “might” could well include “speculative” risks. Indeed, given the difficulties with risk assessment, we will never be able to say definitely that a respondent will “really” commit an “irreparable” act. Based on previous threats and actions, all we can say about a present or future threat is that it is more likely than not or probable that it “might” be carried out.

It is interesting that in his reasons, Judge Inglis does not discuss the parliamentary history of section 13(1) or the section 5 objects of the Domestic Violence Act 1995. He does not mention his mandatory duty under section 5(3) to exercise his powers pursuant to the objects of the Domestic Violence Act. He also places no emphasis on the protective measures in the Domestic Violence Act as set out in the *van Rijn v van Rijn* and *TLL v PS* cases (that is, the solicitor’s certificate and the 42-day rule). Perhaps most importantly, he does not analyse the New Zealand Bill of Rights Act 1990 in terms of sections 4, 5 and 6.<sup>169</sup> He asserts section 27 as if the Bill of Rights Act were supreme law rather than a guide to statutory interpretation, as it clearly is from sections 4 and 6.<sup>170</sup>

Even if one were to concede that section 4 is not the definitive answer and that this is a section 6 Bill of Rights Act case, Judge Inglis fails to carry out what surely must be the necessary next step in his reasoning, the section 5 Bill of Rights Act inquiry.

### ***Natural Justice Principles for Applicants***

Does the process for considering without notice applications, which must be the most potentially dangerous type of application which comes before the Family Court, accord with the principles of natural justice for applicants? We acknowledge that the process may initially be “speedy”,<sup>171</sup> but does it provide “an effective legal remedy for victims” as required by section 5(1)(b) of the Domestic Violence Act 1995? Indeed, what types of case are accorded court time during the Family Court day? What makes them more important than these without notice protection order applications?

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<sup>168</sup> As discussed above, s. 5(3) of the Domestic Violence Act 1995 states, “Any Court which, or any person who, exercises any power conferred by or under this Act must be guided in the exercise of that power by the object specified in subsection (1) of this section”, to wit: “(a) Recognizing that domestic violence, in all its forms, is unacceptable behaviour; and (b) Ensuring that, where domestic violence occurs, there is effective legal protection for its victims.”

<sup>169</sup> This is also true of Judge Boshier in his speeches and Justice Priestley in *D v D*.

<sup>170</sup> Section 4 of the New Zealand Bill of Rights Act 1990 states: “Other enactments not affected ... No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.” Section 6 states: “Interpretation consistent with Bill of Rights to be preferred ... Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.” Section 5 states: “Justified limitations ... Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

<sup>171</sup> Section 5 of the Domestic Violence Act 1995 states: “(2) This Act aims to achieve its object by—... (b) Ensuring that access to the Court is as speedy, inexpensive, and simple as is consistent with justice.”

In our previous research, we stated that in domestic violence–related proceedings, clear and unambiguous messages of domestic violence must be given to both the applicant and the respondent.<sup>172</sup> Otherwise, we stated, the court at least tacitly colludes in the abuser’s violence. From this perspective, what message does a victim of domestic violence (or her legal representative) get when applications for without notice protection orders are dealt with in this summary manner? Who benefits from this way of dealing with section 13 applications? Finally, given that utilising this “tea-time” approach impacts disproportionately on women, does not the process and the lack of judicial commentary on its natural justice implications cause real concerns about the gender neutrality of the Family Court, especially since male partners or ex-partners account for half the homicides of women this country?<sup>173</sup>

### *D v D*

If *W v W* sets out a more stringent test for granting temporary orders under section 13 of the Domestic Violence Act 1995, Justice Priestley appears to provide High Court legitimisation for this approach in *D v D*, an appeal by an applicant against the refusal of a Family Court judge to grant her a without notice protection order. *D v D*, furthermore, specifically deals with the issue of whether a Family Court judge must give reasons for his or her judgment when placing an application for a without notice protection order on notice. These issues feature in our case studies; for example, when four of our women’s applications were put on notice, one withdrew her application (Lee-Mei), and there were no judicial reasons given for why Halle and Amira had their temporary protection order applications put on notice.

*D v D* also allows us to reflect on the decision making utilised in determining whether a temporary protection order will be made, declined or put on notice. In *D v D*, the appellant filed her application for a without notice protection order on 10 July 2004. Although she filed her application in Hamilton, Justice Priestly states “the papers [her application and three affidavits in support] were examined by Geoghegan DCJ, who was sitting in Rotorua.”

Judge Priestley, in *D v D*, upheld the Family Court judgment in which the judge gave no reasons for denying the application. He states at paragraph 29 of his judgment:

I am of the view that it would be unreasonable to expect Family Court Judges and in particular duty Judges, whom this Court is aware are sometimes required to deal with twenty or thirty urgent ex parte domestic violence applications each day, faxed to the relevant Court from all parts of the country, to give reasons as to why they have either made or declined to make the ex parte orders sought.

If orders were made, it is a fair inference that the Judge has decided on the basis of the papers before the Court, that the statutory criteria have been made out, and in particular that s 13 is applicable. Conversely, in a situation where, as here, the Court directs that the application is to be heard on notice, it is, in my judgment, a fair inference that the Judge has determined that s 13 is inapplicable and that the threshold for proceeding ex parte has not been made out.

Is that what natural justice is for applicants under section 13(1) of the Domestic Violence Act 1995, that an appellate court judge can “infer ... that the threshold for proceeding ex parte has not been made out”? In the face of differing tests for the granting of a without notice protection order, and despite one test being much more stringent than the other?

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<sup>172</sup> Busch, R., Robertson, N. R., & Lapsley, H. (1992). *Protection from family violence: A study of breaches of protection orders*. Wellington: Victims Task Force.

<sup>173</sup> Ministry of Women’s Affairs. (2002). *The status of women in New Zealand 2002: The fifth report on New Zealand’s progress on implementing the United Nations Convention on the Elimination of All Forms of Discrimination against Women*. Wellington: Ministry of Women’s Affairs, at p. 138.

In *D v D*, the Family Court judge had set a review date of 31 July for the now on notice application, three weeks away. Counsel for the appellant, however, pointed out on appeal that the 31 July hearing date is not a substantive hearing but just a first call; the substantive hearing would be as far away as another six to eight weeks. Indeed, by 2006, all of our legal key informants stated that this period of time has increased in some areas of the country to up to three months.

In a rather catch-22 depiction of the legal issue in *D v D*, Justice Priestley states:<sup>174</sup>

I also note that section 13 gives to a Family Court Judge a discretion. Therefore, effectively, I am being asked to overrule a decision made by Geoghegan DCJ in his discretion. The test for overruling the exercise of a discretion by a Judge has been thus formulated in *May v May* (1982) 1 NZFLR 165, 170 (CA):

An appellant must show that the judge acted on a wrong principle, or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that he was plain wrong.

Needless to say, the appellant in *D v D* cannot meet this test. She cannot show that Geoghegan DCJ acted on a wrong principle or that he failed to take into account some relevant matter (or vice versa). She cannot “show” anything about the judge’s reasoning precisely because he has given no reasons.

Judge Priestly concludes his decision in *D v D* by appearing to favour Judge Inglis’s more stringent test in *W v W* over the decision by Judge MacCormick in *van Rijn v van Rijn*. Justice Priestley finds:<sup>175</sup>

I decline to make definitive comments on the proper interpretation to be given to section 13(1) and the jurisdiction to make protection orders on an ex parte basis under the Act because I have not had the benefit of any submissions in opposition to the competent submissions by Mr. Hudson. However, there is a clear line of authority over the past decade ... of High Court decisions which caution the Family Court against granting ex parte relief too readily. The policy reason behind such caution must clearly be that rights are affected. With regard to the Domestic Violence Act, the interface between that statute and s16B of the Guardianship Act [now section 61 of the Care of Children Act 2004] can have the effect of fragmenting family relationships and importantly, severing for several weeks a relationship between a father and his children.

The policy of the Domestic Violence Act and in particular the section 5 objects mean that protection must remain centre stage. Although Mr. Hudson is correct that one should not necessarily adopt different standards or criteria when dealing with psychological abuse as opposed to physical abuse, none the less the need for protection in an urgent situation, and in particular where a risk of harm may be involved is glaringly obvious where physical violence or sexual violence are being threatened. In making that comment, I am not in any way minimising the insidious long-term harm which can flow from psychological violence.

The learned Family Court Judge, on the papers before him, was faced with a situation where there was no claim of physical violence or indeed a threat of physical violence. The papers disclosed a clear pattern of verbal abuse, belittling and harassment which have clearly taken their toll on the appellant and the elder child. The application was filed not as a result of any recent violence or psychological abuse, but instead as a result of the appellant’s (which might in part be justified) that psychological abuse would be renewed once the respondent learned that she had decided that the marriage was at an end. This perception on her part falls clearly inside the realm of violence which is “purely speculative” (see *W v W* FC, New Plymouth, FP 043/001/01,

<sup>174</sup> *D v D* [2004] NZFLR 320 (HC), at paragraph 35.

<sup>175</sup> *Ibid*, paragraphs 36-39.

30 May 2001). There may well be situations where a perceived check of that type requires instant action.

I am not in the least unsympathetic with the appellant's predicament. Her fears are, in part, the product of what appears to have been psychological damage caused to her over the past two or three years as a result of the respondent's alleged behaviour. Her perception is not to be minimised and indeed s.13 (2) (a) specifically enjoins the Court to have regard to her perceptions. Indeed, her perception and the assessment of the appellant's current emotional state contained in both the affidavit of her father and of DMR reinforce the view that the appellant's fears are not subjectively fanciful.

So despite expressly not deciding the correct section 13(1) test to be applied, Justice Priestley's obiter distinguishes between granting protection orders on a without notice basis for psychological violence and physical violence. Moreover, despite the fact that Justice Priestley finds that the respondent has used "a clear pattern of verbal abuse belittling, and harassment which have clearly taken their toll on the appellant and the elder child"<sup>176</sup>, Justice Priestley states that the abuse that the appellant fears "falls clearly within the realm of violence that is purely speculative."<sup>177</sup> It is important to reiterate that section 13(2) mandates that judges look at the appellant's perception of the nature and seriousness of the violence used and its impact on her and her children when deciding whether to make a temporary protection order.

Is this risk of harm "speculative"? The appellant and at least the eldest child have already suffered psychological damage as result of the husband's "clear pattern" of psychological abuse. Given her past experiences with her estranged husband, isn't the wife "the expert" on what is likely to happen when her husband is told that the separation is permanent? In terms of a "risk of harm", isn't Justice Priestley admitting there is a possibility of further psychological harm (as a minimum) when he states that her fears – backed up by her father's and her friend's affidavits – are not "subjectively fanciful".<sup>178</sup> Why has Justice Priestley not discussed section 3(4) of the Domestic Violence Act 1995 which states "a number of acts that form part of a pattern of behaviour may amount to abuse, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial." Or section 3(5), which states that "Behaviour may be psychological abuse ... which does not involve actual or threatened physical or sexual abuse."<sup>179</sup>

Section 13(1) specifically allows for without notice orders to be given on the basis of psychological abuse. For example, in *A v B*,<sup>180</sup> Justice Hammond granted a without notice protection order despite the fact that only psychological abuse had been alleged by the applicant. Indeed, Justice Hammond found that the psychological abuse of the applicant had not been intended by the respondent but had occurred as a result of his behaviour. As opposed to the *D v D* decision, Justice Hammond recognised that the Domestic Violence Act was "remedial legislation" which called for a "wide, large, and expansive" interpretation of the Act to allow for protection for victims.<sup>181</sup>

Instead of focusing on the section 5 objects of the Domestic Violence Act, *D v D* appears to represent a very narrow reading of the Domestic Violence Act based on judicial concern that if a

<sup>176</sup> Ibid, paragraph 38.

<sup>177</sup> Ibid, paragraph 38.

<sup>178</sup> Ibid, paragraph 39.

<sup>179</sup> For a very recent study on the impact on women of psychological abuse, see Pico-Alfonso, M., Garcia-Linares, I., Celda-Navarro, N., & Blasco-Ros, C. (2006). The impact of physical, psychological, and sexual intimate male partner violence on women's mental health: Depressive symptoms, posttraumatic stress disorder, state anxiety and suicide. *Journal of Women's Health, 15*(5), 599-611.

<sup>180</sup> *A v B* [1998] NZFLR 783 (HC).

<sup>181</sup> Under s. 5 of the Interpretation Act 1999, this is what is now called a "purposive interpretation".

protection order is granted “the effect can sever for several weeks a relationship between a father and his children.”<sup>182</sup> There is no mention in Justice Priestley’s discussion that psychological violence, especially intimidation and isolation, are primary predictors of future physical violence.<sup>183</sup>

It needs to be underscored that the decision in *D v D* is legitimated in the name of ongoing contact with a father who has, at a minimum, carried on a clear pattern of verbal abuse, belittling and harassment over a period of two or more years, which has resulted in psychological damage to the mother and the eldest child. In contrast, section 15 of the Domestic Violence Act 1995 states:

A Court must not decline to make a protection order merely because of the existence of other proceedings (including, but not limited to, proceedings relating to the role of providing day-to-day care for, or contact with, or custody of, a minor) between or relating to the parties, whether or not those proceedings also relate to any other person.

Our key informants confirm that section 15 of the Domestic Violence Act 1995 is not being followed. Repeatedly, we were told by our key informants that “contact with an abuser trumps safety”, and, with respect, this is clearly what this aspect of the *D v D* case represents.<sup>184</sup> What is surprising is that if the appellant’s allegations of prior psychological abuse are true (and Justice Priestley appears to accept they are), why is not safety from future psychological abuse (or worse) to the wife and the children the central concern of the court when exercising its discretion whether or not to grant a without notice protection order? Must the wife and children be abused again before the court will grant a protection order on the basis of psychological violence? One thing for certain, however: it will take Mrs D three months or more for her protection order application (now on notice) to be heard substantively before the court and during that time she and her children will have no effective legal protection from Mr D’s abuse, whether psychological or physical.

Unfortunately, despite its weaknesses, *D v D* seems to have been influential. For example, in a speech marking ten years since the implementation of the Domestic Violence Act 1995, Judge Boshier cited it in explaining the court’s (then) new practice of “grant[ing] fewer without notice applications.”<sup>185</sup> We provide further analysis of this speech later in this chapter.

### *Ritchie v Department of Courts and TLL v PS*

*D v D* needs to be contrasted with *Ritchie v Department of Courts*<sup>186</sup> and *TLL v PS*.<sup>187</sup> As Wendy Davis has stated, the *Ritchie* case “suggests that some Family Court Judges may be imposing far

<sup>182</sup> *D v D* [2004] NZFLR 320 (HC), at paragraph 36. Interestingly, we cannot find a single study which points to children being harmed by the short-term absence of a father. This is hardly surprising, many fathers are absent from their children’s lives for short periods as they go away on business, sporting trips or temporary work assignments.

<sup>183</sup> See, for example, Bennett, L., Goodman, L. A., & Dutton, M. A. (2000). Risk assessment among batterers arrested for domestic assault: The salience of psychological abuse. *Violence against Women*, 6(11), 1190-1203.

<sup>184</sup> Of course, contact and safety are not necessarily irreconcilable. From the evaluation of child access under the domestic violence legislation, it would seem that over half of day-to-day caregivers make some type of contact arrangements within three months of the time that a protection order is granted. Mr and Mrs D may, therefore, have been able to work out parenting and contact arrangements with a protection order in place. (Chetwin, A., Knaggs, P., and Young, P. T. W. A. (1999). *The domestic violence legislation and child access in New Zealand*. Wellington: Ministry of Justice.)

<sup>185</sup> Boshier, P. (2006). *The Domestic Violence Act ten years on*. Speech at Te Unga Waka Marae, Epsom, 27 March. Retrieved 12 June 2006 from <http://www.justice.govt.nz/family/media/domestic-violence-act-ten-years-on-march-2006.html>, at p. 6.

<sup>186</sup> *Ritchie v Department of Courts* [2004] NZFLR 1072 (HC).

too high a threshold for without notice protection orders.”<sup>188</sup> In *Ritchie*, Justice Laurenson quashed the decision of a Family Court judge who had put the applicant’s without notice protection order on notice. Justice Laurenson referred to the applicant’s allegations of physical, sexual and psychological violence and commented:<sup>189</sup>

Based on the material placed before me, I concluded that I did not see how one could reasonably conclude that the behaviour relied on by the applicant could not be said to be behaviour which would, or might, entail a risk of harm or undue hardship.

As seen in Chapter 8, Justice Laurenson’s statement is virtually the same as the ones that Halle’s and Lee-Mei’s lawyers made when their applications for a temporary notice was put on notice.

Justice Laurenson also highlights the way in which without notice protection orders are made.<sup>190</sup>

The decision under review was made by an experienced and respected Family Court Judge in Chambers, when he was considering some twenty similar applications.

But, in contrast to Justice Priestly’s analysis of the section 13(1) test, Justice Laurenson comments:<sup>191</sup>

Interpreting the word “delay”, I do so on the basis that this is not simply a temporal consideration, but that it must also include anything that goes with the delay and the consequences of that. In my view, if the delay carries with it the requirement to serve notice of the proceedings on the respondent, that is an element of the delay which would, or might, entail a risk of harm or undue hardship.

If *D v D* involved a Family Court not giving reasons for its decision for refusing the applicant a without notice protection order, *TLL v PS* highlights the opposite issue. In *TLL*, the Family Court judge had not given reasons for her decision to make a without notice protection order on behalf of the applicant. As opposed to not giving reasons when turning down an application for a temporary order, the *TLL* case involved the failure of the Family Court judge to give reasons when a without notice protection order had been granted. The distinction is an important one, as will be demonstrated.

Justice Lang in *TLL* cites the “practical reasons” why reasons cannot always be given in respect of section 13(1) applications. He comments:<sup>192</sup>

We acknowledge also that a blanket requirement to give reasons in every case would necessarily impose a considerable burden on the Judges of the Family Court. It is reasonable to assume that the workload created by applications brought under the Act is considerable. In her submissions, Ms Davis observed that in the twelve month period prior to 19 August 2005, the Family Court had received more than 4,500 applications under the Act. Of these, it is likely that a reasonable proportion were applications made without notice. If this figure is correct, it demonstrates that the Judges of the Family Court must spend a significant proportion of their time dealing with such applications. Any requirement that reasons be given in all cases would obviously have a significant impact on the workload of that Court.

Citing *Lewis v Wilson & Horton Ltd*,<sup>193</sup> however, Justice Lang comments on the value for giving reasons, even in ex parte proceedings:<sup>194</sup>

<sup>187</sup> *TLL v PS [Protection orders]* [2006] NZFLR 897 (HC).

<sup>188</sup> Davis, W. (2004). Gender bias, fathers’ rights, domestic violence and the Family Court. *Butterworths Family Law Journal*, 4(12), 299-312.

<sup>189</sup> *Ritchie v Department of Courts* [2004] NZFLR 1072 (HC), at paragraph 15.

<sup>190</sup> *Ibid*, at paragraph 16.

<sup>191</sup> *Ibid*, at paragraph 16.

<sup>192</sup> *TLL v PS [Protection orders]* [2006] NZFLR 897 (HC), at paragraph 75.

As a matter of general principle, it is obviously desirable that reasons be given to explain any judicial decision that significantly affects the right of any party. In particular, we agree that a requirement that reasons be given serves the public interests. It maintains judicial accountability, it enables the decision to be properly understood by any appellate or supervisory jurisdiction and it provides discipline for the judge making the decision.

Justice Lang, furthermore, distinguishes the effects that providing no reasons under section 13(1) has on respondents and applicants respectively, and reminds us that if an application is put on notice, the applicant is “the losing party”. He also underscores that if a without notice protection order is made, the respondent will be able to ascertain why that order has been granted by reading the documents served on him along with the order. However, when the temporary protection order application is put on notice, the applicant for such an order has no way of ascertaining why her temporary protection order has not been granted. As Justice Lang describes it:<sup>195</sup>

As the present case demonstrates, it will also generally be clear to the affected party why a temporary protection order was made. The evidence adduced in support of the application must demonstrate that there is a risk of harm to the applicant and that risk must be sufficiently likely or immediate to warrant the order being made without notice.

In the present case, the nature of the risk was established by the evidence relating to the previous violence and threats of violence directed by Mr L towards Ms S and the children of the marriage. The immediacy or likelihood of future harm or hardship to them was demonstrated by the fact that they had to leave home, and that Mr L was out looking for them at the time that the application was made. We are of the view that, once he read the affidavit filed in support of the application, any reasonable person in Mr L’s position would have had no difficulty in understanding why the orders were made.

Justice Lang then goes on to discuss the safeguards built into the Domestic Violence Act 1995 to protect respondents’ natural justice rights. And while acknowledging Justice Priestley’s ratio (that is, that Family Court judges are not required to provide reasons when determining without notice applications made under the Domestic Violence Act), Justice Lang comments pointedly at the end of his judgment:<sup>196</sup>

In particular, it may sometimes be desirable for brief reasons to be given when an application for a temporary protection order is declined. In those circumstances, the applicant is effectively the losing party and will wish to know the reason why the application was not granted. It will often be obvious from the papers why an application has been granted. It may not, however, be so obvious why it is declined. Had that been done in *D v D*, the applicant may not have felt the need to lodge an appeal.

It should not be surprising to find out that when women’s applications for without notice protection orders are put on notice, almost half the applicants just walk away from the courts.<sup>197</sup> It is just too scary to wait for three or more months for the application to be dealt with. In our four case studies where applications were put on notice (Halle, Sripai, Lee-Mei and Amy), Lee-

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<sup>193</sup> *Lewis v Wilson & Horton Ltd* [2002] 3 NZFLR 546 (CA), at pp. 566-567.

<sup>194</sup> *TLL v PS [Protection orders]* [2006] NZFLR 897 (HC), at paragraph 22.

<sup>195</sup> *Ibid*, at paragraph 41.

<sup>196</sup> *Ibid*, at paragraph 66.

<sup>197</sup> See Figure A3 in Appendix 1. For the period sampled (1 October 2003 to 31 March 2004), 47% of applications put on notice were withdrawn.



Mei did not continue with her application once it was put on notice. Of the original four, only Halle obtained a permanent protection order.

### **Recent Judicial Discourses**

As explained above, Judge Boshier, in his tenth anniversary of the Domestic Violence Act 1995 speech, noted that “The Court grants fewer without notice applications.”<sup>198</sup> An analysis of that speech indicates that Judge Boshier still sees the natural justice debate as a live issue. For example, he stated:

There is a philosophical clash between the views of those who want the Family Court to grant more protection orders without notice, and those who think the Court is already far too liberal in this regard. Orders made without notice may appeal to those who consider the rights of the applicant to be paramount but such orders are contrary to basic rights of due process, and can have a significant impact upon the care arrangements of children. The High Court has given clear guidance that without notice orders are to be granted with caution. As Priestley J said in *D v D*:<sup>199</sup>

There is a clear line of authority from the past decade of High Court decisions which caution the Family Court against granting ex parte [without notice] relief too readily. The policy reason behind such caution must clearly be that rights are affected.

It appears that some judges have denied women without notice protection orders when the Domestic Violence Act 1995 clearly states that temporary protection orders are available for psychological abuse. As early as the Domestic Violence Act process evaluation in 2000,<sup>200</sup> Helena Barwick and her colleagues pointed out that “applicants who suffer psychological abuse may be disadvantaged by the [judicial] tendency to place applications on notice where there is no physical abuse.” Judges interviewed by these researchers gave several reasons for putting such orders on notice, including psychological abuse or where the parties were living apart. One judge interviewed stated:<sup>201</sup>

Unless there is a serious risk of injury then really there is no reason why an application can't be dealt with “on notice”, given a hearing date promptly and give the respondent a chance to be heard.

From this comment, we can see that despite the enactment of the Domestic Violence Act 1995, some judges are using the test for ex parte protection orders which existed under the Domestic Protection Act 1982. That Act had required a “serious risk of injury”. We might have expected that the lowering of the section 13 test to “risk of harm” would have resulted in a less onerous test being utilised for granting temporary protection orders than under the prior legislation, especially in the light of the parliamentary history of the Domestic Violence Act and the section 5 objects clause.

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<sup>198</sup> Boshier, P. (2006). *The Domestic Violence Act ten years on*. Speech at Te Unga Waka Marae, Epsom, 27 March. Retrieved 12 June 2006 from <http://www.justice.govt.nz/family/media/domestic-violence-act-ten-years-on-march-2006.html>, at p. 6.

<sup>199</sup> *D v D* [2004] NZFLR 320. At paragraph 36, just prior to the quotation cited by Judge Boshier, Justice Priestley states: “I decline to make definitive comments on the proper interpretation to be given to s 13(1) and the jurisdiction to make protection orders on an ex parte basis under the Act because I have not had the benefit of any submissions in opposition to the competent submissions made to me by Mr Hudson.” Therefore, *D v D* is cited for more than its dicta actually stands for. As well, as we have seen, ex parte applications under the Domestic Violence Act have more stringent requirements for dealing with natural justice concerns than other statutes which allow for ex parte orders to be made.

<sup>200</sup> Barwick, H., Gray, A., & Macky, R. (2002). *Domestic Violence Act 1995: Process evaluation*. Wellington: Ministry of Justice.

<sup>201</sup> *Ibid*, at p. 56.

In his tenth anniversary speech, Judge Boshier stated:<sup>202</sup>

There is not one definition of what violence is, nor how it should be dealt with. The judges have offered varying perspectives. For example, Judge Adams has outlined the broad categories of violence as they are viewed in the Family Violence Courts, which I will mention briefly below. Judge J Doogue has discussed the different way violence is manifested and the effect on a child's relationship with a non-custodial parent. The approach of assessing the various characteristics of the violence involved can be seen in the decision of Judge Murfitt, cited above, in considering how the applicant is affected. The Judge said:

I agree with the observations of Judge Walsh to the effect that, in assessing whether an order is necessary, relevant circumstances might include the remoteness or proximity of the violence, whether the violence was a single event or part of a pattern of conduct, whether it occurred as a symptom of the breakdown of the relationship, the character of the applicant and the effect on the applicant of the violence, the applicant's perspective of the violence, and whether any other protective measures (such as undertakings, trespass notices or jail terms) or changes in circumstances (such as relocation of either party).

How does this statement accord with the objects of the Domestic Violence Act 1995? First, do Family Court judges really see undertakings and/or trespass notices as "protective measures"? Undertakings do not and cannot provide effective legal protection (one of the section 5 objects). In fact, they give an illusion of protection which is perhaps more dangerous than not having a protection order at all. (See recommendation 23.) For example, police cannot arrest for a breach of an undertaking. As well, breaching an undertaking carries no criminal penalty and proceedings for a breach must be commenced by the applicant herself. These criticisms have also been canvassed by Barwick and her colleagues.<sup>203</sup>

Furthermore, it is quite worrisome if the analysis of domestic violence has regressed to pre-Domestic Violence Act days and we are again seeing domestic violence as a "symptom of the breakdown of the relationship".<sup>204</sup> As we said in our research in 1992, domestic violence is a real problem in and of itself, not a "symptom" of another, more significant, relationship problem. Such an approach is another example of the trivialisation that can occur when typologies of batterers minimising violence at the time of separation are utilised. It is problematic that there are Family Court judges who believe that without notice protection orders should not be made in these circumstances.

Judge Boshier acknowledged the real possibility of retaliation during the period between the filing of a without notice application and the time that a put-on-notice application will actually be

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<sup>202</sup> Boshier, P. (2006). *The Domestic Violence Act ten years on*. Speech at Te Unga Waka Marae, Epsom, 27 March. Retrieved 12 June 2006 from <http://www.justice.govt.nz/family/media/domestic-violence-act-ten-years-on-march-2006.html>, at p. 10.

<sup>203</sup> Barwick, H., Gray, A., & Macky, R. (2002). *Domestic Violence Act 1995: Process evaluation*. Wellington: Ministry of Justice, at p. 79.

<sup>204</sup> In our subsequent chapter on the criminal courts, we will see that relationship counselling is often the outcome of a perpetrator being charged with a criminal offence and appearing in the Waitakere and Manukau Domestic Violence Courts. As well, we have been told by various legal key informants that both parties in parenting order proceedings are now being sent for relationship counselling, even when there has been violence in their relationships. If true, this would be a significant retrenchment from what was the typical practice when the Domestic Violence Act 1995 was first enacted. Then judges did not often send parties to relationship counselling if the respondent had used violence against the applicant or a child of the family, had caused bodily harm to either of them or had threatened to do so.

heard.<sup>205</sup> It is surprising, therefore, that he, like Judge Inglis in *W v W*, has not discussed the section 5 New Zealand Bill of Rights Act 1990 “reasonable limitations” inquiry. This is problematic, given recent research which concludes that an attempt to leave a violent partner, with children, is one of the most significant factors associated with severe domestic violence and death.<sup>206</sup> It also belies the findings of American and Canadian domestic violence fatality reviews that have consistently shown separation as the period of highest risk for women and child victims of domestic violence.<sup>207</sup> Finally, there appears to be no consideration given to the fact that domestic violence itself represents some or all of the following violations of a victim’s fundamental human rights under the New Zealand Bill of Rights Act 1990: deprivation of life, torture, cruelty, degrading treatment, arbitrary detention, as well as the denial of the freedom of association and freedom of expression.<sup>208</sup>

In his tenth anniversary speech, Judge Boshier described the “balance” that he thinks must be achieved between protecting respondents’ section 27(1) rights<sup>209</sup> and protecting the rights of battered victims. Given that 91% of applicants for without notice protection orders are women, any such “balancing” has implications for gender equity, especially if it privileges respondents’ rights to natural justice over applicants’ rights to safety and autonomy. As Judge Boshier comments:<sup>210</sup>

We do work differently as a result of the legislation and the social awareness that produced it. But we must still try to preserve the processes that are fundamental to justice; to establish the facts and to allow all parties the right or opportunity to respond where possible to decisions that would affect them. So our concern to protect the victims of violence has not been at the expense of ensuring that the Court adheres to fundamental principles of justice. We have had to try to balance those concerns. The need to act with appropriate urgency and yet uphold fairness has produced a trade-off, as we have moved to favour with notice applications that are acted on more quickly and with stronger evidential requirements

Where were the voices of battered women in “the social awareness” that produced this new “trade-off”? Given that our key informants state that it takes up to three months or more for protection order applications that are put on notice to be heard, one can only wonder whether the Family Court is actually “acting with appropriate urgency”. Or in the words of the objects of the Domestic Violence Act 1995: does this trade-off provide “speedy” and “effective legal protection” for battered women? Who benefits from this judicially adopted approach?

One of our key informants gave us a chilling example of the balance or trade-off in action. He told us about a presentation he had recently made to a judicial training session on a recent

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<sup>205</sup> Boshier, P. (2006). *The Domestic Violence Act ten years on*. Speech at Te Unga Waka Marae, Epsom, 27 March. Retrieved 12 June 2006 from <http://www.justice.govt.nz/family/media/domestic-violence-act-ten-years-on-march-2006.html>, at p. 6

<sup>206</sup> See, for example, Websdale, N., Sheeran, M., & Johnson, B. (2005). *Reviewing domestic violence fatalities: Summarizing national developments, 1998-2004*. Minneapolis: Minnesota Center against Violence and Abuse. Retrieved from <http://www.mincava.umn.edu>.

<sup>207</sup> See, for example, *ibid.* See also Domestic Violence Death Review Committee. (2006). *Annual report to the Chief Coroner 2005*. Ontario: Office of the Chief Coroner.

<sup>208</sup> New Zealand Bill of Rights Act 1990, ss. 8, 9, 14 and 17.

<sup>209</sup> New Zealand Bill of Rights Act 1990, s. 27(1), states: “Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights, obligations, or interests protected or recognised by law.”

<sup>210</sup> Boshier, P. (2006). *The Domestic Violence Act ten years on*. Speech at Te Unga Waka Marae, Epsom, 27 March. Retrieved 12 June 2006 from <http://www.justice.govt.nz/family/media/domestic-violence-act-ten-years-on-march-2006.html>, at p. 14.

homicide in the South Island. The woman was killed within a few days of her application for a without notice protection order being put on notice by the Family Court. Our informant described the numerous “red flags” indicating the applicant’s high risk for homicide by her estranged partner (for example, recent separation, previous history of domestic violence, the partner’s suicide threats, and a recent escalation in violence including strangulation), but she was unable to meet the Family Court judge’s test for a protection order without notice.

This homicide case underscores recent comments made by Lord Justice Nicholas Wall about annual “refresher” multidisciplinary domestic violence training for judges. Strangulation has only recently been recognised as a significant factor in lethality risk assessment. Judges untrained in this area in the last three years would not understand the significance of that act within the context of prior or ongoing domestic violence, especially when coupled with threats of suicide.

That the threshold for granting protection orders without notice has been raised seems incontrovertible. Our analysis of key decisions in the Family Court and Court of Appeal supports this conclusion. It is confirmed by the speech of the Principal Family Court Judge discussed above. The change was signalled by the high proportion of without notice applications put on notice during the period 2001 to 2003 (see Figure A2 in Appendix 1) which implicitly discouraged without notice applications. That discouragement was made explicit in the Continuing Legal Education seminar on the role of lawyers in relation to protection orders run in 2004.<sup>211</sup> One of our key informants reflected on the change in judicial decision making, and told us:

To top it off, the [Law Society] then ran a road show [the seminar] telling everyone not to apply for applications without notice – and that’s exactly what has happened.

In our opinion, the impact of this current approach undermines the objects of the Domestic Violence Act 1995. The law has been effectively changed *de jure*, without public debate or parliamentary scrutiny.

### **Compliance with Natural Justice Principles: Final Protection Orders**

The stringent approach to granting without notice protection orders has been carried forward by some Family Court judges when deciding whether or not to grant a final protection order or whether to discharge an interim one. For example, in Claire’s case, the judge who discharged her final protection order appended a copy of *W v W*<sup>212</sup> to her written reasons. Remarkably, certain judges’ apparent disagreement with the provisions of section 60 of the Care of Children Act,<sup>213</sup> has led them to read these concerns down into their decisions about granting final orders. As discussed in Chapters 10 and 11, the desire to maintain ongoing contact between the father and the child seems to “trump” the court’s concern about the applicant’s need for a protection order. We question this approach given the plain meaning of section 15 of the Domestic Violence Act 1995 discussed above.

The case of *W v M*<sup>214</sup> is a recent example which very clearly demonstrates our concerns. In *W v M*, the estranged husband (Mr W) applied for a discharge of his wife’s final protection order and a warrant to enforce his right to access to one of his daughters. Ms M had first obtained a temporary protection order and then a final one, the latter made after Mr W had repeatedly

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<sup>211</sup> See particularly the paper in the seminar materials by Alex Ashmore which refers to the “the new hesitancy” in stating that “Orders are clearly harder to get.” (Ashmore, A. (2007). Theoretical underpinnings of the Domestic Violence Act. In A. Ashmore & E. Smith (Eds.), *The role of the lawyer in protection orders in the Family Court* (Seminar materials). Wellington: New Zealand Law Society, Continuing Legal Education, at p.11.)

<sup>212</sup> *W v W* (Family Court, New Plymouth, FP043/001/01, 30 May 2001, Judge Inglis).

<sup>213</sup> Previously, s. 16B of the Guardianship Act 1968.

<sup>214</sup> *W v M* [2004] NZFLR 1057.

breached her temporary protection order. The parties had four children together. In support of her final protection order application, the wife (Ms M) had commented that she was:<sup>215</sup>

... constantly subjected to Mr. W's demands, put downs and abuse over a period of 18 years. She stated that she had come to fear the applicant. She also alleged at least 3 incidents of physical abuse involving shaking and a blow to her head. She further maintained that Mr. W's attitudes and behaviour and controlling nature had a severe psychological impact on her.

Mr W denied that he used physical abuse against his wife. However, the judge noted that Mr W has been convicted of an unreported number of breaches of his wife's protection order. In a somewhat problematic comment, judge MacCormick appears to blame the wife for these breach prosecutions. He stated:<sup>216</sup>

Incidents occurred, relative to what may well in some cases have been chance meetings, which upset Ms. M. Mr. W was prosecuted for breaches of the protection order, which I presume was at the instigation of Ms. M. Possibly the most significant alleged breach was one on 28 April 2001. That was one prior to the making of the temporary protection order final. It is referred to in the judgment of Judge Brown of 18 July 2001 and was possibly the critical factor in his decision to make the temporary order final.

What does "instigation" mean in this context? There is an inference that Ms M has used the law to limit Mr W's rights. The judge's empathy for Mr W seems to permeate the entire judgment. Moreover, the concern that the judge has for the applicant husband seems to blind him to the husband's ongoing use of psychological and physical abuse against the wife. For instance, Judge MacCormick comments:<sup>217</sup>

Ms. M was considering separation. But while she may have communicated this to Mr. W, this does not appear to have been in clear and unequivocal terms which were acknowledged by him. ... the end result was that although Ms. M had prepared herself for the separation, Mr W was taken almost completely by surprise and still had to adjust to Ms. M's decision after a 17 or 18 year relationship and 15 years of marriage. The relationship broke down almost immediately. Ms. M moved out and sought a temporary protection order.

The interpretation of "almost completely by surprise" is purely Mr W's perspective. Note how the judge interprets this scenario as fitting into Johnston's "separation-engendered violence" category, even though Ms M has stated that Mr W's controlling behaviour manifested itself for the entire relationship. This point coincides with an issue raised by many of our key informants; that is, some Family Court judges appear to disregard repeated instances of psychological violence and only focus on "severe physical violence", despite the express provisions of the Domestic Violence Act 1995, thereby narrowing the scope of the Act enormously.

The judge continues in his concern for Mr W:<sup>218</sup>

One of the problems was that even the temporary protection order limited Mr. W's ability to contact his children because both a temporary protection order and a final protection order apply for the benefit of the children automatically, whether or not there has been any physical violence to them. This meant that until Mr. W could get a custody order or an access order, then his contact with the children was solely in the control of Ms. M. When domestic violence is alleged which includes allegations of physical violence, then the Court must, before ordering any unsupervised access or

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<sup>215</sup> Ibid, at paragraph 5.

<sup>216</sup> Ibid, at paragraph 8

<sup>217</sup> Ibid, at paragraph 5.

<sup>218</sup> Ibid, at paragraph 7.

custody, determine whether or not the children will be safe in the unsupervised care of their father.

The court does not mention that the Domestic Violence Act 1995 expressly states that it is an act of psychological abuse against children for a person to be violent (physically, sexually or psychologically) to anyone with whom the child has a domestic relationship. The provision accords with the overwhelming majority of research findings about the negative effects on children of witnessing violence.<sup>219</sup> Instead, the court contends, with no supporting research or citations, that a short lapse of contact with an abusive parent is a significant detriment to the welfare and best interests of children.

In her affidavit, Ms M describes a traumatic incident which resulted in Mr W being convicted of two breaches of a protection order and also male assaults female.<sup>220</sup>

[Mr. W] approached L [one of his children] in [a shopping mall], lifted him in his arms and went to walk off with him. I went up to the applicant and asked him to put L down. L was very afraid. The applicant refused to put L down. He then shouted at me and blamed me for ruining his family. He became very abusive. I tried to get him to release L. The applicant then elbowed me in the throat and pushed me whilst he ran off with L. Members of the public intervened, stopping the applicant taking L, and they phoned the police. L was very frightened by this incident and didn't want to see his father for some time. Subsequently on 10 January, after a defended hearing, Mr. W was convicted of two breaches of the protection order and one charge of male assaults female. Annexed and marked C is a copy of a letter from the police.

In the same affidavit, she repeats that:<sup>221</sup>

I have no doubt that the existence of the protection order recently has prevented the applicant from contacting me. I am scared he will be violent towards me if there is not a protection order in place, or he will continue to badger me with correspondence, approach any future places of employment I may have [as he did about her being the soccer coach] or he will confront me publicly at any opportunity ... I have dealt with the issue in Hamilton by simply not going to public places where I am likely to run into him.

Despite the wife's concerns and another incident involving their teenage daughter M that resulted in the police attending at Mr W's house, the court seems to regard both parties as equally culpable for the volume of court proceedings between them. The judge states:<sup>222</sup>

It is clear from the above background that there has been a significant amount of litigation and dispute between the parties which the children have inevitably been involved with. I note that matters between the parties involving Mr. W have come before [three] District Court Judges and [four] Family Court Judges and before one High Court Judge. That represents a very considerable amount of litigation over something less than a 4 year period – costly to the taxpayer as well as emotionally costly to the parties and their children.

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<sup>219</sup> Graham, S. S., & Edleson, J. L. (2001). *Domestic violence in the lives of children*. Washington, DC: American Psychological Association; Ferguson, D. M., & Horwood, L. J. (1998). Exposure to interparental violence in childhood and psychosocial adjustment in young adulthood. *Child abuse and neglect*, 22(5), 339-357; Hurley, D. J., & Jaffe, P. (1990). Children's observations of violence: II. Clinical implications for children's mental health professionals. *Canadian Journal of Psychiatry*, 35(6), 471-476; Holden, G. W., Geffner, R., & Jouriles, E. N. (1998). *Children exposed to marital violence: Theory, research and applied issues*. Washington, DC: American Psychological Association.

<sup>220</sup> *W v M* [2004] NZFLR 1057, at paragraph 11.

<sup>221</sup> *Ibid*, at paragraph 12.

<sup>222</sup> *Ibid*, at paragraph 29.

It is interesting that police prosecutions for breaches of Ms M's protection order are seen as being in the same category as Mr W's appeal of the Family Court decision giving Ms M day-to-day care of the children and also his appeal of the decree of dissolution. Judge MacCormick further comments<sup>223</sup>:

As is evident from the foregoing, nothing has been able to negotiated by consent. During the course of the hearing before me, however, Mr. W withdrew his application for a warrant. If M at her age does not wish to see her father currently (and in all likelihood that is probably the case after the events at the end of the last school term holiday access), Mr. W would be most unwise to endeavour to force the issue currently, given her age. To force access against M's will would involve the use of police or a social worker to uplift her. It would be enormously counter-productive for that to be done against her will. The position needs to be progressed in other ways and Mr. W very wisely, and to his considerable credit, accepted this. Hopefully it is the first step in a more positive direction.

While acknowledging that Mr W's application for a warrant to enforce contact between him and his teenage child M could not be in M's best interests, Judge MacCormick credits Mr W with withdrawing this application. This gesture, moreover, seems to serve as the basis for the judge's decision to discharge Ms M's protection order on the grounds that it is no longer "necessary" for Ms M's protection. In finding this, Judge MacCormick places a restrictive gloss on section 14(5). Where the Act expressly requires the judge to consider the perception of the person who applies for a protection order about the nature and seriousness and effects of the violence on her and her children, Judge MacCormick instead comments that Ms M's perception needs to be evaluated to see "whether it is perceived to be justified on as independent a basis as possible".<sup>224</sup> One can understand that the applicant's perception of the nature, seriousness and effects of the violence are not determinative but what do the additional words "justified on as independent a basis as possible" mean? We would have thought that no more than "a reasonable man" test was required by the Act.

Even though Judge MacCormick finds that the temporary protection order was not obtained by "any significantly false or deliberately misleading evidence", he continues:

I do however consider that it was relatively marginally considered to be necessary given the significant restrictions on liberty, movement and contact with children that a protection order necessarily involves.<sup>225</sup>

How does Judge MacCormick arrive at this conclusion? Is he applying the statute as written or as recently reinterpreted by case law and judicial articles and speeches? After all, the judge has already told us that Mr W has been convicted of several breaches of Ms M's protection order and one of male assaults female; that he has not completed a programme; that he has had at least two upsetting incidents with the children post-separation and that now they don't want to see him. One might have imagined that Judge MacCormick might have discussed the negative effects on the W children of witnessing violence against their mother, no less of their being the direct and intentional targets of Mr W's violence, at least psychologically.

Despite Mr W's repeated breaches of his ex-wife's protection order, Judge MacCormick finds that the protection order is no longer necessary for Ms M's protection. He states:<sup>226</sup>

I do not consider that he poses any physical threat to Ms M or Mr. RW or to the children. In my view, the only issue is one of possible emotional abuse by harassment

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<sup>223</sup> Ibid, at paragraph 33.

<sup>224</sup> Ibid, at paragraph 35. Judge MacCormick is quoting from *Butterworths Family Law Commentary* at paragraph 7.623.

<sup>225</sup> Ibid, at paragraph 36.

<sup>226</sup> Ibid, at paragraph 39.

or other intrusion on the reasonable future life of Ms M and/or Mr. RW. In the present case, and in this present case only, I consider the difficulties that have been experienced by the parties may in fact be lessened – although doubtfully eliminated altogether – by the discharge of the order. The order itself has been a source of annoyance, dispute and frustration, although that is far from the only factor in considering the desirability of discharge. It is simply part of the matrix in this case.

Indeed, Judge MacCormick regards it similarly.

I accept that Ms M considers she still has a continued need for protection and that if the protection order were removed she believes she would continue to be harassed by Mr. W in terms of emails and/or other communications which would be intrusive and would endeavour to be controlling and demanding. I am not satisfied that she is right, but time will tell. That is the challenge for Mr. W.

While mentioning that three out of four of the children no longer have any contact with Mr W (and that that may be because of Mr W's ongoing denigration of Ms M to them), the judge states:<sup>227</sup>

My own perception is that the children would raise an almighty cheer if they knew that the parties were going to cease all Court proceedings, all accusations against the other, all concerns arising out of the past and were to move forward with their own lives, completely independently of the other.

Judge MacCormick quashes the protection order not because he feels that there is no possibility of Mr W continuing to harass and intimidate Ms M. He discharges the order because it would be good for Mr W and maybe that would, in turn, be good for the children and even Ms M. Judge MacCormick states:<sup>228</sup>

I perceive it will be easier for Mr. W to do this if the protection order is discharged. He has had a considerable sense of injustice with regard to it. I suspect he has also had difficulty in leaving matters lie because of his own seeming need for absolute particularity and correctness, which causes him to take issue with this point or that. That seems to have inhibited his ability to see what is happening in the wider perspective and to appreciate the ongoing effects on the children. Ms M and Mr. RW seem to have had a similar difficulty in letting things go. For the children, the parties desperately need to call a truce and both pull back.

Judge MacCormick continues:<sup>229</sup>

Mr. W's particularity apart, he presented well to the Court, without any show of anger or overt indication of vindictiveness. His wish to see Ms M prosecuted for perjury seemed to arise from an almost obsessive need for "correctness" rather than anything else. This has probably always been the irritant for Ms M and is possibly now an irritant to the children, or some of them, also. He seems reluctant to let issues go. S's comments, in Mr. Higgs' report indicate something of a perceived unrelenting and wearying persistence.

Mr. W may also have a tendency to see issues in black and white terms. From my perspective there are many shades of grey between black and white; and a myriad of other wonderful colours besides if one can let go of the search for black and white. Many would consider these sort of comments inappropriate for a legal judgment; but I make them simply in the hopes that there might be something in them that might assist one or both of the parties and consequentially lead to a better future for the children.

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<sup>227</sup> Ibid, at paragraph 43.

<sup>228</sup> Ibid, at paragraph 44.

<sup>229</sup> Ibid, at paragraphs 45-48.



Weighing all the above factors, I do in fact consider that the order should now be discharged. I perceive any usefulness that it may have had to have run its course, relative to the restrictions and the detrimental effects of an order. On balance I no longer consider the order necessary and justified. In this particular case I consider it to have been impeding (at least recently) a return to a situation of greater normality.

That, in my view, needs to be attempted for the sake of the children.

Rather than carrying out the section 5 objects of the Domestic Violence Act 1995, Judge MacCormick's desire is to establish ongoing contact between Mr W and the children, something that Mr W's actions have made problematic. For example, Judge MacCormick states:<sup>230</sup>

I perceive that Mr. W does wish to be a good and constructive father to his children. I consider that to be a sincere and genuine wish, albeit that to restore a relationship with all the children will now be a slow and very difficult process given the point now reached Ms M does however have the legal right to re-apply for a protection order should she consider that to be genuinely and indisputably needed. It would need to be significant harassment by Mr. W, seriously impinging on her right to lead an independent future life.

Again, it needs to be underscored that section 14 of the Domestic Violence Act 1995 does not require that orders can only be granted if they are "indisputably needed", for instance because of "significant harassment ... seriously impinging on [one's] right to lead an independent future life."

Indeed, and this will be explored in more detail in Chapter 11, despite Mr W's violence and his convictions for breaches of Ms M's protection order and male assaults female, Judge MacCormick canvasses whether Ms M has "deliberately alienated" the children. He finds that she has not, "at least not to any significant degree".<sup>231</sup> This is a remarkable feature of this case since even Johnston and Campbell have commented that there is no place for a parental alienation approach when domestic violence has been used by a parent against a parent or a child.<sup>232</sup> But, unfortunately, while he implicitly uses Johnston and Campbell's "separation-engendered violence" typology, Judge MacCormick does not seem to realise that those authors have altered their views about domestic violence and its effects on children.

As if to underscore his own doubts about Mr W's future ability to function in a non-psychologically abusive way, Judge MacCormick states:<sup>233</sup>

I consider it almost beyond comprehension that Mr. W should now want Ms M prosecuted for perjury because she said that she would be obtaining a police report and then failed to obtain it. That is exactly the sort of thing that perpetuates and fuels the conflict. If Ms M intended to obtain the report when she swore her affidavit that is almost certainly what she intended to do. She is entitled to change her mind, as to whether it was worth bothering with or not. Perjury involves a clearer and deliberate intention to mislead. I do not remotely perceive that to be the situation to be here. Likewise, a lie involves, to my way of thinking, a patent and deliberately intentioned truth. ... to mis-recall the past is not necessarily to lie.

Mr. W seems to have been obsessed by the pursuit of absolute correctness at the expense of everything else, including, sadly at the expense of his relationship with some of his children – when that was what he was most wishing to foster and preserve.

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<sup>230</sup> Ibid, at paragraph 56.

<sup>231</sup> Ibid, at paragraph 58.

<sup>232</sup> See discussion of parental alienation syndrome in Chapter 11.

<sup>233</sup> *W v M* [2004] NZFLR 1057, at paragraph 59.

*W v M* prioritises the feelings of a recidivist abuser over the safety of Ms M, her new partner and the children. It leads one to query again, whatever happened to the statutorily mandated approach set out in section 5(3) Domestic Violence Act 1995?

### **Recommendations**

Decisions such as *W v M*, *D v D*, *W v W*, and the original decision in *Ritchie v Department of Courts*, have at least one thing in common. Each decision seems contrary to the intention of Parliament in passing the Domestic Violence Act 1995, to make protection orders more accessible. Each of these decisions leaves us asking that judges enforce the law as it is written, not as some of them may wish it were written.

Some of the problems we have addressed in this chapter seem reflective of a significant lack of understanding of domestic violence. This is evident, for instance, in the trivialisation of psychological violence and the minimisation of the risks abusers present to both their partners and their children. It is evident in the way certain judges get side-tracked into concern about the right to natural justice for respondents without any countervailing concern about the same rights for applicants. Chapter 11 identifies similar problems in relation to Care of Children Act determinations. In that chapter, we follow Lord Justice Nicholas Wall's lead in calling for regular training of judicial officers – and of others – in the dynamics of domestic violence and the principles of risk assessment.<sup>234</sup> (See recommendation 13.)

Here, we make two recommendations for statutory change which would help protect applicants' rights to natural justice. We recommend:

**THAT section 13 of the Domestic Violence Act 1995 be amended to the effect that a without notice application for a protection order may not be declined or placed on notice unless the applicant and her lawyer have had an opportunity to participate in an (ex parte to the respondent) hearing, in the court in which the application was filed, to address any questions which might have otherwise led the judge to decline the application or put it on notice. (#1)**

**THAT section 13 of the Domestic Violence Act 1995 be further amended to require Family Court judges to give reasons (in writing) when they either decline or put on notice a section 13 application for a temporary protection order. (#2)**

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<sup>234</sup> Wall, N. (2006). *A report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled 'Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement'*. London: Royal Courts of Justice.

## 10: Children and Domestic Violence: Women's Experiences

As is abundantly clear from the case studies, women's concerns about their children are central to their efforts to negotiate their own safety. Often, it is concerns about the effects of the violence on their children which precipitates women's decisions to separate and/or seek a protection order. Sometimes women remain in the relationship with the abuser – or reconcile with him – because they feel that doing so is in the best interests of the children. The later is especially a possibility when women feel that the abuser is likely to gain the day-to-day care of, or unsupervised contact with, their children. Both these outcomes are represented among our participants.

In these ways, children's exposure to domestic violence is a major theme to emerge from the case studies. Another major theme relates to women's experiences in seeking orders from the Family Court giving them the day-to-day care of their children. These experiences encompass Family Court-ordered counselling, mediation and defended parenting proceedings. This chapter reviews women's experiences in these regards. However, first, it is useful to briefly review relevant contemporary research and innovative policy.

### **Research and Policy Relating to Domestic Violence and Child Abuse**

Recent research highlights unequivocally the close links between domestic violence and child abuse, through both the direct abuse of the child as well as the harmful effects on the child of living with and often witnessing domestic violence.<sup>235</sup> Depending on the context, methodology and definitions used, it has been found that between 30% and 100% of the children of abused women are themselves abused.<sup>236</sup> Many of these children, therefore, sustain the psychological “double whammy” of being both witnesses to their mother's violence and the targets of their father's violence as well.<sup>237</sup>

The co-occurrence of spousal violence and child abuse (physical, sexual and psychological) is well illustrated nationally in child fatality reviews.<sup>238</sup> For example, in the Commissioner for Children's Investigation into the Deaths of Saliel Alpin and Olympia Jetson,<sup>239</sup> Olympia, Saliel and their mother were repeatedly abused over a period of years by the mother's partner. Indeed, chillingly,

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<sup>235</sup> See, for example, Graham-Berman, S., & Edleson, J. (Eds.). (2000). *Domestic violence in the lives of children*. Washington, DC: American Psychological Association, and Jaffe, P., Lemon, N., & Poisson, S. (2003). *Child custody and domestic violence: A call for safety and accountability*. Thousand Oaks, CA: Sage.

<sup>236</sup> Appel, A. E., & Holden, G. W. (1998). The co-occurrence of spouse and physical child abuse: A review and appraisal. *Journal of Family Psychology*, 12(4), 578-599; Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. Thousand Oaks, CA: Sage; Edleson, J., Mbilinyi, L., & Shetty, S. (2003). *Parenting in the context of domestic violence*. San Francisco, CA: Judicial Council of California. Retrieved from <http://www.mincava.umn.edu>, at p. 9; Whitney, P., & Davis, L. (1999). Child abuse and domestic violence in Massachusetts: Can practice be integrated in a public child welfare setting? *Child Maltreatment*, 4(2), 158-166. Note that some commentators confuse the picture by referring to a single co-occurrence rate. Calculating (a) the proportion of abused children who have mothers who are being abused and (b) the proportion of abused mothers whose children are being abused produces somewhat different figures. The former consistently produces a lower figure than the latter. That is, while perhaps half of the children identified as being abused have mothers who are also being victimised, a rather larger proportion – some estimates are as high as 100% – of the children of battered women are themselves abused.

<sup>237</sup> Edleson, J., Mbilinyi, L., & Shetty, S. (2003). *Parenting in the context of domestic violence*. San Francisco, CA: Judicial Council of California. Retrieved from <http://www.mincava.umn.edu>, at p. 17.

<sup>238</sup> See, for example, the reports into the deaths of James Whakaruru, Coral Burrows, Delcilia Witika, and Craig Manukau.

<sup>239</sup> Commissioner for Children. (2003). *Report on the investigation into the deaths of Saliel Alpin and Olympia Jetson*. Wellington: Commissioner for Children.

the girls feared that their stepfather would kill them and after many years of Child, Youth and Family interventions, that is exactly what happened. Interestingly, the death review states that the police attended domestics at the Alpin home "at least" 18 times.<sup>240</sup> The question inevitably arises, what might have happened if effective safety-focused interventions had been offered as a result of any of the first 17 attendances?

In a recent harrowing New Zealand example of how children become involved in a parent's violence, the *Dominion Post* reported:<sup>241</sup>

A Christchurch man bashed his former de-facto partner to death in a blind rage over a stolen Nazi flag ... at one stage [the killer] got the couple's 12 year old son to help drag her unconscious, body back inside his flat. [The deceased's] five year old son, from another relationship, witnessed much of the beating.

Given the co-occurrence of child abuse and domestic violence against women, we have significant concerns about many Family Court judges' apparent lack of attention to the literature on the significant deleterious effects on children of being the targets of and/or witnessing domestic violence. As an example, Principal Family Court Judge Boshier states (quoting from Judge Jan Doogue) that there is little research on "the benefits or otherwise of contact between a violent parent and their children."<sup>242</sup> However, the National Council of Juvenile and Family Court Judges' website belies this assertion,<sup>243</sup> as does the work of a myriad of American, Canadian and British child psychologists working in this critical area.<sup>244</sup> Bruce Perry's work on the permanent impacts of domestic violence on the neurobiology of child witnesses is especially sobering.<sup>245</sup>

In his March 2006 report on 29 child homicides in the UK,<sup>246</sup> Lord Justice Nicholas Wall reiterates the English Court of Appeal's acceptance of the report by psychologists Claire Sturge and Danya Glaser. This report, requested by the UK Official Solicitor to deal with the implications of domestic violence for contact orders, specifically deals with the benefits and risks for children of direct and indirect contact to violent non-residential parents. Sturge and Glaser conclude:<sup>247</sup>

... there should be no automatic assumption that contact to a previously or currently violent parent is in the child's interests; if anything, the assumption should be in the opposite direction and the case of the non-residential parent one of proving why he can offer something of such benefit not only to the child but to the child's situation (i.e.

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<sup>240</sup> Ibid, at p 28.

<sup>241</sup> Reported NZPA. (2005). Nazi flag row led to death. *Dominion Post*, 8 November, p 6.

<sup>242</sup> Boshier, P. (2006). *The Domestic Violence Act ten years on*. Speech at Te Unga Waka Marae, Epsom, 27 March. Retrieved from <http://www.justice.govt.nz/family/media/domestic-violence-act-ten-years-on-march-2006.html>.

<sup>243</sup> See, for example, Dalton, C., Carbon, S., & Olesen, N. (2003). High conflict divorce, violence, and abuse: Implications for custody and visitation decisions. *Juvenile and Family Court Journal*, 54(4), 11-34.

<sup>244</sup> See, for example, Graham-Berman, S., & Edleson, J. (Eds.). (2000). *Domestic violence in the lives of children*. Washington, DC: American Psychological Association; Jaffe, P., Lemon, N., & Poisson, S. (2003). *Child custody and domestic violence: A call for safety and accountability*. Thousand Oaks, CA: Sage; Edleson, J., Mbilinyi, L., & Shetty, S. (2003). *Parenting in the context of domestic violence*. San Francisco, CA: Judicial Council of California. Retrieved from <http://www.mincava.umn.edu>.

<sup>245</sup> See, for example, Perry, B. D. (1997). Incubated in terror: Neurodevelopmental factors in the "cycle of violence". In J. Osofsky (Ed.). *Children, youth and violence: The search for solutions* (pp. 124-148). New York: Guilford Press.

<sup>246</sup> Wall, N. (2006). *A report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled 'Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement*. London: Royal Courts of Justice, paragraph 8.28.

<sup>247</sup> Sturge, C., & Glaser, D. (2000). Contact and domestic violence: the experts' court report. *Family Law*, 615-629.

act in a way that is supportive to the child's situation with his or her resident parent and able to be sensitive to and respond appropriately to the child's needs), that contact should be considered.

Indeed, echoing Sturge and Glaser's conclusion, Madam Butler-Sloss in the *Re L* decision stressed:

The family judges and magistrates need to have a heightened awareness of the existence of and consequences (some long-term) on children of exposure to domestic violence between their parents or other partners. There has, perhaps been a tendency in the past for courts not to tackle allegations of violence and to leave them in the background on the premise that they were matters affecting the adults and not relevant to issues regarding the children. The general principle that contact with the non-resident parent is in the interests of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence has occurred. It may not necessarily be widely appreciated that violence to the partner involves a significant failure in parenting – failure to protect the child's carer and failure to protect the child emotionally.<sup>248</sup>

Lord Justice Wall in his 2006 report also underscores the negative effects on children of witnessing domestic violence and cautions:

Reinforcement needs to be given to the lead provided by Drs Sturge and Glaser (and accepted by the Court of Appeal in *Re L*) that it is a non-sequitur to consider that a father who has a history of violence to the mother of his children is, at one and the same time, a good father. The opportunity should be taken, either in a judgment or a lecture to make this point, with the concomitant that it needs to be considered in all cases where there is domestic violence. This would, in my view, ensure a more rigorous approach to safety in these cases of being both witnesses to their mother's violence and the targets of their father's violence as well<sup>249</sup>

Lord Justice Wall concludes his report by recommending mandatory multidisciplinary training for Family Court judges in the UK on domestic violence issues prior to appointment and also annual refresher courses updating research on domestic violence issues for all Family Court judges.<sup>250</sup> In the following chapter, we make a similar recommendation in relation to Family Court judges and other professionals working in the Family Court.<sup>251</sup>

### **Children's Involvement in the Violence**

In our case studies, everyday places and events sometimes became sites of violence. For example, in Te Rina's case study, she was hit by her partner, Pera, while she was holding their baby son. She dropped the baby and he hit his head. Pera continued to assault her while she attempted to comfort the baby and their older child who was screaming. Similarly, Katrina also talks about being assaulted while holding the baby and needing to comfort other young children at the same time. She remembers:

The toddlers were screaming and I had to put the baby down on the sofa and [I see] there's blood all over my baby.

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<sup>248</sup> *Re L (A Child) (Contact: Domestic Violence)* [2001] Fam Law 260, at p. 271.

<sup>249</sup> Wall, N. (2006). *A report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled 'Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement'*. London: Royal Courts of Justice, paragraph 8.28.

<sup>250</sup> *Ibid*, at paragraph 8.29.

<sup>251</sup> Lawyers who act for the child, supervised contact facilitators, Family Court counsellors, and child in the middle facilitators.

Mele recalls the worst physical assault she witnessed her mother, Lily, receiving. She was six and this time it was her father who was holding the baby:

I remember waking up to screaming downstairs ... I opened the kitchen door and there is blood everywhere in the kitchen, the dining room. I remember going into the lounge and Masi was standing over my mother. He was drunk. She was screaming and crying for him to stop. He was holding the baby. He tried to hit my mother and missed. The baby's forehead was bleeding. While he was holding the baby, he was hitting my mother at the same time. She was begging for mercy. He was ignoring me. I was trying to stop him and he was hitting me in the process of trying to hit her. So I sat on [my mother] and tried to cover her as best as I could. He was doing whatever he could, kicking, punching. I actually got off the lightest. He was grabbing stuff from out of the cupboards: pots, pans. He got a milk bottle and it smashed me in the eye. I only got a black eye.

During the incident, Lily screamed for Mele to leave the house and call the police. Mele did not want to leave her mother's side. She believed Masi would kill her mother if she left.

After Lily obtained a non-molestation order, Mele remembers Masi continuing to come back. She and her brother Tavita had the job of calling the police when he showed up.

He came back, in and out. We were told not to open the door to him. We used to always call the police when he was around. The cops would come with the dogs and take him away. He wasn't allowed anywhere near us. The police would come, get him, chuck him in the cells, release him and it was all the same again.

Violence was what life was all about for Mele. To her, at the age of seven, it was normal. As well, she recalls that her mother's spirit began to waver:

She got sick of calling the police and I think that's what broke her. I remember he became a permanent fixture in the house. Her kicking him out became less and less.

With Masi back home, Lily became pregnant. She fell into a deep depression and on her return from hospital, placed the cot and baby in Mele's bedroom.

I had to go to school and look after my brother at the same time. I would fall asleep at school all the time; I would have to get up in the middle of the night. It wasn't just the Samoan culture thing of being the oldest. My mother had given up. At the age of seven, I was running the house on some levels.

Mele's story has two sad and predictable outcomes. Not only did Mele look after her brothers and the household, she became the woman of the house in every sense. Masi began to sexually abuse her when she was seven years old. And when he grew up, Tavita, Mele's younger brother, became an adult abuser of his wife and children.

Lyla's son has also been affected by violence. He has witnessed the violence against his mother and also been the direct target of violence himself. As Lyla remembers:

At the age of 14, he ran away from us because my partner threatened him and told him to get out. So I said, "You better go." So I watched my own boy at the age of 14 walk out. That was really painful. I sacrificed – I put up with my partner and let my big boy walk out.

Subsequently, Lyla's "big boy" was diagnosed with schizophrenia. Lyla blames herself.

I knew it was because of me. Part of me told myself that part of it was rejection, because I left him behind and chose the partner over him. A lot of it has to do with our relationship and how the partner bullied him, like, you know, "You should get out and work, and you are a big boy now." Things like "Don't smoke our drugs." [Steve would] physically abuse him, going up to him with a fist in his face to find out where I am. He would say to my son, "Where is she? You know where she is?"

Tiare's five children also witnessed Fetu's violence against her. Whenever he was on one of his drinking binges, Fetu was violent and he did not care who was present at the time. He would

often beat Tiare in front of the children: Tiare talks specifically about what happened to two of her children. Her daughter, who looks after her, still fears raised voices and drunken people. Her son punches, kicks and verbally abuses her. Tiare told us:

**When my son got big enough, he started hitting me, even if his father was there.**

Indeed, again predictably, once he became an adult, not only did Tiare's son beat her; he also became an alcoholic and a drug addict. Though asked many times, he has refused to leave Tiare's home. He often threatens his mother and continues to physically and verbally abuse her. He steals her mail and tears up her bills. As a way to try to protect herself, her nephew lives at her house. When he's there, Tiare's son won't hit her.

Sometimes it was the violence to the children that motivated our women to separate from their partners. For example, after her mother convinced her to reconcile with Jatinder, Pinky recalls that Jatinder began to beat their sons. One day, for example, their younger son talked back and refused to obey his father. Jatinder was terribly angry and swore to beat him so much that his mother would not be able to save him. He also bragged that he was not afraid of the police. Pinky left again and moved into a refuge. As she told us:

**It was my bad luck that I had to go through this all over again.**

Once the Family Court awarded Jatinder unsupervised access, Pinky's worries about her children increased. Each time before visiting their father, the boys, especially her younger son, would cry because he did not want to go. When they returned, they would tell Pinky that they were terrified of their father when he was drinking. The younger son told her that he would hide himself in the house when he was visiting Jatinder. Pinky voiced her concerns and fears for the safety of her sons to her lawyer but her lawyer told her that the problem was with Pinky, that it was Pinky who was stressed and anxious, not the boys.

One day Pinky was asked by her younger son's teacher to meet with her. When Pinky arrived, the teacher told Pinky that her younger son had confided in her and told her that he did not like to go and visit his father but that his mother forced him to go. The teacher advised Pinky that she should call the police and not force the boys to go to their father's house because it was having a detrimental effect on them.

Because of the unsupervised contact order, however, Pinky feels powerless to protect her children. She now questions whether she might have been able to shield her sons from Jatinder's violence, if she had not separated and continued to take the violence and abuse upon herself.

Sonal's children, too, were the direct victims of violence. In fact, it was an attack on her younger son which precipitated Sonal's decision to apply for her third protection order and separate from Ranjit.

Tessa remembers that Tasi was physical with their daughter "to get at me". She recalls that "one time Tasi put her on the roof of the house because he was trying to hide her from me". Tasi's mother also used threats to take the little girl to control Tessa. She told Tessa, for example, that if she didn't behave, she would take her granddaughter to Samoa.

Rachel's children saw Chris's violence against their mother. They were the targets of his violence as well. For example, one time Rachel was assaulted while the children were in the bath. Rachel told us: "They witnessed him punching holes in the wall right by my head." Another time, when Rachel refused to respond to Chris's jibes ("I just kept my eyes low and didn't say anything"), Chris became physically and verbally aggressive to his daughter Rebecca instead. He cornered her in the bathroom, towering over her and yelling:

**"You fuckin' useless bitch! You are fucked up, a screw ball."**

Rachel remembers Rebecca being terrified, crouched in the corner. The abuse continued until Chris had to use the toilet. Rachel used the opportunity to get Rebecca out of the house. Rebecca ran to the neighbour's house with Chris chasing her. The neighbour let Rebecca in but slammed the door on Rachel and the baby.

On one occasion while Jess and Jodie were taking a bath together, Bruce got violent. In his rage, he pounded the walls, screamed at them, and then poured jugs of cold water over them. Jess told us about the most obvious impact of this scene on the screaming Jodie:

It was two months before I could get Jodie to have a bath without immediately crying and wanting to get out.

When Phillip first became violent to Louise, her initial reaction was to try to help him. Phillip (who was now regularly using P (methamphetamine)) promised to go into treatment but changed his mind. Louise, like many battered women, then began to notice the impact of Phillip's behaviour on the children. It was only when she saw what was happening to her children that she asked him to move out.

I started to notice his mannerisms ... his blaming, denial and minimisation started to come out in the children. The way he treated me was how my son began to treat me. I was trying to work this out.

Subsequently there were two breaches of Louise's protection order, both of which occurred in front of the children. In one incident, when Louise was taking her daughter to ballet class, Phillip confronted her about whether she was dating any one else. When Louise confirmed that she was seeing someone, Phillip flew into a rage. He attacked her car. He grabbed her. He hit her. While he was assaulting her, Louise recalls him saying:

"I'll fucking kill you, you bitch ... I'll kill both of you ... I'll kill that fucking cunt."

All this was witnessed by their frightened daughter. On another occasion, at the children's school, Phillip appeared, assaulted Louise and threatened to kill her, again in front of the children.

In Amanda's case, she told us about one incident when Katie was one year old. Amanda had gone to Raymond's place to breastfeed Katie. Raymond had some of his family there.

I asked, "When can I have her back tonight?" [They said], "Oh, you can't have her back – she is not coming back tonight." ... so I thought, alright I'd take her, I'll go now thanks. And they pulled her out of my arms. I had her in my arms. They backed me up against a car and then I got Raymond and his mother pulling her out of my arms. It was the most awful thing. So she starts screaming. Then they got her and took her into the house. I said, "Give me back my baby." ... Then [Raymond] refused to give her back all weekend. He let me feed her a couple of times. He wouldn't give her back. He said, "You are an unfit mother. You are stark raving mad." And I had to go to court to get her. It took a week. I lost half a stone.

Even now, several years later, Amanda is worried about the sort of pressures Raymond puts Katie under.

He can be very critical about physical appearance. He has got a big hang up about that – [about] weight. She is my build, which is fine – I'm a normal 12-14 ... To tell a four or five year old that you need your eyebrows plucked, or starting on the thighs – thighs are a big thing – and bottoms – big thighs, fat ... so he won't let her eat and she has to wait for breakfast till he gets out of bed ... I know, little subtle things and they may be just in my mind or they may not. But I just say, "You are normal. You are healthy." She is active. She is growing and needs to eat regularly. He tends to be someone who sleeps in, doesn't eat breakfast, maybe doesn't have lunch and doesn't eat until around four in the afternoon. You can't do that to a child, so if he is picking on her, "You eat too much, you eat too much, you eat too much" – I worry about that.



Raymond has also reported Amanda to Child, Youth and Family.<sup>252</sup> She got “a grilling” from two social workers investigating claims that Katie had a burn on her foot and a bruise on her back. According to Amanda, the bruise was tiny and the “burn” was a rub mark from her new shoes. Such scrutiny has begun to make Amanda super cautious. At one stage, she and Katie were living with a relative who owned a ten-acre block. Her relative told Katie that there were lots of trees to climb.

I said, “Don’t let her climb the trees. They’ll take me to court if she breaks her arm. We will have Child, Youth and Family around at the drop of a hat.”

Although her partner did not hurt the children and targeted the abuse only at Tina, the children were affected still by the fights and abuse they witnessed.

I don’t tell them anything, but my eldest saw most things, and he doesn’t want to talk, and I’ve been trying to get him into counselling cause he has seen so much, but he doesn’t want to get involved in court proceedings, and he knows what his father is doing, but doesn’t want to get involved.

The normalisation of violence extended to Patricia’s daughter as well. With one exception, George was not physically violent towards Debbie but many of the assaults happened in front of her. As Patricia recalls:

She’s just used to it. It had been happening for as long as she can remember, you know. It’s just another thing that happened. It never affected her. She just carried on doing whatever she was doing at the time – never looked twice.

The one incident in which George did use violence against Debbie resulted in an armed offenders squad call-out and multiple charges being filed against George. We will consider the sentence he received for these convictions in Chapter 13. Here, however, we record that Debbie did have a major psychological reaction to George’s use of violence against her and her mother. When we met her, she had developed alopecia; her hair had begun to fall out.

The case studies confirm the findings from local and international research. Children of battered women are very often the direct victims of the batterer and almost inevitably witness the violence against their mothers. Witnessing violence, like direct victimisation, has well-documented deleterious effects on children.<sup>253</sup> The provision of physical and emotional safety and a strong bond with the non-battering parent help children recover from the trauma of domestic violence.<sup>254</sup> All of these factors support the decision by Parliament to legislate for protection orders to cover the children of the protected person. On the other hand, some interest groups would like to see children removed from the protection orders granted to adult applicants.<sup>255</sup> Our

<sup>252</sup> Raymond was not charged with breaching Amanda’s protection order for contacting Child, Youth and Family, although there is case law which states that such behaviour when done without any reasonable cause does constitute a breach on the basis of psychological abuse. See *S v Police* (2002) 22 FRNZ 28 (HC).

<sup>253</sup> Perry, B. D. (1997). Incubated in terror: Neurodevelopmental factors in the “cycle of violence”. In J. Osofsky (Ed.). *Children, youth and violence: The search for solutions* (pp. 124-148). New York: Guilford Press; Graham-Berman, S., & Edleson, J. (Eds.). (2000). *Domestic violence in the lives of children*. Washington, DC: American Psychological Association; Jaffe, P., Lemon, N., & Poisson, S. (2003). *Child custody and domestic violence: A call for safety and accountability*. Thousand Oaks, CA: Sage; Edleson, J., Mbilinyi, L., & Shetty, S. (2003). *Parenting in the context of domestic violence*. San Francisco, CA: Judicial Council of California. Retrieved from <http://www.mincava.umn.edu>; Dalton, C., Carbon, S., & Olesen, Nancy, (2003). High conflict divorce, violence, and abuse: Implications for custody and visitation decisions. *Juvenile and Family Court Journal*, 54(4), 11-34.

<sup>254</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. Thousand Oaks, CA: Sage.

<sup>255</sup> See, for example, Rex McCann’s presentation, “Fathers’ perspectives,” made to a seminar held in Auckland on August 5, 2002.. Retrieved 21 August, 2007, from [http://www.fatherandchild.org.nz/Resources/2003+before/res\\_atleasttwoparents.htm](http://www.fatherandchild.org.nz/Resources/2003+before/res_atleasttwoparents.htm)

research, like the overwhelming thrust of social science research, suggests that such a change would be a retrograde and dangerous step.

### **Counselling, Mediation and Consent Orders**

Much has been written about the inappropriateness of mediation (or in the New Zealand context, couples counselling for the purpose of arriving at a consent parenting order) as a conflict resolution strategy when there are significant power imbalances between the parties.<sup>256</sup> In the US, the National Council of Juvenile and Family Court Judges' Model Code on Domestic Violence specifically states that there should be no mediation over day-to-day care of children or contact with them if a protection order has been issued or domestic violence has occurred.<sup>257</sup> Moreover, the model code stipulates that mediators must screen all referrals from the Family Courts for the presence of domestic violence. Indeed, such screening must include an assessment of the danger posed by the perpetrator, "recognising that victims of domestic violence are at a sharply elevated risk as they attempt to end the relationship and utilise the legal system to gain safeguards."<sup>258</sup> As of August 2004, 26 states had statutes and/or court rules that prohibited mediation for parenting orders when domestic violence had occurred.<sup>259</sup> For example, the Mandatory Mediation Prior to Trial statute in Alabama states that:<sup>260</sup>

In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or if the court finds that domestic violence has occurred, the court shall not order mediation.

As well, the Alabama statute further comments:<sup>261</sup>

A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between the parties. Where evidence of domestic violence exists mediation shall occur only if:

- (1) Mediation is requested by the victim of the alleged domestic or family violence;
- (2) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and
- (3) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.

The fear is, of course, that the victim will be intimidated during Family Court counselling into consenting to orders which are not in her or children's best interests. As the national council comments:<sup>262</sup>

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<sup>256</sup> For a recent empirical study of child custody mediation in cases of domestic violence, see Johnson, N. E., Saccuzzo, D. P., & Koen, W. J. (2005). Child custody mediation in cases of domestic violence. *Violence against Women*, 11(8), 1022-1053.

<sup>257</sup> National Council of Juvenile and Family Court Judges. *Model code: Model code on domestic and family violence*. Retrieved from <http://www.ncjfcj.org/images/stories/dept/fvd/pdf/mdecode>.

<sup>258</sup> *Ibid*, at paragraph 4.08(A).

<sup>259</sup> *Juvenile and Family Law Digest*, 36. (2004). The states are: Alabama, Alaska, Arkansas, California, Delaware, Florida, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Virginia, and Wisconsin.

<sup>260</sup> Code of Alabama, s. 6-6-20.

<sup>261</sup> Code of Alabama, s. 6-6-20.

<sup>262</sup> National Council of Juvenile and Family Court Judges. *Model code: Model code on domestic and family violence*. Retrieved from <http://www.ncjfcj.org/images/stories/dept/fvd/pdf/mdecode>, commentary to paragraph 4.08A.

Mediation is a process by which parties in equivalent bargaining positions voluntarily reach consensual agreements about the issue at hand. A victim/applicant is frequently unable to participate equally with the person who has used violence against them.

In his 1993 review of the Family Court Judge Boshier concurred that mediation should not be utilised within the context of domestic violence because of the inherent power disparities between the parties. Judge Boshier specifically concluded that:<sup>263</sup>

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.

We will further discuss the problems with consent orders concerning parenting orders in Chapter 11 of this report. We will review the recommendations of Sir Ronald Davison who, in his inquiry into the deaths of the Bristol children, noted the considerable dangers in accepting consent memoranda in cases involving domestic violence.<sup>264</sup> We will also focus on what we perceive as inherent flaws in the newly initiated Parenting Hearings Programme Pilot. That pilot, which specifically includes domestic violence cases in its ambit, utilises “settlement conference” processes quite akin to mediation.

Two of our women participated in mediation, Amanda and Amira. In addition, Amy was directed to “communication” counselling with her ex-partner, apparently in the hope that such counselling would help them come to an agreement about the care arrangements for Joy. In all three cases, the results were very negative. We discuss the experiences of these women below.

### Inappropriate “Communication” Counselling

Amy’s experiences of Family Court counselling were mostly negative. She and Peter were directed to attend “communication counselling” to sort out their parenting dispute. Amy felt that their first counsellor blamed her for Peter’s use of violence and seemed to minimise the importance of their daughter’s witnessing of Peter’s sexual activities while Amy was away at work. Amy told us that she had no idea what this communication counselling was supposed to accomplish. “I felt dehumanised by it”, she said, and then recalled in detail her experiences with this counsellor.

I saw a white lady in [suburb] and I didn’t trust her. She wasn’t interested in what I was saying. She didn’t seem at all concerned that my husband was having sex in front of my daughter. I wanted to ask her, “What would happen if you learned that was happening to your daughter?” It felt like she just wanted to write her report and send us away. I was saying important things and she just didn’t listen.

Amy reflected on the monoculturalism and unprofessionalism of the counselling.

[The counsellor] didn’t seem to know anything about our culture. I don’t know whether she was racist or not but she didn’t like me. She made me feel that these things that were happening were all my fault. I got the feeling that it was my problem that my husband left me, my problem that my daughter didn’t have two parents. I just felt guilty. At first I told her that I’m studying, I’m working, I’m planning to do this and this for my daughter. I’m planning to have a better job than a labourer’s job. She told me that I should read to my daughter at night. I said, “I do. I read to her, in Chinese.” She said, “You’re in New Zealand now; you have to read to her in English!”

This counsellor also questioned Amy on why she was studying at night: “Do you think that your daughter is less important than your studying?” Then Amy told us:

<sup>263</sup> Boshier, P. (1993). *The review of the Family Court: A report for the Principal Family Court Judge*. Auckland, at p. 119

<sup>264</sup> Davison, R. (1994). *Report of the inquiry into Family Court proceedings involving Christine Marion Bristol and Alan Robert Bristol*. Wellington: Office of the Minister of Justice.

She made me so confused. I'm the kind of person who can't just sit at home and get depressed. I want to do something, to continue with my study. And when I told her that my daughter and I sleep in the same bed, she said, "That's unacceptable! I can't believe that with your daughter being two and a half, you're still sleeping with your daughter." I didn't even bother to tell her that I slept with my parents in their bed in China until I was six. I felt that the counsellor was so judgemental. I didn't know then that I could apply for a Chinese-speaking counsellor. I came home with tears running down my eyes. My mother-in-law told me to tell my lawyer to get me another counsellor.

The problems with Amy's counselling got even worse. The counsellor got angry when she learned that Amy's lawyer had applied for another counsellor to be appointed by the court. Her lawyer, however, told Amy that she needed to keep going to the original counsellor in the meantime so that she would not look obdurate to the court. "Don't miss your appointment", her lawyer told Amy. Amy then told us what happened next.

The counsellor hadn't heard that I was changing counsellors. But my lawyer had sent this application onto Peter's lawyer and so Peter had a copy of the letter and gave it to the counsellor at our next meeting. The counsellor read it and started to yell at me. She was waving the letter around and yelling at me. I couldn't believe that a counsellor who was a professional could shout at me. I was her client as much as Peter was.

Peter and Amy got a different counsellor and Amy says that, "He was good". He had done some research about Peter's and her cultural backgrounds.

I saw books on his desk. He wasn't rushing us to an agreement. He had suggestions for how things should be done.

### Bullying in Mediation

Amanda too had custody and access issues to be sorted out with her ex-partner. She and Raymond had to take part in a mediation conference, the outcome of which was a consent order to the effect that they would have shared care of Katie. Raymond was given access every second weekend, three of every four access times to be in Amanda's home town, with Amanda taking Katie to Raymond's home city on the fourth occasion. Access was to be in three-hour blocks because Katie was being breastfed. Katie was to be in Amanda's care the rest of the time.

While the order was technically made by consent, Amanda felt "completely" bullied in mediation.

We got a shared care order because he is such a bully and his lawyer is such an incredible bully.

Given Raymond's use of violence, the order made was, predictably, unsafe and unworkable. Shared custody requires a high level of trust and cooperation.<sup>265</sup> Almost by definition, it is inappropriate in cases of domestic violence. As Amanda commented:

Once that protection order was out of the way [I was] perceived as being no different from him. He could argue all he liked. I had no protection from him and he was still abusing me.

Amira, of course, was never in a strong position to engage in mediation. There could be no equality of bargaining power between her and Barry. He was a Kiwi, financially solvent, fluent in English and not in danger of being removed from New Zealand without his child. The power imbalances which make mediation problematic in any domestic violence case were accentuated by Amira's language difficulties, her cultural differences, her poverty and homelessness and her

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<sup>265</sup> Meier, J. (2003). Domestic violence, child custody and child protection: Understanding judicial resistance and imagining the solutions. *Journal of Gender, Social Policy and the Law*, 11, 657-710.

uncertain immigration status (which Barry unilaterally controlled). With all of these factors at play, mediation was never going to deliver justice – for either Amira or her daughter Zola.

Amira's lawyer talked about how different Amira was culturally from both the judge and counsel for the child. As an example, she reflected on Amira's communication style. When Amira was upset, she would become very animated. She would switch between English and the other languages she spoke. She would wave her arms around.

And she would cry, even in Court. Like at the mediation, she would cry. Lots of clients cry in mediation but it was quite an expressive cry. "This is my baby!" A stream of tears, not just a – well, you know, in our culture, even the ones that do cry – well usually, they are trying to hold it back. She wasn't trying to hold it back. It was just coming out.

Amira clearly broke some of the unspoken rules of the dominant Pākehā culture in which strong, demonstrative displays of emotion are discouraged. At the same time, she was in despair. She was not getting her message across and could not protect Zola, literally, from Barry's clutches. It is easy to see why she might become more emotional, confusingly switch languages and cry.

After the mediation, Amira "consented" to orders which saw her application for a protection order withdrawn and Barry gain custody of Zola. We asked Amira's counsel if she wished Amira had not consented to the making of these orders.

I think I'd rather that she had stuck to her guns. I think she felt completely powerless. I think she felt backed into a corner. I think she felt that if she didn't agree, it would be worse. And I think one of the things which really hung over her was the whole immigration thing. I think she thought that, "If I go along with things, I might get to stay in the country. If I don't, I am going to be out of the country." I think that was like this huge thing in her head all the time. I don't think she was in a position, at some level, to decide otherwise. And I'd have to say that if I were in her position, then I would have done exactly the same thing.

Crucially, in Amira's case, counsel for the child supported the "agreement" reached at mediation in respect of interim custody and access issues. In the opinion of the support person who accompanied Amira to her interview with the counsel for the child, counsel took an immediate dislike to Amira and had little patience with her limited and heavily accented English. Ultimately, the counsel for the child advised the court:

Although in my view there are unresolved separation issues which are causing anxiety and distress to both parties and affecting their communication with one another, I have not identified any safety issues for Zola in the short term, should she reside with her father.

This seems remarkable considering the contents of Amira's affidavit: physical violence, extensive psychological violence, the undisputed fact that 11-year-old Zola was sharing a bed with her father, and the presence of Barry's axe under his pillow. These facts and allegations certainly raise significant safety issues. The process by which the counsel for the child formed her view that there were no safety issues is not clear. Instead, the consent memorandum was adopted as a Family Court order despite the well-documented concerns about negotiated resolution of child custody disputes in cases of domestic violence.<sup>266</sup>

As will be discussed in detail in Chapter 11, under section 16B of the Guardianship Act 1968 (now section 60 of the Care of Children Act 2004), there is no jurisdiction for a Family Court judge to make a custody or access (parenting) order unless the court is satisfied that the child will be "safe" during such arrangements. Had the court carried out a section 16B(5) analysis in the

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<sup>266</sup> See, for example, Johnson, N. E., Saccuzzo, D. P., & Koen, W. J. (2005). Child custody mediation in cases of domestic violence. *Violence against Women*, 11(8), 1022-1053.

light of Amira's allegations of Barry's physical and sexual violence against herself and Zola, quite a different outcome might have resulted. Instead, the court seemed to push violence issues to the side, relying instead on mediation as the preferred strategy for resolution despite the insurmountable power disparities between Barry and Amira.

### Mediation Inappropriate in Domestic Violence Cases

In his report on child homicides, Sir Nicholas Wall underscores that whether or not parties agree to a consent order, such an order cannot be made unless the Family Court judge feels it is in the child's best interests. Lord Justice Wall states:<sup>267</sup>

It has, however, to be remembered that the responsibility for making an order remains that of the judge, and judges can only make orders in relation to children if they consider that the order is in the best interests of the child. A judge cannot therefore abnegate responsibility for an order because it is made by consent. Judges have the responsibility to scrutinise proposed consent order and satisfy themselves that the particular order is in the interests of the child.

How differently Amira's and Zola's stories might have turned out if the court had carried out its responsibilities to act in accordance with the paramouncy principle. Similarly, Amanda should never have had to deal with Raymond in mediation.<sup>268</sup> In this regard, we reiterate the conclusion about mediation made by Judge Boshier in his 1993 report. It is as valid a conclusion now as it was then. Despite the Family Court's continued and even increased use of mediation-type dispute resolution processes, there is no research either locally or internationally which contradicts the Principal Family Court Judge's decade-old conclusion:<sup>269</sup>

We believe that mediation should be avoided by the judicial process as a legitimate means of dispute resolution in such circumstances.

In relation to mediation and consent orders, we recommend:

**THAT the Family Proceedings Act 1980 be amended to empower judges considering applications under the Care of Children Act 2004 to direct that the parties *not* be referred for counselling or to a mediation conference:**

- (a) when a party has used violence (as defined by section 3(2) of the Domestic Violence Act 1995) against the other party or a child of the marriage or civil union or de facto relationship; or
- (b) if, because of previous counselling or mediation within the past 12 months, counselling or mediation is unlikely to serve a useful purpose; or
- (c) for any other reason. (#9)

**THAT the Family Proceedings Act 1980 be further amended to specifically exclude victims of domestic violence (as defined by section 3(2) of the Domestic Violence Act 1995) from being required to take part in counselling. (#10)**

**THAT the Care of Children Act 2004 be amended to the effect that, where allegations of domestic violence have been made in parenting order proceedings, no consent**

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<sup>267</sup> Wall, N. (2006). *A report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled 'Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement'*. London: Royal Courts of Justice, paragraph 8.20.

<sup>268</sup> Part of the problem here was the unwise advice from Amanda's solicitor to withdraw her application for a permanent protection order. This aspect is discussed in Chapter 15.

<sup>269</sup> Boshier, P. (1993). *The review of the Family Court: A report for the Principal Family Court Judge*. Auckland.

parenting orders be made unless the Family Court judge first scrutinises the proposed consent order and satisfies himself or herself that the particular parenting order is in the best interests of the child(ren). The impact and effects of the violence on the child(ren) must be evaluated and the court must be satisfied that the physical, sexual and psychological safety of the child(ren) will be ensured during any day-to-day parenting and/or contact arrangements. (#6)

**THAT** a counsellor who receives any referral from the Family Court to conduct counselling shall screen for the occurrence of domestic or family violence between the parties. Where evidence of domestic violence exists, mediation shall occur only if:

- (a) counselling is requested by the victim of the violence;
- (b) counselling is provided by a counsellor who is trained in domestic violence and able to protect the safety of the victim; and
- (c) at any counselling session with the perpetrator, the victim is permitted to have in attendance a support person of her choice (including a lawyer) who may advocate on her behalf. (#15)

### ***Defended Parenting Hearings***

For some of the women in the case studies, obtaining a protection order spelled the end of their partner's involvement in the children's lives. For example, in Sarah's case, Simon did not oppose the making of the final protection order and since then he has had very little contact with the children. When Sarah asked for the children's clothes and some photographs, Simon refused to give them to her. However, from time to time, Sarah telephones Simon and the children speak to him. He, however, does not phone them and has never visited them. Once in a while, he sends birthday presents. Sarah considers herself fortunate. Having seen the hassles and intimidation that some of her friends have experienced over contact issues, Sarah counts herself lucky that Simon has pretty much disengaged himself from the children's lives. Despite the lack of contact, she still fears him. As she told us, "I still have nightmares, often."

Similarly, in Jess's case, Bruce did not contest her application for custody of Jodie and has not sought any contact with his daughter.

However, a number of the women have participated in defended parenting hearings with their abusive ex-partners. For example, after extensive litigation including numerous applications and various interim orders, the Family Court awarded Amanda custody of Katie and Raymond was given fortnightly weekend access. Like the earlier arrangement, three times out of four, access was to be exercised in Amanda's home town, with Amanda taking Katie to the city where Raymond lived every fourth time. Christmas's were to be alternated between Raymond and Amanda.

In coming to this conclusion, the judge applied the analysis required under section 16B of the Guardianship Act 1968<sup>270</sup> – but in respect of Amanda, not Raymond. That is, the judge noted Raymond's allegations that Amanda had exposed Katie to domestic violence. This allegation rested heavily on the incident video-taped by Raymond's brother. The judge concluded that the incident needed to be seen in context, namely that Amanda was entitled to expect Katie to be returned to her and that Katie was being breastfed on demand. While the judge noted that he did not condone Amanda's actions, neither did he consider that they reflected adversely on her.

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<sup>270</sup> Section 16B of the Guardianship Act 1968 was re-enacted as ss. 60(3) and (4) and 61 of the Care of Children Act 2004.

Amanda was refused permission to relocate to Australia, however. A condition of Raymond's contact order was that Katie not be removed from New Zealand. Amanda remains angry that she has been subjected to prolonged, aggressive litigation, through which Raymond has been able to exercise a considerable amount of control over her, including forcing her to abandon her plans to move to Sydney. As she tells us:

[Raymond] spent about \$30,000 on [Family Court proceedings]. They can throw money at it, to make your life miserable, to get out their anger and the lawyers will respond because that is their job and they get a couple of hundred of bucks an hour for it. As much as they may not like it, that's what their job has turned into ... and you have no choice but to respond if you get an affidavit thrown at you because they are making an application to court.

On a more positive note, when we spoke to Amanda last, there had been no new proceedings for almost two years. As well, as she had become sick of her mounting legal costs, Amanda has learned how to represent herself. After so much courtroom experience, she describes herself as having learnt "communication skills" and how not to "buy into" Raymond's aggressive tactics. And she has had some success. During the last hearing, which concerned an application by Raymond to make her pay more of the travel costs associated with access, the outcome was an order requiring her to pay less than she had already been paying.

Tessa's ex-partner agreed to a parenting programme as a condition of his access order. Tessa believes that her daughter felt torn between her and Tasi, not wanting to hurt either parent.

She used to be stressed out the day before [the access visit] and in the morning she would be concerned that I wouldn't like her anymore, and she used to worry about what she could say to her father. It wasn't fair on her. And the day he didn't show up, she was so upset.

Tessa believes that Tasi saw contact to their daughter as a way back into Tessa's life. But after two visits with his daughter, Tasi never returned. After a while, Tessa asked the Family Court to suspend Tasi's access so that her daughter would no longer be subjected to the stress. Tasi did not contest the application. Moreover, he never attended any sessions of the parenting programme.

While Rowena did not get a final protection order, she did get a final parenting order giving her the day-to-day care of her daughter. The order gave Paul contact. He exercised contact on one or two occasions, but he no longer wants to see his daughter. Rowena states that there has never been a card or a present from Paul, even on the child's birthdays. Paul's older daughter by another relationship, whom Rowena had cared for, went to live with Paul, at least for a while. She later ran away (to the home of one of Rowena's friends) after Paul had "belted her up". She was subsequently taken into the care of Child, Youth and Family. Fortunately, Rowena's child has not been physically abused by Paul.

Rachel's experiences about contact have not been positive. Despite the fact that the children witnessed Chris nearly kill Rachel twice (as well as his numerous breaches of her protection order), the Family Court has ordered supervised contact between him and the children. Although the District Court judge had specifically denied Chris's application for home detention, in part because of that judge's concerns about the impact of Chris's behaviour on the children, the court's belief in the benefits of contact for the children seems to have carried the day. As Rachael says:

My kids didn't want to go but the court has ordered that they get to see this psycho man. The kids were terrified with him.

Rachel went on to describe how during the hearing, Chris was "a charmer". She also mentioned the Family Court judge's apparent lack of concern for her need to keep her address secret from Chris. She recalled:



The judge in the Family Court said to me, "What do you mean, you don't want us to know your address? How can we post you anything if we don't know your address?" In the meantime, [Chris] is sitting in the court, so [my lawyer] has to remind the judge about the safety issue. No matter what he did to me or what he put his kids through, [the judge] in the Family Court totally minimised me. Even my lawyer at the time wasn't very good. I was in the middle of severe trauma and she was saying, "Be quiet, be quiet. You can't speak out in court." I was speaking out because [Chris] was getting access to the kids and I felt like I was crazy and perhaps all these people were right, but I knew deep within my own being that this was outrageous. From whoa to go it was treated really badly.

Priya obtained interim parenting and protection orders against Satya. However, he defended both orders. He claimed that he had a secure job and the support of his family and that Priya was financially insecure and alone in New Zealand. In fact, this is often the situation for immigrant women from certain cultures; they often live with their husband's family after marriage.

Counsel for the child was appointed to act in the defended parenting proceedings. Priya was advised by him that as Satya had family support and she had none, it would be good for her to demonstrate to the court that she valued the children's stability by sending them back to their old school. Counsel for the children also informed Priya that it would be good for her custody case if she relocated to her old neighbourhood, close to where her husband and his family lived. At the time, Priya was living far away from her husband's neighbourhood and felt safe. However, in light of the advice she received, she moved closer to Satya's home.

Because they were now living in the same neighbourhood, Satya was able to find out where Priya lived. By coincidence, they met at The Warehouse and Satya followed Priya and the children home. The couple talked about their differences and Satya promised to stop drinking and move in with her and the children, away from his family. She forgave him. As she told us:

I understand the importance of both parents in the children's lives. If I was alone and did not have children, it may have been a different story.

Once they were reconciled, Satya persuaded Priya to move back into his family's home again. To her dismay, everything went back to square one not long afterwards. The physical and psychological abuse, the denigration and intimidation, the participation of Satya's whole family in Priya's abuse, all of this recommenced. As the violence escalated, Priya called the police and she and the children moved into a refuge again.

Satya had supervised access. During one visit, he found that his son had a scratch on his arm. He complained that it was unsafe for his children to live with Priya at the refuge and that her care of them was inadequate. He accused Priya of not providing food for them and not sending them to school. He also notified Child, Youth and Family that she was a bad mother. Again, as with Raymond, Satya was not charged for breaching Priya's protection order by making an unjustified complaint to Child, Youth and Family.<sup>271</sup>

Priya became depressed and when Housing New Zealand found her and the children a house, they moved once again. Satya, however, did not give up pursuing Priya. He approached her in the street again, she again threatened him with the police but he was not afraid. He stalked her and discovered her new address, and the pressure to reconcile started all over again. We asked Priya why she did not call the police despite Satya breaching the protection order. She commented:

My children did not really understand what was going on between their mum and dad. [Satya] always approached me when the kids were around and I did not want them to have ill feelings for me or their father by calling the police on him. It would have confused them even more.

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<sup>271</sup> *S v Police* (2002) 22 FRNZ 28 (HC).

Satya was awarded unsupervised access to the children when he started a stopping violence programme and started going to counselling for his alcohol problem. The pressure to reconcile began again. Satya started to visit Priya and the children regularly, now constantly begging her to come back.

Since we conducted our interview, Priya has decided to give Satya one more chance. She believes that the children love Satya and tells us that he has never physically abused them. When we asked Priya why she had decided to reconcile with Satya, she told us:

It was for the sake of the children ... Another reason was the culture that I come from. In my culture, we are always told that a woman's place is with her husband no matter what.

In the court proceedings for custody of Alana, Sripai did not want to consent to Kevin having unsupervised access visits. As we described in Chapter 8, Sripai was unhappy with Kevin's sexualisation of their young baby's body. But Sripai's residence visa was to expire and the Family Court had granted Kevin a non-removal order which prevented Sripai from taking Alana back to Thailand. In those circumstances, Sripai felt helpless and decided to reconcile with Kevin. She applied for residence permit under the family partnership category. Because of the reconciliation, Kevin supported her application.

But the abuse did not stop. Sripai and Kevin had frequent arguments over money, and Kevin invariably threatened to withdraw his support for her residence permit. For example, on one occasion, Kevin asked for money to buy a lotto ticket. Sripai refused as she did not have enough money for food. Kevin's response was again to threaten to withdraw his support for her residence application. He went to his mother's house after the fight. Sripai recalled:

When he returned, he was smiling and so calm so I asked him if he had smoked some pot. He said, "Yes how do you know?" I said, "Because you are smiling with me."

Sripai still does not have a residence permit to live in New Zealand. Her visitor permit has now expired. She has applied for an extension through her lawyer on the grounds that her presence in New Zealand is necessary to attend the Family Court proceedings. So Sripai's fate will be determined by the Family Court as well as the immigration officers, each acting independently of each other.

I am in an impossible situation. I cannot return to Thailand with Alana because of an order preventing [the] removal of Alana from New Zealand.

Amy initially got a temporary protection order and a parenting order. Peter was awarded supervised contact with Joy. Almost immediately, however, Peter decided to defend the protection order and apply for unsupervised contact. He began to bombard Amy with affidavits. In what is now well identified as a power and control tactic,<sup>272</sup> Peter used the court processes to intimidate and harass Amy.

Every week or sometimes twice a week, the lawyer would call up and say, "We got another affidavit from Peter and another from his friend." And the information in those affidavits were just lies. I was so angry about what he said. For a person like me, I asked for an interpreter. I speak some English, but not good enough to do this legal stuff. I can't write in English. I have my dictionary with me. I go through these affidavits line by line. My lawyer doesn't speak Chinese so I had to do it myself. Every day, I just worked on the affidavits, and talked to my lawyer. I seemed to have to say the same things over and over again, and I almost lost my hope. It was only my mother-in-law saying "just hold on" that kept me going.

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<sup>272</sup> Jaffe, P., & Crooks, C. (2005). *Understanding women's experiences parenting in the context of domestic violence: Implications for community and court related service providers*. Retrieved from <http://www.vaw.umn.edu>.

Amy remembers being surprised when her lawyer told her that Peter would definitely be awarded unsupervised contact to her daughter. Her lawyer told her:

The father wants to have contact with the girl and according to the New Zealand legal system, he has that right.

So, Amy told us, the lawyers arranged for a daytime visit between Peter and Joy in front of a local McDonald's. Amy talks about her feelings about this visit:

I told [my lawyer], "I don't want to see him; he's nearly destroyed me. If I had stayed long enough, he might have killed me." And my lawyer said, "That's why we're doing a visit at a place which is open, with other people around. If he does anything to you or shouts at you, just dial 111 and call the police."

The lawyer did not want Amy to be seen by the court as hostile to Peter having contact with Joy. The use of parental alienation in the Family Court clearly influenced Amy's lawyer to agreeing to this unsafe contact plan; calling 111 was the lawyer's plan for balancing Amy's and Joy's needs for safety against Peter's "right" to have contact with his daughter.

One can only query how safe Joy and Amy would have been if the 111 plan had had to be implemented. More importantly, the experiences of Amy, like those of Pinky and Patricia, show how lawyers' worries about their clients being construed as hostile or alienating has caused women's and children's safety to be compromised. We will discuss this issue in detail in Chapter 11. Suffice it to say here that the English Court of Appeal in *Re L* has been very critical of parental alienation syndrome,<sup>273</sup> that many US courts have refused to allow evidence to be admitted about so-called parental alienation because it is not seen as having any scientific credibility,<sup>274</sup> and even Janet Johnston has said that courts should not use parental alienation in cases where children have either witnessed and/or been the direct targets of violence.<sup>275</sup>

In the end, Peter suggested that there be shared custody of Joy. Everyone, including Amy's lawyer, told Amy that that was probably what the court would award if the matter proceeded to trial. Amy tried to work out how shared custody could work:

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<sup>273</sup> *Re L (A Child) (Contact: Domestic Violence)* [2001] Fam Law 260, at p. 271.

<sup>274</sup> Williams, R. J. (2001). Should judges close the gate on PAS and PA? In Alienated children in divorce [Special issue]. *Family Court Review*, 39, 267-281. In this article, at p. 276, Justice Williams states the rule in *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993). In *Daubert*, the US Supreme Court outlined a number of factors that could be used by courts in evaluating the admissibility of expert evidence: (a) whether the theory can be and has been tested (focusing on methodology); (b) whether the theory has been subjected to peer review and publication; and (c) the known or potential rate for error; (d) whether the theory has been generally accepted. Justice Williams states that under *Daubert*, judges must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline and he queries whether the methodology behind parental alienation syndrome and parental alienation is testable; whether it has been subjected to peer review; and whether there is there any general acceptance of what parental alienation syndrome or parental alienation mean within a profession or professions. He concludes that does not meet the criteria under *Daubert*. For example, it has not been recognised in the DSM-IV (American Psychiatric Association. (1994). *Diagnostic and statistical manual of mental disorders* (4th ed.). Washington, DC: American Psychiatric Association) and the articles by Dr Richard Gardner have not been peer reviewed.

<sup>275</sup> Kelly, J. B., & Janet R Johnston, J. R. (2001). The alienated child: A reformulation of parental alienation syndrome. In Alienated children in divorce [Special issue]. *Family Court Review*, 39, 249-266. The authors significantly distinguish between so-called parental alienation syndrome children and children who have been exposed to domestic violence. They state, at p. 253: "Children who are realistically estranged from one of their parents as a consequence of that parent's history of family violence, abuse or neglect need to be clearly distinguished from alienated children. Among this group are children who are estranged as a cumulative result of observing repeated violence or explosive outbursts of a parent during the marriage or after separation, or who were themselves the target of violence and abusive behaviour from this parent. Often they can only feel safe enough to reject the violent or abusive parent after separation."

I wanted to have her on the weekdays; he would have her during the weekends. But he wanted week about. But how could anyone work or study with that arrangement? And then when I wouldn't agree, he said he wanted full custody. I knew that was so he could get on the Domestic Purposes Benefit.

By the time that Peter and Amy next went before the judge, Peter wanted sole rather than shared custody. According to Amy, "even the judge was shocked." After the hearing, the judge awarded the parties shared custody: On Monday, Wednesday and Friday, Joy was to be with Peter. On Tuesday, Thursday, Saturday and Sunday, she was to be with Amy. In Amy's mind, the court didn't care about Peter's violence. She summarised what she thought was the essence of the court's judgment. It certainly was a lot briefer than the risk assessment under section 61 of the Care of Children Act 2004.

You're not with him now? He's not going to beat you. And has he ever beaten the child? No. He's not dangerous to her.

From what we can tell from our family lawyer key informants, the judge's reasons for shared custody are now commonplace in the Family Court but, with respect, ill-conceived. For instance, the reasons fail to have regard to what is required in order to have shared custody work. At a minimum, the parties need to be able to be child-focused, communicate well and respect one another so that cooperative agreements about the child can be made. Both parents must also be able to focus on the child's welfare rather than how the child can be used to undermine and control the other parent.<sup>276</sup> Furthermore, the judge's reasons do not take into account the high correlations between child abuse and spousal abuse, or the well-identified negative effects on children of having to negotiate frequent access changeovers between acrimonious parents.<sup>277</sup>

By the time of our interview, another plan about Joy had been put into place. After all the contested legal proceedings and numerous affidavits about the benefits to Joy of overnight access, shared custody and/or sole custody to Peter, he has now consented to seeing Joy only during the day on Saturdays. His reason: the form of shared custody awarded by the court did not allow Peter to receive the Domestic Purposes Benefit. He has to go to work and wants to earn a lot of money. Contact with Joy as ordered undermines his job prospects. Amy comments ironically:

So once he couldn't use her to get money, he just gave her back. Just like throwing a ball.

In Patricia's case, George now has regular access to Debbie and her infant brother, even though he has been found guilty of male assaults female, possession of a dangerous weapon, and threatening to kill Patricia. Every second week, Patricia drops the children off at a supervised access centre 15 minutes before access is due to begin. George has one and a half hours with the children and Patricia collects the children 15 minutes after he has left. According to Patricia, Debbie says she enjoys seeing her father but Patricia notes that Debbie is "grumpy" before and after the access visits. "Grumpy" is understandable. The charges George faced arose from a sustained attack on Patricia, witnessed by Debbie, culminating in George holding a knife to Debbie's throat to stop Patricia leaving the house with her.<sup>278</sup> As we noted earlier, Debbie developed alopecia as a result of the trauma.

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<sup>276</sup> Turkat, I. D. (2002). Shared parenting dysfunction. *American Journal of Family Therapy*, 30(5), 385-393.

<sup>277</sup> Johnston, J. (1998). Proposed guidelines for custody and visitation for cases with domestic violence, high-conflict and violent parents in Family Court. Retrieved from <http://www.courtinfo.ca.gov/online/reference/familycourtservices/grants/hcvpfc.htm>, at p. 6.

<sup>278</sup> A charge of threatening to kill Debbie was withdrawn.

Officially, the access arrangements are recorded as having been made by consent. In fact, Patricia feels she had no choice in the matter. George had applied for the day-to-day care of the children but in mediation said that he would be happy with supervised access. As an aside, one can only query how mediation can occur in the face of one of the parties having been convicted of threatening to kill and male assaults female against the other party (no less all of the prior assaults and threats for which George was never charged). If the prerequisite to mediation is equal bargaining power, one can only wonder whether utilising mediation in Patricia's case was appropriate.

George's lawyer, Patricia's lawyer and counsel for the children conferred at the end of the conference, and, as Patricia told us, "All three lawyers said I had no choice." That is, the lawyers told Patricia that if she did not agree to supervised access for George, she would face a protracted and difficult hearing in which she might be seen as trying to alienate her children from George. Patricia's lawyer specifically advised her not to oppose supervised access or "it would look bad for you".

Even the judge's memorandum notes that Patricia had given her consent "reluctantly". Furthermore, as we will show in the Chapter 13, George's ongoing contact with the children seems to have saved him from a prison sentence for his crimes. In terms of Patricia's and Debbie's experiences, the District Court judge's analysis must surely be a prime example of what we have in the past called "learned hopefulness" in decision makers.<sup>279</sup> The District Court judge stated:

On balance, I think it would be in everybody's interest to sentence you to community work rather than sentence you to prison. I hope that this incident has brought you to your senses. I take some comfort from the fact that there has been ongoing access without further issues and there seems to be no suggestion of ongoing animosity, although I could imagine that your former partner will always be cautious of you, given your admitted offending.

In the face of his community work sentence, George is now applying for unsupervised contact to Debbie and the baby. Indeed, there are plans for him to apply for shared care in the near future. It will probably help his case if Debbie's hair stops falling out by then.

Delays in the Family Court and Phillip's anger that Louise had gotten into a new relationship have cost Louise dearly. As we have already discussed, initially Phillip had informally agreed that the children could relocate with Louise so that she could take up a new job. As a result, Louise had given notice at her job and had arranged for her house to be tenanted. She needed a quick resolution if she wasn't to miss out on this new opportunity. Having already spent over \$800 on legal fees to obtain her protection order, she decided to represent herself. She prepared her own affidavit and organised supporting affidavits from people who knew her and the children. She went to court prepared to state her case and expecting a quick resolution.

But the hearing did not proceed. Phillip wanted more time. Twice the case was adjourned. Because so many people were involved in the arrangements, Louise felt that she had no option but to give up her plans. A month after Phillip was released from his second remand in custody, the court made a determination. Noting that Louise had now agreed not to move, the court only considered the issue of access. The judge made a finding that violence had occurred, and invoking *Fielder v Hubbard*,<sup>280</sup> determined that Phillip's behaviour had included psychological violence towards the children and that this needed to be taken into account. Supervised access was continued and a permanent protection order was made.

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<sup>279</sup> Robertson, N., & Busch, R. (1998). The dynamics of spousal violence: Paradigms and priorities. In F. Seymour & M. Pipes (Eds.), *Psychology and family law: A New Zealand perspective*. Dunedin: Otago University Press.

<sup>280</sup> *Fielder v Hubbard* [1996] NZFLR 769.

Louise found the process draining and frustrating. She had been well prepared for the hearing and the counsel for the children said her affidavits were “fantastic” and included everything necessary to have the court grant her application to relocate. But by delaying the process, Phillip was able to put a stop to plans to which he had previously agreed. All, it appears, because Louise was dating another man.

As well, Phillip’s parents and his new girlfriend are the access supervisors and perhaps as a result, Phillip’s access with the children is not always safe. For example, Phillip’s parents sometimes allow him to take the children away alone from the house, in contravention of the order. Despite Louise’s complaints about these breaches of the supervised access order, they have not been removed as access supervisors. Instead, they and Phillip’s girlfriend have been required to sign agreements which set out the conditions of access. The court then monitors access every six weeks. While these arrangements have helped to allow the children to have continued contact with their father, it comes at a cost. Phillip’s parents are busy and are sometimes unavailable. Phillip has missed some weekends. Arrangements have to be continually renegotiated, requiring Louise to have more contact with Phillip than she would like. And every six weeks she needs to attend court so that the monitoring of contact can continue.

### **Summary**

In brief, the experiences of the women discussed in this chapter bear out what many of our key informants familiar with the operation of the Family Court told us: contact trumps safety. That is, the Family Court too often privileges men’s assumed rights to their children above the safety and wellbeing of those children – and above the safety and autonomy of their mothers. It does so despite all that is known about the co-occurrence of domestic violence and child abuse, about the deleterious effects on children of witnessing domestic violence, about the dangers children face if placed in the unsupervised care of a batterer parent, and about how such exposure to the batterer can undermine children’s healing from trauma. It might also be noted that contact too often trumps safety despite the provisions of sections 58 to 62 of the Care of Children Act 2004. Those provisions specifically address parenting orders made within the context of domestic violence.

To better understand how all this happens, it is useful to turn to recent case law and to articles and speeches by certain judicial officers. It is also useful to identify problematic discourses utilised by psychologists, counsel for the child and judges in deciding these cases. It is to these matters that our discussion now turns.

## 11: Children and Domestic Violence: The Legal Context

In the previous chapter, we analysed the ways in which the children in our case studies became involved in the abuser's violence. As well, we discussed our women's experiences of counselling, mediation and defended parenting hearings. We also reviewed the literature on the co-occurrence of child abuse and spousal violence. We pointed out that international research has demonstrated that woman battering is the primary context within which child abuse occurs,<sup>281</sup> and that, moreover, there is voluminous research which questions whether there are benefits for a child of having frequent contact with an abusive parent.<sup>282</sup> We also concluded that consent orders made within the context of domestic violence are problematic. As a minimum, judges need to satisfy themselves that the proposed consent order carries out the best interests and welfare of the subject child(ren).

In this chapter, we explore the legal context within which parenting orders are made, specifically the difficulties that arise in terms of battered women's and children's safety when there are parenting proceedings before the Family Court. We will review recent case law on parenting orders made within the context of domestic violence.<sup>283</sup> We reluctantly conclude that some judges are not carrying out statutorily mandated approaches and are instead making decisions based on what they would prefer the law to be. In the final part of this chapter, we will look at the recently implemented Parenting Hearing Programmes. Reflecting on our discussions in Chapters 9 and 10, we will raise concerns about natural justice for applicants during the newly implemented parenting hearings pilot and query whether the quasi-mediation processes being utilised during them are safe and fair for battered women and children.

### **Legislative Framework**

Sections 58 to 62 of the Care of Children Act 2004 are the specific provisions that deal with parenting orders made within the context of domestic violence. Succinctly put, these provisions prioritise the "safety of the child" in its widest sense over any other factor to be considered when making custody/access orders.<sup>284</sup> Crucially, where the court is satisfied that a party has used violence against the child or a child of the family, or against the other party, it must not make an order giving the violent party the day-to-day care for the child or allowing the violent party unsupervised contact – unless it is satisfied that the child will be safe while in the care of, or having unsupervised contact with, the violent party.<sup>285</sup> Moreover, the Act sets out a number of matters which the court must consider in determining whether the child will be safe if a violent party provides day-to-day care for, or has unsupervised contact with, the child.<sup>286</sup> In short, the provisions amount to a rebuttable assumption that a violent parent will not have unsupervised contact with (or the care of) with his or her child(ren).

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<sup>281</sup> Jaffe, P., Poisson, S., & Cunningham, A. (2001). Domestic violence and high conflict divorce: Developing a new generation of research for children. In S. Graham-Bermann & J. Edleson (Eds.), *Domestic violence in the lives of children: The future of research, intervention and social policy*. Washington, DC: American Psychological Association.

<sup>282</sup> See, for example, Sturge, C. & Glaser, D. (2000). Contact and domestic violence: The experts' court report. *Family Law*, 615-629, and Johnston, J. (1998). Proposed guidelines for custody and visitation for cases with domestic violence: High-conflict and violent parents in Family Court. Retrieved from <http://www.courtinfo.ca.gov/onlinereference/familycourtservices/grants/hcvpfc.htm>, at p. 6.

<sup>283</sup> An extensive case law analysis is beyond the scope of this report but will be forthcoming. We have chosen a few recent seminal cases which we have found directly relevant to our study.

<sup>284</sup> Busch, R. (1995). Prioritising the safety of children: The rebuttable presumption in practice. *Mental Health Bulletin*.

<sup>285</sup> Care of Children Act 2004, s. 60(3) and (4).

<sup>286</sup> *Ibid*, s. 61.

These provisions initially appeared as sections 16A to 16C of the Guardianship Act 1968. They were incorporated into that Act in a 1995 amendment which codified the recommendations made by former Chief Justice Sir Ronald Davison in the Bristol Inquiry.<sup>287</sup> Having reviewed the Bristol family's Family Court file and after reviewing the latest research findings on domestic violence and children, Sir Ronald Davison stated:<sup>288</sup>

My conclusion is that under the law as it presently is and with the current practices of the family court, the deaths [of the three children] 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.

As we have previously commented,<sup>289</sup> Alan Bristol's potential for dangerousness to his children was never considered. Societal myths about what a killer "looks like" masked his risk as a child murderer. At the worst, he was seen as a "lousy partner but a great dad".<sup>290</sup>

As we have shown in Chapter 7, these provisions, now incorporated into the Care of Children Act 2004, closely accord with what is known about the risks batterers pose to children – and to children's recovery from trauma. When they were first enacted in 1995, they represented a best practice approach to the issue of the welfare of the child when domestic violence was a factor either in the parent–child or the spousal relationship.<sup>291</sup> Ten years after their implementation, sections 58 to 62 continue to reflect the approach of the National Council of Juvenile and Family Court Judges on which they were based.<sup>292</sup> The State of California, which had previously been in the forefront of favouring shared custody for separating parents, has now adopted a rebuttable presumption against sole custody or shared care/joint custody orders being made to violent parents.<sup>293</sup> Moreover, many forms of psychological abuse (as well as sexual and physical abuse) trigger California's rebuttable presumption.<sup>294</sup> And ten years after the Davison report in New

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<sup>287</sup> On 5 February 1994, Alan Bristol killed his three daughters and himself, while the children were in his custody pursuant to an order of the Family Court. For a full account of this case, see Busch, R., & Robertson, N. R. (1994). I didn't know just how far you could fight: Contextualising the Bristol Inquiry. *Waikato Law Review*, 2, 41-68.

<sup>288</sup> Davison, R. (1994). *Report of inquiry into Family Court proceedings involving Christine Madeline Bristol and Alan Robert Bristol*. Wellington: Office of the Minister of Justice.

<sup>289</sup> Busch, R., & Robertson, N. R. (1994). I didn't know just how far you could fight: Contextualising the Bristol Inquiry. *Waikato Law Review*, 2, 41-68.

<sup>290</sup> Ibid. For a recent critique of the "dangerous oxymoron" that a man could be a lousy partner but a great dad, see also Wall, N. (2006). *A report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled 'Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement'*. London: Royal Courts of Justice.

<sup>291</sup> The provisions mirrored the National Council of Juvenile and Family Court Judges. (1994). *The Model Code on Domestic and Family Violence*. Reno, NV: National Council of Juvenile and Family Court Judges, sections 401-403.

<sup>292</sup> Dalton, C., Matthews, G., Matthews, K., Drozd, L., & Wong, F. (2006). *Navigating custody and visitation evaluations in cases with domestic violence: A judge's guide*. Reno, NV: National Council of Juvenile and Family Court Judges.

<sup>293</sup> California Family Code, s. 3044 (custody of children, matters to be considered in granting sole or joint custody).

<sup>294</sup> California Family Code, s. 3044(c), reads: "For purposes of this section, a person has 'perpetrated domestic violence' when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings."



Zealand, Lord Justice Nicholas Wall reached similar conclusions in his investigation of five cases of child homicide in which the English courts were involved.<sup>295</sup>

We can find no research over the past 12 years which casts serious doubts on the approach embodied in sections 58 to 62 of the Care of Children Act 2004. To the contrary, more recent research has served only to deepen our understanding of the risks batterers pose to their children and the conditions needed to assist children to recover from the trauma of violence.<sup>296</sup>

We agree with Dr Clare Dalton and Judge Susan Carbon, who have recently written in the *Juvenile and Family Court Journal*.<sup>297</sup>

The challenge in these cases is to remain steadfastly focused on the best interest of the children who need both an opportunity to heal from past exposure to abuse and an opportunity to live free from either the fear or the reality of abuse (for themselves, their non-abusive parent, or their abusive parent's new partner or family).

### **Psychological Abuse**

With the minor qualifications mentioned in Chapter 7, section 61 of the Care of Children Act 2004 seems to broadly accord with current research and accepted good practice for domestic violence risk assessment.<sup>298</sup> The section 61 risk assessment and associated provisions are triggered by an allegation of violence. However, it is important to underscore that here, "violence" is limited to "physical" and "sexual violence".<sup>299</sup>

This is at odds with one of the "Principles relevant to child's welfare and best interests", namely:<sup>300</sup>

the child's safety must be protected and, in particular, he or she must be protected from **all forms** of violence (whether by members of his or her family, family group, whanau, hapu, or iwi, or by other persons). [Emphasis added]

It is also contrary to Article 19.1 of the United Nations Convention on the Rights of the Child, which calls on states to "protect the child from all forms of physical or mental violence."<sup>301</sup> The anomalous and narrow definition of violence which applies in sections 58 to 62 means that evidence that a child is being psychologically abused by witnessing physical, sexual and/or

<sup>295</sup> Wall, N. (2006). *A report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled 'Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement'*. London: Royal Courts of Justice, paragraph 8.28.

<sup>296</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage; Buzawa, E., & Buzawa, C. (2002). *Domestic violence: The criminal justice response* (3rd ed.). Lowell, MA: University of Massachusetts; James, B. (1994). *Handbook for treatment of attachment-trauma problems in children*. New York: Free Press; Herman, J. (1992). *Trauma and recovery*. New York: Basic Books; Scott, K. L., & Wolfe, D. A. (2000). Change among batterers: Examining men's success stories. *Journal of Interpersonal Violence*, 15(8), 827-842; Sturge, C., & Glaser, D. (2000). Contact and domestic violence: the experts' court report. *Family Law*, 615-629.

<sup>297</sup> Dalton, C., Carbon, S., & Olesen, N. (2003). High conflict divorce, violence, and abuse: Implications for custody and visitation decisions. *Juvenile and Family Court Journal*, 54(4), 11-34.

<sup>298</sup> However, as we will show, s. 61 is not always adequately canvassed when parenting orders are made within a context of domestic violence. See discussion earlier in this chapter of *B v M* and *B v M* "the sequel".

<sup>299</sup> Care of Children Act 2004, s. 58.

<sup>300</sup> *Ibid*, s. 5(e).

<sup>301</sup> Under Article 19(1): "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." United Nations. (1989). Convention on the Rights of the Child. Retrieved 15 April 2005 from <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

psychological violence against anyone with whom she or he has a domestic relationship<sup>302</sup> may be ignored. This is an obvious inconsistency.

This inconsistency has been a somewhat contentious issue in applications for parenting orders. On the one hand, in some decisions, such as *Cocker v Middleton*<sup>303</sup> (which we discuss below), the court has taken the view that it is able to consider psychological abuse when conducting the section 61 risk assessment. On the other hand, in *Bonnar v Fischbach*,<sup>304</sup> having determined that the respondent had not used physical or sexual violence against the children,<sup>305</sup> the court held that it could not include an assessment of the effects of past emotional abuse of the children in conducting the section 16B(5) (now section 61) risk assessment.<sup>306</sup> These and other decisions of the Family Court were reviewed by Justice Heath in *A v X*<sup>307</sup> who held:<sup>308</sup>

I am satisfied that, in assessing the question of “safety” of the child for the purposes of s 16B(4) of the Act, the Court is entitled to have regard to all relevant factors touching on that issue, whether directly or indirectly related to the actual violence proved to have taken place or not.

Useful though this decision is, we feel that the inconsistency between the narrow definition of violence in section 61 (as limited to physical and sexual violence) and the broader wording of the “Principles relevant to child’s welfare and best interests” (namely “all forms of violence”)<sup>309</sup> needs to be removed. A child’s need for “safety”, in its widest meaning, needs to be prioritised over a violent parent’s supposed “right” to day-to-day care or unsupervised contact to that child. We recommend:

**THAT section 58 of the Care of Children Act 2004 be amended by adding “psychological violence” to the types of violence which trigger the rebuttal assumption that a violent party should not have a role in providing the day-to-day care of a child or have unsupervised contact with a child unless the court is satisfied that the child will be safe. (#5)**

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<sup>302</sup> As set out in s. 3 of the Domestic Violence Act 1995, s. 5(e) of the Care of Children Act, and Article 19.1 of the United Nations Convention on the Rights of the Child.

<sup>303</sup> *Cocker v Middleton* [1997] NZFLR 113, Judge Inglis QC.

<sup>304</sup> *Bonnar v Fischbach* [2001] NZFLR 925.

<sup>305</sup> *Ibid*, at paragraph 46. Among other things, Justice Heath noted that s. 16B(5)(i) allowed the court to consider “Such other matters as the Court considers relevant.” The inclusion of (i) seems to contradict a reading of s. 16B as restricting the enquiry to only that sort of violence alleged by one of the parties. Citing the Court of Appeal in *ER v FR* [2004] NZFLR 633, Justice Heath, at paragraph 59, noted: “Parliament could not possibly have intended that the inquiry into a child’s safety should be restricted more in a case where actual violence had been found to have taken place than in a case where the Court was unable to determine, on the basis of the evidence before it, whether or not the allegation of violence was proved.”

<sup>306</sup> *Ibid*, at paragraph 51. Here, the court was specifically referring to s. 16B(5)(e) (now s. 61(e)). That requires the court to consider “the physical or emotional harm caused to the child by **the** violence” (emphasis added). The point here is that “the” violence was read by the court as referring exclusively to the violence alleged by the other party – and not to violence of any other type.

<sup>307</sup> *A v X* [2005] 1 NZLR 123. Here, Justice Heath referred to *Payne v Payne* [1996] NZFLR 786, *Fielder v Hubbard* [1996] NZFLR 769, *ER v FR* [2004] NZFLR 633, and *M v M* [2002] NZFLR 743.

<sup>308</sup> *A v X* [2005] 1 NZLR 123, at paragraph 60.

<sup>309</sup> Care of Children Act 2004, s. 5(e).

### **Judicial Attitudes Post Guardianship Amendment Act 1995**

In our 1992 research, we noted that:<sup>310</sup>

Family Court judges interviewed in general felt that violence from one spouse to another, even in the presence of the children, was insufficient reason to deny access to the abusive partner.

Since then, much more research has been completed regarding the deleterious effects of domestic violence on children and the risks batterers pose to children, Sir Ronald Davison completed his inquiry into the Bristol killings,<sup>311</sup> and Parliament enacted the Guardianship Amendment Act 1995, the provisions of which have been incorporated into the Care of Children Act 2004. The new provisions certainly saw the Family Court adopt a different approach to children affected by domestic violence, one in which violence against a spouse was indeed seen as a reason for denying unsupervised access to the violent partner. On the other hand, some key informants have suggested to us that over the past few years, there has been some swing back in the direction of pre-1995 views. We examine this issue below.

#### **An Exemplary Approach**

In a 1997 decision, *Cocker v Middleton*, Judge Inglis adopted what we recommend as a best practice approach to judgment writing under section 61 of the Care of Children Act 2004. The case involved post-separation physical abuse of the mother by the father in front of the children and ongoing intimidation and threats by him. The father's violence also included one incident:<sup>312</sup>

where the mother was driving with the children [and] the father followed her in his own car for some distance in an intimidating manner, stopped her for the purpose of collecting her key to their former home, followed her again, and finally overtook her, brandishing a gun at her.

In his decision, the judge set out his findings and considerations under each of the section 61<sup>313</sup> risk assessment factors. Moreover, he did not accept the father's explanations, justifications and excuses for his violence, namely that the father was upset about the separation, that the mother had had an affair during marriage, and that the father was "disappointed" by what he saw as "access hassles" created by the mother. Instead of minimising the violence by assigning it to some methodologically dubious category like "separation engendered violence", Judge Inglis found:<sup>314</sup>

In the particular circumstances of this case, and given the intensity of the father's continuing animus against the mother, the fact that the incidents of physical violence were not recent, or persisted in frequently or habitually, is of less importance than the likelihood of physical violence occurring again. There must be a serious doubt whether the father truly understands how unacceptable it is to resort to physical violence. Certainly his continuing bitterness and frustration are powerful factors in lowering his resistance to this means of expressing himself. In all this there is a risk of a degree which must be regarded as unacceptable.

Judge Inglis, moreover, did not accept that mere attendance at a stopping violence programme demonstrated that the father had dealt with his violence. After commenting that the father had

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<sup>310</sup> Busch, R., Robertson, N. R., & Lapsley, H. (1992). *Protection from family violence: A study of protection orders under the Domestic Protection Act 1982*. Wellington: Victims Task Force, p. 234.

<sup>311</sup> Davison, R. (1994). *Report of inquiry into Family Court proceedings involving Christine Madeline Bristol and Alan Robert Bristol*. Wellington: Office of the Minister of Justice.

<sup>312</sup> *Cocker v Middleton* [1997] NZFLR 113, at p. 116.

<sup>313</sup> Although at the time, these provisions were included in s. 16B of the Guardianship Act 1968.

<sup>314</sup> *Cocker v Middleton* [1997] NZFLR 113, at p. 118.

attended an anger management programme for ten weeks but that his abusive behaviours continued despite enrolling for a second programme, Judge Inglis stated:<sup>315</sup>

... whether such a programme will assist with the father's real difficulty by addressing the real cause of his anger and the intensity of his feeling that he has been wronged and his wish to retain control of the situation, remains to be seen.

In accordance with good risk assessment practice, Judge Inglis did not assume that attendance at a programme per se demonstrated that the respondent had "changed" and therefore that unsupervised access was now appropriate. Judge Inglis, moreover, found that the respondent not only had to stop physically abusing the applicant; he also had to stop intimidating and harassing her. Finally, he made the clear statement that the significance of acts of psychological violence can only be understood within the context of prior physical and psychological violence.<sup>316</sup>

In his decision, Judge Inglis read down the approach outlined by section 3 of the Domestic Violence Act into his (now section 61) risk analysis. He stated that while "violence" (now in section 58) was expressly limited to physical or sexual abuse, the word "safe" (now in section 60(4)) allowed him to read the risk of ongoing psychological abuse into his assessment. He stated:<sup>317</sup>

I do not consider that the concept of a child's "safety" in terms of [now section 60(4)] can properly be limited in that way [to physical and sexual violence]. The Guardianship Act is child-centred. It focuses on the welfare, needs and security of the child. I find it difficult to accept that the legislature, in passing legislation specifically directed to the situation of a child where there has been physical violence in the home, could have intended [now section 60(4)] to operate only to protect the child against physical abuse as such from the violent parent, and not to protect the child against the well-recognised psychological and emotional consequences for the child of the violence between the parents. I do not consider that [now section 61(e)] which expressly directs the Court in assessing the child's safety to have regard to the "physical or emotional harm caused to the child by the violence" could reasonably have been intended to be limited to physical or emotional harm caused only by violence directed at the child. And in any event, [now section 61(i)] expressly authorises the Court to have regard to "all other matters the Court thinks relevant."

Moreover, the issue of "safety" can sensibly be considered only within the whole context in which the physical violence has occurred. In the present case the propensity for physical violence lies in the intensity of the father's negative view of the mother and his lack of insight into its effects on the children. That raises a clear issue of "safety" in terms of [now section 60(4)]. And it is not to be overlooked that what harms the mother necessarily harms the children.

I would therefore hold that [now section 60] is designed to protect a child not only from physical harm but also from the psychological and emotional harm resulting from their exposure to the physical violence that has occurred within the context of a violent parent's inherently negative and violent attitude towards the other parent.

### A Change in Policy?

In contrast to the approach taken by Judge Inglis in the 1997 case discussed above, according to our legal key informants, the Family Court currently appears to prioritise contact over safety. This is the case, they told us, even when there is ongoing abuse. The Family Court judge's decisions in *B v M*,<sup>318</sup> which we discuss below, are examples of contact trumping safety. How much those

<sup>315</sup> Ibid, at p. 119.

<sup>316</sup> Ibid, at p. 121.

<sup>317</sup> Ibid, at p. 121.

<sup>318</sup> *B v M* (High Court, Auckland, CIV2004-404-2006, 21 May 2004, Heath J), reported as *A v X* [2005] 1 NZLR 123.

decisions reflect a more general change of approach is difficult to say but certain judicial speeches do point to some sort of reassessment. For example, in discussing the general approach to protection orders, the Principal Family Court Judge has noted that making a protection order inevitably has an impact on the care arrangements for children and that there is more attention on such issues now than when the Domestic Violence Act 1995 was implemented.<sup>319</sup> Judge Doogue has gone further, calling into question research on the deleterious impacts on children of witnessing domestic violence.<sup>320</sup> Although the research cited does not support her contention, Judge Doogue goes on to offer an alternative framework, namely, Johnston and Campbell's typology of domestic violence discussed in Chapter 7.<sup>321</sup> As we have shown in Chapter 7, Johnston and Campbell's typology is conceptually flawed, has never been validated, but has been extensively critiqued.<sup>322</sup> More tellingly, Johnston herself in two recent articles has called into question a great deal of what she had written in her earlier, 1993, articles. For example, in a 1999 article, Proposed guidelines for custody and visitation for cases of domestic violence, high conflict, and violent parents in Family Court, Johnston states:<sup>323</sup>

Children who have witnessed or overheard severe or repeated incidents of violence perpetrated by parent(s) are likely to be acutely or chronically traumatized and at risk

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<sup>319</sup> Specifically, Judge Boshier, in his review of developments over the ten years since the implementation of the Domestic Violence Act 1995, stated: "Inevitably, the making of a protection order can impact upon the care arrangements for children. There is possibly more focus now on the issue of the effect of a protection order on the relationship between parents and children, compared with when the Domestic Violence Act came into force 10 years ago. There is considerable prominence in current legislation [that is, the Care of Children Act 2004] on children having a meaningful relationship with both of their parents, whether or not they are living with them." Boshier, P. (2006). *The Domestic Violence Act ten years on*. Speech at Te Unga Waka Marae, Epsom, 27 March. Retrieved 19 December 2006 from <http://www.justice.govt.nz/family/publications/speeches-papers/default.asp?inline=domestic-violence-act-ten-years-on-march-2006.asp>, at p. 6.

<sup>320</sup> Doogue, J. (2004). The Domestic Violence Act 1995 and s. 16B of the Guardianship Act 1968: The effect on children's relationships with their non-custodial parent. *Butterworths Family Law Journal*, 4(10), 243-248. Judge Doogue comments: "At this point social science cannot support the assumption that any access, even supervised access with a parent who has been violent, is necessarily in a child's best interests. But nor does it support the assumption that access to a parent who has been violent is necessarily detrimental to a child's best interests ... Research and experience support the proposition that in New Zealand some children are being deprived of contact with a parent who has been alleged or judged to be violent when that is **not in their best interests**" (emphasis added). However, the only research cited to support this contention is the 2000 process evaluation of the Domestic Violence Act (Barwick, H., Gray, A., & Macky, R. (2000). *Domestic Violence Act 1995: Process evaluation*. Wellington: Ministry of Justice). As we noted in Chapter 7, this evaluation did not assess outcomes for children. Instead, to support her contention Judge Doogue relies entirely on the reported comments of the "disenfranchised" fathers interviewed. (For example, "the authors reported that the 15 respondents who discussed access arrangements were 'generally bitter and angry at their loss of ready contact with their children'" (p. 4). That is, the cited research does not address the best interests of children at all but the anger of (some of) their fathers.

<sup>321</sup> In Doogue, J. (2004). The Domestic Violence Act 1995 and s 16B of the Guardianship Act 1968: the effect on children's relationships with their non-custodial parent. *Butterworths Family Law Journal*, 4(10), 243-248, Judge Jan Doogue states: "Writing in the Family and Conciliation Courts Review of July 1993, Janet Johnston and Linda Campbell identified five types of inter-parental violence drawn from a study of five convict families in the United States involved in child custody disputes. [sic] ... **This analysis could provide a useful framework within which to consider risks for children when the Court is considering access and care arrangements under the Guardianship Act 1968 as it highlights the contextual parameters of violence**" (emphasis added). See also the discussion in Chapter 7.

<sup>322</sup> See, for example, Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage. Dalton, C. (1997). When paradigms collide: Protecting battered parents and their children in the Family Court system. *Family and Conciliation Courts Review*, 37(3), 273-296, at p. 279. See also the discussion in Chapter 7.

<sup>323</sup> Johnston, J. (1998). *Proposed guidelines for custody and visitation for cases with domestic violence: High-conflict and violent parents in Family Court*. Retrieved from <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/hcvpfcfs.pdf>, at p. 3.

for emotional, behavioral, and social difficulties, including long-term victim or perpetrator roles. Children who do not directly witness spousal abuse are also negatively affected by the climate of violence in their homes and are likely to experience impairment of development and socialization skills. Even very young children and infants who are not thought to be cognizant of the violence are negatively affected. For these reasons, children need to be protected from witnessing threats of violence or actual physical abuse and from exposure to a climate of violence in their homes.

In that article, she concludes that courts should:<sup>324</sup>

Limit child's exposure to parental conflict. All arrangements for contact between a child and parent should be carefully structured to limit the child's exposure to conflict between the parents and to ensure the safety of all present.

Frequent transitions may not be advisable. Where there is ongoing conflict and reasonable fear of violence between parents, and/or the child shows continued stress reactions to transitions between parents, access arrangements that require the child to make frequent transitions between parents should be avoided.

Where there is ongoing conflict and fear of violence between parents, timesharing schedules that require the child to spend substantial amounts of time with both parents are not usually advisable.

### Parental Alienation

In an even more recent, 2001, article, Johnston and her co-author, Joan Kelly, make it clear that parental alienation syndrome (or parental alienation, as it is now being commonly framed in our Family Court) is not an applicable concept when dealing with parenting orders in respect of children who have been exposed to domestic violence. As Johnston and Kelly state:<sup>325</sup>

Children who are realistically estranged from one of their parents as a consequence of that parent's history of family violence, abuse or neglect need to be clearly distinguished from alienated children. Among this group are children who are estranged as a cumulative result of observing repeated violence or explosive outbursts of a parent during the marriage or after separation, or who were themselves the target of violence and abusive behaviour from this parent. Often they can only feel safe enough to reject the violent or abusive parent after separation.

Johnston and Kelly's views are echoed in the 2006 judicial guide *Navigating custody and visitation evaluations*, which comments:<sup>326</sup>

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<sup>324</sup> Ibid, at p. 6.

<sup>325</sup> Kelly, J., & Johnston, J. (2001). The alienated child: A reformulation of parental alienation syndrome. In Alienated children in divorce [Special issue]. *Family Court Review*, 39, 249-266, at p. 253.

<sup>326</sup> Dalton, C., Matthews, G., Matthews, K., Drozd, L., & Wong, F. (2006). *Navigating custody and visitation evaluations in cases with domestic violence: A judge's guide*. Reno, NV: National Council of Juvenile and Family Court Judges, at pp. 25-27. The judicial guide concludes: "Cases known or suspected to involve domestic violence pose particular challenges because: ... It is appropriate for parents to try to protect themselves or their children from exposure to violence, even when it means limiting the other parent's contact with the children; ... Abusive partners commonly sabotage their respective partner's parental authority over, and relationship with, the children; ... Abusive parents rarely take responsibility for the consequences of their behaviors, but instead blame their partners for turning the children against them; and ... Children in abusive households may feel safer identifying with the abusive and more powerful parent. If the history of violence is ignored as the context for the abused parent's behavior in a custody evaluation, she or he may appear antagonistic, unhelpful, or mentally unstable. Evaluators may then wrongly determine that the parent is not fostering a positive relationship with the abusive parent and inappropriately suggest giving the abusive parent custody or unsupervised visitation in spite of the history of violence; this is especially true if the evaluator minimises the impact on children of violence against a parent or pathologises the abused parent's responses to the violence."

In contested custody cases, children may indeed express fear of, be concerned about, have distaste for, or be angry at one of their parents. Unfortunately, an all too common practice in such cases is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from “parental alienation syndrome” or “PAS”. Under relevant evidentiary standards, the court should not accept this testimony. The theory positing the existence of “PAS” has been discredited by the scientific community ... The discredited “diagnosis” of “PAS” (or allegation of “parental alienation”), quite apart from its scientific invalidity, inappropriately asks the court to assume that the children’s behaviors and attitudes toward the parent who claims to be “alienated” have no grounding in reality. It also diverts attention away from the behaviors of the abusive parent, who may have directly influenced the children’s responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways toward the children themselves, or the children’s other parent. The task for the court is to distinguish between situations in which children are critical of one parent because they have been inappropriately manipulated by the other (taking care not to rely solely on subtle indications), and situations in which children have their own legitimate grounds for criticism or fear of a parent, which will likely be the case when that parent has perpetrated domestic violence. Those grounds do not become less legitimate because the abused parent shares them, and seeks to advocate for the children by voicing their concerns.

Key informants have advised that the now discredited concept parental alienation syndrome is still being utilised in Family Courts throughout the country, even in cases where violence has been used by one parent against another.<sup>327</sup> We have already seen that in 2001, Johnston and Kelly found that children could be realistically “alienated” when they had witnessed violence against one parent at the hands of another.<sup>328</sup> Sturge and Glaser have also disputed the validity of the parental alienation syndrome concept,<sup>329</sup> as have Freckleton,<sup>330</sup> the National Council of Juvenile and Family Court Judges,<sup>331</sup> and other recent psychological researchers.<sup>332</sup> Moreover, parental alienation syndrome (or its off-shoot, parental alienation) has not been recognised in the fourth edition of the *Diagnostic and statistical manual of mental disorders* (DSM-IV).<sup>333</sup> However, in spite of all of this, we want to posit one further query: why are abusive parents who coerce, denigrate and/or physically abuse their spouses in front of their children so rarely construed as “parental alienators”? For example, this phrase was never used to describe the respondent in *PCN v JCF*, a case we discuss later in this chapter. Parental alienator would certainly have been an appropriate term to apply to Tiare’s partner, whose son followed his father’s example and began beating her when he was big enough. As well as assaulting her in front of the children, Louise’s partner called her “a whore” and a “slut”. George often used similar derogatory terms when he assaulted Patricia, assaults often witnessed by their daughter, who, according to Patricia, still loves

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<sup>327</sup> In *W v M* [2004] NZFLR 1057, for example, the mother is referred to as an “alienator” but not a “substantial” one.

<sup>328</sup> Kelly, J., & Johnston, J. (2001). The alienated child: A reformulation of parental alienation syndrome. In Alienated children in divorce [Special issue]. *Family Court Review* 39, 249-266, at p. 253. Indeed, this entire volume, edited by Johnston and Kelly, is on parental alienation syndrome.

<sup>329</sup> Sturge, C., & Glaser, D. (2000). Contact and domestic violence: The experts’ court report. *Family Law*, 615-629.

<sup>330</sup> Freckleton, I. (2002). Evaluating parental alienation and child sexual abuse accommodation evidence. *Butterworths Family Law Journal*, 4, 57.

<sup>331</sup> Dalton, C., Matthews, G., Matthews, K., Drozd, L., & Wong, F. (2006). *Navigating custody and visitation evaluations in cases with domestic violence: A judge’s guide*. Reno, NV: National Council of Juvenile and Family Court Judges.

<sup>332</sup> See, for example, Emery, R., Otto, R., & Donohue, W. (2005). A critical assessment of custody evaluations: Limited science and a flawed system. *Psychological Science in the Public Interest*, 6(1), 1-29.

<sup>333</sup> American Psychiatric Association. (1994). *Diagnostic and statistical manual of mental disorders* (4th ed.). Washington, DC: American Psychiatric Association.

her father. Lyla effectively lost her relationship with her “big boy” as a result of her partner’s violence against her.

### **Recent Approaches to Contact and Shared Care**

Johnston does not favour shared care when children are fearful or traumatised or have been exposed to violence, recent research concurs with her and clearly indicates that it is inappropriate to award joint custody or shared care to a violent parent. As Dalton and her colleagues state:<sup>334</sup>

Abuse, whether a child is abused directly or abused by exposure to the abuse of the other parent, is de facto poor parenting. Any arrangement that gives the abusive parent shared custody will create unacceptable risks for both the children and the abused parent and provide the abusive parent with too many opportunities to continue a pattern of intimidation and control. Requiring ongoing negotiations between the parents over major decisions involving the children is similarly unacceptable, because the abused parent and children will remain hostage to the abusive parent’s agenda.

As we have already seen in Chapter 10, moreover, the English Court of Appeal in *Re L*<sup>335</sup> and Lord Justice Wall’s report on child homicides<sup>336</sup> also emphasise that spousal abuse with children witnessing is a form of child abuse that represents a total failure of parenting.

### **A Problematic Approach: *B v M***<sup>337</sup>

Given the consistency of the research findings favouring the statutorily mandated approach found in sections 60 and 61 of the Care of Children Act 2004, it is surprising that when we look at recent case law, there are Family Court judges who seem to refuse to enforce these provisions (or their earlier version under the Guardianship Act 1968). Instead they appear to apply the law as they wish it were written. Various judgments in *B v M* give a clear example of one such Family Court judge. Key legal informants, moreover, commented that *B v M* is not an anomalous case. These informants stressed that contact appears to trump safety all too often in parenting proceedings. What really distinguishes *B v M*, we suggest, is the tenacity that the appellant demonstrated. She endured four court hearings because she did not want to compromise her four-year-old’s right to safety during court-ordered contact. Few battered women would have had either the emotional or the financial wherewithal to pursue these proceedings to their successful outcome. This is especially true because legal aid grants for Care of Children Act applications are loans and not gifts, so are repayable by the recipient. One can only wonder how high the appellant’s legal fees were in respect of these four hearings, which included two appeals to the High Court.

### **The First Decision**

The first Family Court decision in *B v M*, later overturned in the High Court, awarded unsupervised access of a four-year-old child to her father. The Family Court judge, prior to his decision, had found that the father had been physically violent to his former wife, Ms B. The legal issues on appeal were whether the Family Court judge had applied the correct statutory test in determining whether the child would be safe during unsupervised access with her father.

<sup>334</sup> Dalton, C., Carbon, S., & Olesen, N. (2003). High conflict divorce, violence, and abuse: Implications for custody and visitation decisions. *Juvenile and Family Court Journal*, 54(4), 11-34.

<sup>335</sup> *Re L* (Court of Appeal (Civil Division), 19 June 2000).

<sup>336</sup> Wall, N. (2006). *A report to the President of the Family Division on the publication by the Women’s Aid Federation of England entitled ‘Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement’*. London: Royal Courts of Justice.

<sup>337</sup> *B v M* (High Court, Auckland, CIV2004-404-2006, 21 May 2004, Heath J), reported as *A v X* [2005] 1 NZLR 123. We will use the citations from the reported case.



The parties had been married for nine years and there were two children, the 4-year-old and her 11-year-old sister. Ms B had obtained interim custody of both, a warrant to enforce her interim custody, and a without notice protection order against Mr M. As related by Justice Winkelmann in the second High Court decision:<sup>338</sup>

Mr. M initially opposed the making of a final protection order in Ms. B's favour. He subsequently consented to the order being made on the basis of "no admission".

Apropos of our discussion about protection orders in Chapter 9, one can only query the Judge's jurisdiction under the Domestic Violence Act 1995 to make a consent protection order on a "no admission" basis. From our perspective, such an order fails in the court's obligation to hold Mr M accountable for his actions (one of the section 5 objects of the Domestic Violence Act) and gives a highly problematic message to both the applicant (Ms B) and the respondent (Mr M) respectively.

At the time of the original Family Court hearing, Ms B had sought permission to return to the UK with the two children. Justice Heath described the relocation issue as the "predominant issue"<sup>339</sup> before the Family Court. There was no contact occurring between Mr M and the older child, and Mr M was exercising supervised access to the younger child. As we shall see, however, after the four hearings about the issue of supervised, as opposed to unsupervised, access to the four-year-old, the issue of the mother's relocation to the UK still had not been dealt with.

Initially access to both children had been supervised by mutual friends of the parties, but as often happens with these ad hoc arrangements, the access broke down after five weeks. Mr M then attended a Salvation Army supervised access centre, "where he attended half of the sessions available to him."<sup>340</sup> For unspecified reasons, the eldest child was not a part of those later arrangements.

The Family Court judge adjourned the custody proceedings after two days of hearing so that counselling could take place to reintroduce the elder child to her father and to assist them to develop a "meaningful and functional relationship"; the proceedings were to be adjourned until after this counselling had occurred. At the same time, the judge made an order for unsupervised access in respect of the younger child. His order read:<sup>341</sup>

Access between [the four-year-old] and her father is to commence as unsupervised. It will be for 2 hours initially and will increase to a full day [from 9 am to 6 pm] every second week after three 2-hourly visits subject to the conditions that:

- (a) Mr. M is not to consume any illicit substances whilst [his daughter] is in his care,
- (b) there is to be no contact between the parents at access changeover; and
- (c) when the [four-year-old] is in his care, he is not to have contact with [his present wife].

At the hearing, the Family Court judge found that domestic violence had occurred during the spousal relationship between Mr M and Ms B, that the 11-year-old was aware of that violence and that she may have witnessed some forms of it. Having made these findings, the judge then had to deal with section 16B of the Guardianship Act 1968 (now sections 60 and 61 of the Care of Children Act 2004), in order to decide whether the children would be "safe" if unsupervised access were granted to the father.

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<sup>338</sup> *B v M [Guardianship]* [2005] NZFLR 1036 (HC), Winkelmann J, at paragraph 5.

<sup>339</sup> *B v M*, reported as *A v X* [2005] 1 NZLR 123 (HC), Heath J, at paragraph 12.

<sup>340</sup> *B v M [Guardianship]* [2005] NZFLR 1036 (HC), Winkelmann J, at paragraph 7.

<sup>341</sup> *Ibid*, at paragraph 17.

As an illustration of why we have recommended that psychological violence be expressly included in the definition of “violence”, the Family Court judge stated:<sup>342</sup>

Bearing in mind that “violence” in relation to [section] 16A is defined as “physical abuse or sexual abuse” and taking into account each of the factors mentioned in section 16B(5)(a) and in particular that the violence took place within the relationship, was directed at Ms. B, not the children, and that some three years have passed since the parties had any sort of contact, that it is unlikely that Mr. M will be physically violent to either of his children. There is no allegation of sexual abuse.

Having regard only to section 16B, provided that there is no contact between Mr. M and Ms. B during access changeovers, I am satisfied that the children will be safe in the unsupervised care of their father.

The comment reminds us of Amy’s synopsis of her Family Court judge’s decision awarding shared care to her and her former partner, Peter.

You’re not with him now. He’s not going to beat you. And has he ever beaten the child? No. He’s not dangerous to her.

The Family Court judge in *B v M* had concerns that domestic violence was currently occurring between Mr M and his new wife, Mrs M. In his judgment, he mentioned that Mrs M had obtained a protection order against Mr M, that he believed that some serious assaults had occurred during this relationship and that the Ms as a couple tended to “minimise the nature and extent of violence that had occurred between them in the course of their relationship.”<sup>343</sup>

Importantly, the Family Court Judge recognised that he had to ensure that the children were not exposed to the violence in Mr M’s present marriage. For that reason, the Family Court judge placed a condition on Mr M’s unsupervised contact with his daughters:<sup>344</sup>

A condition will have to be attached to contact between the girls and their father, to the effect that when the children are with him, he is not to have any contact with Mrs. [M]. This may in Mr. M’s eyes be quite a Draconian restriction but I cannot run the risk that a situation may arise when the children are with him, where things get out of control between he and his wife, and the children witness violence.

The Family Court judge also conditioned the father’s contact with children on his not being under the influence of illicit drugs and that there be no contact between the parents at access changeovers.

Section 16B (now section 60(3) of the Care of Children Act 2004) mandates that the judge has no jurisdiction to award unsupervised access to Mr M unless he is satisfied that the children will be “safe” with Mr M during unsupervised access. Clearly, however, the judge is not sure about the children’s safety during unsupervised access. Otherwise, he would not impose three significant conditions on such access. In addition, how realistic is it to totally exclude the new Mrs M from the children’s lives, especially after the first three two-hour access visits, when at least the four-year-old will be with her father from 9 am until 6 pm every fortnight. Most importantly, who is responsible for monitoring/reporting if Mr M breaches one of these conditions; that is, if he is stoned during his contact visits or involves Mrs M in the contact visit or indeed if “things get out of control between he and his wife and [the child] witnesses violence”.<sup>345</sup> How much “safer” do

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<sup>342</sup> *B v M*, reported as *A v X* [2005] 1 NZLR 123 (HC), Heath J, at paragraph 16.

<sup>343</sup> *Ibid*, at paragraph 20.

<sup>344</sup> *Ibid*, at paragraph 20.

<sup>345</sup> *Ibid*, at paragraph 20.

these conditions actually make this young child? One can assume that, as in other cases,<sup>346</sup> the judge's safety provision involves relying on the child to report the prohibited behaviours to her mother who will then, in turn, report to her own lawyer or the lawyer for the child. But how likely is this four-year-old – in the face of her and her sister's previous exposure to her father's violence – to report these breaches of the contact conditions? Who will explain the conditions' ramifications to the child? And finally, how appropriate an arrangement is this, in terms of ensuring that the child will be "safe" during contact?

The fact that these children are still at risk of exposure to ongoing violence is demonstrated by the Family Court judge's concluding comments:<sup>347</sup>

Mr. M has to change the way he relates to his children. He must be prepared to accept some responsibility for the current state of affairs. He has acknowledged this in part during his evidence to me. He has indicated a willingness to engage in the counselling process with [the elder child]. I owe it to [the children] to give them the opportunity to know, respect, and love their father. The children are entitled to be brought up and nurtured by both their parents. Although Mr. M behaved in a way that was damaging emotionally for the girls during the relationship with Ms. B and for some time afterwards, I cannot say that he is now disqualified from playing any practical role in the children's lives.

What statutory provision is the Family Court judge referring to when he states that he "owes" the children the opportunity to "know, respect and love their father" and that they are "entitled to be brought up and nurtured by both their parents"? Is it not Mr M who "owes" it to his children to raise them in physically and psychologically safe ways? Is not that a prerequisite to giving the children "the opportunity to know, respect, and love their father"? Are we not already seeing one product of Mr M's "total failure of parenting",<sup>348</sup> namely the refusal of his elder child to have any contact with him as a result of being exposed to his violence against her mother? Indeed, this child's refusal may be an example of Johnston and Kelly's statement that given a history of domestic violence, a child can be "realistically estranged" from a violent parent.<sup>349</sup> Finally, and perhaps on a more jurisprudential note, one can only query why the "practical role" – given Mr M's violence and other problems – needs to involve unsupervised access to this four-year-old child, especially in the light of the rebuttable presumption in section 16B against unsupervised contact being awarded to a violent parent.

The Family Court judge's approach in *B v M* is clearly contrary to the risk assessment mandated by section 16B(4) of the Guardianship Act 1968 (and its current equivalent, section 60(4) of the Care of Children Act 2004). Moreover, if the judge had followed the approach in *Cocker v Middleton*,<sup>350</sup> "safety" would include being safe from the ongoing emotional abuse of witnessing spousal violence. Until a violent parent takes responsibility for his use of violence and stops using violence (neither of which Mr M has done in this case), the children will necessarily not be "safe", especially not a four-year-old with whom it is difficult to develop adequate safety plans.

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<sup>346</sup> For another example of young children being placed in the position of being the monitors of the court's conditions, see *Spence v Spence* [2001] NZFLR 275 where the judge made a reasonable access order in favour of a father who she found had repeatedly used force which was "excessive, unreasonable and abusive." Despite Mr Spence's express statements that he would continue to use physical violence against the children because of his religious beliefs, the court granted Mr Spence reasonable access to the four children "provided he does not physically discipline them."

<sup>347</sup> *B v M*, reported as *A v X* [2005] 1 NZLR 123 (HC), Heath J, at paragraph 22.

<sup>348</sup> *Re L (A Child) (Contact: Domestic Violence)* [2001] Fam Law 260, at p.271.

<sup>349</sup> Kelly, J., & Johnston, J. (2001). The alienated child: A reformulation of parental alienation Syndrome. In Alienated children in divorce [Special issue]. *Family Court Review*, 39, 249-266, at p. 253.

<sup>350</sup> *Cocker v Middleton* [1997] NZFLR 113.

This Family Court judge's analysis underscores problems inherent in either an explicit or implicit use of Johnston and Campbell's 1993 typologies of batterers. Succinctly put, Johnston and Campbell only posited one risk to children on access, namely, that they would be exposed to further violence between their parents. Ignored in Johnston and Campbell's 1993 work is the fact that some batterers are serial abusers and batter their new partners as well. Moreover, as we have discussed in Chapter 10, there is a significant co-occurrence between spousal abuse and child abuse.<sup>351</sup> Research demonstrates that violent parents may continue to intimidate, coerce, and use a myriad of other power and control tactics to control their children as well as their subsequent partners. As Bancroft has stated:<sup>352</sup>

Each of Johnston's categories assumes that the only danger to children from unsupervised visitation is the risk of exposure to continued violence between the parents. This is a tremendous oversight, ignoring other risks that are actually far more pervasive. Anywhere from one-half to two-thirds of batterers also physically abuse their children. Batterers are often sexually abusive as well; one study found daughters of batterers are six times as likely to be incest victims than girls growing up with non-batterers, and another study indicates that a batterer is three to four times more likely than a non-batterer to perpetrate child sexual abuse.

Seen in this light, the assumption of the Family Court judge that the children in *B v M* will be safe as long as there is no contact between their parents during access changeovers, and the father refrains from using illicit drugs and never takes his children over to his home when his new wife is present (or meets up with her at a movie or at a restaurant or a park) is naive and dangerous.

### The First High Court Decision

The mother appealed the Family Court judge's decision to the High Court. As part of his "preliminary observations, Justice Heath states:<sup>353</sup>

The effect of the 1995 amendment on the relationship of children to non-custodial parents has recently come to the fore. The research and literature underlying the 1995 reforms are being questioned. A good example of that questioning can be found in the thoughtful and learned paper prepared by Judge Jan Doogue, a senior Family Court Judge, for the child and youth law conference 2004 ... Judge Doogue at p 2 proffers the view that social science cannot support the assumption that any access, even supervised access, with a parent who has been violent is necessarily in the child's best interests; but, nor can it support the assumption that access to a parent who has been violent is necessarily detrimental to the best interests of a child.

Justice Heath also comments that the approach Judge Doogue outlines seems to be "contrary" to "much of the research and literature that led to the passage of the 1995 [Guardianship Act] Amendment and the Domestic Violence Act."<sup>354</sup> He then makes the obvious and legally correct comment:<sup>355</sup>

It is not for this Court to express any view as to the preferable policy approach. The role of this Court, as a Court exercising appellate jurisdiction from the Family Court, is to interpret the legislation passed by Parliament with a view to ensuring consistent application of that legislation in like cases.

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<sup>351</sup> Edleson, J. (2001). Studying the co-occurrence of child maltreatment and domestic violence in families. In S. Graham-Bermann & J. Edleson (Eds.), *Domestic violence in the lives of children: The future of research, intervention, and social policy* (pp. 91-110). Washington, DC: American Psychological Association.

<sup>352</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage.

<sup>353</sup> *B v M*, reported as *A v X* [2005] 1 NZLR 123, at paragraph 29.

<sup>354</sup> *Ibid*, at paragraph 30.

<sup>355</sup> *Ibid*, at paragraph 31.

We heartily endorse Justice Heath's comments in this regard. The role of Family Court judges is to implement the law as written, using a purposive interpretation when dealing with ambiguous words and phrases.

Justice Heath then continues by outlining what the "safety" inquiry is and what it entails. He states:<sup>356</sup>

As I have noted, the usual inquiry of a Judge, on an application under the Act, is predictive assessment of the best interests of the child. However, when issues of domestic violence arise, a logically prior inquiry is undertaken, namely into the safety of the child (the section 16B inquiry). Only if the s.16B inquiry is answered favourably to a parent who has been found to have been violent will the Court be able to consider (on a s.23 inquiry) whether it is in the best interests of the child for unsupervised access or a custodial order to be made in favour of that parent.

Justice Heath then continues:<sup>357</sup>

There are two parts to the section 16B inquiry. First, to ascertain, as a matter of historical fact, whether a parent has been violent ... second, a predictive assessment of whether the child will be safe, in the future, while in the care of a parent who has been found to be violent in the past.

It goes without saying that, as delineated in the section 16B(5) (now section 61) risk assessment, a major determinant of whether the parent will be violent in the future is precisely whether the parent has been violent in the past and/or whether he continues to be violent currently. It is for this reason that we disagree with the dicta of Justice Young in *ER v FR*<sup>358</sup> when he states:

The necessity to make a backwards looking finding (necessarily on the balance of probabilities) whether sexual abuse occurred has the risk (recognised in *M v Y*) of distracting attention from the fundamental and forwards-looking issue of what is required in the best interests of the child.

In his comments, Justice Young seems to contradict a basic principle of risk assessment. As the New Zealand Standard for Risk Assessment reminds us, the best predictor of future behaviour is past behaviour.<sup>359</sup> The "fundamental forwards-looking issue" cannot be addressed adequately if we do not know, or if we minimise, the violent party's past violence. Indeed, section 61 refines the "backwards-looking finding" by contextualising that finding in terms of how recently and frequently such violence and violence in general have occurred. An "out-of-character" incident several years ago clearly will not have the same weight or relevance attached to it as an ongoing pattern of abuse against repeated partners.

After citing *M v M*,<sup>360</sup> Justice Heath states<sup>361</sup>:

It is difficult, however, to discern from the judgment precisely what factors led the Judge to view that the younger [four-year-old] child would be safe in Mr. M's care. Although the Judge in paragraphs 6 and 7 of the judgment took into account potential psychological harm to the child when ordering unsupervised access, he did so in terms of the subsequent section 23 inquiry rather than as part of the prior section 16B inquiry. That is no mere quibble with the Judge's approach. Had the Judge considered the potential psychological harm to the child as part of the section 16B inquiry as to

<sup>356</sup> Ibid, at paragraph 32.

<sup>357</sup> Ibid, at paragraph 33.

<sup>358</sup> *ER v FR* [2004] NZFLR 633 (CA), at paragraph 15.

<sup>359</sup> Standards New Zealand. (2006). *Screening, risk assessment and intervention for family violence including child abuse and neglect NZS8006:2006*. Wellington: Standards New Zealand, at p. 45.

<sup>360</sup> *M v M* [2002] NZFLR 743 (HC), Fisher and Priestley JJ.

<sup>361</sup> *B v M*, reported as *A v X* [2005] 1 NZLR 123, at paragraph 70.

safety, he would have lacked jurisdiction to make an order for unsupervised access unless he was satisfied ... that the child would be safe in the care of Mr. M. Only if he could find affirmatively that the child would be safe, would he have been entitled to consider whether unsupervised access was in the best interests of the child.

Justice Heath continues:<sup>362</sup>

Having considered the evidence in this case, I am left with significant doubts as to the reasons that led the Judge to hold that the child would be safe in Mr. M's care. The fact that the judge foresaw the possibility of violence erupting between Ms. B and Mr. M on an access changeover and regarded the likelihood of violence between Mr. M and his present wife during the period of unsupervised access as providing the basis for a conditional order suggests that he had real concerns about Mr. M's propensity for violence, notwithstanding his current attendance at a programme designed to stop violence. Nevertheless, the Family Court Judge may well have had good reasons which were simply expressed inadequately. For that reason, I propose to remit the issue to the Judge for further consideration.

Justice Heath then calls for the giving of judicial reasons, an issue we have already raised in Chapter 9 in relation to applications for protection orders. In a similar vein to our discussion of natural justice issues for battered women applicants, in *B v M* the giving of judicial reasons might well be construed as involving natural justice for this four-year-old child. This is especially so in light of how deleterious the effects of exposure to violence can be on children's short-term, medium-term and long-term welfare. As Justice Heath states:<sup>363</sup>

It goes without saying that it is important for Family Court Judges to make findings in relation to each stage of the inquiry they conduct. Not only are such findings required for the benefit of the appellate courts, but they are also required to enable the parties to understand why orders have been made. The regrettable features of this case are that Mr. M will be denied the benefit of the unsupervised access order in his favour while the issue is remitted for reconsideration and Ms. B simply does not understand the reasons why the unsupervised access order was made.

Justice Heath's decision again reinforces our recommendation for "psychological abuse" to be inserted into the section 59 Care of Children Act 2004 definition of "violence". Its omission has created a gap which certain judges have utilised to argue that the section 61 Care of Children Act inquiry should be limited to the type of violence which has been used by the respondent perpetrator in the past. Justice Heath in the first High Court decision in this case disagrees with that approach. In exploring the meaning of "violence" in the various subsections of section 16B(5), Justice Heath makes the following points:<sup>364</sup>

The references [in section 16B(5)(d) and (h)] to "further violence" are not, in express terms, limited to the type of violence found to have taken place in the past. Finally, the Court is given a general power to take account of such other matters as it considers relevant. That provision must be intended to refer to any factor touching on the safety of the child while in the care of the violent parent.

Factors s. 16B(5)(d), (f), (g), and (h) plainly go beyond matters relating to "the violence" found to have occurred. They are all matters relevant to a predictive assessment of whether the parent who has been violent in the past is likely to be violent in the future and whether any such violence might put the safety of the child or children at risk. In my view, there is no warrant for restricting the predictive assessment of the safety of the child to violent acts of a type that have occurred in the past.

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<sup>362</sup> Ibid, at paragraph 74.

<sup>363</sup> Ibid, at paragraph 75.

<sup>364</sup> Ibid, at paragraphs 56–59.

Such a construction also accords with the interpretation given to section 16B(6) by the Court of Appeal in *ER v FR*.<sup>365</sup> In that case, the court stated:

Parliament could not possibly have intended that the inquiry into a child's safety should be restricted more in a case where actual violence has been found to have taken place than in a case where the court was unable to determine, on the basis of the evidence before it, whether or not the allegation of violence was proved.

Justice Heath then concludes:<sup>366</sup>

I am satisfied that, in assessing the question of "safety of the child" for the purposes; of section 16B(4) of the Act, the Court is entitled to have regard to all relevant factors touching on the issue whether directly or indirectly related to the actual violence proved to have taken place or not.

We concur totally with Justice Heath's analysis. Indeed, we posit the question: who benefits from a narrower approach to this issue of the safety of the child? Certainly not the child, if one believes any of the relevant research on the impact of domestic violence on children, whether as a direct target or "simply" as a witness. The violent parent is the only one to benefit from a reading of the concept of "safety" which limits its ambit to the specific violence which has occurred in the past. Moreover, is it not the court's obligation to supply a purposive meaning to the word "safety" in section 16B(4) (now section 60) and (5) (now section 61)? Clearly such an interpretation would prioritise the welfare and best interests of children to be safe from violence in all its forms over the rights of a violent parent to have unsupervised access.

### ***B v M: The Sequel***<sup>367</sup>

Very rarely do we get to see a parenting order case remitted back to the Family Court for reconsideration and then appealed again by the same party to the High Court. But this is exactly what happened in *B v M*. When the case was remitted back, the Family Court judge again refused to apply the statutorily mandated approach of section 16B (now section 60). Instead of conducting "the logically prior inquiry into the safety of the child before carrying out the inquiry into the best interests of the child" as Justice Heath had directed, the Family Court judge again "decided to depart from this approach and conduct the section 23 inquiry before the inquiry into the safety of the child under section 16B."<sup>368</sup> The judge justified his approach by stating:<sup>369</sup>

Section 23 requires the welfare of the child to be the first and paramount consideration in every decision made concerning care arrangements for that child. There is nothing in the wording of s 16B which suggests that the paramountcy principle no longer applies or that its importance is diminished in any way.

One can only question what this judge's definition of the "welfare of the child" is. Do we doubt that "welfare" is dependent on the physical, sexual and emotional safety of the child? What research findings suggest that there is a category labelled "welfare of the child" that exists independently of a child's sense of emotional and physical safety? And perhaps somewhat pedantically, is it not the role of this judge to apply the legislation as passed by Parliament and not to substitute his view as to what the preferable policy approach should be? Is this not inherent in the concept of "rule of law"?

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<sup>365</sup> *ER v FR* [2004] NZFLR 633 (CA).

<sup>366</sup> *B v M*, reported as *A v X* [2005] 1 NZLR 123, at paragraph 60.

<sup>367</sup> *B v M [Guardianship]* [2005] NZFLR 1036 (HC), Winkelmann J.

<sup>368</sup> *Ibid*, at paragraph 24.

<sup>369</sup> *Ibid*, at paragraph 24.

Given this Family Court judge's approach, one is not surprised to read that, after researching 29 child homicide cases referred to him by the Women's Aid Federation of England, Sir Nicholas Wall was driven to state:<sup>370</sup>

I am the first to accept that contact cases involving domestic violence need the most rigorous examination by judges and magistrates who are properly trained in and alert to the risk factors posed by domestic violence. I am equally the first to accept that judges who prove themselves incapable of trying such cases appropriately, or who deliberately ignore good practice should lose their family ticket – the pre-requisite to the right to hear such cases.

In supporting his view that the section 23 inquiry should precede the section 16B(4) inquiry despite the express words of the statute, the Family Court judge referred to Article 9 of the United Nations Convention on the Rights of the Child, which he said:<sup>371</sup>

... reinforces the right of a child to be nurtured and brought up in the care of both parents, and a right to a functional and fulfilling relationship with a parent who may not be a primary caregiver.

The Family Court judge then concluded that:<sup>372</sup>

[the four-year-old child's] welfare requires her to have as normal a relationship as possible with her father so that she can be parented and nurtured by him, provided this can be done safely.

Of course, Article 9 of the United Nations Convention on the Rights of the Child is subject to the best interests of the child test. If ongoing contact is not in the child's best interests, Article 9 clearly cannot be cited to authorise its occurrence. Furthermore, as previously mentioned, Article 19.1 mandates that States Parties take all steps to protect children from all forms of mental and physical abuse and injury.

The Family Court judge candidly answers the question of why he refuses to first conduct the section 16B(5) (section 61) inquiry. He is opposed to supervised access but if he construes (as Justice Heath has said he must) section 16B(4) (section 61) as a jurisdictional step prior to his being able to award unsupervised access in the face of allegations of violence, then supervised access it will need to be. This judge does not want to order supervised access at a supervised access centre in this case (remember that access by friends had already been tried and failed) and he explicitly tells us why:<sup>373</sup>

[Supervised access] is an artificial environment by nature, restricted and invasive. The contact she has with her father in the current supervised access centre is limited in time and in activities. She is missing out on being parented and nurtured by her father whilst in that environment.

One cannot help but ask, is it the "fault" of the statute that this child is "missing out" on being "parented" and "nurtured" in this way? If the judge has a philosophical problem with supervised access centres, does this make it his right not to act in accordance with the statute?

Based on notes prepared by the supervised access centre people, the Family Court judge concluded that the child's "relationship with her father is happy."<sup>374</sup> Those notes also stated that

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<sup>370</sup> Wall, N. (2006). *A report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled 'Twenty-nine child homicides: Lessons still to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement'*. London: Royal Courts of Justice, paragraph 8.10

<sup>371</sup> *B v M [Guardianship]* [2005] NZFLR 1036 (HC), Winkelmann J, at paragraph 25.

<sup>372</sup> *Ibid*, at paragraph 25.

<sup>373</sup> *Ibid*, at paragraph 26.

<sup>374</sup> *Ibid*, at paragraph 27.



Mr M showed “skill and affection in nurturing and building a relationship with his daughter.”<sup>375</sup> However, while it is positive that Mr M can demonstrate these traits in a supervised environment where the safety of the child is monitored, can the judge be assured that Mr M will carry this behaviour into a nine-hour long period of unsupervised contact every fortnight? What about Mr M’s previous physical abuse of the children’s mother, Ms B, and his ongoing physical abuse of his present wife, Mrs M? Indeed in this regard, both High Court judges mention that Mr M’s father had filed an affidavit on behalf of his former daughter-in-law which stated that his son had also assaulted other former female partners of his. In one case, his father stated, he had broken the arm of a previous partner.<sup>376</sup> Importantly, Mr M did not call his father for cross-examination on his affidavit.

The Family Court judge then referred to his earlier decision and commented:<sup>377</sup>

It was my view that the risk [to the four-year-old] from her father was not one of physical abuse but one of emotional or psychological abuse. I formed the view that provided there was no possibility of Mr. M being violent to his wife ... in the presence of [the four-year-old], then the risk of emotional abuse to [the four-year-old] was well within acceptable bounds. I had formed the view that just because of Mr. M’s previous conduct, [the child] should not be deprived of the right to have a significant relationship with her father provided her safety was assured. I therefore put in place the structured orders relating to contact between [her] and her father with a view to ensuring her safety and ensuring that there was no unacceptable risk to her.

It is because of Mr M’s ongoing propensity to violence, not “his previous conduct” to the child’s mother, that the child will not be “safe”. The evidence is that he is currently abusing his new wife and that violence is a behaviour which he has manifested over many relationships. In addition, we know that the judge is aware of the co-occurrence of child abuse and spousal violence. It was specifically mentioned by Justice Fisher in *M v M*<sup>378</sup> and referred to by Justice Heath in the first *B v M* High Court appeal.<sup>379</sup>

As Justice Winkelmann states in the second *B v M* appeal, it was only after the judge had confirmed that unsupervised contact between Mr M and his younger daughter should occur, that he directed himself to the section 16B (section 60) inquiry. As part of this “latter” inquiry, the judge made the following findings of fact:

- (a) There is no evidence that Mr M has ever physically abused either of the children and there is little risk that he will do so in the future.<sup>380</sup>
- (b) Mr M has been physically violent in a serious way to his present wife, Mrs M. Mrs M has obtained a protection order against Mr M. The violence was recent. That violence was of uncertain frequency. It is not of an isolated nature.<sup>381</sup>
- (c) The manner in which Mr M deals with his female partners is such that there is a high likelihood of further violence occurring between him and Mrs M.<sup>382</sup>

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<sup>375</sup> Ibid, at paragraph 27

<sup>376</sup> Ibid, at paragraph 13.

<sup>377</sup> Ibid, at paragraph 28.

<sup>378</sup> *M v M* [2002] NZFLR 743 (HC), Fisher and Priestley JJ.

<sup>379</sup> *B v M*, reported as *A v X* [2005] 1 NZLR 123 (HC), Heath J.

<sup>380</sup> *B v M [Guardianship]* [2005] NZFLR 1036 (HC), Winkelmann J, at paragraph 29.

<sup>381</sup> Ibid, at paragraph 28.

<sup>382</sup> Ibid, at paragraph 28.

- (d) Mr M has been psychologically abusive to the children.<sup>383</sup>
- (e) There is a serious risk of further abuse of a similar nature should the children be involved in the periphery of violence being perpetrated by Mr M or by witnessing violence.<sup>384</sup>
- (f) On the balance of probabilities, the only risk to the four-year-old arising from contact with her father is the risk of emotional abuse based on being involved either on the periphery of or by witnessing domestic violence between either Mrs M or Ms B. There is no evidence which would suggest another source of risk to the child.<sup>385</sup>

Ms B again appealed the Family Court decision.

In her judgment, Justice Winkelmann reviews the legislative history of section 16B. She states:<sup>386</sup>

The immediate catalyst for the package of reforms of which section 16B was a part, was a report from the former Chief Justice, Sir Ronald Davison following his Inquiry into Family Court proceedings involving the Bristol Family. In that case, custody of three children had been awarded to a father who subsequently took his own life and that of his three children. The Inquiry found that while there was no evidence of a history of violence against the children, there was evidence of a history of violence against the wife.

As stated in the introduction to this chapter, moreover, section 16B was enacted specifically because the risk that Alan Bristol ultimately posed to his children (that he might kill them) was not perceived as even a remote possibility precisely because he had never been physically abusive to them during the marriage.<sup>387</sup> It was that inability to recognise the significant co-occurrence between Alan Bristol's spousal abuse (his sexual, physical and psychological abuse of his wife, Christine) and his potential for severe physical and emotional abuse of the children that masked his dangerousness during the various Bristol Family Court hearings.<sup>388</sup>

Justice Winkelmann repeats much of the Heath judgment in her own decision. She disagrees with the Family Court judge in terms of the section 23 inquiry being superior to the section 16B inquiry. Indeed she states that: "Section 16B is in effect a statutory direction that the first consideration as to a child's welfare is the child's safety in circumstances at least where there is a history of violence on the part of one or both parties to the proceedings."<sup>389</sup>

And then she continues:<sup>390</sup>

Section 16B does create an obstacle in the way of the violent parent obtaining custody or unsupervised access to their child. However, it is not an insurmountable obstacle. If the violent parent can satisfy the Court that the child will be safe, both physically and emotionally, whilst in his or her care, they may obtain custody or unsupervised access. The framework for the safety inquiry is that set out in section

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<sup>383</sup> Ibid, at paragraph 25.

<sup>384</sup> Ibid, at paragraph 29.

<sup>385</sup> Ibid, at paragraph 31.

<sup>386</sup> Ibid, at paragraph 36.

<sup>387</sup> Busch, R., & Robertson, N. R. (1994). I didn't know just how far you could fight: Contextualising the Bristol Inquiry. *Waikato Law Review*, 2, 41-68.

<sup>388</sup> Indeed, the Ontario Domestic Violence Fatality Review Board identified the link between physical spousal violence and child homicide in its 2005 report. The board interpreted it as a form of payback to the estranged female partner.

<sup>389</sup> *B v M [Guardianship]* [2005] NZFLR 1036 (HC), Winkelmann J, at paragraph 38.

<sup>390</sup> Ibid, at paragraphs 39-40.

16B(5). It contemplates a sophisticated analysis of the nature and context of the violence and its impact upon the family, with a view to predicting the future safety of the child.

There can be no simple formula as to how the Court can be satisfied as to the child's safety. Each case must be considered on its own facts. One matter that will be highly relevant however is the steps taken by a violent party to understand the effect of their violent behaviours and to prevent further violence occurring. As Judge Von Dadelszen said in *Payne v Payne*.<sup>391</sup>

... what has occurred in the past (the history) is really the only reliable indicator of what may occur in the future.

In allowing the appeal and quashing the Family Court's unsupervised access order (again), Justice Winkelmann made several important points. For example, she found that:<sup>392</sup>

By considering [the child's] welfare under s.23 generally before proceeding to the specific s.16B safety inquiry, the Judge erred as to the correct legal test to be applied. By conducting a general consideration of what was in the best interests of the child without regard to the mandatory first consideration of her safety, the Judge commenced his s.16B inquiry having already concluded that [the child's] welfare required her to have a normal relationship with her father, provided it could be done safely. The effect of this approach was to focus the s.16B inquiry on the safety of the proposed arrangement, rather than an analysis of whether the father had shown that [the child] would be safe in his care. I conclude that this approach caused the Judge to minimise the significance of what is a lengthy and on-going history of violent and controlling behaviour by the father. It caused the Judge to place too much reliance upon court-imposed conditions to keep [the child] safe.

And she continued:<sup>393</sup>

In making the orders for unsupervised access that he did, the Judge assumed that the Court-imposed conditions will be complied with. However, the ability to monitor compliance by Mr. M will be limited. [The child] is now a four year-old-child, who will not necessarily be able to report non-compliance. Nor will she be able to remove or protect herself from an unsafe situation. The likelihood of non-compliance and its potential effect on [the child's] development are not referred to or considered by the Judge.

And finally Justice Winkelmann concludes:<sup>394</sup>

I am also satisfied that because the Judge began his s.16B inquiry having already concluded that her welfare required her to have a normal relationship with her father, he failed to address himself to the burden placed upon Mr. M to satisfy the court that [the child] will be safe during access.

We need to ask ourselves what is "a normal relationship" with a serial batterer? Indeed, there is a recently developing literature on batterers as parents<sup>395</sup> which makes depressing reading but it was not cited by the Family Court judge. Instead of a sophisticated analysis of the risks to the welfare of this child,<sup>396</sup> the Family Court judge appears to substitute a Disney movie scenario of what parents should be like. He then appears to accept responsibility for ensuring that this type of

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<sup>391</sup> *Payne v Payne* [1996] NZFLR 785, at p 791.

<sup>392</sup> *B v M [Guardianship]* [2005] NZFLR 1036 (HC), Winkelmann J, at paragraph 42.

<sup>393</sup> *Ibid*, at paragraph 43.

<sup>394</sup> *Ibid*, at paragraph 44.

<sup>395</sup> See, for example, Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage.

<sup>396</sup> See our discussion of the multiple risks batterer parents pose to children in Chapter 7.

parenting will occur, and that despite his previous behaviour, Mr M will be this type of parent as long as the judge orders conditioned unsupervised access. But is it not Mr M who is responsible for establishing such a relationship, first by accepting responsibility for his former and current violence and then by ensuring that he will no longer use forms of physical and emotional violence as tactics of control and intimidation? These children, first and foremost, must be protected from exposure to physical and emotional abuse, and that is what the violence provisions of the Guardianship Act 1968 (and now the Care of Children Act 2004) are aimed at achieving.

Instead of remitting the matter again to the Family Court for determination of the contact issue, Justice Winkelmann herself resolves the issue. Her decision accords with best practice in terms of the section 16B (now sections 60 and 61) inquiry. She delineates each of the risk factors and then makes findings of fact in respect of each. As we have already stated, in our opinion this represents natural justice for the parties as well as for the subject child.

One of Justice Winkelmann's most interesting comments involves her assessment of "the likelihood of further violence occurring."<sup>397</sup> Agreeing with Justice Heath's analysis, she specifically states that "this criterion is not limited to the violence of the type that has previously been found to have occurred."<sup>398</sup>

And she continues quoting from the report of the court-appointed psychologist:<sup>399</sup>

Given that Mr. M's violence and controlling behaviours continue apparently unabated, there has to be a very high risk of further violence occurring which [the child] could witness. It is very difficult to quantify risk, particularly when the risk being quantified is a risk of violence. However, there is a body of literature that identifies that where males have previously been violent towards adult females, there is a risk of that violence at some stage being transferred to the children of the relationship. In this case, there is a history of long-standing and serious violence towards female partners. The Court-appointed psychologist characterises the violence towards Ms. B as having been part of a pattern of controlling behaviour. She has also identified that Mr. M's relationship with close family members are antagonistic and dysfunctional.

In conclusion, Justice Winkelmann quashes the unsupervised access order and reinstates the order for supervised access. She comments that even on cross-examination in the second case, Mr M attempted to "minimise the seriousness and significance of his violence"<sup>400</sup> and "has not come to any proper realization of the impact of his violent and controlling behaviours on Ms B and his children."<sup>401</sup> Justice Winkelmann then states unequivocally:<sup>402</sup>

Given Mr. M's ongoing violence, it is apparent that he has made no adequate attempts to prevent further violence occurring in the future. His lack of insight into his own behaviours make it a very real likelihood that further violence will occur.

Under section 16B(5)(i), "such other matters as the Court considers relevant", Justice Winkelmann states that she considers it relevant that Mr M has refused to undertake a drug test to clarify whether or not he is using drugs. Clearly, the Family Court judge had not been convinced that Mr M no longer took drugs either: that is why he conditioned his first and second unsupervised access orders on Mr M refraining from using illicit drugs.

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<sup>397</sup> Guardianship Act 1968, s. 16B(5)(d) (now Care of Children Act 2004, s. 61(d)).

<sup>398</sup> *B v M [Guardianship]* [2005] NZFLR 1036 (HC), Winkelmann J, at paragraph 62.

<sup>399</sup> *Ibid*, at paragraph 63.

<sup>400</sup> *Ibid*, at paragraph 68.

<sup>401</sup> *Ibid*, at paragraph 69.

<sup>402</sup> *Ibid*, at paragraph 69.

Can the Mr M we see in these two High Court judgments really be the same person who appeared before the Family Court judge? How did the Family Court judge fail to see that he was an ongoing abuser who posed a myriad of threats to his daughter during unsupervised access?

### Some Implications of *B v M*

The decisions of the Family Court in *B v M* raise serious concerns about the newly initiated Parenting Hearing Programmes Pilot which will be discussed at the end of this chapter. It is worth considering here, however, that the evidence against Mr M meeting his burden of proof in terms of section 16B(4) (section 60(4)) was so clear in this case; one must wonder how many other unsafe shared care/contact orders are being made where there is no ongoing physical abuse of the new wife to substantiate the mother's fears that the children will be at risk of becoming direct and/or indirect targets themselves of their father's violence? Or where the mother does not have the financial and/or emotional wherewithal to go through four hearings about the issue of unsupervised access? Or where the judge limits the hearing to two hours and has no benefit of a report from a psychologist who is also a specialist in domestic violence issues?

*B v M* illustrates a scenario where a Family Court judge is so committed to what he sees as normal parenting arrangements (that is, unsupervised contact, even for a violent parent), that he fails to take into account his mandatory obligations under the statute. It reminds the authors of the comments by key informants to the 1999 Rhodes, Graycar, and Harrison Australian report.<sup>403</sup> In that report, legal key informants talked about the welfare of the child as necessitating ongoing contact with both parents. However, when asked to give a reference which showed that to be true for children who had been exposed to domestic violence, not one of them could. It is as if that proposition has been accepted as a mantra, without any research to justify it. Indeed, in the Jan Doogue article, the very way that she posits her core statement demonstrates how little concern there is for safety of the child as a primary issue. She states:<sup>404</sup>

At this point social science cannot support the assumption that any access, even supervised access with a parent who has been violent, is necessarily in a child's best interests. But nor does it support the assumption that access to a parent who has been violent is necessarily detrimental to a child's best interests.

In a strictly literal sense, the statement is true. Everyone can believe that there will be one or several or even many cases in which it can be shown that access of some sort to a violent parent was not necessarily detrimental to a child's best interest. What the current research findings conclude, however, is that it is much more likely than not that such contact will be detrimental, and that children exposed to parental acrimony and domestic violence, especially ongoing violence, are unlikely to heal until they are no longer so exposed.

Moreover, one can only query whether Family Court judges are trained well enough in the dynamics of domestic violence and in how domestic violence impacts on children's emotional and psychological wellbeing that they will be able to pick up that minority of children for whom unsupervised access to a violent parent will not be "necessarily detrimental"?<sup>405</sup> Again, this issue will be further explored under the Parenting Hearing Programme Pilot discussion.

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<sup>403</sup> Rhoades, H., Graycar, R., & Harrison, M. (1999). *The Family Law Reform Act 1995: The first 3 years*. Melbourne: Department of Courts.

<sup>404</sup> Doogue, J. (2004). The Domestic Violence Act 1995 and s. 16B of the Guardianship Act 1968: the effect on children's relationships with their non-custodial parent. *Butterworths Family Law Journal*, 4(10), 243-248, at p. 243.

<sup>405</sup> As an aside, one might also query whether Judge Doogue considers that Ms B had obtained her protection order against Mr M "as a weapon", precisely to defeat this unsupervised access application? Who benefits when a judge states that women use protection orders as "weapons"? Once she has made this "weapons" statement, moreover, can the judge be seen as neutral and fair when she sits on cases involving parenting orders when the woman has obtained a protection order?

It needs to be remembered that the section 60 inquiry does not require that no access be awarded to a violent parent. It allows the Court to order supervised access even when the parent remains violent. This is common practice. What the section 60 approach does is to allow children to maintain safe contact with a violent parent. Indeed, rarely is no access given.<sup>406</sup> Section 60 creates a rebuttable presumption. If the violent parent can show – on a balance of probabilities – that the child will be safe when in that parent’s day-go-day care or during unsupervised contact, the court has jurisdiction to make those orders.

Again we find ourselves in the position of recommending that judges follow the law. The outcome in *B v M* (and in *PCN v JCF*, discussed later in this chapter) would almost certainly have been different if the statutorily mandated risk assessment had been conducted. So too would have been the outcomes for Amanda and Amira and their respective daughters discussed in the previous chapter.<sup>407</sup> Moreover, in the interests of natural justice and transparency, we agree with Justice Heath that “It is important for Family Court Judges to make findings in relation to each stage of the inquiry they conduct.”<sup>408</sup>

At the same time, the risk assessment mandated in section 60 of the Care of Children Act will not be effective unless judges have good quality information on which to base their inquiry. The gap in good quality advice was glaringly obvious in Amira’s case, where the lawyer for the child seemed to completely miss the indicators suggestive of serious risk to Zola, most notably Barry’s violent and controlling behaviour; his sharing a bed with his daughter and the presence of the axe. Similarly, the judge in Amy’s case seemed not to recognise the sexualised behaviour of Peter towards their daughter as significant risk factor.<sup>409</sup> No psychologist’s report was requested in these cases, yet these risk factors could easily have been identified by a psychologist or social worker with specialist training in domestic violence.

**THAT, in cases involving an inquiry under section 60 Care of Children Act 2004, a psychologist who has specialist training in domestic violence should be appointed to evaluate the risk to the child, the impact of the prior violence on the child, the implications of the violence on each party’s parenting abilities, and the meaning of the child’s expressed wishes. (#16)**

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<sup>406</sup> In a recent discussion with a law class, one Family Court judge stated he could only remember one time in about ten years when he had ordered no access. The Ministry of Justice does not keep such statistics. It should, because it would silence the misstatements from fathers’ rights groups who suggest no access is a common outcome in the Family Court.

<sup>407</sup> In Amanda’s case, a s. 60 inquiry was conducted in relation to violence by Amanda, after her brother-in-law captured on video the struggle which ensued when her daughter was not returned to her as agreed. Our point here is that Amanda’s successful without notice application for a protection order included clear allegations of violence **against** her which should have triggered the risk assessment in relation to her ex-partner. That it did not was presumably due to the fact that Amanda, acting we believe on bad advice, had had the temporary order discharged.

<sup>408</sup> *B v M*, reported as *A v X* [2005] 1 NZLR 123, at paragraph 75.

<sup>409</sup> See Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage, especially pp. 84-97 for a discussion of the batterer as incest perpetrator, including the shared attitudes of batterers and incest perpetrators (entitlement, externalisation of responsibility and victim blaming, confusion of love and abuse, objectification, and the sexualisation of domination). As the studies reviewed by Bancroft and Silverman show, there is a significant co-occurrence of battering and sexual abuse, the children of batterers being even more at risk when their mother is no longer present.

### **Ascertaining Children's Views**

Under section 6 of the Care of Children Act, children's views about parenting orders must be ascertained and taken into account.<sup>410</sup> It is surprising, however, that children's views to see a violent parent are sometimes accorded great weight despite concerns that domestic violence has been made acceptable or even "normalised" for such children.<sup>411</sup>

The primary question that we have not seen posited in much of the case law is: how are children's views constructed in a domestic violence environment?<sup>412</sup> Surely that is a central question that must be determined in order to assess the meaning of children's views. Moreover, we are concerned that judges are not currently sufficiently trained in domestic violence issues to be able to make such assessments, especially without the aid of psychologists properly trained in domestic violence related issues<sup>413</sup>. Indeed, we query the adequacy of the training currently available on this issue for lawyers for who act for children and specialist report writers.<sup>414</sup>

It goes without saying that we support every parent's meaningful involvement with his/her children as long as that involvement is in the welfare and best interests of those children. Children should be able to sustain their relationships with each parent post separation, provided that it can be done safely, without undue risk to the wellbeing of the child. That is exactly the position that sections 60 and 61 of the Care of Children Act 2004 assume as well.

The focus must be on children's safety and children's right to flourish. There cannot be "trade-offs" in terms of this position. Moreover, our courts and the Legal Services Agency need to be resourced adequately to make this happen. Decisions about granting protection orders and/or parenting orders made within the context of domestic violence must be the two most significant types of proceedings (at least in terms of the risks of long-lasting and intergenerational harms) heard in the Family Court. Their results impact not only on the parties themselves but on the lives of their children and their communities as well. Natural justice/due process should not be sacrificed because "doing it right" would cost too much.

### **A Problematic Approach: *PCN v JCF***<sup>415</sup>

In Chapter 7, we reviewed some of the factors which must be taken into account when assessing what children say about their parents in the context of domestic violence. Fear of upsetting the batterer<sup>416</sup> and traumatic bonding<sup>417</sup> are factors custody evaluators must take into account when

<sup>410</sup> Section 6(2)(a) and (b) of the Care of Children Act 2004 states: "(a) a child must be given reasonable opportunities to express views on matters affecting the child" and "(b) any views the child expresses (either directly or through a representative) must be taken into account."

<sup>411</sup> See, for example, discussion below concerning *PCN v JCF* [2005] NZFLR 625. In terms of a Hague Convention example, see *S v S* [1999] NZFLR 625 (HC), Fisher J.

<sup>412</sup> It is interesting to note, however, the psychologists' evidence in *S v S* on this issue. Citing their evidence, Justice Fisher states: "As to influences upon [the children], the two psychologists explained that children placed in an abusive home often tend to side with the aggressor. That can be due to the fact that they 'identify with the person who appears to be right because they get their own way' or because it is 'part of the submission to control of the dominant and aggressive parent'."

<sup>413</sup> See discussion above of Dalton, C., Matthews, G., Matthews, K., Drozd, L., & Wong, F. (2006). *Navigating custody and visitation evaluations in cases with domestic violence: A judge's guide*. Reno, NV: National Council of Juvenile and Family Court Judges.

<sup>414</sup> The limited coverage of children and domestic violence was evident in the most recent training for counsel for the child applicants. Of the 15 sessions, only one focused on children and domestic violence. Of the 355 pages (excluding legislation) of reading for the course, only 26 focused on this topic.

<sup>415</sup> *PCN v JCF* [2005] NZFLR 625.

<sup>416</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage.

children express a wish to live with and/or see a violent parent. One key informant commented that it is a worry to many psychologists that some judges appear to believe that a child can safely articulate his or her own views in proceedings involving a violent parent. This is especially problematic when that parent is present. As he commented:

The child who has witnessed or experienced abuse will say what he thinks his Dad or the judge or the lawyer wants to hear. It is precisely because of this power dynamic that psychologists are essential as expert witnesses in these cases.

Claire Dalton and her colleagues have also recently stated:<sup>418</sup>

It should be recognised that children may never feel safe disclosing negative information or feelings about a parent; at a minimum, they should be interviewed separately in cases where there are allegations of abuse, even if they are also interviewed or observed with one or both parents.

In Appendix II to the psychological report on children and domestic violence adopted by the English Court of Appeal, Sturge and Glaser raise issues about the difficulties in construing the meaning of children's wishes or views. They list the problems as:

- (a) distinguishing between wishes and deeper feelings;
- (b) statements influenced by a specific context;
- (c) separating out the incidental or transitory;
- (d) pressure from disputing adults;
- (e) risk of being burdened with guilt;
- (f) risk of receiving hostility from others;
- (g) decision affected by information quality and provider bias;
- (h) articulation affected by age and how they might think it will be received;
- (i) whether they have promised someone what or not to say;
- (j) whether they have support;
- (k) where and how they are asked;
- (l) where it is difficult to explain the alternatives to children.

All of these matters are illustrated in the case of *PCN v JCF*, a Family Court case in which the judge accords a child's views significant weight, despite the fact that the boy's wishes to live with his violent father derive apparently from his fear that his father will re-victimise him or his mother (or perhaps his younger sister) if he loses custody of them. The case, as in *B v M*, again shows how children can be positioned by the court to become the monitors of their violent parents, clearly not a very safe or psychologically desirable position for any child. It is also a case where the judge conducts a very clear section 60 (section 16B) inquiry about the issue of day-to-day care but then does not carry the safety inquiry through to the issue of whether she has jurisdiction to award unsupervised access to the father. Finally, it is a case where the violent parent's use of power and control tactics post separation is forcefully demonstrated.

*PCN v JCF* involves an application for custody by the mother (Ms F) of two children (aged 11 and 7) who, the Family Court judge tells us, "had been witness to prolonged and serious domestic violence between their parents."<sup>419</sup> The parties had been in a relationship for nearly 11

<sup>417</sup> James, B. (1994). *Handbook for treatment of attachment-trauma problems in children*. New York: Free Press; Herman, J. (1992). *Trauma and recovery*. New York: Basic Books.

<sup>418</sup> Dalton, C., Carbon, S., & Olesen, N. (2003). High conflict divorce, violence, and abuse: Implications for custody and visitation decisions. *Juvenile and Family Court Journal*, 54(4), 11-34.

<sup>419</sup> *PCN v JCF* [2005] NZFLR 625, at p. 625.



years, until April 2003. Since July 2003 the children have been living with Mr N, their father. The court stresses that this arrangement was not with the mother's consent. The judge states:<sup>420</sup>

Mr. N removed the children from [the mother's] care in Kawerau. He said she was neglecting them. She said that she was too afraid to resist his removal of the children. On his return to Wellington, Mr. N applied on 17 July 2003 for interim and final custody. When Mr. N made his application, he did not bring to the Court's attention the fact Ms F had a final custody order and he was uncertain whether there was a final protection order. Those orders were made by the Family Court at Whakatane on 27 March 2000. Nor did he make the Court aware that his supervised access order made on 27 March 2000 was suspended on 20 July 2000 after he had seriously assaulted Ms F.

The case, therefore, also raises concern about the Family Court's access to information concerning prior Family Court orders made in other registries, and demonstrates the need for the Family Court to have access to relevant information about criminal court proceedings concerning the parties. In this case, Mr N had been convicted of running over Ms F with his car while the children were backseat passengers and witnesses.

### **Mr N's Violence towards Ms F and Other Partners**

The Family Court judge reviews the father's denials, excuses for, and minimisations of his violence. The judge records that:<sup>421</sup>

[Mr. N] had said that the relationship was stormy with lots of arguments and lots of yelling and shouting. He said there were many times when Ms F hit him and there were times when he either hit her back or he hit her first. He said the fights were often about money or Ms F being promiscuous. Ms F would want money to gamble with and she would flirt with other men which made Mr. N angry. He further said that the fights were generally when they had both been drinking and the arguments were loud and verbally abusive and there were times when the neighbours called the police. He accepted he had been convicted of assaulting Ms F on three occasions and on the last occasion when he used a motor vehicle as a weapon he was sent to prison for six months. He said he pleaded guilty on advice of his lawyer even though he disputed some matters in the summary of facts.

Ms F, on the other hand, is quoted in an affidavit as saying:<sup>422</sup>

I never hit [Mr. N]. He's a big man. I used to run away from him. I was scared of him and the kids had seen that. I wouldn't even try to hit him. I would be on the floor and he would be sitting on my back. I couldn't move. He'd pin my arms. I never hit him. I would only mouth off at him.

It is noteworthy that jealousy is a significant risk factor for domestic violence against women and accusations of provocation (in this case, "flirting with other men") are commonly expressed justifications for violence by men who use domestic violence against women.<sup>423</sup>

The judge continues:<sup>424</sup>

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<sup>420</sup> Ibid, at paragraph 2.

<sup>421</sup> Ibid, at paragraph 8.

<sup>422</sup> Ibid, at paragraph 16.

<sup>423</sup> For example, see Towns, A., & Adams, P. (2000). "If I really loved him enough he would be okay." Women's accounts of male partner violence. *Violence against Women*, 6(6), 558-585; Adams, P. J., Towns, A., & Gavey, N. (1995). Dominance and entitlement: The rhetoric men use to discuss their violence towards women. *Discourse & Society*, 6(3), 387-406.

<sup>424</sup> *PCN v JCF* [2005] NZFLR 625, at paragraph 19.

Without going into every incident of violence between the parties the evidence is overwhelming that the violence used by Mr. N against Ms F was serious. It was cruel, harsh and brutal without regard to the consequences for Ms F. The assault using the car as a weapon was potentially lethal. It was not the first time Mr. N had driven a car at Ms F. The incident on 19 July which resulted in his conviction on 18 October 2000 also involved a motor vehicle. On that occasion Mr. N had punched Ms F in the face and pushed her over and kicked her three times on the leg. To escape him she crawled under a van. Mr. N reversed his car in an attempt to run Ms F over. Ms F attempted to run to Social Welfare and a place she referred to as "Meikles". She went up on a grassy verge and Mr. N drove up on that. His car brushed past Ms F's leg. She ran over to the pub near the TAB and Mr. N was driving again towards her but the police arrived.

The court found:<sup>425</sup>

Ms F presented as being very fearful with some of the classic symptoms of a victim of violence in a relationship in which she felt powerless and that her life was foreshortened, that is that she was not going to survive ... she has remained wary and hypervigilant about Mr. N and his family. In para 2 of her affidavit sworn on 15 October 2003 Ms F stated:

Last year [Mr. N] got me so stressed I started to lose my hair and I got shingles.

### Section 16B Safety Inquiry

In the face of this evidence of repeated and severe violence, the judge conducted a section 16B(4) (section 60 Care of Children Act) inquiry to ascertain in whose custody the children would be safe and what sort of contact arrangements should be ordered. In terms of nature and seriousness and frequency of the violence, the Family Court judge found:<sup>426</sup>

There have been 14 recorded domestic violence call-outs by the police between 1995 and March 2003. The earliest recorded was 7 September 1995 which noted that Mr. N had pushed Ms F, punched her in the chest and struck her across the back with a steel studded leather belt. The latest on 24 March 2003 stated there was a loud verbal argument but no complaint was laid. The incident on 20 November 1999 recorded that both parties pushed and kicked each other. That was the only one which did not record Ms F as the victim.

In terms of how recently the violence has occurred, the Family Court judge stated:<sup>427</sup>

Mr. N's last conviction was on 21 November 2001<sup>428</sup> for which he was sentenced to one year's imprisonment. Ms F's evidence was that when he was released, they lived together in Wellington and he continued to beat her. She said that because she had no support in Wellington when the neighbours heard her crying and called the police, she told the police he was not hitting her. In his affidavit sworn on 21 October 2003 Mr. N in para 20 stated that he accepted that in March 2003 Ms F was in the Women's Refuge and that was after a particularly bad argument and the police were called. He said that the police simply told them to sort things out and get help. No charges were laid and no complaint made.<sup>429</sup>

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<sup>425</sup> Ibid, at paragraph 21.

<sup>426</sup> Ibid, at paragraph 25.

<sup>427</sup> Ibid, at paragraph 26.

<sup>428</sup> Three and a half years prior to the judgment in this case.

<sup>429</sup> From the facts of *PCN v JCF* [2005] NZFLR 625, one begins to glimpse the leniency in some District Court sentencing that our case study participants and key informants complained about, and the inadequacy of some police practices in holding perpetrators accountable for their actions. We discuss these issues in detail in Chapters 11 and 12.

In terms of Mr N's sentencing the Family Court judge in this case comments:<sup>430</sup>

Although there was no summary of facts provided for the last conviction, the sentence of 12 months' imprisonment would indicate that it was considered by the sentencing Judge as serious violence.

Mr N had been charged under section 202C of the Crimes Act 1961 (for which the maximum penalty is five years' imprisonment). However, he was sentenced to 12 months in prison despite the fact that this was his second conviction for running Ms F down with a motor vehicle and that he had other assault convictions in respect of her as well. Having the children as passengers in the motor vehicle at the time Mr N was running down their mother does not seem to have featured in the District Court judge's sentence as an aggravating feature. Given the trauma which must have been experienced by the children, however, and the probable impact of their witnessing their father's actions, we recommend adopting an approach to sentencing that construes children's presence during domestic violence-related offences as an aggravating factor which should prima facie lead to an enhanced sentence for the accused. This issue will be further discussed when we look at Rachel's experiences of the criminal courts in Chapter 13.

The judge finds that Mr N is continuing his psychological abuse of Ms F and the children by denying contact between them. For example, the judge finds:<sup>431</sup>

[Ms. F] described vividly her reaction when she heard Mr. N swear about her in the background when she was trying to speak with one of the children on the telephone. She was afraid he would take his anger against her out on one of the children and made no attempt to telephone the children after that. The absence of direct communication has also caused difficulty for her in having contact with the children. On 23 September 2003 she travelled to Wellington to see the children and she rang her daughter R to ask R to bring the children to a park. Ms F waited at the park from about 10 am until 6.30 pm but the children did not come. It was later that evening that Ms F made the telephone call to Mr. N's home number. When one of the children answered the telephone Ms F heard Mr. N say "Is that that bitch, hang that f... phone up, it's that bitch." More recently when Ms F has come to Wellington she has stayed in the car and arranged for the children to come out to the car so she did not have to go into Mr. N's house. Ms F made it clear in her evidence she does not want any direct contact with Mr. N. Ms F's avoidance of Mr. N has reduced any opportunity for physical violence. The power and control dynamic continues to operate.

The judge then records that there is no evidence that Mr N has caused any significant physical harm to either child. She does this despite the following:<sup>432</sup>

They have not suffered violence in the way Ms F has. In his evidence when cross-examined by [counsel for the child], Mr. N said that he used to be quite hard on [the son] and would "boot his bum" or smack him on the bum with open hands. He would also smack [the daughter] ... I note that [the daughter] said that when she was living with both her mother and Mr. N, both would use physical discipline. When she asked if there was a difference between her mother hitting her and Mr. N hitting she became tearful. She then agreed with [the lawyer for the child] that the violence she got from Mr. N was much more severe than that from Ms F.

And the judge continues:<sup>433</sup>

The emotional harm however suffered by the children, [the boy] in particular, is another matter. In paragraph 18 of her affidavit sworn on 15 March 2004, Ms F stated

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<sup>430</sup> *PCN v JCF* [2005] NZFLR 625, at paragraph 22.

<sup>431</sup> *Ibid*, at paragraph 31.

<sup>432</sup> *Ibid*, at paragraph 37.

<sup>433</sup> *Ibid*, at paragraph 37.

that Mr. N would take the children's presents and food out of the cupboard and drive off if they had had a fight. He would say to the children "Blame your mother for making me angry" and he would break their stuff. He broke the PlayStation 2 that way. I have already quoted from her in which she referred to the daily violence in the home and her taking the children into the bedroom and the children being terrified.

The psychologist's report also concentrated on the emotional harm suffered by the children. According to the judge, the psychologist described the boy as being:<sup>434</sup>

... very reserved and shut down throughout [her] assessment. He refused to answer any questions or responded with a single word. When observed with each parent, he initiated no interaction with them. When she tried to ascertain his wishes on care arrangements he said he had a wish but did not want to disclose it. When he was being interviewed, he was concerned whether Mr. N knew about the interview. He tried to telephone Mr. N but was unable to reach him. He still worries about his parents' interaction with each other. He indicated he would be more worried if the Court granted custody to his mother, not for himself but for his parents. In the last para of page 4 of [her] report:

[The boy]'s awareness of his father's capacity for violence and his awareness of the continuing bad feelings between his parents and the custody contest would influence him to choose the option that preserved peace and safety as much as possible. It is perhaps significant that he is not expressing a wish to stay with his father given these influences, but he may be constrained by loyalty to his mother's wishes, or by a wish he holds to be with his mother or by fears for his own safety with his father.

The judge quotes the psychologist as further finding:<sup>435</sup>

[The boy] had internalised the effects of his past violence. He appears to be stuck in a pattern of fear and worry as a result of what he has experienced within his parents' relationship. He cannot trust his father and remains afraid of his reactions, and he cannot trust his mother because she has not been strong in standing up to his father. This leaves him unable to be close to anyone. He has become very independent emotionally, attempting to protect himself and his parents by not showing anyone what he thinks or feels. His attempts to protect suggest he is experiencing traumatic memories from the past and that these are accompanied by fear or anxiety at a level that is disturbing or aversive. He drew a picture during my interview with him which graphically illustrated an angry man holding a boy who looked both afraid and angry. He would not talk about his drawing. Regardless of the care regime determined by the Court, [the boy] needs assistance to understand the emotions he is experiencing as a result of the past conflict and violence, and to be free from his burden of responsibility for keeping his father calm and his mother safe.

During the hearing, Ms F's lawyer asked the children if they had any worries or were sad or scared about anything and neither responded. She then asked if they did have worries, whom would they talk to? The judge reports:<sup>436</sup>

[The girl] said M, [the 11-year-old boy], and M said no one. He said he would not talk to his father as he was scared his father would be angry and he worries about making his father angry. The impact of violence on [the girl] is different. She presented as much more confident and open. She told [the psychologist] she had little memory of when her parents were together. However [the psychologist] stated that there was clearly conflict and control in her parents' relationship and children tend to internalise

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<sup>434</sup> Ibid, at paragraph 41. A psychologist's report was obtained under s. 29A of the Guardianship Act 1968. A similar provision in s. 133 of the Care of Children Act 2004 gives the court the power to request a cultural, medical, psychiatric or psychological report on the child.

<sup>435</sup> Ibid, at paragraph 42.

<sup>436</sup> Ibid, at paragraph 45.

roles they have witnessed — victim or peacemaker or aggressor — and these often become models in their own relationships. There was some concern about Mr. N overindulging or overcompensating when it came to his care of [the girl]. However that has enabled her to feel loved by Mr. N. She is somewhat less guarded than M but Ms F reported that when she went to the children's school [the girl] was as anxious as [the boy] that Mr. N may not have known that Ms F would be there. I find that the children have been emotionally and psychologically harmed by witnessing family violence between their parents.

The mother opposed the children remaining in Mr N's custody. Not only did she worry about his potential for physical abuse to the children, she also worried about whether he would allow her to see the children, no matter what the court ordered. Moreover, even if his physical violence did not flare up again, she worried about other psychological risks that the psychologist had outlined were probable if the children remained in Mr N's custody:<sup>437</sup>

isolation, jealousy of outside contacts, not allowing the children to make their own friendships or have an open home where friends can come or children stay at other children's homes, engage in community activities. Children who retain a fear of their parent and being controlled by them do not develop their own individuality and are constantly aware of what might be expected of them rather than what their own attitudes or wishes are so that it would be difficult for them to express themselves freely. That impacts on their confidence and self-esteem and prevents them developing to their full potential.

We again underscore that children failing to develop to their full potential cannot be in either their welfare or their best interests. Pursuant to section 60 of the Care of Children Act 2004, judges must strive to ensure the children's exposure to violence stops so that healing from trauma can be fostered.

The judge then reports the mother's response to why she has not until now actively pursued her custody application:<sup>438</sup>

[Mr. N] made an application for custody of the children in July 2003 and I started to defend it but I didn't have the strength or the ability to see it through then and I couldn't come back to Wellington because I was scared of the pressure he would put on me to get back together.

With facts that could come straight out of our case studies, the mother expands on that answer:<sup>439</sup>

I lost custody of [the boy] and [the girl] because I didn't appear at the Court in Wellington for the hearing in November 2003. Part of the reason for that was that I had nothing. I only had a bag of clothes. I couldn't follow through on my custody application while I didn't have a place for the kids to live. I didn't want to live in Kawerau because [Mr. N]'s family are all there and I thought he would tell his nephews in the Mongrel Mob to come round and punch me and they would have.

When later in this chapter, we analyse Parenting Hearing Programmes, we will return to look at this case and query how *PCN v JCF* would have been dealt with under this newly implemented process for dealing with "high risk cases".

In attempting to ascertain the children's wishes, the judge canvasses the psychologist's report. In that report the psychologist had commented:<sup>440</sup>

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<sup>437</sup> Ibid, at paragraph 48.

<sup>438</sup> Ibid, at paragraph 49.

<sup>439</sup> Ibid, at paragraph 49.

<sup>440</sup> Ibid, at paragraph 52.

... that in all settings at both parents' homes and during both interviews [the boy] presented as closed and reluctant to talk. He said he had a wish about his care arrangements but did not want to disclose it. He had not told anyone his wish but he could not say what made it difficult to tell. [The psychologist] confirmed with counsel for the children that she had also not received any indication of [the boy]'s wishes. [The boy] thought that his mother had made changes since separation and the changes were positive but he thought that his father had not changed. M was anxious during the interview as to whether his father knew he was seeing [the psychologist] In his second interview [the boy] indicated that each parent still got cross about each other and that made him anxious to the extent that he tried to avoid that happening. He indicated he would be more worried if the Court granted custody to his mother, not for himself but for his parents."

And then again later in the judgment, the judge alludes to counsel for the child's memorandum just prior to the hearing. In it, the lawyer stated that she had seen the boy again and that he was still very closed in his responses but he was able to tell her his views<sup>441</sup>:

He said he wanted to stay living with his father and have contact with his mother on the weekends. By then he was aware of Ms. F's intention to move to the Wellington area. [Counsel for the child] asked [him] whether his view was the same as the one he had when he spoke to the psychologist. He said it was not.

[A social worker who had also interviewed the children] in her section 29 report dated 27 May 2007 on p 9 second paragraph.<sup>442</sup>

[The children] present as polite, well behaved children. What is immediately obvious is that [the boy] is holding something in. He has witnessed horrific violence in his home and now lives in fear that it may happen to him or it may occur with someone else.

The judge outlines the steps Mr N has taken to deal with his violence. She records:<sup>443</sup>

Mr. N has completed three living without violence or anger management programmes. They were group programmes and he said in evidence that he found it difficult to relate to other persons attending the programme or to be open during any of the sessions. He said he had done a living without violence programme in prison which he found more helpful. He also said he drank a lot less and for the past two years has been going to gym to keep himself fit for the sake of his children.

Less alcohol, a fitness regime and attendance at a living without violence programme can all be seen as credits to Mr N but they must be interpreted alongside other comments he has made. For example, the judge records what appears to be a threat by Mr N that he will relapse into his "old ways" if he is not awarded the children's day-to-day care:<sup>444</sup>

He has also avoided having another partner to prevent any possibility of domestic violence. His evidence was that having the children gave him the strength to remain non-violent and sober. He wants his children to grow up in a home without fear of violence. He himself raised the question as to whether or not he could maintain his strength of will to continue in his new ways if the children were taken from his care. He told [the psychologist] that he would go to work and to the pub and be back in his old ways He also would resent paying child support.

After hearing the psychologist's evidence that the children, particularly the boy, would not "benefit from the help they needed" unless there were changes in both parents' behaviour, Mr M

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<sup>441</sup> Ibid, at paragraphs 53 and 54.

<sup>442</sup> A social worker's report had been obtained under s. 29 of the Guardianship Act 1968. A similar provision now appears in s. 132 of the Care of Children Act 2004.

<sup>443</sup> *PCN v JCF* [2005] NZFLR 625, at paragraph 32.

<sup>444</sup> Ibid, at paragraph 61.

volunteered to attend a one-on-one living without violence programme and a parenting programme. The psychologist had said that part of what was needed from Mr N was for him “to acknowledge his violence and take responsibility for it.”<sup>445</sup>

But the judge comments:<sup>446</sup>

Although he said he did that, I noted that in less guarded parts of his evidence he continued to blame Ms. F. He still saw his violence as retaliation for Ms F’s behaviour. [The psychologist] said Mr. N needs to understand the differences in the power between the parties and some of the other aspects of control that there were in their relationship. He needs to understand what the factors are in himself which contribute to the violence and acknowledge and understand the verbal or emotional violence in the relationship. Violence continued even after Mr. N had completed his third anger management programme. It has effectively stopped because Ms F has taken steps to avoid Mr. N rather than anything he has done himself. He is still not able to make the children and in particular [the boy] feel safe living with him.

In making her findings on the section 16B(4) (section 60) inquiry, the judge refers to the conclusions of Sturge and Glaser,<sup>447</sup> which we have discussed earlier in this chapter. The judge specifically sets out the matters which Sturge and Glaser assert should be considered in determining whether there should be contact between children and a violent parent. These factors are:<sup>448</sup>

- (a) some (preferably full) acknowledgement of the violence;
- (b) some acceptance (preferably full if appropriate, i.e. the sole instigator of violence) of responsibility for that violence;
- (c) full acceptance of the inappropriateness of the violence particularly in respect of the domestic and parenting context and of the likely ill-effects on the child;
- (d) a genuine interest in the child’s welfare and full commitment to the child. That is, a wish for contact in which he is not making the conditions;
- (e) a wish to make reparation to the child and work towards the child recognising the inappropriateness of the violence and the attitude to and treatment of the mother and helping the child to develop appropriate values and attitudes;
- (f) an expression of regret and the showing of some understanding of the impact of their behaviour on their ex-partner in the past and currently;
- (g) indications that the parent seeking contact can reliably sustain contact in all senses.

### Family Court Judge’s Contact Decision

After this delineation of the risk factors and findings pursuant to section 16B(5), it comes as a surprise that the judge grants unsupervised access to Mr N despite the fact that nowhere in her judgment does she conclude that the children would be “safe” during those arrangements. As we have already seen in the *M v M* and *B v M* decisions, there is no jurisdiction for a judge to award anything but supervised contact unless she or he can be satisfied, on a balance of probabilities, that the children will be “safe” during unsupervised contact arrangements with the violent parent. Indeed, each time the judge tried to find a positive example of Mr N’s behaviour, there was

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<sup>445</sup> Ibid, at paragraph 62.

<sup>446</sup> Ibid, at paragraph 62.

<sup>447</sup> Sturge, C. & Glaser, D. (2000). Contact and domestic violence: the experts’ court report. *Family Law* 615-629.

<sup>448</sup> *PNC v JCF* [2005] NZFLR 625, at paragraph 78.

always a caveat. For example, when Ms F expressed concern that Mr N would not abide by conditions imposed on his access, the judge agreed and commented:<sup>449</sup>

To date he has shown a lack of regard for the law. He removed the children from Ms F when she had a protection order and a custody order in her favour. In her evidence Ms F said that if Mr. N had custody he would take it on himself not to let her see the children whatever the Court ordered.

In another example, the judge stated:<sup>450</sup>

Mr. N has cared for the children since July 2003 and provided them with a stable and violence free environment. That is to his credit. However that could only have been achieved by him as he was the perpetrator of the violence. The evidence established that until July 2003, Ms F was the children's primary caregiver when the parties had lived apart and that when the children were initially removed from her, both of them missed her very much.

We would, moreover, disagree with the statement that the period post July 2003 had been "violence free", given the interference that Mr N has placed in the way of virtually any contact (even by telephone) between Ms F and the children. We consider that needlessly depriving the children of their mother constitutes emotional abuse.

Rather than making clear and unambiguous findings about the children's safety, the court engages in what two of the authors have called "learned hopefulness in decision-makers";<sup>451</sup> optimistic hopes that abusers will now "change", despite years of repetitive violence. For instance, the judge comments towards the end of her decision:<sup>452</sup>

I would hope that each party having heard the other give evidence and having heard the evidence of [the psychologist] would now accept the importance to the children of their keeping to Court orders to prevent any further conflict between themselves and to at last enable the children to feel safe in the care of each of them and also in moving from one parent to the other.

It is interesting that the mother has never breached any court orders but the judge's language speaks of "each party" now needing to abide by court orders so that "further conflict between themselves" can be avoided. It is another illustration of minimising the violence by categorising it as "mutual" violence. Given, moreover, that previous behaviour is the primary determinant of future behaviour and that Mr N's authority has rarely been so under challenge, do we share this judge's optimism about the possibility of "further conflict" being avoided?

Rather than the safety issue determining what form of continued contact Mr N will have with his children, the Family Court judge uses the children's stated wishes to tip the scale to not only

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<sup>449</sup> Ibid, at paragraph 78.

<sup>450</sup> Ibid, at paragraph 82.

<sup>451</sup> Busch, R., & Robertson, N. (1998). The dynamics of spousal violence: Paradigms and priorities. In F. Seymour & M. E. Pipe (Eds.), *Psychology and family law: A New Zealand perspective*. Dunedin: University of Otago Press. As well, see statement by Dr Ian Hassall, then Commissioner for Children, regarding his review of the death of Craig Manukau: "It is not that other considerations should be ignored but bitter experience shows that over time these considerations tend to take over. The whole purpose of the intervention which is the safety of the child is lost sight of unless the social worker or some other competent person with the power to return proceedings to this focus does not deliberately and repeatedly bring forward the slogan, 'The child must be made safe now'." Hassall, I. (1993). *Report to the Minister of Social Welfare on the New Zealand Children and Young Persons Service's review of the death of Craig Manukau*. Wellington: Commissioner for Children, at p. 16.

<sup>452</sup> *PNC v JCF* [2005] NZFLR 625, at paragraph 81.



unsupervised access but “more extensive access than what might otherwise have been considered appropriate.”<sup>453</sup> The judge states:<sup>454</sup>

The children would have liked to have lived with him. I do not consider it appropriate for many reasons which have been already set out above to decide the matter on the basis of their wishes alone. I have taken them into account and for that reason their contact with Mr. N will be more extensive than what might otherwise have been considered appropriate. Whether that amount of contact continues will depend on whether Mr. N is able to protect the children from any further conflict and whether he is able to support Ms F in her parenting by not undermining her or antagonising the children against her.

Looking at the Sturge and Glaser list set out earlier in this chapter and referred to in the case itself, is the judge taking this boy’s views at face value? We would have expected an analysis of how this boy’s (and his sister’s) views had been constructed over the years that he has heard and seen and felt his father’s violence, including his backseat passenger perspective on his father using his motor vehicle as a weapon to run his mother down. Indeed, was it not the boy’s fear that severe violence might follow if his father did not “win”? Of all the participants in these proceedings, the boy and his mother are the “experts” about what sets Mr N off and both are afraid of him and what will result if he is denied day-to-day care of the children. Indeed, if one can believe him, so too is Mr N.

But having delineated the Sturge and Glaser list, the judge says nothing at all about which of the perceived difficulties with interpreting the children’s views are relevant in this case. If the reason for this boy’s wishes is to protect his mother’s safety, surely that is not his role as a child of this family. Or is the Judge concerned that if Mr N is not given at least frequent unsupervised access, he will inevitably resort to physical violence again? In any event, the Judge has no jurisdiction to award Mr N anything but supervised access unless her findings demonstrate that the children will be safe during unsupervised access. And it is hard to see, on a balance of probabilities, how she could possibly have found that.

We’d like to end this discussion of *PCN v JCF* by repeating a quote from Janet Johnston in one of her later articles. She stated:<sup>455</sup>

Where there is ongoing conflict and reasonable fear of violence between parents, and/or the child shows continued stress reactions to transitions between parents, access arrangements that require the child to make frequent transitions between parents should be avoided.

Where there is ongoing conflict and fear of violence between parents, timesharing schedules that require the child to spend substantial amounts of time with both parents are not usually advisable.

Research findings cannot possibly have reinforced this judge’s view that it is in these children’s welfare and best interest to spend three weekends out of four in the unsupervised care of Mr N. One is reluctant to suggest that the judge herself is placating Mr N by giving him extensive contact so that he will not feel too aggrieved about day-to-day care being shifted to Ms F. Moreover, if Mr N returns to his physically violent ways, will he blame the Family Court for provoking him by not giving him custody of the children? Is it not on the cards that he will simply again abscond with the children, as he has in the past, perhaps during one of his

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<sup>453</sup> Ibid, at paragraph 87.

<sup>454</sup> Ibid, at paragraph 87.

<sup>455</sup> Johnston, J. (1998). *Proposed guidelines for custody and visitation for cases with domestic violence: High-conflict and violent parents in Family Court*. Retrieved from [http://www.courtinfo.ca.gov/online/reference/family\\_court\\_services/grants/hcvpfc.htm](http://www.courtinfo.ca.gov/online/reference/family_court_services/grants/hcvpfc.htm), at p. 6.

unsupervised access weekends? The judge makes it clear that Mr N has not followed any previous court orders made in respect of him.

### Some Implications of *PCN v JCF*

*PCN v JCF* shows how important it is for children's expressed wishes for contact with a violent parent to be evaluated carefully. Traumatic bonding<sup>456</sup> or a simple fear of upsetting the abuser can mean that children may express wishes for arrangements which are not in their best interests. In giving evidence, the psychologist who had assessed the children noted that:<sup>457</sup>

The children's wishes could not be considered without fully seeing the effects of the violence on them and their attitude. [The psychologist] said one should be very cautious about interpreting the children's wishes and she would give them less weight.

The judge seemed not to take this warning on board. Instead she cited the children wishes as the reason for ordering "more extensive [contact] than what might otherwise have been considered appropriate."<sup>458</sup> On the other hand, the judge considering Amira's case for the custody of Zola had no such expert opinion available because no psychologist's report had been requested. Some of the key informants we spoke to were concerned that the Family Court was not calling for specialist reports where, in their view, such reports were needed. According to some, the court had become less inclined to call for section 133<sup>459</sup> reports than previously. We think it dangerous to award unsupervised contact to a violent parent without proper investigation of the safety issues. Accordingly, we recommend:

**THAT the Care of Children Act 2004 be amended to the effect that unsupervised contact with a party who has used violence (as defined by section 3(2) of the Domestic Violence Act 1995) against the other party or a child of the other party, shall not be granted unless the court has first considered a report from a psychologist who has specialist training in domestic violence. Such a report shall evaluate the risk to the child, the impact of the prior violence on the child, the implications of the violence on each party's parenting abilities, and the meaning of the child's expressed wishes. (#8)**

As *PCN v JCF* also shows, the Family Court can find itself, in effect, unknowingly countermanding existing parenting orders as parents denied the day-to-day care of children in the court in one centre can apply for a parenting order in their favour in another centre.<sup>460</sup> Moreover, not only are such applications mistakenly heard as if there were no orders in place; they are also heard without any knowledge of any relevant domestic violence charges, including breaches of protection orders. The lack of such contextual information increases the risk of imprudent decision making. In Chapter 13, we recommend that the Ministry of Justice reviews its information systems to ensure judges have all relevant information available to them. (See recommendation 17.)

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<sup>456</sup> James, B. (1994). *Handbook for treatment of attachment-trauma problems in children*. New York: Free Press; Herman, J. (1992). *Trauma and recovery*. New York: Basic Books.

<sup>457</sup> *PNC v JCF* [2005] NZFLR 625, at paragraph 57.

<sup>458</sup> *Ibid*, at paragraph 87.

<sup>459</sup> Care of Children Act 2004. (Previously, such reports were requested under s. 29A of the Guardianship Act 1968.)

<sup>460</sup> Interestingly, this is exactly what Alan Bristol did. Davison, R. (1994). *Report of inquiry into Family Court proceedings involving Christine Madeline Bristol and Alan Robert Bristol*. Wellington: Office of the Minister of Justice.

## Relocation

Relocation was an issue for two women in our case studies. It was a significant issue for Amanda who was not allowed to move with her daughter to live with her new partner in Sydney. Similarly, Louise had to abandon her plans to move to take up a job offer. Although he had initially agreed to the move, Louise's ex-partner filed an application opposing relocation when he discovered she was in a new relationship. The application was eventually withdrawn but only after it had succeeded in delaying things to the point where it was no longer possible for Louise to go. Other abused women may want to relocate to return to more supportive environments, close to friends and whānau (as Te Rina was able to do). This is especially important considering that isolation from family and friendship networks is such a well-recognised tactic of power and control.<sup>461</sup>

Like applications for temporary protection orders, relocation is also a gendered issue. As Wendy Davis has shown, it is overwhelmingly mothers who wish to relocate.<sup>462</sup> Moreover, citing the work of Mark Henaghan, Davis has noted that the Family Court has become significantly less likely to allow mothers to relocate over the past 20 years to the point where only a third of relocations are approved.<sup>463</sup> There will clearly be flow-on effects of these case law outcomes in terms of lawyers' advice to their clients to not even consider applying to relocate, whether domestic violence is present or not. As Judge Boshier, in his article "Relocation cases: An international view from the Bench", has recently stated:<sup>464</sup>

The Care of Children Act arguably requires the Court to give greater weight to keeping contact with both parents over any other consideration. It is the aim of the new Act to promote a continuing role for both parents in the upbringing of their children, regardless of the child's residential circumstances. This joint involvement points away from allowing relocation.

## Contrasting Positions on Relocation: *M v M*<sup>465</sup>

The intersection between domestic violence and relocation applications is well illustrated by *M v M*, a High Court appeal by a mother from a Family Court decision refusing her permission to relocate to Gisborne from South Auckland with the three children of the marriage (aged eight, seven and three). Instead, the Family Court had given interim custody of the children to the father. The parties had accused each of violence towards the other and towards the children. As Justice Fisher states, "the dominant allegation was that the father controlled the mother through actual and feared violence."<sup>466</sup>

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<sup>461</sup> See Duluth Abuse Intervention Project. *The power and control wheel: Tactics of power and control*. Duluth, MN: Duluth Abuse Intervention Project.

<sup>462</sup> Twenty-eight of the 31 relocation cases decided between 2001 and 2003 involved mothers who wanted to relocate. Davis, W. (2004). Gender bias, fathers' rights, domestic violence and the Family Court. *Butterworths Family Law Journal*, 4(12), 299-312.

<sup>463</sup> Ibid, at p. 299, Davis notes: "Henaghan's analysis of 75 relocation cases between 1988 and 1998 revealed an average success rate during that period for the relocating parent of 62 per cent. However, in 1999 and 2000, the success rate dropped to 48% and between 2001 and 2003, it dropped still further to 38%, 12 cases. Since three of the 12 cases in which parents were allowed to go were High Court appeals where the decision of the Family Court not to allow relocation was overturned, the success rate in the Family Court over that period for the party seeking a relocation order was therefore only 29%."

<sup>464</sup> Boshier, P. (2005). Relocation cases: An international view from the Bench. *Butterworths Family Law Journal* 77, at p. 78.

<sup>465</sup> *M v M* [2002] NZFLR 743 (HC), Fisher J.

<sup>466</sup> Ibid, at paragraph 3.

In one of her affidavits, the mother had stated:<sup>467</sup>

I have been in an abusive relationship with the [respondent] from the time we were married. The first two years were very violent with black eyes, blood noses and rape. After a while I learned not to agitate him so that he would not get up to the violence. However, he would still rape me nearly every night ... The accused isolated me from my friends and family. For the past two years I have been trying to get more independent so that I can leave him and also get the children away from him.

Justice Fisher continues with his recitation of the facts:<sup>468</sup>

The mother's allegations were documented in great detail in reports to experts, as were the occasionally violent but largely ineffective reactions on her part. Her accounts were corroborated by her mother and by the detailed analysis of the Court appointed psychologist.

Justice Fisher comments that the father admitted that he had been physically abusive to the appellant prior to, and immediately after, the parties married. At the hearing, the court-appointed psychologist concluded that the mother was suffering from post-traumatic stress from which she was gradually recovering. The mother had left the children with the husband at the time of separation.

### Safety of the Children

As Justice Fisher states:<sup>469</sup>

Once the allegation of violence against the mother had been made it was mandatory for the Court to make a finding on it section 16B(2)<sup>470</sup> of the Guardianship Act 1968. If the evidence had been examined the Court could not have escaped the conclusion this was a battered wife. Once that conclusion had been reached a number of consequences would have followed.

The "consequences which follow" involve the rebuttable presumption that a violent parent should not be granted custody and/or unsupervised access unless the court can be satisfied that the children will be safe with him. It also involves carrying out the section 16B(5)<sup>471</sup> risk assessment. However, instead of performing these statutorily mandated steps, the Family Court judge had simply commented that the evidence on the husband's violence "was not very helpful"<sup>472</sup> and left it at that. As Justice Fisher comments, "I think that was a mistake."<sup>473</sup>

Justice Priestley amplifies on the dimensions of this judicial "mistake". He states:<sup>474</sup>

In my judgment, the various findings which the learned Family Court Judge made, in respect of the allegations were, with respect, inadequate. In particular there was no clear and cogent finding as required by s.16B(4)(a) that the Court was satisfied that the children would be safe in the father's custody. Such a finding would require reasons and a consideration of the section 16B(5) criteria.

And he continues:<sup>475</sup>

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<sup>467</sup> Ibid, at paragraph 3.

<sup>468</sup> Ibid, at paragraph 3.

<sup>469</sup> Ibid, at paragraph 7.

<sup>470</sup> Now s. 60(2) of the Care of Children Act 2004.

<sup>471</sup> Now s. 61 of the Care of Children Act 2004.

<sup>472</sup> *M v M* [2002] NZFLR 743, at paragraph 6.

<sup>473</sup> Ibid, at paragraph 6.

<sup>474</sup> Ibid, at paragraph 63.

This was a case where the Family Court was faced with undisputed evidence of persistent violence between the parents. There was additionally evidence of a disclosure by [the oldest child] to [the court appointed psychologist] of inappropriate discipline with a vacuum cleaner cord. There was further evidence from the children of general fearfulness towards their father. All the criteria specified in section 16B(5)(a) to (e) had been raised. An assessment was thus required.

Justice Priestley raises concerns about why the Family Court judge did not weigh the oldest child's allegations of being beaten by the father with a vacuum cleaner hose more heavily. He states:<sup>476</sup>

This highly relevant issue has not, with respect, been dealt with satisfactorily by the learned Family Court Judge. He stated that he was "not persuaded on the evidence that punishment in the nature of beating with a vacuum cleaner flex had taken place." Yet there is no evidence before the Family Court, other than the father's denial, to gainsay the child's allegations. Certainly no satisfactory reasons were given by the Family Court Judge for rejecting [the psychologist's] evidence of the child's disclosure.

### Neutrality of the Judge

Indeed, in terms of this issue, the High Court judge even questions the Family Court judge's neutrality as between the mother and the father. Justice Priestley states:<sup>477</sup>

Against the background of the evidence before the Family Court, I am puzzled that whilst the learned Family Court Judge had no difficulty in finding as a fact that on one occasion the mother inflicted an injury on [the oldest child], he was unable to make any factual finding about the father's approach to discipline and domestic control. With respect the learned Family Court Judge displays a somewhat ambivalent approach to this evidence. He was not persuaded on the evidence that the father was "guilty of harshly treating the children", nor was he persuaded that the children "necessarily fear" the father.

In his next paragraph, Justice Priestley points out that in the psychologist's report prepared for the Family Court hearing, the oldest boy had clearly stated that he was "scared of his father's disciplinary approach."<sup>478</sup> Justice Priestley also comments that the two older children ("as it turns out prophetically"<sup>479</sup> are his exact words) had told the psychologist that their father would not let them have contact with their mother, or telephone her, or express any opinion about her "because of their father's strong opinions against her and them having contact."<sup>480</sup>

### Family Court Decision

Without delineating his findings of facts in respect of any of the required section 16B(5) inquiry,<sup>481</sup> the Family Court judge had given interim custody to the father and rejected the mother's application to relocate with the children to Gisborne, where her whānau support was located. On the other hand, the judge did have one concern. He wanted to have the children have access to their mother more often. He stated:<sup>482</sup>

<sup>475</sup> Ibid, at paragraph 65.

<sup>476</sup> Ibid, at paragraph 67.

<sup>477</sup> Ibid, at paragraph 68.

<sup>478</sup> Ibid, at paragraph 69.

<sup>479</sup> Ibid, at paragraph 69.

<sup>480</sup> Ibid, at paragraph 69.

<sup>481</sup> See recommendation re best practice in terms of the s. 60 inquiry earlier in this chapter.

<sup>482</sup> *M v M* [2002] NZFLR 743, at paragraph 27.

What does concern me more than anything else about the present arrangements is the fact that the children do not see as much of their mother as I would think is appropriate and as much of her as they clearly desire to see. What I would wish for them is a situation where both parents lived close to each other and the children were able to move freely and comfortably between their homes and to spend reasonable periods of time in the home of each of them ...

I urge [the] mother to return to Auckland as soon as she is able. Once she has sorted herself out as I understand her to explain her essential reason for going back to Gisborne, I think she should consider returning to the South Auckland area and once again seeking to be more involved in the care of the children than the distance between herself and them will permit at least in the immediate short-term future. At that stage, I would want to put in place an arrangement which as far as possible provided these children with the benefits of a shared parenting regime.

Just like in *B v M*, one can only wonder what “the benefits of a shared parenting regime” for these children will be. Can we really believe (again) in this Disney movie scenario of “free and comfortable movement between the two homes” in the face of the fear and abuse both the mother and the children have suffered at the hands of the father? What are the psychological assumptions underpinning the Family Court judge’s optimism that his hopes could possibly be achieved (ignoring, for a moment, his statutory obligations under the Guardianship Act 1968)?

### High Court Decision

The High Court in *M v M* reversed the Family Court judge’s decision. Justice Priestley, moreover, specifically dealt with the desirability of allowing the children to relocate to Gisborne with their mother. In this regard, Justice Priestley stated:<sup>483</sup>

I consider that the learned Family Court Judge has erred in his stated preference for the mother residing in South Auckland. Such an approach does not recognise to an adequate extent the post-traumatic stress disorder symptoms still operating on the mother and her ability to function adequately as the caring and competent parent she is. The mother needs to be in a supportive environment with her own family and outside the orbit of the father’s control and influence.

While the Family Court judge had felt that the move to Gisborne would be destabilising for the children, Justice Priestley disagreed. He found:<sup>484</sup>

In my judgment such a move would be in the best interests of the children. It would place the children in the daily care of a committed and caring parent who is well on the road to recovering from the effects of an abusive relationship. Such a change guarantees a preservation of the relationship between the mother and the three children. I do not consider that the mother would attempt to limit the contact between the children and their father. Nor do I consider that, given regular and predictable contact with their father, the children will become alienated from either him or his Tongan culture.

### Some Implications of *M v M*

In *M v M*, the Family Court denied the applicant the chance to relocate, even though, as the High Court was to later find, such a move was in both her interests and those of her children. Louise and Amanda both had similar outcomes to their parenting hearings, but neither appealed the decision to the High Court. We think the approach adopted by the Justice Fisher accords with what is known, not only about the effects of post-traumatic stress but also about what is needed for children to heal from the effects of violence. Healing is likely to be promoted if children are

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<sup>483</sup> Ibid, at paragraph 71.

<sup>484</sup> Ibid, at paragraph 71.

“outside the orbit of the [abuser’s] control and influence”<sup>485</sup> and if the custodial parent is well supported. Accordingly, we recommend:

**THAT section 4 of the Care of Children Act 2004 be amended to the effect that, where a party has used violence against the other party or a child of the other party (as defined by section 3(2) of the Domestic Violence Act 1995), the court must, in determining what best serves the child’s welfare and best interests, take into account any wish of the other party to relocate so that she or he is able to recover from the trauma of violence and to better provide an environment which will support the recovery of the child. (#7)**

In *M v M*, the High Court followed up its excellent analysis of the need of battered women to be able to relocate by giving specific and detailed orders about ongoing access and telephone calls. This carries out an approach that we support and recommend. Because an abusive partner is likely to exploit every ambiguity to demonstrate his ongoing capacity to disrupt and control the life of the former partner, parenting orders where there has been domestic violence need to be drafted with clarity and precision to minimise the need for ongoing interpretation and negotiation between the parties.<sup>486</sup> Moreover, clarity and specificity mean that it is easier to demonstrate non-compliance with an order that is clear, giving the court a solid basis for modifying the arrangements.

This sort of exemplary approach reflects a good understanding of the dynamics of domestic violence and of the risks batterers pose to their partners and children. Conversely, as we have commented earlier, a lack of understanding is implicated in some of the problematic decision making reviewed in this and previous chapters. As Lord Justice Nicholas Wall has observed, inadequate training can contribute to needless deaths. We agree with him that judges and other professionals need to be properly trained and that such training needs to be regularly updated. We recommend:

**THAT the Ministry of Justice ensure that all professionals (for example, judges, counsel for the child, specialist report writers, mediators, counsellors and supervised access providers) working in the Family Court and specialist domestic violence criminal courts be required to demonstrate a multidisciplinary understanding of domestic violence, including the principles of scientifically rigorous risk assessment, prior to their appointment, and that they be required to participate in annual “refresher” training on these matters. (#13)**

Moreover, we think that practice will be improved by regular evaluations of the outcomes of judicial decisions. At the moment, judges seldom receive feedback on the outcomes which follow their decisions. Good evaluation could provide such feedback. We recommend:

**THAT the Ministry of Justice commissions periodic evaluations to assess the extent to which decision making regarding applications for protection orders and parenting orders contributes to the Domestic Violence Act 1995’s goal of providing effective protection to victims of domestic violence and their children. (#23)**

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<sup>485</sup> Ibid, at paragraph 71.

<sup>486</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. London: Sage; Dalton, C., Carbon, S., & Olesen, N. (2003). High conflict divorce, violence, and abuse: Implications for custody and visitation decisions. *Juvenile and Family Court Journal*, 54(4), 11-34. As the latter authors state: “Requiring ongoing negotiations between the parents over major decisions involving the children is similarly unacceptable, because the abused parent and children will remain hostage to the abusive parent’s agenda.”

### **Parenting Hearing Programmes Pilot**

That it is now harder to obtain a protection order without notice, the use of a typology which minimises violence, a reported trend in Care of Children Act 2004 determinations in which contact is privileged over safety, and a growing reluctance to allow women to relocate suggests significant undermining of the objects of the Domestic Violence Act 1995 to “recognis[e] that domestic violence in all its forms, is unacceptable behaviour ... and ensur[e] that ... there is effective protection for its victims.”<sup>487</sup> Unfortunately, a recent innovation in the Family Court is likely to further undermine those objects.

In November 2006, the Family Court began to pilot “a new court process for determining difficult childcare cases.”<sup>488</sup> According to a Family Court briefing paper, *The Parenting Hearing Programme (less adversarial children’s hearings)*, this initiative is intended to deal with the 5% of parenting order proceedings which now result in defended hearings.<sup>489</sup> It is based on an Australian approach, the Children’s Cases Pilot Project, which has been briefly trialled in that country, but with one very important difference. Whereas participation in the Australian model was entirely voluntary – the consent of both parties was required<sup>490</sup> – in the New Zealand pilot, cases are assigned. There is no ability for battered women – who we have already seen are at risk of being intimidated or coerced into parenting agreements and/or consent orders with their abusers – to opt out. We think this difference is crucial because there are certain features of the programme which make it a potentially very dangerous process for battered women and their children, yet cases involving domestic violence are envisaged as being prime candidates for the programme.<sup>491</sup>

The rationale for implementing the Parenting Hearing Programme pilot is clearly expressed in the briefing paper.<sup>492</sup>

By avoiding delays and providing faster resolution of cases, the new process is intended to significantly reduce the damage that protracted and bitter litigation does to the co-parenting and parent-child relationships.

This is a flawed view. It sees “protracted and bitter litigation” as the cause of the problem. On the other hand, as Amanda, Claire, Amy and Hilda’s case studies show, “protracted and bitter litigation” is often a power and control tactic of an abuser.

According to the briefing paper, under the Parenting Hearing Programme:

A single judge will deal with the proceedings from beginning to end. The Judge will be proactive and maintain a tight control over proceedings ... The judge handles the case throughout, decides the issues to be determined, decides the evidence that is called,

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<sup>487</sup> Domestic Violence Act 1995, s. 5(1).

<sup>488</sup> Boshier, P., & Udy, D. (2006). *Parenting Hearings Programme (less adversarial children’s hearings)* (Briefing paper). Wellington: Ministry of Justice, at p. 1.

<sup>489</sup> Ibid, at p. 1.

<sup>490</sup> McIntosh, J. E. (2006). *The Children’s Cases Pilot Project: An exploratory study of impacts on parenting capacity and child well-being*. Final report to the Family Court of Australia.

<sup>491</sup> Boshier, P., & Udy, D. (2006). *Parenting Hearings Programme (less adversarial children’s hearings)* (Briefing paper). Wellington: Ministry of Justice. At p. 2, the authors note that two types of “high-risk” cases will be admitted to the programme. The first are those involving “Urgent applications – cases where urgent relief is sought, particularly where there is domestic violence, sexual abuse, mental illness or other issues that pose a high risk to the children and family.” (The second are “intractable cases” in which counselling or mediation has failed to reach a resolution.)

<sup>492</sup> Ibid, at p. 1.



decides the way the evidence is received, decides the manner in which the hearing is conducted, and decides the case.<sup>493</sup>

A key stage appears to be a preliminary hearing at which “the parties address the Judge orally as to what they see as the issues, what their goals are, and the orders they are seeking and why.”<sup>494</sup> The judge then identifies the issues and determines the approach to be taken to resolve them, which may include settlement discussions. The extent of the judge’s proactive role is illustrated in the briefing paper’s description of the lead up to the final hearing.

Before the [final] hearing, the judge will have determined the process to be followed, the evidence to be presented, the number of witnesses, the order of cross-examination, and the way the evidence is to be presented.

There are some potential benefits of judges taking the “more proactive role” outlined in the briefing paper. Potentially, a judge taking such an approach might have saved Amy the time and expense of addressing the multiple affidavits filed by Peter and his friends, affidavits which needlessly and abusively prolonged proceedings.

However, a closer examination of the briefing paper reveals serious concerns about the impact of the Parenting Hearings Programme on battered women. Firstly, we think it a dangerously naive view that battered women participating in a preliminary hearing will necessarily be able to clearly articulate their concerns about their abuser’s parenting qualities, especially since he will be present in the room. Their difficulty will be exacerbated by the short time-frames. That is, preliminary hearings are to be held within 14 days of the application being made,<sup>495</sup> clearly insufficient time for a battered woman to receive the sort of support and education which might go some way to empower her. For instance, we doubt it would be easy for the mother in *PCN v JCF*,<sup>496</sup> whose partner had connections in the Mongrel Mob, to provide a full and frank account of her concerns about his parenting.

Here, we are not reassured by one of the stated benefits of the preliminary hearing under the programme. The briefing paper states: “listening to the parties directly allows the judge to hear and observe the true dynamics between the parties.”<sup>497</sup> Again, this seems a dangerously naive view. Recall that Rachel’s partner was “a charmer” in court. Despite the obvious fact that Chris had been sentenced to a term of imprisonment for a serious and sustained assault on Rachel, the Family Court judge could not understand her concern about Chris knowing her address and, in her view, totally minimised the issue of safety for her and her children.

The risk that violence will be minimised in the Parenting Hearing Programme is evident in the way the briefing paper prioritises a forward-looking approach, which is believed to focus on resolution, rather than canvassing the past. For example, a key feature of the programme is said to be “a more child-focused approach, with its greater emphasis on the children and their needs and views, **rather than on the parents’ issues and histories**” (emphasis added).<sup>498</sup> The focus

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<sup>493</sup> Ibid. at p. 3.

<sup>494</sup> Ibid, at p. 7.

<sup>495</sup> And final hearings held within two months. Ibid, at p. 4.

<sup>496</sup> *PCN v JCF* [2005] NZFLR 625. See discussion earlier in this chapter.

<sup>497</sup> Boshier, P., & Udy, D. (2006). *Parenting Hearings Programme (less adversarial children’s hearings)* (Briefing paper). Wellington: Ministry of Justice, p. 7.

<sup>498</sup> Ibid, at p. 1.

on children's needs and views is said to "eliminate peripheral issues and evidence."<sup>499</sup> The paper goes on to state that:<sup>500</sup>

This new approach is intended to do away with lengthy affidavits that deal mainly with historical issues that may simply be common ground or that are more likely to inflame matters than help the Judge decide the case.

A forward-looking approach that avoids dredging up the past is commonly promoted in conflict resolution models such as mediation. But such approaches are posited on the existence of equal bargaining power between the parties. They are inappropriate for cases where domestic violence has provided the context for the parties' "negotiations".<sup>501</sup> Moreover, in domestic violence cases, the "historical issues" are of crucial importance in determining the best interests of the child. Determining the best interests of a child requires understanding the extent, nature and history of the violence to which he or she has been exposed. It requires an analysis of the impact of that violence on the child. Without fully canvassing such issues, a child's wish to see or live with an abusive parent may be taken at face value, rather than being seen as a strategic position taken out of fear or a response shaped by traumatic bonding.<sup>502</sup> And of course, without fully canvassing the violence, proper risk assessment is impossible. As we noted in Chapter 7, past behaviour is the strongest predictor of future behaviour.

As it is presently constituted, with its emphasis on speedy resolution, the Parenting Hearings Programme carries a significant risk that violence against women will be relegated to the category of a "peripheral issue" to be "eliminated" from consideration.<sup>503</sup> After all, that is what the Family Court did when Amanda and Amy sought orders giving them the day-to-day care of their children, no less the mothers involved in *PCN v JCF*<sup>504</sup> and *M v M*,<sup>505</sup> discussed earlier in this chapter.

We are not alone in our misgivings about the Parenting Hearings Programme. Both the National Collective of Independent Women's Refuges<sup>506</sup> and the Family Law Section of the New Zealand Law Society<sup>507</sup> have expressed similar views. We recommend:

**THAT the Parenting Hearings Programme Pilot deal only with cases in which both parties have freely consented to take part. Moreover, sufficient time periods and resources need to be available for specialist reports to be obtained and the mandatory approach specified in sections 60 and 61 of the Care of Children Act 2004 to be carried out. (#17)**

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<sup>499</sup> Ibid.

<sup>500</sup> Ibid, at p. 8.

<sup>501</sup> See, for example, Busch, R. (2002). Domestic violence and restorative justice initiatives: Who pays if we get it wrong? In H. Strang & J. Braithwaite (Eds.), *Restorative justice and domestic violence*. Sydney: Cambridge University Press.

<sup>502</sup> See our discussion of these issues in Chapter 7.

<sup>503</sup> Boshier, P., & Udy, D. (2006). *Parenting Hearings Programme (less adversarial children's hearings)* (Briefing paper). Wellington: Ministry of Justice, at p. 1.

<sup>504</sup> *PCN v JCF* [2005] NZFLR 625. See discussion earlier in this chapter.

<sup>505</sup> *M v M* [2002] NZFLR 743, at paragraph 27.

<sup>506</sup> Letter from Heather Henare, Chief Executive, National Collective of Independent Women's Refuges, to the Secretary for Justice.

<sup>507</sup> Family Law Section, Executive Email Bulletin, October 2006.

## 12: Police

Of all the agencies of the state, the New Zealand Police is the one with the most direct responsibility for protecting citizens from assault. Police officers play a crucial role in the enforcement of protection orders and are at the “front-end” of the criminal justice response to violence against women, including the enforcement of protection orders. We begin this chapter by briefly discussing the evolution of the police Family Violence Policy. We then draw on the experiences of the women featured in our case studies to reflect on various aspects of that policy, describing aspects which seem to be working well, highlighting problems women encountered in relation to the police and making recommendations about the implementation, and, in some cases, the revision, of the police Family Violence Policy.

### **The Police Family Violence Policy**

Police policy in relation to domestic violence evolved quite quickly during the closing years of the twentieth century. As in most Western jurisdictions, the police response to domestic assaults for much of last century could be described as reluctant involvement,<sup>508</sup> as police typically saw domestic assaults as private conflicts, not readily amenable to police intervention.<sup>509</sup> During 1985 and 1986, Sergeant Greg Ford evaluated a pilot pro-arrest policy in Hamilton which was subsequently adopted nationally in 1987.<sup>510</sup> The key features of the policy were that offenders “should” be arrested where there was evidence of an offence having been committed without asking victims to make a formal complaint and that victims should be routinely referred to support agencies.

As noted in Chapter 1, our previous study of women’s experiences of protection orders revealed major problems in the police response to domestic violence in general and to breaches of protection orders in particular.<sup>511</sup> That study was conducted when the 1987 pro-arrest policy was approximately three years old. Since then, the Domestic Violence Act 1995 has introduced a single protection order to replace the non-violence and non-molestation orders and a Family Violence Database has been established by the police to improve the storage and retrieval of information relating to domestic violence incidents. In addition, the police Family Violence Policy has been revised three times, in 1992, 1993 and 1996.

The current (1996) policy is an extensive 87-paragraph document.<sup>512</sup> It includes a clear statement that “the protection of the victim is paramount” (paragraph 3) and sets out three core principles on which policy and practice are to be based, namely:

- Protection of victims (which includes children who witness family violence);
- Holding assailants accountable; and
- Consistent practices across agencies and groups.<sup>513</sup>

The current policy is much more comprehensive than its 1987 precursor, providing detailed guidelines in a number of areas which we review below. Our current study suggests a number of

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<sup>508</sup> Ford, G. W. (1986). *Research project on domestic disputes: Final report*. Wellington: Police Psychological Services, New Zealand Police.

<sup>509</sup> Fagan, J. (1996). *The criminalisation of domestic violence: Promises and limits*. Washington: National Institute of Justice.

<sup>510</sup> Police Commissioner. (1987). Domestic dispute policy changes. *Commissioner’s Circular*, 1987/11.

<sup>511</sup> Busch, R., Robertson, N. R., & Lapsley, H. (1992). *Protection from family violence: A study of protection orders under the Domestic Protection Act 1982*. Wellington: Victims Task Force.

<sup>512</sup> Police Commissioner. (1996). *1996/2: Family Violence Policy*. Wellington: Office of the Commissioner of Police.

<sup>513</sup> *Ibid*, at paragraph 4.

areas in which police practice has improved (also discussed below), but, when considered against the three principles of protection, accountability and consistency, our general conclusion is that many of the problems we identified in 1992 remain. That is, the overwhelming picture which emerges from the case studies presented in Volume 1 is that women felt that the police had failed to protect them and had failed to hold perpetrators accountable for their violence. Overall, the police response was characterised by its inconsistency. Certainly, some of the women we interviewed told us about incidents in which they were pleased with the police response, but each of these women had, on other occasions, experienced quite unsatisfactory service from the police.

In addition, it should be noted that for most of the women, there were numerous occasions on which they were assaulted and/or had their protection order breached but, for various reasons, they did not call the police. In fact, over a quarter (12 of the 43) had no contact with the police at all despite the assaults and/or breaches they experienced. Given the central role of the police in protecting citizens, it is significant how reluctant the women in our case studies were to seek police assistance. We therefore begin our discussion of the case studies by examining the barriers to accessing police services.

### **Barriers to Calling the Police**

As the case studies show, there are multiple barriers to accessing police services. For some of the women, these barriers were the same as the factors which served to keep them in the abusive relationship. That is, a decision to call the police was tantamount to a decision to leave the relationship. For example, on one occasion when Alistair was assaulting Marjorie, her son yelled at her to call the police but she didn't because she "couldn't see anything happening." She couldn't see where she would live, how she could support herself financially, or how she could look after her disabled son. If calling the police is seen as a declaration of leaving the relationship, then the prospect of poverty, homelessness, worse violence or death, community condemnation, losing the care of one's children and, possibly, the ability to protect the children from further violence become almost insurmountable barriers to accessing police services.

Our case studies reveal various other barriers to accessing police services – and particular patterns across the four streams. Most notable here is that while all the Māori women (8) and most of the Pākehā women (12 out of 13) contacted the police at least once, fewer of the Pasifika women did so (6 out of 9) and only half of the other ethnic minority women (7 out of 14).<sup>514</sup> Unsurprisingly, non-residence status was an important barrier here. For example, when Amy arrived at work with bruises and scratches on her body, her workmates asked if she had been beaten by her husband and offered to call the police. But Amy pretended that she had fallen because she was concerned that if the police got involved, Peter might not sponsor her application for residence and she would have to leave the country – and lose all contact with her daughter. Eve's partner, Richard, repeatedly threatened to "take away" her residence. Similarly, Laura was initially reluctant to call the police because her abuser was the principal applicant for residence.

Language was a barrier for some of the other ethnic women. Calling the police was never an option for Amira. Sripai and Pinky had difficulty communicating with the police: so too did Alice. In the view of her interpreter, Alice's limited ability to make herself understood in English resulted in one police officer considering her "mad". As the interpreter pointed out, Alice's

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<sup>514</sup> For a discussion of some of the issues relating to policing domestic violence within immigrant communities, see Shim, W. S., & Hwang, M. J. (2005). Implications of an arrest in domestic violence cases: Learning from Korean social workers' experiences in the US. *Journal of Family Violence*, 20(5), 313-328.

English deteriorated when she was upset or anxious, both very understandable feelings when dealing with police officers in the context of domestic violence.

For many of the women in our case studies, involving the police was simply too dangerous. For example, Eve was given a very specific threat not to call the police. In Stripai's case, her partner's father made a similar threat. Tiare was punished by Fetu for calling the police while Lyla was "afraid that ... [Steve] would catch me with the phone." Patti's partner made sure she did not have access to either a landline or a cellphone. He also controlled her access to the car. On several occasions, Jess was unable to call the police because her partner got to the phone first or cut the call off before she got through. Once when Stripai did go to call the police, her partner grabbed the phone and smashed it. Similarly, when Mele tried to phone the police to protect her mother, Masi had already cut the phone cable. Considering the leverage Trudy's partner and his criminal associates were able to exert, calling the police was never an option for her, at least while she was living in Australia.

Concerns about children sometimes acted as a barrier to calling the police. Lin-Bao told us that she didn't want to call the police because it would upset her children. For Nusrat, Titiana and Elizabeth, fear of losing their children was a major disincentive to calling the police.

Lyla faced a different sort of barrier. Because she had a criminal record from her younger days, she was not sure that she could trust the police. One of the barriers Te Rina faced was living in the local equivalent of "the Bronx", an area which Te Rina told us was reputedly a low priority for the police.

None of these barriers is new and some of them have been mentioned in very recent local research.<sup>515</sup> Some are beyond the scope of the police to address by themselves (although we do later make recommendations which might make it easier for women from cultural and linguistic minority groups to access effective police services). However, our analysis does serve to underline the importance of women's experiences of the police in shaping their willingness to report future violence. That is, because it is so difficult for most women to call the police in the first place, an inadequate police response may totally discourage women from making further calls. This was exactly what happened to Maria. When she called the police, the attending officers were so taken by Eru's good reputation that they did not arrest him. She did not call the police again. Similarly, Mele's mother lost faith in the police and gave up calling them – as did Alofa. Roimata called the police only sometimes after she formed the impression that "they can't be bothered." And Rowena told us that she felt that she could not trust the police again after they failed to take action against Paul. Such experiences illustrate the importance of the police not only "getting it right" but getting it right consistently.

### ***Police Understanding of Family Violence***

To some extent, the sort of problems discussed above reflect a poor understanding of family violence. The police policy adopts a definition of family violence which is largely congruent with sections 3 and 4 of the Domestic Violence Act 1995.

The term "family violence" includes violence which is physical, emotional, psychological and sexual abuse, and includes intimidation or threats of violence. The term "family" includes such people as parents, children, extended family members and whanau, or any other people involved in relationships. Examples of such relationships include partners, caregivers, boarders, flatmates, and people in same-sex relationships, but does not include neighbours. This definition has the same meaning

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<sup>515</sup> Hand, J., Elizabeth, V., Rauwhero, H., Selby, S., Burton, M., Falanitule, L., & Martin, B. (2002). *Free from abuse: What women say and what can be done*. Auckland: Auckland Healthcare Services.

as sections 3 and 4 of the Domestic Violence Act 1995 relating to the meaning of “domestic violence” and “domestic relationships”.<sup>516</sup>

Potentially, paragraph 2 of the policy serves a useful purpose in reminding officers that violence should not be read narrowly as being limited to physical violence but that emotional, psychological and sexual abuse are to be included, along with threats and intimidation. Each of these behaviours is expressly forbidden under section 19 of the Domestic Violence Act 1995, and would, therefore, constitute a breach of a protection order. In the absence of a protection order, the threshold is a little higher. The Crimes Act 1961 does not specifically prohibit emotional or psychological abuse per se, but, depending on the nature of the behaviour and context, such abuse could be subject to criminal charges such as those available under sections 306 to 308 of the Crimes Act (threats to kill, threats to do grievous bodily harm, threats to destroy property, damaging property to intimidate).

However, the overwhelming impression from our case studies is that police consistently read family violence in a very narrow way. In particular, they often minimise psychological violence. This is most obvious in the non-enforcement of breaches involving telephone calls and text messages, which continue to be trivialised as “technical” breaches,<sup>517</sup> despite the fact that to the protected person, such calls and messages are often part of an orchestrated campaign of psychological violence and intimidation.

For example, Hilda found it very difficult to report a breach of her order when John rang her cellphone to accuse her of stalking him after a chance encounter in the street. He had obviously obtained her new number. Hilda, who was experiencing post-traumatic stress disorder, was devastated, given all that she had gone through. However, to the police officer who rang her late that night, it was “in the greater scheme of things ... only a phone call” and took action only after Hilda insisted. Similarly, Jess was told “This isn’t really serious” when she first reported Bruce’s emails which she had found “disturbing, semi-threatening at times, and ... quite destabilising to read.”

In Louise’s case, there was no follow-up to the series of text messages sent from Phillip’s cellphone, just days after he had been released from custody while on remand for several charges of assaults on her. Texts which said that Louise could relocate with the children only “over his dead body” and warning her that the children would find out that their mother had sent their father to jail were described in a POL400 as involving no direct threats – despite the fact that he had been assessed a short time earlier by the Risk and Lethality Assessment Worksheet as being a “high risk”.

In our case studies there are other examples of an overly narrow view of domestic violence being taken by the police, a view in conflict with the stated policy. For example, one of the main ways Pita maintained his power and control over Alofa was by dramatic displays of destroying property. Alofa became frustrated with the police because her husband could continue to destroy her property and face no consequences. The police told Alofa that since Pita was not physically harming her, there was nothing that they could do to help her. Similarly, the police showed little

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<sup>516</sup> Police Commissioner. (1996). *1996/2: Family Violence Policy*. Wellington: Office of the Commissioner of Police, at paragraph 2.

<sup>517</sup> As we explained in Jess’s case study, key informants (particularly, but not exclusively, police officers) often made a distinction between “real” breaches and “technical” breaches. “Real” breaches are those involving physical violence. “Technical” breaches are those which involve contact but no violence and attract minimal sentences, or more commonly, are not prosecuted in the first place. Such a distinction makes sense only if one has no understanding of the tactics of power and control respondents employ and are completely blind to the impact of psychological violence, including the terrorising effect of such unwanted and unlawful contact. Crucially, there is no basis in law for such a distinction.

understanding of Lee-Mei's predicament in being locked out of the house she had shared with her partner.

The police officer who responded to the one call Maria made to the police showed little understanding of domestic violence when he was so persuaded by Eru's public reputation as a mild-mannered, gentle man that he blamed her for what had happened. The response Marjorie got from the police officer to whom she spoke was only marginally better. The officer, who was on the same trust board as Alistair, suggested that perhaps Alistair needed counselling. The officer showed no interest in dealing with the violence as a crime.

Similarly, the police officers to whom Alice reported, first, two dead rabbits lying outside her shop, and second, a bullet hole in the door to her lawyer's office, seemed to place little importance on the fear these events engendered in Alice. Moreover, as some of the case studies show, when a lack of understanding of domestic violence is combined with gaps in cultural understanding, quite unsatisfactory service may result.

The case studies do provide contrasting examples of police showing a good understanding of psychological violence. For example, Elizabeth reported to the police that Stephen had breached his protection order by phoning her. In the course of the conversation, he had also threatened to kill her parents. Police recognised this as not only a threat against her parents but also as an act of psychological violence against Elizabeth herself. Stephen was subsequently convicted of breaching the protection order by an act of psychological violence.

Police eventually took similar action against Bruce in respect of Jess's protection order when it was discovered that he had been monitoring her email. Although this prosecution was unsuccessful, the police did show a good understanding of psychological violence. Similarly, after being arrested for an assault on Hilda, John sent her a bunch of flowers with a note asking her to marry him. Police had no trouble recognising this as an act of psychological violence and arrested him for breaching the conditions of his bail. Similarly, Claire's ex-partner was charged with breaching his protection order by leaving roses on the windscreen of her car.

While a lack of appreciation of the significance of psychological violence was the most obvious gap in police officers' understanding of family violence, the case studies suggest a number of other problems in police knowledge. Some of these related to the Domestic Violence Act 1995. For example, police reportedly told Lyla that to revive the non-contact conditions of her protection order she needed to give Steve written notice that she did not want him to contact her. There is no such requirement in the law. Neither did there seem to be any possible ambiguity about her withdrawing her consent to having Steve "living in the same dwellinghouse":<sup>518</sup> she had, after all, just driven him to a hotel with his belongings.

Such inconsistencies in the way police officers understand family violence suggest inadequate training. Some members of the police to whom we spoke were critical of the limited amount of time spent on family violence in the basic training of police recruits, currently six hours of the 19-week programme. It was noted that family violence does feature in in-service training from time to time but this too was considered inadequate. Family violence constitutes a very significant part of police work. In 2006, police attended 69,220 incidents of family violence.<sup>519</sup> Violence and sexual attacks make up 10% to 12% of all recorded crime with one-third of recorded violence

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<sup>518</sup> Domestic Violence Act 1995, s. 20(3). Under the provisions of s. 20(2), the non-contact condition of a protection order is automatically suspended for any period during which the respondent, with the express consent of the protected person, is living in the same dwelling. Under s. 20(3), the non-contact condition is revived if that consent is withdrawn.

<sup>519</sup> Commissioner of Police. (2006). *New Zealand Police annual report for the year ended 30 June 2006*. Retrieved 19 January 2007 from <http://www.police.govt.nz/resources/2006/annual-report>.

family related.<sup>520</sup> The amount of training in the area of family violence needs to be significantly increased so that is more commensurate with the proportion of police work which is family violence-related.

It is important that training in family violence work pays close attention to the dynamics of family violence. In particular, this needs to include the role of psychological violence, including the use of threats and destruction of property. Unless police officers have a good understanding of the tactics of coercive control, they are at risk of blaming victims and/or putting them into dangerous situations.

Moreover, given the increasing cultural diversity of New Zealand, training needs to include the consideration of domestic violence in diverse cultural contexts. For many of the women in our case studies, specific cultural values and/or the marginalised status of their ethnic or cultural communities provided additional barriers to their safety and autonomy. Effective policing requires a good understanding of relevant cultural factors, a theme we return to later in this chapter. We recommend:

**THAT the New Zealand Police substantially increases the amount of pre-service and in-service training in domestic violence, and ensures that such training pays particular attention to helping police officers understand the dynamics of family violence in diverse cultural contexts. (#35)**

### ***An Interagency Approach and Providing Support to Victims***

According to the police Family Violence Policy:

Successful models for responding to family violence suggest the implementation of a coordinated and interagency approach within a framework of locally developed protocols. The principles of “consistent messages” and “no gaps in services” should underpin local responses. Protocols must include reference for appropriate support and protection for victims, suitable programmes to rehabilitate offenders, and procedures for local monitoring and evaluation of services. “Fast-track” options for court hearings are an option.<sup>521</sup>

This general statement is followed up with more specific guidelines, requiring, for example, district commanders to establish protocols for referring victims of family violence to appropriate agencies so that they may received “appropriate and timely support and information about services and remedies” (paragraph 27). Women’s Refuge is identified as “the primary agency delivering support for victims of family violence” (paragraph 31). In short, the policy sets out the broad framework of the sort of interagency approach recognised worldwide as best practice and is fundamental to Te Rito, the New Zealand Family Violence Prevention Strategy.<sup>522</sup>

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<sup>520</sup> Ibid.

<sup>521</sup> Police Commissioner. (1996). *1996/2: Family Violence Policy*. Wellington: Office of the Commissioner of Police, at paragraph 5.

<sup>522</sup> Ministry of Social Development. (2002). *Te Rito: New Zealand Family Violence Prevention Strategy*. Wellington: Ministry of Social Development. The Duluth Abuse Intervention Project was, and perhaps remains, the most influential exemplar of the interagency approach. (See Pence, E. (1989). *The justice system’s response to domestic assault cases: A guide for policy development* (Rev. ed.). Duluth, MN: Minnesota Program Development, Domestic Abuse Intervention Project.) Locally, the value of the model has been demonstrated in the Hamilton Abuse Intervention Project. (See Robertson, N. R. (1999). *Reforming institutional responses to violence against women*. PhD thesis, University of Waikato. Retrieved 11 June 2006 from <http://www.nzfvc.org.nz/PublicationDetails.aspx?publication=12704>.) Subsequently, the inquiry into the deaths of Saliel and Olympia Aplin argued powerfully for the need for interagency collaboration to reduce child abuse (see Grant, T. (2003). *Report on the investigation into the deaths of Saliel Jalessa Aplin and Olympia Marisa Aplin*. Wellington: Office of the Commissioner for Children) as did an earlier report into the death of James Whakaruru (see Office of the Commissioner for Children. (2000). *Final report on the investigation into the death of Riri-o-te-Rangi (James) Whakaruru, born 13 June 1994, died 04 April 1999*. Wellington: Office of the Commissioner for



## Women's Experiences

There are many examples in the case studies of these aspects of the policy being well implemented. For example, Tessa, Hilda, Jess, Patricia and Patti were all contacted, mostly in person, by a specialist women's advocate shortly after a police call-out. Often this support made a vital difference as women learnt about protection orders, got put in touch with lawyers and were informed about women's domestic violence programmes. For two women, the police referral was to generic Victim Support workers. This was useful for Te Rina (she was put in touch with a lawyer and got a protection order without notice) but Tiare felt the young worker who visited her did not understand her and trivialised what had happened.

Sometimes police attending call-outs provided valued practical assistance. Both Eve and Sripai were given a lift to a women's refuge and Elizabeth was taken to the psychiatric unit where she was receiving treatment. Police helped Halle collect her belongings when she moved out of Michael's house. Police ensured access to services in other ways. Laura was advised to contact the local community law centre. And for many of the women, it was the police who first provided information about protection orders.

The case studies also show instances in which the police participated in, and sometimes initiated, useful interagency collaboration. A good example concerned Elizabeth. For a long time, her partner, Stephen, was able to avoid accountability for his severe physical, sexual and psychological violence because of his ability to exploit Elizabeth's mental health problems and his ability to enforce her non-cooperation with the police. However, in the end, the police won a vital prosecution against him, leading to Stephen serving a term of imprisonment. Good investigative practices were important here but these would not have been effective without the close collaboration of women's advocates, social services workers and mental health professionals. Similarly, good interagency practices were invoked to support Lyla's attempt to end the relationship with Steve, including discussion of relocation options and providing Lyla with a personal alarm.

On the other hand, many of the case studies include no references to women being given "appropriate and timely support and information."<sup>523</sup> This was not necessarily the fault of the police. It is possible that, in some instances, referrals were made to agencies that failed to follow up the women concerned.<sup>524</sup> However, it does point to gaps in implementing the sort of interagency referral protocols required under the police Family Violence Policy.

We were struck by the very small number of women from other ethnic minorities who reported receiving any sort of follow-up.<sup>525</sup> Mostly, these women lived in major cities where reportedly there are interagency protocols in place. It is quite likely then, that these women are experiencing cultural and/or language barriers to receiving or seeking support following a police call-out. Certainly, language was a significant barrier for Alice, for whom the police response was quite inadequate and follow-up lacking.

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Children). For a recent evaluation of coordinated responses to violence against women, see Robinson, A. L. (2006). Reducing repeat victimization among high-risk victims of domestic violence: The benefits of a coordinated community response in Cardiff, Wales. *Violence against Women*, 12(8), 761-788.

<sup>523</sup> For example, Police told Katrina and Tony "to sort it out".

<sup>524</sup> According to the police Family Violence Policy, officers attending a domestic violence incident "shall" notify the relevant support agency – without asking permission – "Unless the victim has already indicated that he or she does not require support": Police Commissioner. (1996). *1996/2: Family Violence Policy*. Wellington: Office of the Commissioner of Police, at paragraph 32. It is theoretically possible that some of the women in the case studies specifically indicated that they did not require support, although none mentioned doing so.

<sup>525</sup> Only Eve, Laura and Sripai specifically mentioned receiving support through the intervention of the police.

## Factors in Inter-agency Collaboration

There are other possible reasons for the differences we have observed in the case studies. One may be regional. Our conversations with key informants revealed wide variations in the extent to which an interagency approach had been implemented. Some police districts have negotiated very specific protocols with relevant community organisations. When well implemented, these protocols ensure that police routinely notify Women's Refuge or other specialist domestic violence agencies of domestic violence call-outs, so that women can be followed up by battered women's advocates. In other areas, arrangements are reportedly much looser and, as many of our case studies show, there is no effective follow-up, or at best, such follow-up is carried out inconsistently.

Key informants from communities in which interagency collaboration is well developed pointed out to us that collaboration works best when there is a shared vision and a common analysis of domestic violence. This is consistent with international literature pointing out the dangers of conflicting agendas in domestic violence work.<sup>526</sup> For example, the problems which arise when women's advocates and children's advocates (especially statutory child protection workers) fail to work together effectively have been well documented,<sup>527</sup> something which is evident in our case studies and discussed further in Chapter 15.<sup>528</sup> Similarly, well-intentioned initiatives such as mandatory arrest policies or no-drop prosecution policies can be counter-productive, unless the implementation is informed by a sound understanding of the power and control dynamics of battering and the role of the state in providing a barrier between battered women and their abusers. That is, mandatory arrest policies can result in the inappropriate arrest of women victims.<sup>529</sup> No-drop prosecution policies can result in battered women being imprisoned for contempt of court when they fail to testify against their abuser.<sup>530</sup> Internationally, these sorts of problems have been shown to have had a disproportionate impact on women of colour.<sup>531</sup>

It is important to emphasise that interagency collaboration needs to focus on case-specific arrangements. Our conversations with key informants revealed varying understandings of what an interagency approach entailed. In some areas, an interagency approach seemed limited to regular, usually monthly, meetings of representatives of relevant organisations. Such meetings are undoubtedly useful in keeping agency members informed about training initiatives, new

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<sup>526</sup> For example see, American Psychological Association Presidential Task Force on Violence and the Family. (1996). *Violence and the family: Report of the American Psychological Association Presidential Task Force on Violence and the Family*. Washington, DC: American Psychological Association.

<sup>527</sup> Schechter, S., & Edleson, J. L. (1994). *In the best interest of women and children: A call for collaboration between child welfare and domestic violence constituencies*. Briefing paper prepared for the conference Domestic Violence and Child Welfare: Integrating Policy and Practice for Families, Racine, Wisconsin, 8-10 June.

<sup>528</sup> See case studies *Crystal, Katrina, Elizabeth, Tiare, Titiana* and *Nusrat*. Some of the problems these women experienced can be attributed to the lack of collaboration between women's advocates and children's advocates, an issue discussed further in Chapter 15.

<sup>529</sup> Rajah, V., Frye, V., & Haviland, M. (2006). "Aren't I a victim?" Notes on identity challenges relating to police action in a mandatory arrest jurisdiction. *Violence against Women*, 12(10), 897-916. DeLeon-Granados, W., Wells, W., & Binsbacher, R. (2006). Arresting developments: Trends in female arrests for domestic violence and proposed explanations. *Violence against Women*, 12(4), 355-371.

<sup>530</sup> Developments in the law: Legal responses to domestic violence. (1993). *Harvard Law Review*, 106, 1498-1620. Ford, D. A. (2003). Coercing victim participation in domestic violence prosecutions. *Journal of Interpersonal Violence*, 18(6), 669-684.

<sup>531</sup> Hanna, C. (1996). No right to choose: Mandated victim participation in domestic violence prosecutions. *Harvard Law Review*, 109, 1850-1910; Mills, L. (1999). Killing her softly: Intimate abuse and the violence of state intervention. *Harvard Law Review*, 113, 550-613; Coker, D. (2000). Shifting power for battered women: Law, material resources and poor women of color. *University of California Davis Law Review*, 33, 1009-1055.

programmes, funding opportunities and policy developments. However, this sort of general information sharing will not produce the sort of seamless, coordinated approach envisaged in the policy. Instead, what is required are detailed protocols specifying the role of each agency, and in some instances, key roles within an agency. For example, protocols in Hamilton detail the roles of police officers attending incidents, police family safety team members<sup>532</sup> and police prosecutors. The protocols also cover the roles of battered women's advocates, cell visitors, court advocates, court victim advisors, and the statutory and non-statutory child protection agencies. The protocols pay particular attention to the arrangements for passing case-specific information between agencies. Such protocols help ensure not only that victims get timely and appropriate support, but also that the risks to children are identified and responded to and that perpetrators are accountable for their violence. They also produce an information flow which can be used to monitor the effectiveness of the participating agencies, a point to which we return later. (See recommendations 35 and 45 regarding the role of non-government organisations (NGOs) in safety audits.)

A slightly different model of interagency collaboration has been developed in San Diego. There, the police department is one of 25 agencies that participate in the San Diego Family Justice Center. The center provides a one-stop shop for victims of domestic violence. At the centre, victims can "talk to an advocate, get a restraining order, plan for their safety, talk to a police officer, meet with a prosecutor, receive medical assistance, counsel with a chaplain, and get help with transportation."<sup>533</sup> As we comment later, this collaborative approach is one of the factors which makes the San Diego police particularly effective in securing convictions in domestic violence prosecutions.

As some key informants noted, effective interagency collaboration requires addressing inequalities of power between partners. On the one hand, there are the government partners such as the New Zealand Police, the Ministry of Justice and the Ministry of Social Development. Such agencies are well resourced and have statutory powers. In contrast, most specialist domestic violence community organisations are small and underfunded, and lack statutory powers. Moreover, the community partners are typically heavily reliant on funding contracts determined by their government partners. In such an environment, there is always a risk that the government agencies will dominate, generally at the expense of women's advocates. The result may be practices and policies which prioritise institutional goals, rather than the safety and autonomy of women.<sup>534</sup>

While the police are obviously a key stakeholder in family violence collaborations, it is important that they do not dominate. For example, key informants from the NGO sector who are involved

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<sup>532</sup> Currently, there are six pilot Family Safety Teams. In other areas, the police family violence coordinator plays a similar coordinating and monitoring role.

<sup>533</sup> San Diego Family Justice Center Foundation. (2007). *Get Information*. Retrieved 8 March 2007 from <http://www.sandiegofamilyjusticecenter.org/info>. The mission statement of the San Diego Family Justice Center reads as follows: "Our mission is to stop family violence, make victims safer, hold batterers accountable, provide long-term support for victims and children through collaboration and coordinated services, and ultimately to be the first large city in the United States to eliminate domestic violence homicides. The San Diego Family Justice Center will work in a united effort to achieve the following objectives: ... Reduce the number of domestic violence cases that go unreported. ... Ensure domestic violence perpetrators are prosecuted. ... Provide help and resources to children exposed to domestic violence. ... Afford appropriate medical care to victims of domestic violence. ... Offer appropriate legal assistance to victims of domestic violence. ... Reduce recidivism and homicides."

<sup>534</sup> Lessard, G. Lavergneb, C., Chamberland, C., Damanta, D., & Turcotte, D. (2006). Conditions for resolving controversies between social actors in domestic violence and youth protection services: Toward innovative collaborative practices. *Children and Youth Services Review*, 28(5), 511-534. See also, Robertson, N. R. (2005). There are no magic bullets: The case for coordinated community interventions. *The Avatea Review*, 3(2), 9-10.

in the family safety team pilots<sup>535</sup> told us that they often struggled against a tendency among police managers to act as leaders, rather than partners, within the teams. In a different context, we heard similar concerns from women's advocates involved in the specialist family violence courts (discussed in the following chapter). It is essential that women's advocates are able to play a central role in interagency collaboration if it is to produce benefits for women victims of domestic violence.

Effective interagency collaboration also requires specific funding. As key informants pointed out, collaboration takes time and money. While there have been some modest improvements in the funding of programmes, on the whole there has been less attention paid to funding the "glue" that holds interagency collaborations together. A notable exception is the Ministry of Social Development's Community Collaborative Initiative Fund.

Bearing these points in mind, we recommend:

**THAT the New Zealand Police places greater priority on working in genuinely collaborative partnerships with Women's Refuges and other specialist domestic violence organisations and negotiates with them:**

- (a) protocols for the provision of support to victims of family violence;**
- (b) case-specific protocols for sharing information which will help to hold offenders accountable for their violence; and**
- (c) arrangements by which specialist domestic violence community-based organisations can participate in monitoring the response of the police and other state institutions. (#36)**

### ***Investigating Family Violence Offences***

The prosecution of domestic violence offenders serves a number of purposes. It serves a symbolic purpose indicating the moral unacceptability of domestic violence. It serves an instrumental purpose in deterring others from offending (general deterrence) and deterring the particular offender from further assaults (specific deterrence).<sup>536</sup> It can facilitate the rehabilitation of the offender if he is sentenced to undertake a specialised stopping violence programme. Importantly, to the extent to which the last two purposes are achieved, it can help ensure the safety of the victim. Unfortunately, because the prosecution case is usually heavily reliant on the testimony of the victim, prosecuting domestic violence offenders can endanger her as the offender uses whatever leverage he has available, including violence and threats of violence, to get her to withdraw from participating in the prosecution. Largely for these reasons, domestic violence prosecutions have a relatively low success rate. In New Zealand, just 55% of prosecutions for male assaults female result in a conviction.<sup>537</sup> In this section, we discuss some of

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<sup>535</sup> Family Safety Teams are being piloted in Auckland, Hamilton, the Wairarapa and Lower Hutt. The teams bring together police staff with adult victim and child advocates from local community agencies. Some sites include a Child, Youth and Family Services worker in the team. The teams aim to "improve outcomes for families via better collaboration and coordination among justice and social service agencies" to address the particular issues and problems evident in their districts. See New Zealand Police. (2007). Teams aim for "violence-free" life for New Zealand families. *Ten One: Community Edition*, 1(November). Retrieved 7 March 2007 from [http://www.police.govt.nz/news/tenone/20051028-278/feature\\_violencefree.htm](http://www.police.govt.nz/news/tenone/20051028-278/feature_violencefree.htm).

<sup>536</sup> Ellison, L. (2002). Prosecuting domestic violence without victim participation. *Modern Law Review*, 65(6), 834-858.

<sup>537</sup> Ministry of Justice. (2004). *Conviction and sentencing of offenders in New Zealand: 1994 to 2003*. Retrieved 18 July 2006 from <http://www.justice.govt.nz/pubs/reports/2004/conviction-sentencing-2003-04/appendix2.html>. The quoted figure is for 2003, the latest available. Of course, male assaults female (Crimes Act 1961, s. 194(b)) is not the only charge laid against domestic violence offenders but almost all such charges are domestic violence-related. In contrast, other sections of the Crimes Act which are often used in cases of domestic violence (for example, ss. 189 (injuring

the problems evident from the case studies relating to the investigation of family violence offences and the arrest of offenders. We also offer suggestions to improve the effectiveness of domestic violence investigations which may lead to more successful prosecutions.

Paragraphs 16 to 18 of the police Family Violence Policy set out broad guidelines for the investigation of family violence incidents. These paragraphs state that action must focus on victim safety, identifying and investigating offences, and arresting offenders. The policy points out that there are a number of offences which may be relevant to family violence, ranging from homicide to wilful damage and burglary. Specific investigative techniques listed are (a) querying the Family Violence Database to obtain information relating to previous complaints, protection orders and firearms; (b) asking questions about the presence or availability of firearms in the specific incident; (c) having the victim identify the offender and the nature of their relationship; (d) having the victim outline the complaint in front of the offender and noting his (her) responses; (e) establishing the identity of people present; and (f) collating information about injury and damage to property. Paragraph 19 states:

Given sufficient evidence, offenders who are responsible for family violence offences shall, except in exceptional circumstances, be arrested. In the rare case where action other than arrest is contemplated, the member's supervisor must be consulted.

The case studies include some examples of good investigative practices and of offenders being arrested as required under the policy. One such example concerns Elizabeth. As mentioned in the previous section, holding Stephen accountable for his violence posed particular challenges given his ability to exploit Elizabeth's mental health problems. However, good investigative procedures played an important role in securing convictions against him. These included the careful compilation of an extensive statement by Elizabeth, securing a search warrant to gather forensic evidence, and using police intelligence to identify Elizabeth as one of the passengers in a car driven by Stephen – thus enabling him to be arrested for breaching the conditions of his bail. On one occasion, police also circumvented Stephen's attempts to intimidate Elizabeth so that she would not testify against him by gathering sufficient evidence of a breach of the protection order that there was no need for her evidence. Other examples of good investigative practices include those prosecutions for breaching protection orders by phone calls or text messages (Claire, Hilda, Jess, Louise). Securing electronic records of such calls made prosecution relatively straight forward. Two women (Rowena, Patti) reported police organising photographs to be taken a few days after an assault to ensure there was evidence of bruises to support a prosecution.

However, overall, it is easier to find examples of poor investigative practices and of failures to arrest offenders and/or to prosecute them effectively. Later, we discuss the particular problem of police failing to arrest respondents who breach their protection order, but in this section we discuss more generic problems in policing domestic violence offences.

### Understanding Needs and Constraints

Some of the problems apparent in the case studies seem to reflect police officers' lack of understanding of what women need to be free of violence and/or a failure to understand the constraints operating on battered women.

For example, Maria's partner was not arrested, apparently because he was considered to be a good man. Elizabeth's partner, Stephen, evaded arrest on several occasions because of his ability to portray her as the problem. The police took no action when Marjorie reported Alistair's

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with intent), 192 (aggravated assault), and 196 (common assault) are also often used in non-domestic assaults. Because there is no simple way of distinguishing which prosecutions under such sections are domestic violence and which are not, the outcomes for male assaults female prosecutions provide the best, though far from perfect, measure of the rate of success for domestic violence prosecutions.

violence. Tiare's partner was not arrested because she and her partner were expected to "sort it out". Caitlyn reported a similar incident. Of course, "sorting it out" with one's abuser is a very problematic prospect with further violence being the most likely outcome, unless one simply complies with the abuser's wishes.

Other women in our case studies found the attitude of police officers to be quite unhelpful. Te Rina told us that she generally did not call the police, but when she did, they usually simply removed Pera from the property and gave him a warning. Roimata told us that the police who attended a call-out looked as if they couldn't be "bothered" and that she was made to "feel like a nuisance." Rachel did not like the judgemental attitude of one of the police officers who admitted to having thought she was "completely loony." Unhelpful police attitudes almost undermined Hilda's resolve to follow through with a complaint relating to a breach of her protection order. Arriving at the police station distraught, she first had to wait 20 minutes to see an officer. When he arrived, he seemed to show little appreciation of her distress, expecting instead a calm, logical and properly sequenced account of the series of events which led to the breach, an unrealistic expectation in the best of times, more so when dealing with complainants experiencing post-traumatic stress disorder. Similarly, police officers seemed to have little appreciation of Nusrat's position, when baldly asking if she wanted to leave her husband when they had arrived in the country, as refugees, only a few days earlier.

Failure to consider the needs of women with limited English was a significant impediment to good investigation and making an arrest in at least two cases. Both Alice and Pinky were frustrated at the inability of police to understand them, although in Alice's case, one police officer seemed to have the patience needed to understand her accented English. Although not a language problem per se, a police officer attending a call-out found Elizabeth "difficult to understand" and assessed her as "slightly 1M" (that is, "mental").

Another set of incidents in which arrests were not made concerned those in which the police put the onus for pressing charges on to the victim. Police asked Sripai if she wanted to file a complaint against her partner but she declined. Katrina told us the police came many times "and I didn't always follow through with pressing charges. I was in denial." Elizabeth, Hilda and Louise were asked if they wanted their ex-partner charged for breaching their protection orders. (At Hilda's insistence, John was charged.) In the presence of her ex-partner, Roimata was asked if she wanted him charged. She wanted to say yes, but didn't after he said "Come on babe. You know it wasn't like that."

As the last example graphically illustrates, asking a victim whether she wants the offender arrested puts her into an invidious position. If she says "yes", she risks retribution.<sup>538</sup> Rachel's partner made this very clear when he told her that "If I wake up in a cell tonight, you are fucking dead." Saying "yes" may also risk losing one's children, a problem discussed in Chapter 10. On the other hand, saying "no", risks confirming the ability of one's perpetrator to abuse with impunity. This problem was addressed in the original 1987 police Domestic Dispute Policy in which it was specifically noted that "Where possible the victim should not be asked to make a formal complaint nor should the victim have to give evidence in court unless there is no case to answer without such evidence."<sup>539</sup> This was dropped from the 1993 and 1996 versions of the policy. We think this provision should be reinstated. In the context of domestic violence, any choice women

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<sup>538</sup> Ford, G. W. (1986). *Research project on domestic disputes: Final report*. Wellington: Police Psychological Services, New Zealand Police; Hoyle, C., & Sanders, A. (2000). Police response to domestic violence: From victim choice to victim empowerment. *British Journal of Criminology*, 40, 14-36.

<sup>539</sup> Police Commissioner. (1987). Domestic dispute policy changes. *Commissioner's Circular*, 1987/11.

are given about the arrest of their attacker may be illusionary.<sup>540</sup> Importantly, failing to make an arrest will likely remove the opportunity for women to have time and space to consider their options, and to be provided with support and information which may allow them to make more informed choices.

### Determining the Predominant Aggressor

As we have shown, a too-common experience when women called the police was that the officers failed to arrest the perpetrator. Lyla and Tiare faced a somewhat different problem. Both women were arrested for violence used in self-defence. In Tiare's case, she was dragged out of bed and assaulted because her partner, who had arrived home late after drinking, wanted his meal reheated. As Fetu continued to punch her, she swung the pan at him, knocking him unconscious. She was arrested and charged with assault. Fortunately, her lawyer obtained records from the hospital showing that she had been repeatedly admitted for injuries sustained in assaults by Fetu. The charges were dismissed. Lyla was not so fortunate. She was convicted and sentenced to nine months' supervision after she called the police in relation to an assault by Steve. When the police arrived, she was found to be in possession of a knife while Steve was found to have suffered a cut. In fact, knowing that the police were on their way, Steve had cut himself, using the knife Lyla had grabbed to scare him off. Elizabeth was never arrested by the police, but, in some ways, she may have been lucky. On four occasions, she was recorded as the offender on a POL400 after Stephen or, as happened on one occasion, one of his friends, called the police.

The inappropriate arrest of battered women has been long recognised as a problem, particularly where pro-arrest or mandatory arrest policies have been implemented.<sup>541</sup> For the sake of clarity, we are not suggesting the arrest of women in incidents of domestic violence is invariably inappropriate. However, arresting women for self-defence, as happened with Lyla and Tiare is clearly inappropriate. Similarly, arrest is not an appropriate response to a woman who uses minor violence in response to the persistent, controlling behaviour of her abuser. This seems to have been what Elizabeth was doing when she was recorded as the offender on four occasions (although she was not arrested on any of these occasions). For example, on one occasion, she was recorded as kicking the door of Stephen's car as he attempted to drive off. Given what we know about Stephen's devious and violent behaviour, it is difficult to characterise him as a victim. Similarly, Halle, Maria, Claire, Jess and Rachel all described instances in which they hit their partners. Potentially, each of these women could also have faced arrest as did Lyla and Tiare.

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<sup>540</sup> This does not mean that the prosecution of domestic violence offenders should be pursued at all costs. As Carolyn Hoyle and Andrew Sanders have argued, criminal sanctions do not necessarily end the violence and cannot, therefore, always be justified in terms of victim safety (even if they can be justified in terms of retribution and general deterrence). These authors advocate a "victim empowerment" model in which specialist domestic violence police officers facilitate support for victims and work with them – with a view to helping women make informed and, as much as possible, non-coerced decisions about prosecution. But while their recommended approach provides for victim choice in relation to prosecution, the authors point out that arrest is vital to give victims time and space to consider their options, and to provide a window of opportunity for support to be mobilised. (Hoyle, C., & Sanders, A. (2000). Police response to domestic violence: From victim choice to victim empowerment. *British Journal of Criminology*, 40, 14-36.)

<sup>541</sup> McMahon, M., & Pence, E. (2003). Making social change: Reflections on individual and institutional advocacy with women arrested for domestic violence. *Violence against Women*, 9(1), 47-74. See also Stuart, G. L., Moore, T. M., Gordon, K. C., Hellmuth, J. C., Ramsey, S. E., & Kahler, C. W. (2006). Reasons for intimate partner violence perpetration among arrested women. *Violence against Women*, 12(7), 609-621; Rajah, V., Frye, V., & Haviland, M. (2006). "Aren't I a victim?" Notes on identity challenges relating to police action in a mandatory arrest jurisdiction. *Violence against Women*, 12(10), 897-916; Stuart, G. L., Moore, T. M., Gordon, K. C., Hellmuth, J. C., Ramsey, S. E., & Kahler, C. W. (2006). Reasons for intimate partner violence perpetration among arrested women. *Violence against Women*, 12(7), 609-621; Miller, S. L. (2001). The paradox of women arrested for domestic violence. *Violence against Women*, 7(12), 1339-1376.

In response to concerns about the inappropriate arrest of battered women, some overseas jurisdictions have implemented a “primary aggressor” or “predominant aggressor” provision into arrest policies.<sup>542</sup> Such a provision empowers officers to consider self-defence, prior violence, future dangerousness and severity of injuries in determining whether to make an arrest.<sup>543</sup> The New Zealand Police has shown some interest in this approach. The Family Violence Investigation Report, which is being trialled in the Wanganui Police District, includes the following instructions.

Consider **self-defence** before making a dual arrest. Is there a primary aggressor – whom presents the most danger if no arrest is made? [Emphasis in original]

We prefer the term **predominant** aggressor to **primary** aggressor. The later can be interpreted as meaning the person who struck first whereas the more important consideration is the danger posed. The distinction is illustrated by Rachel’s account of a sustained assault in which she received kicks and punches to the head, body and legs. She believed she was going to die. This assault happened after she drove down to the pub to tell Chris how sick and tired she was of his irresponsible behaviour. In what could be construed as the first hit, her car lightly touched Chris as she pulled up outside the pub where he was drinking with his friends. Similarly, Claire got a dislocated rib after lightly smacking Robert on the back of the hand after he repeatedly ignored her requests to leave the car radio alone.

We note that the concept of a predominant aggressor is appearing in some police training material. While this is a good start, we think it should become a formal part of the police Family Violence Policy. A predominant aggressor test could potentially encourage more women to call the police. As Jess noted, on two occasions she had attempted to protect herself from Bruce by fighting back. As a result she was subsequently reluctant to call the police in case Bruce used this against her.

## Recording Threats and Violence

Many of the women in our case studies felt that police officers had minimised or made light of the violence they had experienced. To use Rachel’s term, the women often felt “invalidated” as a result. When minimising violence becomes part of the investigation and prosecution of offenders, it also has implications for the effectiveness of the state in holding men accountable for their violence. In Chapter 13 we discuss problems in the criminal courts, but here we wish to draw attention to specific problems in the way police prepare prosecutions.

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<sup>542</sup> For example, within the US, Alabama, Arkansas, California, Colorado, New York, Washington and Wisconsin have such policies.

<sup>543</sup> For example, see the Model Code developed by the International Association of Chiefs of Police. This instructs police as follows: “When trying to determine the predominant aggressor, officers shall consider the following questions: Who uses threats and intimidation in the relationship? Who isolates his or her partner? Who is emotionally abusive? Who minimizes, denies, and blames in the relationship? Who uses the children to get his or her way in the relationship? Who is sexually abusive? Who engages in economic abuse? Who uses coercion and threats? Who carries out any threats (if any threats have been made)? Who has a history of committing violent crimes? What does the premise history tell you about calls for service to the residence? Is there a history of domestic violence between the parties? Is there a physical size difference between the parties? Who has a protection order in effect against him or her or a history of protection orders against him or her? Who appears to be more capable of assaulting the other? What is the severity of injuries to the parties? Who uses self-defense? Is there potential for violence in the future? What types of injuries do the parties have? Are they offensive or defensive in nature? Who fears whom? Is there a likelihood of further abuse? If so, by whom? What type of evidence has been gathered from witness accounts?” International Association of Chiefs of Police. (2006). *Domestic violence: Model code*. retrieved 8 March 2007 from <http://www.theiacp.org/documents/pdfs/RCD/IACPDomesticViolencePolicy.pdf>, at p. 7.



These problems became really apparent in those cases in which we were able compare the woman's statement to the investigating officer(s) with the summary of facts handed up to the court.

Roimata's and Te Rina's case studies include such comparisons. Missing from the summary of facts prepared for a breach of Roimata's protection order was specific information about the nature of Mark's threats, the fact that he was chasing Roimata, the fact that there were two children present (not one child) and specific information about the impact of Mark's behaviour on the children. In the case of Te Rina, the statement of facts presented the assault as arising from an argument for which she was as much responsible as Pera. According to the summary, this argument escalated to the point at which Pera pushed Te Rina, causing her to drop her baby son, and slapped her. The summary made no mention that Pera arrived home already angry, that Te Rina had attempted to leave because she was afraid of him and that Pera made threats against her and the children. The summary glossed over the fact that Pera continued to attack in quite a calculated way despite having already caused Te Rina to fall, dropping the baby on his head, and despite the fact that Te Rina was attempting to comfort her children. Specific information about the impact of the violence on the children was also omitted. Pera, like Roimata's ex-partner, was ordered to undertake community service. Such a sentence seems more commensurate with Pera's characterisation of the assault as him having simply "lost it" than with the injuries and terror experienced by Te Rina and her children.

If men are to be held fully accountable for their violence, it is important that the sort of specific details described above are included in the summary of facts. Certainly, some of this sort of information may be included in a victim impact statement and therefore placed before the court at sentencing. However, such information should be included in the summary of facts because it addresses the seriousness of the offence and the offender's culpability and is therefore relevant to conviction as well as sentencing. It could impact on plea bargaining. If such information is missing from a statement of facts, it makes it easier for the defence to argue that a lesser charge is warranted (for example, to have a male assaults female charge downgraded to a common assault charge). Similarly, if specialist family violence courts are to continue to use the category systems described in Chapters 7 and 13, the absence of detailed information about an assault may mean that offences are construed as fitting within what is assumed to be a less serious category.

"Toning down" the violence as described above does serve a short-term goal, in that it may encourage the offender to plead guilty. Because obtaining a conviction in defended domestic violence cases has been widely regarded as particularly difficult, mainly because of the reluctance of some victims to give evidence in the face of intimidation (for example, Mele's mother, Elizabeth and Lyla), prosecutors are often keen to secure a guilty plea. This is more likely if the offender faces a lesser charge than might be justified and/or the summary of facts "tones down" the violence. "Toning down" may also help to avoid the situation Hilda found herself in. She had to give evidence in a pre-sentencing hearing after John pleaded guilty but disputed aspects of the summary of facts. However, as we discuss below, there are other ways of addressing these problems.

A different investigative problem arises in those incidents in which men stop short of physical assault but use psychological violence in the form of threats. According to police key informants, it is rare for men to be prosecuted for threatening behaviour. Undoubtedly, prosecuting threats poses particular problems. In the absence of corroborative evidence, successful prosecution may rely on the court's view of the credibility of the victim's testimony. But it should be less difficult to prosecute threats when there is corroborative evidence, such as the testimony of other witnesses. This was the case when Jess's partner returned to her house the first night after the separation with a piece of timber, threatening to smash all the windows. He was not arrested or charged despite that fact that the threats were witnessed by Jess's friend. Corroborative evidence

of a different type is often available when threats involve the destruction of property, as was the case with Alofa. When she called the police, her partner was smashing plates, clocks, jars and anything else not secured to the floor, the damage being very obvious. Pita was removed from the scene but not arrested. With such corroborative evidence potentially available, both of these men could well have been convicted for a threatening act (under section 308 of the Crimes Act 1961).

On the other hand, our interviews and review of police files often revealed some excellent investigative work. This included police taking photographs of injuries, particularly when bruises were most apparent a few days after the assault (for example, Patti and Rowena). Another good example involved Elizabeth. The police obtained a warrant to search Stephen's flat and obtained evidence of damage to walls and doors, including blood stains. They managed to get Stephen's statement acknowledging a threat against her parents admitted as evidence. In other cases, medical certificates were used to good effect. Such good investigative procedures reduce the reliance on victim testimony, increasing the chances of holding men accountable for their violence.

### Prosecuting Offenders Without Victim Participation

The value of reducing reliance on victim testimony is well illustrated in Elizabeth's case study, marked as it was by the extraordinary lengths to which Stephen went to prevent her from testifying against him. Logically, the reliance on victim testimony can be reduced to zero. That is, there is no statutory impediment to prosecuting batterers without the participation of their victims. After all, this is exactly what happens in prosecuting charges of manslaughter and murder.

Prosecuting without victim participation, not only means that the offender has nothing to gain from intimidating his victim, it also emphasises that domestic violence is not a private matter which can be left to the parties.<sup>544</sup> In contrast, requiring victim participation tends to reinforce the notion that domestic violence is a private matter of little concern to the wider community. Such prosecutions expose women to cross-examination in which defence counsel can discredit them by drawing on common myths about domestic violence, such as the belief that men of otherwise good character do not assault their wives or that genuine victims leave their partners and/or call the police immediately there is violence. In contrast, prosecution without victim testimony relies on:

Physical evidence [which] is objective and less susceptible to the dangers of disbelief or denial. It forces the trier of fact to make a more rational determination of guilt, a determination that is not based on misconceptions and stereotypes about domestic violence and the believability of the victim.<sup>545</sup>

Of course, such prosecutions rely on good investigative techniques.<sup>546</sup> These are incorporated into some police manuals. For example, San Diego police are instructed to investigate domestic violence cases with the assumption the victim will be unable to participate in any prosecution. That is, they are required to prepare for "evidence-based" as opposed to "victim-based" prosecution. This is achieved by such things as: conducting separate interviews with the offender

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<sup>544</sup> Ellison, L. (2002). Prosecuting domestic violence without victim participation. *Modern Law Review*, 65(6), 834-858.

<sup>545</sup> Hanna, C. (1996). No right to choose: Mandated victim participation in domestic violence prosecutions. *Harvard Law Review*, 109, 1850-1910, at p. 1901.

<sup>546</sup> It may also require a different attitude from the bench. An experienced police sergeant told us of one prosecution in which the police considered that they had sufficient evidence to proceed without the victim's testimony. The judge dismissed the charge without hearing the evidence when told that the victim was not available to testify. We understand that the police are considering an appeal.

and victim upon arrival; identifying and interviewing possible witnesses (including neighbours and children); recording any admissions of guilt; taking photographs of the victim, offender, any weapon and the setting; and impounding evidence such as bloody clothing or damaged property.<sup>547</sup> Other evidence which can help sustain a prosecution without victim participation are recordings of emergency calls, seeking victims' permission for the release of medical records and interviewing emergency clinic staff with a view to having them give evidence if necessary.<sup>548</sup> This approach has been remarkably effective. There is no victim participation in 70% of the cases prosecuted by the San Diego Police Domestic Violence Unit, yet 90% of prosecutions succeed, a rate more than one and a half times higher than the New Zealand figure quoted above.<sup>549</sup> Such an approach should be adopted here.

Some key informants told us that attempts to prosecute without victim testimony have sometimes failed when judges have refused to allow the case to proceed. This is unfortunate and may need to be addressed through appeal processes or judicial review.

We are aware that training in family violence currently includes good investigative practices such as recording spontaneous exclamations from Communications Centre data, recording as much information as possible at the scene while memories are fresh and before damage is repaired, and endeavouring to obtain corroborative evidence to reduce the necessity for the victim to testify in court. These are good practices which should be encouraged.

### **Police Bail**

The police Family Violence Policy includes a direction that family violence offenders should not be given police bail but held in custody until the first available hearing (paragraph 20). However, the subsequent paragraphs make it clear that there may be circumstances in which police bail may be granted. Paragraph 21 requires officers to consider both the safety of the victim and the New Zealand Bill of Rights Act 1990 if the circumstances (unspecified) indicate that bail may be "appropriate." The approval of a non-commissioned officer is needed if an offender is to be released on police bail, in which case, the victim must be notified and "afforded appropriate protection and/or support" (paragraph 22). The victim should be given an opportunity to discuss any conditions of bail which may be imposed (paragraph 23) and informed of any conditions which are imposed (paragraph 25). In the particular case of offenders arrested for breaching a protection order, the policy reminds officers of section 51 of the Domestic Violence Act 1995, which requires that arrested respondents are not to be released on police bail for 24 hours.<sup>550</sup>

In fact, section 51 of the Domestic Violence Act 1995 has now been repealed by the Bail Act 2000. While the repealed provisions have been incorporated into section 23 of the Bail Act, the Act has introduced more stringent rules for giving domestic violence offenders police bail.

The changes introduced by the Bail Act 2000 are significant. Firstly, section 7 makes it clear that certain domestic violence offenders are not bailable as of right.<sup>551</sup> That is, offenders charged under sections 194(a) and 194(b) of the Crimes Act 1961 – assault on a child and male assaults female respectively – are not bailable as of right. Neither are offenders charged under

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<sup>547</sup> Ellison, L. (2002). Prosecuting domestic violence without victim participation. *Modern Law Review*, 65(6), 834-858.

<sup>548</sup> Wattendorf, G. (1996). Prosecuting cases without victim cooperation. *FBI Law Enforcement Bulletin*, 65(4), 18-21.

<sup>549</sup> Ellison, L. (2002). Prosecuting domestic violence without victim participation. *Modern Law Review*, 65(6), 834-858.

<sup>550</sup> However, they may be given bail by the court within that period.

<sup>551</sup> The general rule is that a defendant is bailable as of right if charged with an offence that is not punishable by imprisonment (s. 7(1)) or with an offence for which the maximum punishment is less than three years' imprisonment (s. 7(2)). Charges under sections 194(a) and 194(b) of the Crimes Act are specifically mentioned as exceptions to s. 7(2).

section 49(1)(a) and (b) of the Domestic Violence Act 1995 – breaches of a protection order (other than failure to attend a programme). Secondly, section 21(2) of the Bail Act makes it clear that in respect of offenders charged with such breaches, “the need to protect the victim of the alleged offence is the paramount consideration” in determining whether the offender should be given bail. For the sake of clarity it should be mentioned here that this provision addresses bail determinations made by the court. That is, the outright 24-hour prohibition against release on police bail in respect of breaches has been retained in section 23 of the Bail Act. The police Family Violence Policy relating to bail must be updated to reflect the current legislation.

The case studies reveal various problems in the way police bail is handled. Sarah’s partner was arrested one evening but instead of being held until the next court sitting, he was released shortly after midnight. The police took Pinky’s partner away but quickly released him. He returned home and she faced more violence for having called the police in the first place. Tessa was pleased that her partner had been arrested but then he was released without her being informed. The same happened with Alofa’s partner. On the face of it, these decisions seem to have been made in violation of the police Family Violence Policy. It is particularly problematic that some domestic violence offenders are being released on bail without the victims being notified. Unless they are notified, women may be lulled into a false sense of security and fail to take adequate steps to protect themselves at a highly dangerous time.<sup>552</sup>

The quick release of domestic violence offenders on bail seems to seriously undermine the value of arrest in the first place. As some authors have pointed out, not all women who call the police want their abuser prosecuted but they do want the police to intervene to protect them from the violence.<sup>553</sup> A quick release on bail fails to provide anything but the most minimal protection. It fails to give victims time and space to consider their options, particularly the psychological space to make decisions away from the immediate coercive control of the offender.<sup>554</sup> At the same time, it also makes it more difficult for women to be afforded the support and information which they may need to make more informed decisions.

The issues were slightly different for Crystal and Patricia, both of whom were asked about their views on bail. As Crystal saw it, one of the problems with enforcing her protection order was that if the police arrested Shane, they would then ring to ask her if it was okay for him to be bailed back to her address. This happened twice, each time within an hour or so of the arrest, in clear breach of the legislation, which requires respondents arrested for breaching their protection order to be held in custody for 24 hours.<sup>555</sup> As Crystal said, “It’s hard to say ‘No, I don’t want him here’.” In the context of domestic violence, asking victims for consent to release offenders to their address seems to defy common sense and to collude with the coercive tactics of the offender. The practice needs to be specifically forbidden.

Patricia was also asked about her views on bail, although in this case, it concerned a remand in the District Court, not police bail. Following an Armed Offenders Squad call-out, George faced serious charges against Patricia and her daughter. Patricia was very clear: it would undoubtedly be safer for her and her children to have George remanded in custody. But then it was suggested to her that opposing bail might make her look bad in the eyes of the Family Court, which was

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<sup>552</sup> Our 1992 report included a case study of a woman killed by her ex-partner shortly after he had been released on police bail. She had not been notified of his release and was still at her home, where he had been arrested a few hours earlier.

<sup>553</sup> This is very clear in interviews conducted in the Thames Valley (UK) police area. See Hoyle, C., & Sanders, A. (2000). Police response to domestic violence: From victim choice to victim empowerment. *British Journal of Criminology*, 40, 14-36.

<sup>554</sup> Ibid.

<sup>555</sup> Domestic Violence Act, s. 51, and its successor, the Bail Act 2000, s. 23.

considering applications under the Care of Children Act 2004. Because she did not want to be seen as an alienating parent, Patricia dropped her initial opposition to bail. George was bailed, and, to make matters worse, Patricia was not notified when subsequent changes to the conditions of his bail meant that George ended up living within two kilometres of her.

The extent to which women should have input into bail decisions is a reasonably complex question. As English research has found, some women who call the police want their partner back once he has calmed down.<sup>556</sup> It is likely that this is true in some instances here. However, as the case studies of Crystal and Patricia show, asking women for their views on bail can put them in an invidious position, in much the same way as asking them for their views on arrest.<sup>557</sup> This is especially true for immigrant women whose abuser is sponsoring their application for residence. Like calling the police, opposing bail risks withdrawal of sponsorship.

It should be noted that the current police Family Violence Policy does not mandate consultation with the victim about whether the offender should be released on police bail. It does mandate consultation about any conditions that may be imposed if he is to be bailed (paragraph 23). Whether it is the intention or not, this distinction presumably affords women the opportunity to seek the imposition of a non-association condition if police determine that there are insufficient grounds for denying police bail – or to ask that there be no such condition. Without wanting to eliminate the possibility of victim input into bail decisions, we wonder if the current policy has the balance right. As the two case studies just mentioned suggest, the policy relating to seeking victims' views may be operating to disempower women.

We think that the current police Family Violence Policy provides officers too much discretion regarding bail. We think it should be rewritten to incorporate a presumption against any domestic violence offender being granted police bail. To some extent, such a provision would make consultation about bail redundant. In the context of domestic violence, asking victims for consent to release the offender, especially for consent to release him to the victim's address, defies common sense and colludes with the coercive controls of the offender. For abusers who are sponsoring their victim's application for residence, it provides an almost absolute guarantee of bail. Moreover, if there are to be exceptional cases in which offenders do get police bail, then we would prefer an approach in which the default position was the imposition of a non-association condition in relation to the victim. We would expect such a condition to be imposed without asking the opinion of the victim.<sup>558</sup> Crucially, we think it vital that victims are informed if the offender is to be released on bail. This is part of the current policy but clearly it needs to be closely monitored.

In relation to bail and other aspects of the police Family Violence Policy discussed above, we recommend:

**THAT the New Zealand Police Family Violence Policy be revised to:**

- (a) incorporate a predominant aggressor test in relation to arrest;**
- (b) include a specific direction that the victim is not to be placed in the position of having to decide whether the offender is to be charged and/or arrested;**

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<sup>556</sup> Hoyle, C., & Sanders, A. (2000). Police response to domestic violence: From victim choice to victim empowerment. *British Journal of Criminology*, 40, 14-36.

<sup>557</sup> Of course, there is normally no room for victim consultation about *police* bail for respondents charged under s. 49(1)(a) and (b) of the Domestic Violence Act 1995. The Bail Act 2000, s. 23, requires that there be no release on police bail for such men within 24 hours of the arrest (although the court may order bail).

<sup>558</sup> For the sake of clarity, it should be noted that we are here discussing *police* bail. We think the sort of presumption we are advocating is not a significant limitation on women's autonomy, in that women who did want their partners to return home could seek removal of the non-association condition when the *court* considered bail.

- (c) reflect a presumption that victims will not be able to participate in prosecutions, and that prosecution without victim participation should be used whenever possible;
- (d) emphasise investigative practices which will support the more effective prosecution of offenders, including collecting and presenting evidence which demonstrates the full extent and impact of violence; and
- (e) reflect the provisions of the Bail Act 2000 to incorporate a presumption against the granting of police bail to any domestic violence offender, and a specific direction that any offender released on police bail be subject to a non-association condition in respect of the victim. (#31)

### **Charging Domestic Violence Offenders**

As the previous discussion suggests, there is often a wide range of charges which can be laid in respect of a single incident of domestic violence – with a correspondingly wide range of maximum penalties. However, the police Family Violence Policy provides only limited guidance to officers making decisions about charging offenders. Specifically, it states that:

Charges must accurately reflect the seriousness of the offence. Such charges may include sexual offences, assaults, threatening behaviour, wilful damage, trespass, or burglary. The specific offence “Male Assaults Female” will be used in most circumstances.

Where a breach of a protection order ... has occurred, and an assault is also detected, offenders are to be charged with the assault and the breach of the order.<sup>559</sup>

A range of charges is evident in our case studies. Two of the men, the partners of Lyla and Debbie, potentially faced ten years’ imprisonment when they were charged with injuring with intent to injure.<sup>560</sup> Similarly, the partners of Louise and Patricia faced maximum penalties of seven years for threatening to kill.<sup>561</sup> On the other hand, more common were charges of male assaults female (two years)<sup>562</sup> or common assault (one year).<sup>563</sup> In some cases, repetitive offending resulted in only one or two representative charges being laid, the others being, in effect, “freebies” (for example, see the case studies relating to Claire and Jess).

The following chapter on the criminal courts discusses in some detail the prosecution and sentencing of domestic violence offenders. As we note there, an informal practice of plea bargaining operates whereby lesser charges are sometimes substituted in exchange for a guilty plea. The effect of this is exacerbated when, as we think happened in some of the case studies, the original charge was at a lower level than was justified in the circumstances. For example, as shown in the following chapter, plea bargaining saw Hilda’s partner avoid prosecution for assault with intent to injure in favour of the lesser male assaults female, despite the serious damage that the assault caused. Similarly, our discussion of the prosecution of Rachel’s partner for assault with intent to injure (three years) suggests the more serious charge of injuring with intent to injure (five years) would have been justified.

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<sup>559</sup> Police Commissioner. (1996). *1996/2: Family Violence Policy*. Wellington: Office of the Commissioner of Police, at paragraphs 47 and 48.

<sup>560</sup> Crimes Act 1961, s. 189. Note however, we were not able to locate the police files for many of the offenders appearing in our case studies. It is possible that some may have faced charges carrying heavier maximum sentences.

<sup>561</sup> *Ibid*, s. 306.

<sup>562</sup> *Ibid*, s. 194(b).

<sup>563</sup> *Ibid*, s. 196.

### **Enforcement of Protection Orders**

The police Family Violence Policy includes detailed guidelines about protection orders. Key points here are that protection orders must be entered into the “persons of interest sub-system” so that police attending a specific domestic violence incident can search the database to find out whether or not a protection order is in place (paragraph 45). Importantly, the policy notes that “offenders responsible for breaches of protection orders shall, except in exceptional circumstances, be arrested” (paragraph 62)<sup>564</sup> and not released on police bail for 24 hours (paragraph 63). Where a breach has occurred and an assault is also detected, police officers are also required to charge offenders with both the assault and the breach (paragraph 48).

### **Women’s Experiences of Breaches**

The provisions listed above are important. Properly implemented, they provide some hope that a protection order does not become “just a piece of paper”. However, as is very obvious from the case studies, the one consistent thing about the enforcement of protection orders was its inconsistency. Sometimes respondents were arrested and sometimes they were not. Sometimes respondents were removed, sometimes they were not. Commonly, the respondent had left by the time police arrived and there was little or no follow up. While obviously police have to deal with the facts of individual cases, the huge variation in the police response to breaches shown in our case studies is a major cause for concern and indicates the need to mandate certain responses, rather than have those responses left to the discretion of the officer.

Most of the women in our case studies who got a protection order (temporary and/or permanent) had their order breached. The main exception was Sarah, whose partner left town when she got her protection order. Commonly, women’s orders were breached repetitively. Not all the breaches were reported to the police but all but three of the women who had their orders breached reported at least one such breach to the police. However, reporting a breach to the police did not necessarily mean that the respondent was arrested or charged. Given the repetitiveness with which some respondents breached their orders, it is not possible to calculate how often reported breaches resulted in an arrest, but we do know that every woman who reported a breach to the police could recall at least one occasion on which no arrest was made. For most, this was the case several times.

In short, breaching protection orders without any consequence was the norm. The commonness of breaches and the rarity of there being consequences for doing so is not a new finding. This is what we found 15 years ago.<sup>565</sup> More recently, all six women interviewed in Lynda Lesorgen’s 2001 study of women’s experiences of protection orders said their orders had been breached, with half of them reporting at least one breach to the police.<sup>566</sup> The 2000 process evaluation of the Domestic Violence Act 1995 conducted by Helena Barwick and her colleagues did not record how many of the 41 randomly selected women with protection orders had had their orders breached, but the researchers noted that 15 had reported breaches to the police. Like the women in our study, those interviewed in the 2000 study reported that the police response was very inconsistent. Those researchers also reported that 8 of the 41 male respondents interviewed

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<sup>564</sup> This section refers police members to s. 50 of the Domestic Violence Act 1995, which sets out the matters which must be taken into account when considering whether or not to arrest. The implications of s. 50 are discussed below.

<sup>565</sup> Busch, R., Robertson, N.R., & Lapsley, H. (1992). *Protection from family violence: A study of protection orders under the Domestic Protection Act 1982*. Wellington: Victims Task Force.

<sup>566</sup> Lesorgen, L. (2001). *The experience of protection orders*. Research report presented in partial fulfilment of the requirements for the degree of Master of Social Work (Applied), Auckland, Massey University.

admitted that they had breached their order. Most were described as being “rather dismissive of the Police action”.<sup>567</sup>

We did not interview the respondents in our case studies, but their behaviour, as described by the women, often seemed to reflect a “dismissive” attitude towards protection orders and attempts to enforce them. This was very evident with Jess’s partner. He told her that he had burnt his protection order. Alice got a similar message: as soon as Harry found out about the protection order he sent friends to ransack her shop. Through unwanted visits, stalking, phone calls, text messages, further violence and psychological abuse, the message was effectively the same for the majority of the women: their ex-partners were demonstrating that the protection order was just a piece of paper. Unfortunately, far too often, the police response did little to change that perception.

### Section 50 of the Domestic Violence Act 1995

As we mentioned above, the police Family Violence Policy says that offenders who breach a protection order “shall” be arrested “except in exceptional circumstances.” It seems difficult to characterise the various instances of non-arrest in relation to breaches described in the case studies as “exceptional circumstances.” They are, on the whole, quite ordinary breaches. One explanation for the failure to arrest respondents who breach their orders was suggested to us by police key informants: certain judgments in the District Court in relation to section 50 of the Domestic Violence Act 1995.

Section 50(1) of the Domestic Violence Act 1995 makes it clear that the police may make an arrest, without a warrant, where there is “good cause” to suspect that the respondent has committed a breach of the order.<sup>568</sup> Section 50(2) sets out the factors the police “must” take into account in deciding to make an arrest. These are:

- (a) The risk to the safety of any protected person if the arrest is not made:
- (b) The seriousness of the alleged breach of the protection order:
- (c) The length of time since the alleged breach occurred:
- (d) The restraining effect on the person liable to be arrested of other persons or circumstances.

In *Police v Keenan*,<sup>569</sup> the court dismissed two charges of breaching a protection order because it held that the arresting constable had failed to take these factors into account. According to our key informants, this has had the effect of discouraging officers from making arrests for breaches of protection orders. This is presumably not the intended effect of section 50(2). After all, without it, police would still have the power to make an arrest without a warrant under the generic provisions of section 32 of the Crimes Act 1961.<sup>570</sup> Our understanding is that

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<sup>567</sup> Barwick, H., Gray, A., & Macky, R. (2000). *Domestic Violence Act 1995: Process evaluation*. Wellington: Ministry of Justice, at p. 88.

<sup>568</sup> Note that s. 50(1) does not apply to “a breach that constitutes an offence against section 49(1)(c) of this Act” (failing to attend a respondents programme as directed).

<sup>569</sup> *Police v Keenan* (District Court, Palmerston North, 25 November 1996, Judge Lovegrove). Subsequently, courts have taken a slightly different view. In *Police v Doran* [1998] DCR 385, the court held that the arresting constable’s evidence was inadmissible because he had failed to consider the s. 50(2) factors. In a more recent case, *Camden v Police* (High Court, Auckland, A66/03, 25 July 2003, Salmon J), the High Court declined to dismiss a case where the police had failed to apply the s. 50(2) considerations. In that case, the evidence of the police officer was ruled inadmissible, but the evidence of the complainant was sufficient to have the respondent convicted.

<sup>570</sup> Crimes Act 1961, s. 32: “Arrest by constable of person believed to have committed offence ... Where under any enactment any constable has power to arrest without warrant any person who has committed an offence, the



section 50(2) was included to encourage police to arrest in cases of breach. That would certainly be consistent with the objectives of the Domestic Violence Act 1995. If section 50(2) is having the opposite effect, statutory amendment is needed. We recommend:

**THAT section 50(2) of the Domestic Violence Act 1995 be repealed and replaced by a provision that, unless there are special circumstances, police shall arrest where there is cause to suspect that the respondent has committed a breach of a protection order. (#4)**

### Minimising Psychological Violence

Earlier in this chapter we discussed problems some of our case study participants experienced which seemed to reflect the fact that certain police officers evidently have a poor understanding of the dynamics of domestic violence. This is also evident in relation to the policing of breaches of protection orders. Specifically, a failure to enforce protection orders often seemed to reflect a narrow view of domestic violence. This was particularly evident in breaches involving phone calls or text messages (for example, see case studies Te Rina, Zaleha, Claire, Elizabeth, Jess, Louise, Patricia, Marama, and Hilda). Hilda's experience is illustrative. She reported a breach in which John had called her cellphone. To the police officer who was following up her complaint, the phone call was "only a phone call" and "not a big deal." Of course to Hilda, it was much more. This was a call made in the aftermath of an horrific assault and protracted proceedings in both the Family Court and District Court in which John took no responsibility for his behaviour and instead attacked her character. It came in the context of a persistent smear campaign against her in the community. It followed a period in which John had been staking out places where he knew Hilda would be. John had been able to make the call despite the care Hilda had taken to get a new number and conceal it from him. To Hilda, who was living with the symptoms of post-traumatic stress disorder, this was not just a phone call but a calculated attempt to destabilise her.<sup>571</sup>

The lack of understanding of psychological violence was evident in a second common scenario involving breaches. Here we refer to those offences in which the respondent breached non-contact provisions by making unwanted visits, but in circumstances which did not involve physical violence. (See case studies Katrina, Marama, Roimata, Tessa, Claire, Elizabeth, Louise and Rachel.) Unsurprisingly, it was often not until the respondent had left that women were able to call the police. Typically, police failed to follow up such breaches. In fact, some did not even attend the scene. Instead, they invited the woman to call again if the respondent returned. As Roimata pointed out, "You get those sorts of answers, so after a while you give up."

Jess's conversations with police were particularly interesting here. These identified an informal policy to prosecute only those breaches which involved serious threats or physical violence. According to the police officers Jess spoke to, this was because the "courts are getting too clogged up with minor stuff."

What Jess reported accords with what many of our key informants have told us. That is, an extra-legal distinction is made between "real" breaches and "technical" breaches. "Real" breaches are those involving physical violence and they may result in charges being laid. "Technical" breaches are those which involve uninvited contact but supposedly "no violence". These are typically not prosecuted. Such a distinction makes sense only if one has no understanding of the tactics of

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constable is justified in arresting without warrant any person whom he believes, on reasonable and probable grounds, to have committed that offence, whether or not the offence has in fact been committed, and whether or not the arrested person committed it."

<sup>571</sup> In this case, John was eventually charged but only because Hilda persisted in her attempts to have the police take the breach seriously.

power and control respondents employ and is blind to the impact of psychological violence, including the coercive and terrorising effects of such unwanted and unlawful contact. Moreover, making a distinction between “real” and “technical” breaches is contrary to section 5(1)(a) of the Domestic Violence Act 1995, which recognises that “domestic violence, in all its forms, is unacceptable behaviour.”

### Blaming Women

A related problem was that in some instances, the police response reflected a common tactic of abusers in that it encouraged women to see themselves as part of the problem. For example, when Tony was regularly breaching the protection order, Katrina would ring the police. She felt that they got “sick of it” and some officers said that “it was tit for tat.” Similarly, when Louise reported a breach of her order, the police officer who followed up decided that Phillip had a “plausible” reason. The officer told Louise that she was sending “mixed messages” to Phillip by sometimes speaking to him. Quite apart from the fact that she had to speak to Phillip to make arrangements about the children, there is nothing in a protection order which precludes the protected person contacting the respondent. A breach of a protection order is about the behaviour of the respondent, not that of the protected person.<sup>572</sup>

Moreover, it is interesting to reflect on what is considered to be a “mixed message”. We were advised by a police key informant that Wendy Mercer, whose estranged husband murdered her and their young baby, had given her murderer a “mixed message”. Because he was the child’s father, he had been invited to attend the child’s birth. The police informant advised that that had stirred his hopes of “reconciliation” and that his believing that she had a new boyfriend had therefore “triggered” her murder. This is ironic in the face of the fears that Patricia had that she might be labelled as an “alienating parent” if she did not agree to George’s bail and the pressures, discussed in the previous chapter, for women to agree to perpetrators having unsupervised access to their children. To this extent, the mixed messages seem to be coming from the state, not from battered women.

### Other Problems

Roimata and Marama encountered problems about the status of their orders. In Roimata’s case, the police attending could not find a record of the protection order. In Marama’s case, the police asked her whether or not her order had been served. These issues should not create confusion. Family Court practice is to forward to the police copies of protection orders and notices of service. Under the police Family Violence Policy, this information should be routinely entered into the Family Violence Database from which it should be easily retrieved. No change of policy is needed here. Instead, what is needed is the sort of monitoring of policy implementation that we have recommend earlier in this chapter.

The status of Lyla’s order was also called into question, but here the issue was whether the non-contact provisions had been revived. That is, Lyla had managed to persuade Steve to leave, and had taken him and his belongings to a hotel, but he subsequently breached the protection order by phoning her. Lyla reported this to the police but was told that she needed to write him a letter to tell him she wanted no more contact. No doubt this advice was in anticipation of Steve defending a breach prosecution by arguing that the non-contact conditions had been suspended by Lyla’s earlier consent to his living with her and had not been revived. However, there is no requirement that the withdrawal of such consent be in writing, and corroborative evidence would have been available from Lyla’s friend and from staff at the hotel where Steve was staying. Lyla

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<sup>572</sup> This point was made in *State v Lucas* 795 NE 2d 642 (Ohio, 2003). “Protection orders are about the behavior of respondent and nothing else. How or why a respondent finds himself at the petitioner’s doorstep is irrelevant.”

was badly advised by the police officer. Here, inadequate training seems to be the issue. (See the earlier recommendation about training.)

Inordinate delays in processing breaches were also problematic. As noted above, it took almost a year for John to be convicted for breaching his protection order. A prosecution against Jess's ex-partner took eight months, and was only partially successful. As Crystal said, the nine months it took a breach to get to court was "enough time to break up, make up and be six months' pregnant." Such delays can leave women unnecessarily exposed to further abuse, intimidation and manipulation. We address the issue of delays in the prosecution of domestic violence offences in the following chapter.

For a complete analysis of the enforcement of protection orders it is necessary to refer to examples of efficient and effective police action in respect of breaches. Here, the careful work done with Elizabeth to secure a conviction without the need for her to give evidence should be remembered. So too should the work other police officers did in obtaining evidence of phone calls and text messages (see Hilda, Claire and Jess). Although eventually failing by virtue of a very narrow reading of section 249(1) of the Crimes Act 1961 by the District Court, police broke new ground in attempting to prosecute Jess's ex-partner for breaching the protection order by intercepting and reading her emails. And Louise received a prompt, effective response on some of the occasions her protection order was breached, if not on others.

However, these last four examples raise another issue. They each involve an articulate, middle-class Pākehā woman who had the support, resources and determination needed to make her protection order work. Each of these women was active in bringing breaches to the attention of the police and following up if she felt that she had not got good service. The results of their efforts can be contrasted with those of a Pacific woman, Tessa, who was also very active in trying to get her order enforced. She experienced many occasions in which the police failed to arrest Tasi for breaching her order, ostensibly because they could not find him. However, simply by reading the paper to find out where he was playing rugby, Tessa often knew exactly where he could be found. Despite passing this information on to the police, Tasi generally evaded arrest. Even when, at considerable danger to herself, Tessa deadlocked him inside the house and called the police, he still did not get arrested. Katrina, a Māori woman, was similarly persistent in reporting breaches of her second protection order taken out against Tony. This was a big step, given the almost total failure of her first order to protect her from Rana, but, as noted above, in the end she was getting the message that the police were "sick of it." Another Māori woman, Roimata, summed up her experience of trying to have her protection order enforced as being "like you have to draw blood or have a cut or bruises before they will do anything." Examples such as these raise issues about ethnicity, and possibly class, contributing to inequalities in women's access to justice.

The importance of effective police action in respect of breaches cannot be overstated. Our case studies show that breaches are common place, and as Marama noted, "The protection order was good because I had it but it isn't good without any enforcement." In many respects, the police Family Violence Policy is sound. What is needed is consistent implementation – which in turn requires monitoring. However, we think that there are three ways in which the policy could be improved. We recommend:

**THAT the New Zealand Police places much greater priority on following up and charging respondents who breach the non-contact provisions of their protection order but have left the scene by the time the patrol arrives, and that where there are multiple offences, each is charged. (#32)**

### **Responding to Diversity**

The women in our four streams did not find police services to be equally accessible and responsive. As we have already shown, Pasifika and other ethnic minority women in our case studies were less likely to call the police than were Māori or Pākehā women and, on the whole, Pākehā women had more success in getting their protection orders enforced than any of the women in the other three groups. While immigration status had a role in these disparities, undoubtedly ethnicity, culture and language were important too.

Pinky, Sripai and Alice each faced language difficulties with the police, although in Alice's case, this seemed to vary depending on the patience of the officer. For other women, culture was more the issue. Titiana was unfamiliar with New Zealand law and did not know how to call the police. Amy "did not understand how things worked" here. Sripai did not understand the role of police in New Zealand, a problem likely to face women whose experience in their country of origin has taught them that the police are not necessarily their friend. It is unlikely that the police understood the community condemnation which Pinky faced for calling them in the first place, or the particular problems Nusrat faced as a refugee.

Police alone cannot address all the language and cultural barriers faced by women seeking protection from domestic violence. These issues need also to be addressed by the courts, Immigration New Zealand and social services generally. And it should be noted that the police have embarked on initiatives which should make a difference, namely, plans for Māori responsiveness, Pacific peoples' responsiveness and an ethnic strategy. The composition of the police has also become more diverse, although the representation of some groups is still lower than in the general population. Specifically, Māori comprise 14.7% of the population but only 11.1% of the police, Pacific peoples comprise 6.5% of the population but only 4.1% of the police, and Asian peoples comprise 6.6% of the population but only 1.2% of the police.<sup>573</sup>

According, we recommend:

#### **THAT the New Zealand Police:**

- (a) **accelerates efforts to increase the ethnic, cultural and linguistic diversity among police recruits; and**
- (b) **ensures District Commanders identify interpreters on whom they can call to assist when dealing with non-English speakers in their districts. (#34)**

### **Risk Assessment**

In recent years, the police have begun to develop risk assessment tools. The Family Violence Investigation Report being trialled in Wanganui includes four risk assessment instruments: (1) a list of 12 "red flags" indicating that that victim is "at risk of dying or suffering serious harm"; (2) a Risk and Lethality Assessment Worksheet from which a numerical risk assessment score can be calculated; (3) open-ended risk assessment questions for adult victims; and (4) a form for recording children's exposure to violence. The first two of these are being used in some other districts. They appeared quite frequently on police files we saw, particularly the Risk and Lethality Assessment Worksheet. (See Appendix 2 for a copy of this.) On the whole these accord with the principles of good risk assessment as discussed in Chapter 7.

### **Use of Risk Assessment to Enhance Responsiveness**

The case studies include two examples of police responses being informed by risk assessments. The first concerned Lyla. She reported a breach of her protection order when Steve rang her.

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<sup>573</sup> Commissioner of Police. (2005). *Annual report for the year ended 30 June 2005*. Wellington: New Zealand Police.

Although Steve was not charged with the breach, the police officer who took the complaint did carry out a risk assessment. The Risk and Lethality Worksheet returned a score of 26, identifying the situation as “extreme risk.”

Considering the way certain breaches are trivialised as merely “technical”, the outcome of the risk assessment was very significant. Steve may have “only” made a phone call, but the Risk and Lethality Worksheet identified the following factors which marked this as a case of extreme risk (as numbered on the worksheet): (16) The victim is afraid of the offender. (17) Offender has threatened victim or children in the past. (18) Offender is very jealous or obsessive about the victim. (19) Offender has committed other crimes of violence. (20) Offender has significant drug or alcohol problem. (21) Victim was seriously hurt or strangled.<sup>574</sup> (23) Offender appears very bitter towards victim. (24) Offender has threatened to kill/injure victim, children or himself. (25) Offender has stalked victim or others in the past. (26) Offender has breached protection orders in the past. (30) Victim is terrified of offender. (31) Victim has recently separated/relationship breakdown. Completing the worksheet and identifying these risk factors meant that this incident was unlikely to be dismissed as “only” a phone call.

In this police district, as in many others, the family violence coordinator monitors family violence incidents by reviewing POL400 and other forms completed by front-line staff. Alerted to the “extreme risk” assessment, the coordinator brought the case to an interagency meeting where it was discussed with other agencies that were in contact with Lyla. Steve’s probation officer was contacted.<sup>575</sup> The coordinator visited Lyla, discussed plans for her safety, talked to her neighbours and issued her with a personal alarm monitored by a security company which had instructions to call the police if it was activated. In the end, the combined effects of Lyla’s determination to end the relationship, the support she received from Women’s Refuge and the family violence coordinator, and the warnings given to Steve by the police and his probation officer have meant that Lyla has not been bothered by Steve since.

Another instance in which risk assessment helped to initiate a more proactive police response involved Louise. When she reported breaches of her protection order the response she received from the police varied. Sometimes Phillip was charged and sometimes he was not. But in most instances, a Risk and Lethality Worksheet was completed. As we show below, the assessment scores varied between “no apparent risk” to “extreme risk.” But as with Lyla, the oversight of a family violence coordinator proved crucial. He was able to recognise a pattern of continuing or escalating risk, and issued instructions that Phillip was a high-risk offender who should be arrested. The instructions were followed and Phillip was subsequently arrested for two breaches, one in which he followed Louise in his car, the other in which he phoned a friend of Louise, urging her to get Louise to turn her phone on. For what might, in isolation, have been seen as so-called technical breaches, Phillip was sentenced to two months’ imprisonment. Louise has had much less trouble with him since.

### Gaps in Risk Assessment

As the case studies show, domestic violence, particularly breaches of protection orders, seem to be often trivialised and do not result in charges being laid. Mostly, we do not know if risk assessments were completed (few files included them) but the examples of Lyla and Louise suggest that good risk assessment may be very useful in placing incidents in context and focusing police officers on the real risks facing women who are abused by their partners.

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<sup>574</sup> Presumably this item was ticked because of previous assaults.

<sup>575</sup> Steve was on parole after serving a term of imprisonment for a very serious assault on Lyla. It was a condition of his parole that he not live with Lyla.

On the other hand, when police answered a call from Marama, the immediate issues revolved around the status of her protection order and whether Patrick or Marama should have the children. Patrick was upset: Marama described him as “bawling.” Patrick was allowed to take the children. Quite apart from the officers’ failure to query the Family Violence Database to verify the existence of the order, they are also likely to have failed to assess the risk Patrick presented. Such an assessment might have made them less sympathetic to a man in tears, instead, alerting them to the risks associated with the history of violence and recent separation. Similarly, risk assessments might have made it less likely that police got “sick” of the repeated calls Katrina made when Tony was breaching her protection order. Risk assessment would most likely have exposed the illogic of asking Crystal whether she wanted Shane bailed back to her home. And risk assessment might have meant that the breaches involving phone calls and text messages were taken more seriously.

For sake of clarity, we are not suggesting that risk assessments should be determinative in decisions to arrest. If this were to be the case, then only high-risk offenders would be arrested and prosecuted. Given the way instances of violent and abusive behaviour need to accumulate before high-risk levels are reached, a likely scenario is that initial breaches could sometimes be expected to result in relatively low risk assessment scores and, therefore, in decisions not to arrest or prosecute. In behavioural terms, such an approach would, in effect, “train” respondents that breaching a protection order is inconsequential. While good risk assessment can be useful for safety planning, it should not drive decisions about arrest and prosecution.<sup>576</sup>

### Need for Consistency

Good risk assessment requires care. The case studies show instances in which some indicators of risk seem to have been overlooked by police officers, for example, Lyla, Claire and Louise. The last example is interesting because there were six completed Risk and Lethality Assessment Worksheets on the files we viewed. These recorded scores of -3, 21, 21, 13, 16, and 26 respectively. This is a wide variation (from “no apparent risk” to “extreme”). Of course, risk levels can be expected to change over time. At the time of the first assessment there was not the history of events which would indicate a high level of risk. But it is problematic that the fourth and fifth assessments indicated lower levels of risk than the two previous assessments, despite the documented events which had occurred in the meantime (particularly an assault, numerous threats to kill and various other breaches of the protection order). These events should have been identified if Louise was consulted in the assessment.

In fact, it is quite possible that some risk assessments are being completed without women having been specifically asked about each of the indicators. Some of the police officers we spoke to believed that some of their colleagues fill in the risk assessment instruments when they are doing other paper work at the end of their shift. Risk assessments which are completed without a careful interview of the woman, as well as a proper check of records, may underestimate the dangers facing women.

### Reducing the Problem of Missing Information

As we have noted, risk assessment in relation to domestic violence is still in its infancy within the New Zealand Police. No doubt the instruments currently being trialled will need further development and officers given further training so that all relevant information is captured in the risk assessment. Here, we would like to identify a particular problem with the way the Risk and Lethality Assessment Worksheet is structured. As can be seen in Appendix 2, there are three

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<sup>576</sup> The case of Louise raises just this possibility. As we note below, there was considerable variation in the scores obtained in the six risk assessments completed. Risk assessments completed on two of the occasions in which Phillip was not arrested returned scores of 13 and 16 respectively, equating with “moderate” risk.

sections. Sections B and C contain various indicators of risk (for example, “Victim is afraid of offender”, “Victim was seriously hurt or strangled” and “Victim has recently separated/relationship breakdown.” Each item ticked contributes two points in the case of Section B items and three points in the case of Section C items. Section A is different. Here, each item ticked results in one point being deducted from the risk score. Eleven of the 15 items in section A are worded in the negative. That is, they are ticked if, for example, the “Offender does **not** have a drug or alcohol problem” or if the “Offender has **no** history of suicide attempts.” The problem is that because such items are phrased in the negative, gaps in the information available result in a tick – hence **reducing** the score, rather than merely failing to increase it. “Credit” ticks can easily accrue if the officer does not know that the offender has, for example, a drug problem or that he has attempted suicide in the past.

The prediction of violence remains an inexact art, but, as discussed in Chapter 7, there is growing evidence that actuarial tools can make a useful contribution for guiding interventions to reduce the frequency of repeated assaults by men apprehended for domestic assaults.<sup>577</sup> The best assessments of risk tend to rely on a combination of factors: batterer history (such as previous assaults and suicide attempts), current batterer behaviour (such as stalking and escalating violence), batterer personality (such as jealousy, possessiveness and a sense of entitlement), and contextual factors (such as separation and access to weapons). But complete reliance on such measures is unwise. As our review of risk assessment has pointed out, the most consistent predictor of risk is the woman’s perceptions of safety and her judgement about the likelihood of further assaults.<sup>578</sup> That is, women are usually the best judges of their safety. However, if for no other reason than that they force police officers to consider historical and context factors surrounding domestic assaults and breaches, the sort of risk assessment tools currently being trialled by the police can, when used in consultation with women, undoubtedly make a valuable contribution to decision making in general and safety planning in particular.

The development and validation of risk assessment tools are complex and specialised tasks. We are not in a position to make detailed recommendations here, but offer the following observations which might be taken into account as risk assessment protocols are revised.

- (a) If the Risk and Lethality Risk Assessment Worksheet is to continue to be used:
  - (i) Section A needs to be revised to remove negatively worded items, so that missing information does not result in points being “deducted” from the risk score.
  - (ii) The current worksheet does not pay sufficient regard to separation. Section C includes the item “recent separation/relationship breakdown.” Certainly, a recent separation indicates an elevated risk but as this is the only mention of separation, the current protocol seems to assume that the risk of separation violence reduces to zero when the separation is no longer “recent”. However, it is clear that a lethal risk of separation

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<sup>577</sup> Hilton, N. Z., Harris, G. T., Rice, M. E., Lang, C., Cormier, C. A., & Lines, K. J. (2004). A brief actuarial assessment for the prediction of wife assault recidivism: The Ontario Domestic Assault Risk Assessment. *Psychological Assessment, 16*(3), 267-275.

<sup>578</sup> Goodman, L. A., Dutton, M. A., & Bennett, M. A. (2000). Predicting repeat abuse among arrested batterers: Use of the Danger Assessment Scale in the criminal justice system. *Journal of Interpersonal Violence, 15*, 63-74; Weiss, A. N., Tolman, R. M., & Saunders, D. G. (2000). Assessing the risk of severe domestic violence: The importance of survivors’ predictions. *Journal of Interpersonal Violence, 15*(1), 75-90; Campbell, J. C. (2004). Helping women understand their risk in situations of intimate partner violence. *Journal of Interpersonal Violence, 19*(12), 1464-1477.

violence can continue for months or years after a separation.<sup>579</sup> The protocol needs to be amended to recognise this risk.

- (iii) Similarly, it is likely that the worksheet does not put sufficient weighting on choking and strangulation. As our case studies show, strangulation is common (for example, Crystal, Katrina, Lyla, Marama, Roimata, Elizabeth, Patricia, Trudy), sometimes to the point of unconsciousness. Given the high risk of death in these circumstances, the current weighting for strangulation (two points) seems insufficient.
- (b) Given the deleterious effects on children of witnessing domestic violence, the risk that children will become the unintended victims of domestic violence and the co-occurrence of domestic violence and child abuse, risk assessments protocols must include consideration of children's exposure to domestic violence.
- (c) The protocols should make it quite clear that risk assessments should be completed in consultation with victims. Unless women are specifically asked, many risk indicators will remain undetected.
- (d) Where police complete a risk assessment, the result of that assessment must be made available to the victim. It seems to us that there is a right to this information under both the Privacy Act 1993 and the Official Information Act 1982. Importantly, informing victims of the risk assessment could help address a common tendency for women to minimise the risks they face and would provide an opportunity for an informed discussion of safety needs.

While some of these points are reasonably technical and require further exploration, the last two concern fundamental issues which must be addressed. Accordingly, we recommend:

**THAT, wherever possible, police officers completing domestic violence risk assessments do so in consultation with victims and that the results be made available to them.**  
(#33)

### **Role of Family Violence Coordinators**

The police Family Violence Policy requires district commanders to appoint family violence coordinators (paragraph 38) who are expected to “have responsibilities for local inter-agency liaison, problem resolution, monitoring staff compliance with local protocols, and family violence-related training” (paragraph 39). These positions are not necessarily full time (paragraph 40).

The role of police family violence coordinators is not necessarily visible to the general public. Of the women we interviewed, only one (Louise) mentioned a family violence coordinator, although others may have had interactions with a coordinator without distinguishing her or him from other police officers (for example, Lyla). However, these two cases do show the difference a good family violence coordinator can make. In Louise's case, the intervention of a coordinator seems to have been crucial in identifying the risk Phillip posed and ensuring that the protection order was properly enforced. Louise certainly appreciated his intervention. Similarly, the family violence coordinator played an important role in mobilising support for Lyla. These two examples are consistent with what Women's Refuge and other NGO key informants told us. An effective family violence coordinator can make a significant difference to the responsiveness of the police by monitoring police performance, problem solving in particularly intractable or high-risk cases, participating in interagency networks and providing training to front-line staff. Moreover, given how little family violence training there is in the curriculum for recruits, it is

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<sup>579</sup> In his review of the literature, Brownridge concluded that the risk of homicide by an ex-partner peaks about three months after separation, but for some men, the risk increases with time, and some men kill years after separation. Brownridge, D. A. (2006). Violence against women post-separation. *Aggression & Violent Behavior*, 11(5), 514-530.



likely that family violence coordinators may be the best hope for filling that particular gap, at least in the short term.

Not all family violence coordinators are full-time appointments. Some combine this role with other duties. Given the significant proportion of police work that is family violence-related and the need for specialist skills and knowledge in responding to it, it seems an appropriate goal that the family violence coordinator should be a full-time position in all but the smallest districts or communities. It may be that different arrangements will suit different districts. For example, in large rural police districts, it may be more effective to have several coordinators appointed at station level rather than a single coordinator overseeing the entire district.

We note that family violence coordinators currently undergo an in-service training programme and that a second, advanced programme is being developed. The training includes input from women's and children's advocates. This is the sort of model which could be expected to enhance the sort of interagency collaboration necessary for effective intervention.

### **Monitoring and Evaluation**

The police Family Violence Policy states:

To achieve and maintain an effective and appropriate response to family violence, local services and protocols will need to be monitored, evaluated and, where necessary, modified. Monitoring of compliance with protocols and policies must include standardised internal police performance measures (which may involve victim surveys). External monitoring within the framework of an inter-agency approach could be offered.<sup>580</sup>

The case studies show that it is one thing to make policy but it is quite another to ensure that policy is implemented. As the police policy states, monitoring and evaluation are key processes in ensuring that policies are being implemented as intended and identifying any modifications which may be needed. Here a distinction is made between “internal” and “external” monitoring. Internal monitoring is mandatory; external monitoring is not.

In making this distinction, the police Family Violence Policy, promulgated in 1996, was consistent with government policy of the time. The 1996 *Government statement of policy on family violence* set out six strategic directions, the first of which was “A co-ordinated and coherent government response to family violence.”<sup>581</sup> Under this heading, it was stated that the Government intended to:

**Monitor and evaluate government agencies' contribution to family violence prevention.** A co-ordinated response to family violence by government agencies is a priority. Co-ordination will be most effective when established through protocols and agreements rather than left to ad hoc arrangements between agencies. [Emphasis in original]<sup>582</sup>

The 1996 *Government statement of policy on family violence* was released two years after the pilot phase of the Hamilton Abuse Intervention Project and was informed, in part, by the experience of that pilot. Certainly, the statement and the more detailed *Good practice guidelines for co-ordination of family*

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<sup>580</sup> Police Commissioner. (1996). *1996/2: Family Violence Policy*. Wellington: Office of the Commissioner of Police, at paragraph 53.

<sup>581</sup> Department of the Prime Minister and Cabinet. (1996). *New Zealand Government statement of policy on family violence*. Wellington: Department of the Prime Minister and Cabinet, p. 7 The other five strategic directions were early intervention, victim safety, perpetrator interventions, Māori designed and managed delivery options, and building safer communities.

<sup>582</sup> *Ibid*, at p. 7. “Prevention” here refers to the prevention of further violence (secondary prevention).

*violence services*,<sup>583</sup> which accompanied it included much of the philosophy and practice piloted in the Hamilton project. For example, among the guiding principles were the safety of victims, the accountability of abusers, and consistent responses across agencies. The guidelines provided quite detailed information about how key government agencies were expected to work with each other and with relevant community agencies (such as women's refuges and stopping violence services). But there was one crucial point in which the 1996 policies departed from the experience of the Hamilton pilot, and this related to monitoring.

It is evident within the good practice guidelines that monitoring was seen primarily in terms of upwards accountability to government managers. For example, in relation to government agencies, internal processes were described in which individual performance was to be monitored against policy guidelines. External processes were described, but only in terms of (1) fulfilling the terms of purchase agreements between departments and the relevant ministers, and (2) the general ability of Parliament to review the operation of departments.

In contrast, a crucial element of the success of the Hamilton pilot was downwards accountability to battered women and their advocates. Police performance was monitored, externally, by community-based advocates in a number of ways. For example, call-out advocates not only provided immediate support to women who called the police, they also asked women for their views on police performance. A court advocate not only provided support and information to women complainants in the District Court, she also monitored police prosecutions. Other advocates monitored occurrence logs and POL400 forms for compliance with arrest and referral protocols. Across all these areas, problematic practices were taken up with police managers. Exemplary practices resulted in commendatory letters to both the officers concerned and their managers. Such monitoring and feedback meant gaps in the criminal justice response to battering were identified and corrective action taken. As a result, Hamilton police were found to be generally consistent in arresting offenders, charging them with male assaults female, holding offenders overnight and seeking non-association conditions on bail. The success rate in prosecutions taken against offenders was one and a half times the national average<sup>584</sup> and Hamilton women interviewed in an independent evaluation reported feeling safer as a result of the project.<sup>585</sup>

The value of external monitoring is not difficult to understand. Institutional objectives do not always coincide with the needs of battered women. For example, arresting offenders, processing them and prosecuting them is an expensive, time-consuming business. In the short term at least, time and money can be saved by not taking action, even if this may subject women to further violence. Once offenders are charged, the institutional goal is to secure convictions. While this is a laudable goal in terms of offender accountability, a narrow focus on this may result in women being endangered and/or alienated from the criminal justice system. This may happen if women are "punished" by offenders for testifying (or intending to testify) against them or if women are held in contempt of court for failing to testify. And as our case studies show, the risk that seeking help from the police will fail to improve the situation, and may even make things worse, is not shared equally by all women, but are mediated by factors such as their ethnicity, culture, language, class, and immigration status and the characteristics and behaviour of their abuser.

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<sup>583</sup> Social Policy Agency. (1996). *Good practice guidelines for co-ordination of family violence services*. Wellington: Social Policy Agency.

<sup>584</sup> For an overview of the Hamilton Abuse Intervention Pilot Project evaluations, see Robertson, N. R. (1999). *Reforming institutional responses to violence against women*. PhD thesis, University of Waikato. Retrieved 11 June 2006 from <http://www.nzfvc.org.nz/PublicationDetails.aspx?publication=12704>.

<sup>585</sup> Dominick, C. (1995). *Overview of the Hamilton Abuse Intervention Pilot Project (HAIPP) evaluation*. Wellington: Ministry of Health.

On the other hand, monitoring by battered women's advocates offers the promise of ensuring that police practice is responsive to the diverse needs of battered women, that it prioritises the safety and autonomy of women, and, as a minimum, does not further endanger them.

This idea of external monitoring was pioneered by the Duluth Abuse Intervention Project and refined for New Zealand conditions by the Hamilton Abuse Intervention Project. Other communities have since adopted some aspects of it. The latest manifestation of this general approach is the Safety Audit.<sup>586</sup> This builds on a crucial insight by Ellen Pence, a key figure in the Duluth project, that Western criminal justice systems are textually mediated. That is, they are systems in which women's stories are selectively recorded, edited and reshaped to serve institutional purposes. Once involved in the system, a woman becomes a case – or often a series of cases – to be processed by various institutional players including police dispatchers, front-line officers, watchhouse staff, prosecutors, judges, other court officials, and quite possibly social workers, child protection workers, health professionals, accident compensation assessors, housing officials and income support case managers. Once processed as a case, a woman's hopes and aspirations may become subjugated by institutional concerns. The very institutions which are meant to protect and support her may in fact oppress and further endanger her.

Whether an intervention protects and supports or whether it oppresses and endangers depends only partly on the individual workers. Much more important are the procedures by which cases are processed. In a textually mediated criminal justice system, the recording, storage and retrieval of information is particularly important. So too are the ways specific decisions are made. According to Pence and her co-author, Jane Sadusky:

A Safety Audit seeks to understand where and how and for which victims of battering an institutional practice is problematic. Hence, an Audit is always asking who is doing what to whom, with what impact and to what degree? ... [An Audit keeps] the experiences of domestic violence victims at the center [and keeps] these questions in mind: What are the implications for safety and accountability in how work is organized and coordinated at this point of intervention? What are the implications for immediate safety? From retaliation? From ongoing abuse and violence? From the unintended consequences of intervention?<sup>587</sup>

Safety Audits involve collecting information through interviews, observations and analysis of texts. They include focus groups with practitioners and victims of battering. Audits are best conducted by interdisciplinary multicultural teams so that multiple perspectives can be brought to bear on the issues. By involving at least some people from other local agencies, a team approach might also be expected to build interagency collaboration. Audits do not follow a tightly structured set of questions but are tailored to the particular setting. Preventing Violence in the Home recently completed a Safety Audit of the Auckland Central Police District. Key informants from both organisations have told us that was a useful exercise. While some recommendations have yet to be implemented, many of the problems identified were addressed in the process of carrying out the audit.

To some extent, the family safety teams currently being piloted around the country have a monitoring role (as do family violence co-ordinators). However, although the teams include "adult victims' advocates" the majority of team members are drawn from statutory agencies (the police and Child, Youth and Family) and the teams are lead by police officers. It is too early to make judgements about the utility of family safety teams but they are unlikely to provide the sort of external monitoring we think necessary.

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<sup>586</sup> Pence, E., & Sadusky, J. M. (2005). *The Praxis safety and accountability audit tool kit*. Duluth, MN: Praxis International.

<sup>587</sup> Ibid, at p. 6.

We recognise that the term “audit” can have negative connotations. However, the experience of the Hamilton Abuse Intervention Project is that police have much to gain from being open to such external scrutiny and feedback. Certainly, process evaluations of the pilot phase showed high levels of satisfaction with the police among victims.<sup>588</sup> For their part, community organisations gain a greater appreciation of the challenges of policing domestic violence. Done properly, such monitoring and feedback can considerably enhance interagency effectiveness.

Safety and accountability audits need not be limited to the police. As we will suggest in subsequent chapters, the idea is applicable to other state agencies, particularly the courts, Child, Youth and Family, and the Department of Corrections, each of which has responsibility for managing perpetrators of domestic violence and/or protecting their victims. We recommend:

**THAT the New Zealand Police, the courts, Child, Youth and Family, and the Department of Corrections collaborate with specialist community-based domestic violence agencies to plan and implement regular safety audits of the state agencies’ handling of domestic violence cases. (#46)**

### **Conclusions**

Police officers are very much at the front line of the state’s response to violence against women. They have a responsibility to protect the lives of citizens and to apprehend perpetrators of violence. They have an important role in relation to the enforcement of protection orders. A timely and effective response can quite literally be the difference between life and death.

Despite the importance of their role, the police are called to only a small proportion of incidents of domestic violence. That is, as the case studies show, dialing 111 is seldom the first response to being abused, and many women face significant barriers to calling the police. In particular, women whose abuser is also their immigration sponsor are extremely reluctant to involve the police. Other barriers are fear of retaliation, shame, cultural and language issues, being prevented from getting to the phone, and previous negative experiences with the police. These barriers serve to reinforce the need for police to get it right when women do call.

We have identified a number of problems in the policing of domestic violence in general and in the enforcement of protection orders in particular. Underlying many of these is a failure to understand the dynamics of domestic violence. Too often, rather than police assuming the responsibility for acting on behalf of the community in making perpetrators accountable for their violence, officers inappropriately place women in the invidious position of making decisions about charging offenders and giving them bail. Such practices reduce violence against women to a private dispute between individuals and represent a failure of the state to meet its obligations to protect all its citizens.

We have made a number of recommendations to improve police practice but it needs to be recognised that the police service cannot, of itself, be totally effective in ending violence against women. Best practice requires police to work closely with other agencies, such as refuges, to ensure victims are provided with support.

Finally, although the police have a crucial role in making perpetrators accountable for their use of violence, arrest is only the beginning of the criminal justice process. In the following chapter, we examine the next step, the prosecution and sentencing of offenders in the criminal courts.

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<sup>588</sup> See Robertson, N. R., & Busch, R. (1992). *The Hamilton Abuse Intervention Pilot Project: Six month evaluation report*. Report for the Family Violence Prevention Co-ordinating Committee. See also Robertson, N. R., Busch, R., Glover, M. P., & Furness, J. A. (1992). *Hamilton Abuse Pilot Project: The first year*. Report to the Family Violence Prevention Co-ordinating Committee.

## 13: The Criminal Courts

In previous chapters, we explored gaps in Family Court and police practices that have compromised the safety of the women featured in our case studies. We also identified some examples of good practice which we suggest should be built upon. In this chapter, we draw upon the case studies for examples of gaps and best practices that arise within the criminal court context. Having discussed the approaches to charging of offenders and bail practices in the police chapter, this chapter will focus on sentencing for domestic violence-related offences. Even though battered women are sometimes admonished for failing to follow through with criminal prosecutions, several of the women in our case studies were willing witnesses for the Crown and yet ultimately found the criminal court outcomes inadequate when measured against the further trauma and risks they experienced. Rather than the provision of meaningful protection for the women and the communication of strong messages to their abusers that domestic violence would not be tolerated by the criminal justice system,<sup>589</sup> the experience of participating in prosecutions left each of these woman feeling further victimised and, as Rachel described it, “voiceless.”

### **Meaning of “Success” in Criminal Prosecutions**

Prior to analysing our women’s experiences of the criminal courts, it is useful to consider what “success” might entail for victims of domestic violence participating in this system. This is not simply a theoretical question. Domestic violence advocates have long debated whether the criminal justice system can usefully be employed to help women achieve safety and autonomy from their abusers.<sup>590</sup> The patriarchal roots of that system are all too obvious. For example, it took until 1986 in New Zealand for rape within marriage to be construed as a crime.<sup>591</sup> As well, we know that the “success” of a criminal court intervention for an abuse victim cannot solely be evaluated in terms of whether a guilty verdict is obtained or whether the offender is not subsequently re-arrested for a further crime of violence.<sup>592</sup> We have seen from our case studies how often the police fail to arrest or charge perpetrators and, as a result, how often women give up trying to action their protection orders and/or just stop calling the police.

As we shall see throughout this chapter, what the women in our case studies wanted from the criminal courts was safety for themselves and their families, accountability and deterrence in respect of the offender, and clear judicial messages denouncing his use of violence. These aims are totally congruent with the section 7 purposes of the Sentencing Act 2002 and, in our opinion, can provide valid reasons for women to participate in criminal prosecutions. For example, section 7(1) expressly states the purposes of sentencing are:

- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
- (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
- (c) to provide for the interests of the victim of the offence; or
- (d) to provide reparation for harm done by the offending; or

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<sup>589</sup> Hanna, C. (1996). No right to choose: Mandated victim participation in domestic violence prosecutions. *Harvard Law Review*, 109, 1850-1910, at p. 1863.

<sup>590</sup> See, for example, Lewis, R., Dobash, R. E., Dobash, R. P., and Cavanagh, K. (2001). Law’s progressive potential: The value of engagement with the law for domestic violence. *Social and Legal Studies*, 10, 105-130. Abstract available at <http://sls.sagepub.com/cgi/content/abstract/10/1/105>.

<sup>591</sup> A result not achieved in the UK until 1994.

<sup>592</sup> McMahon, M., & Pence, E. (2003). Making social change: Reflections on individual and institutional advocacy with women arrested for domestic violence. *Violence against Women*, 9(1), 47-74.

- (e) to denounce the conduct in which the offender was involved; or
- (f) to deter the offender or other persons from committing the same or a similar offence; or
- (g) to protect the community from the offender; or
- (h) to assist in the offender's rehabilitation or reintegration.

It is our belief that the section 7 purposes can be used as a benchmark to evaluate the “success” of criminal court sentences or outcomes for the women in our case studies. We will do this by utilising the following set of questions, all based on those purposes.

How has the safety and protection of women been enhanced by their participation in criminal cases? Have the messages conveyed by the judgments and sentences clearly and unambiguously signalled that the criminal courts will neither condone nor minimise domestic violence? Have abusers been held accountable for the harm they have done, and have their sentences deterred them from committing further harm? Is there a consequence for every act of violence, and do subsequent acts of violence engender greater consequences? Is the abuser's sentence congruent with the degree of harm suffered by the victim?

A myriad of factors determines whether there has been a “successful” outcome for battered women as a result of a criminal prosecution. As a minimum, a woman must sense that her truth has been heard, that a clear message has been given from the Bench that she should not have been abused, and that her abuser is held accountable for his violent behaviour commensurate with the degree of harm that she has experienced. Primarily, her safety must be enhanced. The risk of further harm to her from the offender must be reduced, if not eliminated, for the outcome of the prosecution to be “successful”. Professor Emily Sack, the author of *Creating a domestic violence court* has stated:<sup>593</sup>

As knowledge about domestic violence has grown during this period, it has become clear that the most effective response is created when all parts of the justice system coordinate their operations and function in a collaborative effort to address the problem. The court is a crucial part of this system, bearing the ultimate responsibility for case outcomes. Moreover, the court has the opportunity to leverage this interaction in many ways: it can address the needs of the many victims coming through its doors, providing them links to services; monitor the behavior of perpetrators and mandate them to appropriate interventions; and use the authority of the judge to demonstrate publicly the commitment that the system has to ending domestic violence.

Instead, for those women in our case studies whose partners went through the criminal justice system and were convicted, most felt that the sentences imposed were, in Patti's words, “ridiculous”. In her case, Tim received nine months' supervision for his first conviction for male assaults female against her and was required to attend an anger management programme for his second assault conviction. He never completed the course but no consequences ensued. Patti commented:

That's so ridiculous ... It's just like giving them a slap and sending them on their way.

Patti's perspective was echoed by Amy, now a domestic violence advocate, who has dealt with numerous ethnic women's domestic violence cases. She commented:

It seems to me the law system is protecting the criminal. In China, raping, beating up the child, beating up the wife, you get a big sentence. You don't get community service. Community service ... It's nothing.

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<sup>593</sup> Sack, E. (2002). *Creating a domestic violence court: Guidelines and best practice*. San Francisco, CA: Family Violence Prevention Fund, at p. 4.

As Professor Cheryl Hanna, a former San Diego domestic violence prosecutor, has stated:<sup>594</sup>

Conviction rates, recidivism rates, deterrence, effective communication of strong symbolic messages and meaningful protection of victims are all possible criteria for measuring the success of a prosecution strategy.

This chapter is about the issue of “success”. Its aim is to compare and contrast the impact of the violence sustained by these women (including the emotional costs to them of participating in criminal prosecutions) with the impact of the sentence on the offender. We will attempt to analyse who benefits from the current sentencing approaches and why.

### ***Women’s Experiences of the Criminal Processes***

One significant problem with the criminal court processes for women in our case studies involves the delays encountered between the commission of the offence and its prosecution. Lengthy delays exposed the women in our case studies to manipulation, intimidation and threats. This is not a problem limited to the New Zealand legal system. The National Council of Juvenile and Family Court Judges has recently commented, “Delays undermine battered women’s ability to ‘play their part effectively’ in the legal system.”<sup>595</sup> In the final analysis, delay colludes with perpetrators’ attempts to escape accountability for their actions. For example, John, Hilda’s ex-partner, became an expert at the tactics of delay. He also defended every action taken against him, both in the Family Court and in the criminal courts. These tactics seriously impacted on Hilda’s resolve to see John held accountable for his violence. For example, she commented:

[The criminal court case] took an awful long time. John delayed and delayed. It took a year before we got through the court the first time. In terms of the Family and District Court, it would be months and months. Psychologically it was like a sword over my head all the time.

Hilda’s psychological exhaustion led to her deciding not to testify and the police withdrawing a breach charge against John just six weeks before the final hearing of John’s male assaults female charge. The breach charge was a representative charge; it related to various times when John was found to be waiting in places where he knew Hilda would be. As he always did, John pleaded not guilty to the charge.

Hilda was already psychologically drained from her participation in the Family Court proceedings where John had applied to have the protection order discharged. She had been subjected to extensive cross-examination about what she saw as “lies about my character”. She was also drained from the year-long male assaults female prosecution as well as the Employment Tribunal proceedings. Hilda mistakenly believed that John “would learn a lesson” as a result of the sentence he would receive for the male assaults female prosecution. Ironically, she probably took the right step. It would have been surprising had John received a sentence in addition to the 150 hours he was given for his male assaults female conviction. If that were so, the breach would have been a “freebie” for John (that is, consequence-free). Needless to say, his breach was far from a freebie for Hilda.<sup>596</sup>

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<sup>594</sup> Hanna, C. (1996). No right to choose: Mandated victim participation in domestic violence prosecutions. *Harvard Law Review*, 109, 1850-1910.

<sup>595</sup> Mentaberry, M., Dunford-Jackson, B., Sheeran, M., & Tucker, J. (2005). *A guide for effective issuance and enforcement of protection orders*. Reno, NV: National Council of Juvenile and Family Court Judges.

<sup>596</sup> This is because ss. 57 and 84 of the Sentencing Act 2002 create rebuttable presumption in favour of concurrent sentences for two or more convictions. John had already been sentenced to a term of 150 hours’ community service. Had he been convicted of the breach of Hilda’s protection order and sentenced to another term of community work, s. 57(1) would have required that the community work sentences be served concurrently unless the court directed that they were to be served cumulatively. In terms of section 84, when dealing with sentencing for two or more offences, s. 84(2) and (3) states: “(2) Concurrent sentences of imprisonment are generally appropriate if the offences

Indeed, just recently, the same conundrum presented itself to Hilda again: to report or not to report John for his most recent breach. As she explained it, he sent her another email, filled with “rubbish” poetry.

Except for the very last line that said, he doesn't know what he did wrong, nor does he care, all he needs is something, something from the pretty rose. He still doesn't believe what he has done, and he is still testing the waters to see if I want him back. What went through my head is, “If I don't report this, the breaches might escalate” which I have seen happen before. “If I do report it, I have to go through the whole process all over again.”

In the end, Hilda decided not to report the breach. Going through another court case seemed just too much. As well, she had already lost one job through missing work to deal with her earlier proceedings against John and could not afford a repeat.

Katrina also talked about her experiences of delay in the criminal court processes. However, she also emphasised the intimidation that she experienced. For example, Katrina talked about Rana's constant harassment and stalking while he was on bail awaiting trial for breaching her protection order. He was never charged for any of his pre-trial actions. She said:

... when it came to having to have to use my protection order, I used it, but it didn't happen the way I thought it would happen. The drama of the court, the having to tell the story, the trying to remember what happened – and it took a long time to get it to court. [Rana] was still out on bail. He was still stalking me, harassing me, bothering me, making me run away. I had to leave my home. In and out of refuge.

Patti also remembers her fear when Tim was charged with male assaults female. She was eight and a half months' pregnant and was assaulted in the street after telling Tim that her lawyer had refused to help her discharge her protection order. She remembers:

... and [Tim] just started bashing me in the middle of [town name] ... A lady in one of the buildings saw it and called the police and then the police came down and tried arresting him, and I just said that “Nothing had happened” and you know, “There was nothing wrong and I didn't want to talk to them and the rest of it”, because before he even got in their car, he turned around and said “Don't say anything.”

In this case, Patti did not press charges but the woman who had witnessed the incident was prepared to testify against Tim. As a result, the police laid the male assaults female charge and Tim was convicted. The outcome of this “successful” prosecution: Tim was sentenced to attend an anger management course, which he started but did not complete. As in many of our case studies, Tim faced no consequences for his failure to complete the mandated programme.

Stephen used intimidatory and sadistic tactics against Elizabeth during delays in the various criminal prosecutions against him. For example, once when Stephen was facing charges of male assaults female and breach of her protection order and Elizabeth was in a psychiatric ward, Stephen phoned her and threatened her:

He was ringing to ask me if anyone had come to see me about going to court next week. He said that I won't get my fuckin kids back because I'm mental. I started shaking when he said this ... He said once these charges are dropped, we can move out of town and get things sorted out.

That was just one of the four occasions that Stephen had charges against him withdrawn because of his intimidation before trial. Each time he was charged, he was able to pressure Elizabeth to not give evidence against him through phone calls, letters or direct contact while he was on bail.

for which an offender is being sentenced are of a similar kind and are a connected series of offences. (3) In determining for the purpose of this section whether 2 or more offences committed by 1 offender are a connected series of offences, the court may consider—(a) the time at which they occurred; or (b) the overall nature of the offending; or (c) any other relationship between the offences that the court considers relevant.”



One time, his mother acted for him. Elizabeth was at court to give evidence against Stephen. Just before the hearing started, Elizabeth went to the toilet. She was accompanied by a court victim advisor. On the way, Stephen's mother intercepted Elizabeth and handed her an envelope, telling her, "These are what you wanted." Inside were pictures of her recently still-born twins, with their footprints and handprints, and written on the back was a message from Stephen: "Elizabeth, don't do this, I love you" and his phone number.

As she recalls, Elizabeth was "very fragile" when she took the stand. She managed to give her evidence-in-chief but became increasingly distraught under cross-examination as Stephen's lawyer began to suggest that she had brought charges against Stephen just to get back at him for causing the car accident which caused the twins' deaths. After an adjournment and a lawyers' meeting in the judge's chambers, the prosecutor explained to Elizabeth that Stephen's lawyer was going to concentrate his cross-examination on the twins' deaths and her sense of vindictiveness towards Stephen as a result. According to the advocate, "Elizabeth just crumbled." She could not go on and the charges against Stephen were (again) withdrawn.

In the face of the psychological cost to her of this experience, Elizabeth's willingness to continue to call the police and to have Stephen charged needs to be applauded. Indeed, Stephen was eventually successfully prosecuted three times after this incident. Twice the police did not need Elizabeth to testify because of their proactive investigative practices. The third prosecution, however, did require Elizabeth to testify, but on that occasion, Stephen was not granted bail. He was remanded in custody until the defended hearing and supports for Elizabeth were put in place at the trial. The prosecution requested that, given the history of intimidation, Elizabeth be screened from Stephen while she testified. The court refused her request but a woman's advocate sat in the court in the line of sight between her and Stephen. According to the police officer in charge of the case, Elizabeth "lost it" only when Stephen mouthed at her "I love you." Stephen was convicted and sentenced to six months' imprisonment.

None of the men mentioned in this section faced any additional consequences for the pre-trial intimidation of their witnesses except Steve, Lyla's partner. He was the one charged with perverting the course of justice. He had written seven letters to Lyla with the promise of marriage if she did not give evidence against him in respect of the various assaults he faced. Alternatively, he threatened to bring up things from her past if she did testify. The police summary states that Steve specifically told Lyla that it would be better for both of them if she disappeared on the day of the court hearing. Then they could be together again.

Steve was sentenced to four and a half years' imprisonment. This was his total sentence for his convictions for breaching Lyla's protection order twice, two convictions for male assaults female, one conviction for wilful damage, one for injuring with intent to injure and one conviction for perverting the course of justice. The maximum sentence for one conviction for injuring with intent to injure is ten years, the maximum for intimidating witnesses under section 117 of the Crimes Act 1961 is seven years.

As part of ensuring that Lyla would appear in court to provide evidence against Steve, she was summonsed to appear and the police collected her from her house on the morning of the hearing. She remembers that Steve "was present in the courthouse and making eyes at me." When we asked her what that meant to her, she told us he was telling her, "You better not get me locked away again."

Lyla's experiences, as with the other women mentioned above, reinforce the need for victim advocacy. (See recommendation 12 and Chapter 8.) Indeed, victim advocacy was crucial to Elizabeth's ability to testify. Having the support of a victim advocate might have meant that Hilda was not quite so "alone" in the criminal court. A victim advocate working with Katrina might have helped to ensure that Rana's breaches of his bail were addressed. We think the

provision of specialist domestic violence victim advocacy is one of the keys to making the criminal courts safer and more responsive to battered women.

A second key initiative, at least for victim witnesses, would be to provide visual screens or alternative ways of giving evidence which shield witnesses from the accused. In fact, the Evidence Act 2006 provides for exactly this, but the implementation of the Act awaits an Order in Council.<sup>597</sup> We recommend:

**THAT sections 103 to 106 of the Evidence Act 2006 be implemented immediately, so that victims of domestic violence are able to give their evidence while screened from the accused or via video. (#11)**

### ***Sentencing for Breaches of Protection Orders***

In her recent work on specialist family violence courts, Professor Emily Sack has stated:<sup>598</sup>

[Protection] orders are effective only when the restrained party is convinced the order will be enforced. Unequivocal, standardized enforcement of court orders is imperative if protection orders are to be taken seriously by the offenders they attempt to restrain.

As we have seen in the previous chapter, the police fall well short of Sack's standard of "unequivocal and standardized enforcement" in relation to the arrest, charging and prosecution of respondents who breach their orders. This is not solely a problem of the New Zealand police. At a conference on restorative justice and domestic violence in Canberra in 2002, the then NSW Police Commissioner Peter Ryan concluded that, "It is a domestic violence lucky dip, which officer turns up at the home of a victim."<sup>599</sup>

### **"Technical" Breaches**

Domestic violence is minimised when breaches of protection orders which do not involve physical assaults are construed as "minor" or "technical". The resulting gap between women's lived realities and the legal system's trivialising responses is quite profound. It is demonstrated by the experiences of five of the women in our case studies who were subjected to various breaches which did not involve physical violence. For example, Hilda contemplated leaving New Zealand and even committing suicide when John breached her protection order by calling her on her new cellphone number. When she reported the breach to the police, however, she was surprised by the officer's trivialisation of John's behaviour. The police officer asked Hilda what she wanted to do about John's breach.

I said, "What do you mean, what do I want to do about it? He has breached the protection order and I was told that I have to report every single breach" ... This policeman said to me, "Well you know, in the greater scheme of things, it's only a phone call. It's not a big deal is it, really?" It went through my head that if I go hysterical here, he is going to believe what [John] tells everyone. So I have to hold myself together, and I said, "Hold on a second. To you it may be one phone call – to me it is one in a chain of events."

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<sup>597</sup> Evidence Act 2006, s. 2, states: "This Act comes into force on a date to be appointed by the Governor-General by Order in Council; and 1 or more Orders in Council may be made appointing different dates for different provisions."

<sup>598</sup> Sack, E. (2002). *Creating a domestic violence court: Guidelines and best practices*. San Francisco, CA: Family Violence Prevention Fund.

<sup>599</sup> Ryan, P. (NSW Police Commissioner). (2001). Presentation to Restorative Justice and Domestic Violence Conference, Australian National University, 25 June.

Because of Hilda's tenacity, the police did trace the call to John's phone. He was charged with breaching the protection order and initially pleaded not guilty, but subsequently changed his plea to guilty. Almost a year after this breach, he was fined \$400.

Another example of the minimisation of non-physically violent breaches is found in Claire's case study. Her ex-partner faced five counts of breaching the protection order. In one of these breaches, he had left roses on the windscreen of Claire's car while it was parked at one of the schools where she tutors. One breach related to a dance Claire attended, where Robert was noticed peering into the hall with binoculars and loitering outside. The third charge was a representative charge. It related to approximately 60 calls made to Claire from various call boxes and cellphones. The remaining two breaches related to Robert sending Claire text messages.

Robert pleaded guilty to all five charges and a pre-sentence report was prepared. Because the probation officer was of the view that Robert "was putting the relationship behind him", he stated that a supervision sentence was not needed. Despite this recommendation, the judge ordered nine months' supervision with special conditions to obtain "such treatment, counselling, programme or intervention as may be directed." Robert was also fined \$500 and ordered to pay court costs of \$130.

A victim impact statement prepared at the time of the hearing tells us about the costs of these multiple breaches for Claire and her family.

... anxiety, drained energy, feelings of exhaustion, loss of self-esteem, constant sleep deprivation and tension. Each time Robert came to my home prior to obtaining the protection order, which were uninvited visits, I felt traumatised by his presence and did not want to enter into any dialogue with him. I felt a prisoner in my own home ... As a result, I was forced to seek professional help from a qualified private counsellor with costs amounting to \$1,600. I have also been forced to change the security on my home by replacing the locks at a cost of \$236. I installed security lights at my house which amounted to \$40. These measures were directly as a result of the need for me to feel safe. Being self-employed I was forced to relinquish some of my clients in order to feel safe and free of being stalked by Robert. This led me to immense financial struggle and I had to seek financial assistance to cover the basic needs to care for my family over the holiday periods ... The emotional harm impacted on all three children in different ways. My son in particular received counselling initiated by him through his school. All three children were sitting exams at the time which made it stressful for them. The relief of no phone calls since the apprehension of Robert has been described by my son as "luxury". We just can't believe how good it feels to be normal again. And for family members ringing it is a joy to have me answer the phone without any of the previous fear experienced.

Claire's "joy" at Robert's multiple convictions has been considerably tempered by Robert's post-prosecution "wins". Firstly, he successfully applied to get the nine-month supervision term cancelled after only six months. A victim advisor informed Claire that the grounds were that Robert had obtained a job which made it inconvenient for him to report to his probation officer. He was also able to have the conditions of the protection order varied so that he could possess firearms. Finally, as discussed in Chapter 8, he was successful in having Claire's protection order discharged.

As a result of these "wins", Robert's actions have had a devastating and enduring impact on Claire. In her worst moments, she tells us, she (like Hilda) wanted to die. At other times, she has considered leaving the country and changing her identity. And in the face of five successful prosecutions for breach of her protection order, Claire tells us that the Robert's sentence has not enhanced her sense of safety. She says:

Now that he has his firearms back I have taken different routes than I normally take. The counsellor said "Claire, it's about you taking control and putting safety measures in place." So I don't go bush walking anymore and think everything through, and now

it's becoming a part of my life. I had to learn to lock the house, lock my car, take my cellphone everywhere ... I carry a hand-held alarm ... The counsellor said to lock my bedroom door and pull the curtains which I never used to do ... I don't go to cafes that I used to go to, I go to different ones. I [ask] people to pick me up if I have to go out at night – we don't have taxis in [this town].

Jess's story is, in part, a rerun of Claire's and Hilda's. When she learned about the extent of Bruce's control over her emails, she was devastated. And while more than 100 breach charges could have been laid against Bruce, only two actually were. One was a representative charge and related to 36 occasions on which he had accessed her email account. The second charge was in respect of one telephone call. Bruce was also charged under section 249(1) of the Crimes Act with accessing a computer system for dishonest purposes.<sup>600</sup> At the time of this writing, Bruce has only been convicted of the charge involving the phone call. His sentence: he was ordered to come up for sentence on this charge if he were convicted of another offence within 12 months. Effectively, Bruce has faced no penalty for his multiple breaches.

The other breach charge representing Bruce's repetitive accessing of Jess's emails was withdrawn. The police reasoning was that it would be difficult to establish Bruce's **intention** to cause Jess psychological harm. They reasoned that because Bruce had not **intended** that Jess find out what he was doing with her emails, his actions did not constitute a breach of a protection order.

If the police approach in Jess's case is correct, there are significant implications for protected persons. Clearly Bruce's actions **caused** Jess psychological harm. The stress and depression which Jess experienced when she discovered what he had been doing (as well as the scale of it) proves this. Moreover, the High Court cases of *A v B*<sup>601</sup> and *P v Police*<sup>602</sup> seem to contradict this police approach. In *A v B*, even though the appellant had not intended to cause psychological violence, his actions had, in fact, done so. Justice Hammond reversed the decision of the Family Court and held that it was not necessary to read down an intentionality requirement to find that a respondent had committed psychological violence. The case of *P v Police*<sup>603</sup> is even more analogous to Jess's case. In *P v Police*, Justice Heath found that there was no need for the appellant to have intended to breach the protection order. For conviction, it was only necessary to prove that he had intended to do the act which constituted the breach, namely, to mail a letter to the wife.

Similarly, in Jess's case, the fact that Bruce never intended her to find out that he was controlling her email account is not the relevant point. He intended to exercise control over her email communications and that is what he did. His actions caused Jess foreseeable and significant psychological harm when she found out about his actions. Those are the three relevant factors. Moreover, if we were to accept the police approach in Jess's case, we would need to ask whether the threshold for psychological abuse would also not be met where perpetrators intended to hide other forms of stalking and surveillance behaviours. Such a position would severely undermine one of the objects of the Domestic Violence Act 1995, to "reduce and prevent" domestic violence "in all its forms" (section 5).

Jess is also very frustrated at the way Bruce's multiple breaches were treated. She told us that:

I got told recently by a police legal advisor that even when there have been multiple breaches of the order, they only need to prosecute one as the sentencing all goes

<sup>600</sup> The s 249(1) charge and its outcome are discussed in detail later in this chapter.

<sup>601</sup> *A v B* [1998] NZFLR 789.

<sup>602</sup> *P v Police* [2006] NZFLR 725 (HC).

<sup>603</sup> *Ibid.*

together anyway.<sup>604</sup> But this doesn't give a clear picture of the real situation that is occurring. And not only that – my experience of police is they won't prosecute one minor offence at a time anyway.

We agree with Jess's analysis. Previously, we have commented that concurrent sentencing, in effect, gives offenders "freebies". Additional offences are frequently not going to lead to heavier sentences. Here, Jess is drawing attention to another problem. Concurrent sentencing discourages prosecutors from pursuing each charge. Deciding that additional charges are not going to make a difference to sentencing, the temptation may be for prosecutors to prosecute only a small representative sample of charges. By such processes, violence against women is again minimised and the gap goes on.

### More Effective Action

Louise's story also shows how breaches that do not involve physical violence are often trivialised, both by the police and the courts. But Louise's case also shows what a difference effective enforcement can make. That is, initially, Phillip faced almost no consequences for breaching the protection order, even though he did so numerous times. That is, he sent her text messages. He rang her. He rang one of the children (also a breach), discovered Louise had a doctor's appointment, and ambushed her there. She remembers he yelled:

I'll make sure the kids fucking hate you ... I hope you end up in [a psychiatric] ward ...  
I'll see you in court.

Phillip was charged with two breaches (a single charge in relation to the text messages and a second charge in relation to the incident at the doctor's surgery). He was fined in respect of both. The breaches continued. Firstly, repeating the earlier pattern, he rang Louise's home and spoke to one of the children. Learning that Louise was at The Warehouse, he ambushed her there.

He came up to me. He stopped my trolley, became verbally and physically aggressive, very quietly, under his breathe so no one would notice ... But they did. People were looking. He kicked my trolley. He wouldn't let me move. He was trying to be discreet, you know, but people were looking.

Louise reported these breaches to the police but no action was taken. Three weeks later, Phillip made about a dozen calls to Louise who subsequently disconnected the phone. He came to her house and refused to leave when asked, doing so only when a neighbour intervened. Louise also reported these breaches to the police, but again there was no action. Phillip avoided being charged for two more breaches the very next day when he visited his children outside the terms of the custody and access orders. On one of these occasions, he tried to remove the child from the child's grandfather's house. For these breaches, Phillip was warned.

Louise described the impact of such breaches in a victim impact statement

He constantly stalks me and tries to make contact with me when he knows he is not allowed ... I am sick of living in this way. I am constantly living in fear and looking over my shoulder to see if he is following me.

And in one of her statements to the police, she reported:

... as a result of Phillip's behaviour I am very nervous and frightened ... I have to keep the phone unplugged at times so Phillip doesn't call. My children are being affected because they receive text messages from Phillip. This is causing problems between the children and me.

She also noted that she kept the house quiet so that she could hear if Phillip was approaching. She described her parenting as suffering and herself as "depressed and on edge." She described

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<sup>604</sup> See earlier discussion of concurrent sentencing.

Phillip as “extremely unpredictable and I fear for my life as his actions are becoming more bizarre and dangerous.”

Fortunately for Louise, the police family violence coordinator intervened and ensured her order was more effectively enforced. Quickly, Phillip was arrested for two new breaches. In the first, he had followed Louise while she was driving with the children in her car. In the second, he phoned a friend of Louise’s and urged her to get Louise to turn her phone on.

Phillip initially elected to defend the charges and was remanded in custody. He later changed his plea to guilty and was sentenced to two months’ imprisonment. However, he was credited with the time he had been in custody, and released immediately. Nevertheless, the experience of being in custody, has, according to Louise, had a significant impact on Phillip. She has certainly found Phillip easier to deal with since, even though she continues to experience problems with his exercise of contact – or sometimes failure to have contact – with the children. Effective, albeit belated, enforcement of the protection order has left Louise feeling more positive.

I found it [the police response] very validating. They believed me ... I was interested in how they were reacting to the situation because I had been dealing with some of these things by myself and had learnt how to minimise them and suddenly they were saying this shouldn’t be happening, they were believing me and they were actioning this stuff and I was going, “Wow, this is good.” Made me feel like, yeah, what I was saying was the truth.

That she can feel so positive despite the earlier failures of the police and courts to properly enforce her order suggests to us how modest are battered women’s expectations. In our view, Louise’s experience, no less those of Hilda, Claire and Jess, bears out Sack’s contention that protection orders “are effective only when the restrained party is convinced the order will be enforced.”<sup>605</sup> In all of these cases, the criminal courts fell well short of “Unequivocal, standardized enforcement of court orders.”<sup>606</sup>

### A Lack of Information Sharing

While the Family Court grants protection orders, it is the criminal court which deals with breaches of those orders. That is appropriate: breaches of protection orders are criminal offences and should be dealt with as such. However, the division between two jurisdictions raises certain difficulties. To some extent, the criminal court is forced to take a somewhat decontextualised view of breaches. That is, the court deals with the actions by which the offender breached the order but usually knows nothing about the circumstances which lead to it being made. But of course, from the point of view of the protected person, the meaning of the breach usually lies much less in the specific actions of the respondent at that time than in what he has done in the past. To develop a full understanding of the impact of breaches, the criminal court needs access to the Family Court file.

For example, the court imposed a \$400 fine when John breached Hilda’s protection order by calling her cellphone. Seen in isolation, that is a lot of money for an unwanted phone call. However, seen in the context of John’s power and control tactics, his manipulation, his bad-mouthing of her within their community, and, not the least, an horrific assault in which her nose was pushed into her face, she was strangled, and she thought she was going to die – an assault which left her with post-traumatic stress and its associated state of hypervigilance – then \$400 hardly seems commensurate with the impact of the call to Hilda’s new cellphone number, a number she had hitherto thought was confidential.

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<sup>605</sup> Sack, E. (2002). *Creating a domestic violence court: Guidelines and best practices*. San Francisco, CA: Family Violence Prevention Fund.

<sup>606</sup> *P v Police* [2006] NZFLR 725 (HC).

Similarly, for monitoring and selectively deleting her emails, Jess's partner received no penalty, just an order to come up for sentence if called upon. Most people would understand his actions as a major invasion of privacy and a considerable intrusion into one's world. But to experience such intrusion from one's (double) rapist, a man whose apparently random assaults have rendered one unconsciousness, who has smashed one's head into the floor, and left one worrying about losing the use of an eye is quite a different thing. It is difficult to imagine how a suspended sentence could be regarded as adequate if the judge had perused Jess's application for a protection order and her accompanying affidavit.

Key informants told us that judges considering sentence in respect of breaches occasionally have access to the Family Court file but this is far from common. It needs to become standard practice. The reverse is true. It would also be useful if Family Court judges considering applications under the Domestic Violence Act 1995 or the Care of Children Act 2004 routinely had access to records of convictions in the criminal court. Effective information sharing is also needed within the Family Court. As it stands at the moment, it is perfectly possible for a party subject to a parenting order made in one court registry to apply for another parenting order in a second court registry and for that court to consider the application unaware of the existing order. (See case study, Amanda.) A comprehensive data-sharing system is needed. We recommend:

**THAT the Ministry of Justice reviews information systems to ensure that:**

- (a) judges in the criminal court considering sentences in domestic violence cases can access relevant records of proceedings in the Family Court (including applications for a protection order, affidavits in support, judges' decisions and memoranda, and so on);**
- (b) judges in the Family Court considering applications under the Domestic Violence Act 1995 and the Care of Children Act 2004 can access records of domestic violence offences in the criminal courts and POL400 forms from the police;**
- (c) judges in one Family Court registry can access records relating to matters involving the parties in other registries; and**
- (d) the records referred to above are retrievable under the name of each party and each child. (#18)**

### ***Sentencing for Assaults***

Several of our case study women participated as victim witnesses in male assault female prosecutions against their abusers; some, like Rachel, more than once. One theme that emerges from these male assaults female prosecutions that has been discussed in Chapter 12 is the discretion that rests in the police to lay a range of charges in respect of the same assault, some of which would carry much more serious outcomes than others. For example, in Rachel's case, the arresting police officer told her that he thought that Chris had seemed to be trying to kill her, by the way he had repeatedly attacked Rachel's head with his shoes and with a hammer. Chris might have, therefore, been charged with attempted murder (which carries a maximum penalty of 14 years' imprisonment). Alternatively, he could have been charged with wounding with intent to cause grievous bodily harm (maximum 14 years), injuring with intent (maximum 10 years), assault with intent to injure (maximum 3 years) or male assaults female (maximum 2 years). As we shall see later in this chapter, Chris was only charged with male assaults female and the sentence he received carried out very few of the sentencing purposes in section 7 of the Sentencing Act 2002.

In other cases, such as Hilda's and Patricia's, the accuseds were initially charged with more serious types of assault but plea bargained these charges down to male assaults female. It needs, therefore, to be seen that charging the accused with less serious offences in itself minimises the

seriousness of the violence that the victim has sustained and furthers the gap created between a woman's lived experiences of the violence and the criminal justice system's response to that violence.

We will begin with Hilda's story. As we have seen from her case study, she remembers John's assault against her in detail. It occurred while she and John were leaving their friends' apartment. They were having a disagreement when:

[John] grabbed me by the neck and smashed my head against the wall and started to throttle me. He banged my head against the wall again, and I thought I was going to die. His eyes went black and he looked like another person and he was, honestly, enraged. I remembered self-defence 101, which was to knee him between the legs. I looked down to see where I was going to knee him, but when he saw what I was going to do, he head butted me and broke my nose ... He was still strangling me and he said to me, "How was that? Would you like another one?" I actually said, "Yes." I remember feeling completely broken, thinking, "That's it – it's over."

Hilda's injuries were severe. It took two hours for the bleeding to stop. She had four stitches. An X-ray showed a serious fracture. She was off work for three weeks. Further medical examinations revealed that significant reconstructive surgery was needed. That could not be scheduled until the swelling went down. For four months, Hilda had to live with a painful, disfigured face. "When I wore my sunglasses, they collapsed into a hole."

She found it embarrassing to be out in public, and had trouble breathing – and sleeping – because of the complications. Undergoing surgery four months later was a further ordeal. "It brought all the horrors of him smashing my face back again", and necessitated another week off work. There was more pain and a scar after the surgery.

The psychological impact of the assault was also severe. Hilda told us:

It was absolutely devastating, that someone who told me he loved me treated me like that. It has totally shaken my faith in humankind.

Hilda had reported the assault immediately. John was arrested and held in the cells overnight. He was then released on police bail, with a condition that he had no contact with Hilda. He immediately sent her a big bunch of flowers with a note asking her to marry him. The police arrested John for breaching the conditions of his bail. He was, however, immediately released on bail again.<sup>607</sup>

A series of status hearings was held during the months between the assault and the trial. There were also several adjournments. To Hilda, John's expensive lawyer seemed able to engineer these delays. She herself had, of course, no lawyer representing her. During this time, John continued to breach her protection order repeatedly. The police gave him written warnings in respect of these breaches. It was also during this time that Hilda got a final protection order but only after the "gruelling" hearing we have described in Chapter 8.

In the criminal court, John had initially been charged under section 194(b) of the Crimes Act 1961 with male assaults female, but after considering the seriousness of the assault, the police laid the more serious charge of assault with intent to injure (section 193 of the Crimes Act). Later, as a result of a plea bargain between the police and John's lawyer, the assault with intent to injure charge was later withdrawn and John pleaded guilty to the original male assaults female charge.

Surprisingly, John's guilty plea did not save Hilda from another "gruelling" court experience. While John pleaded guilty to male assaults female, he disputed some of the statement of facts. A hearing, therefore, was held to consider evidence relating to the seriousness of the assault. John's lawyer argued that grabbing Hilda had been an instinctive reaction on John's part to hitting his

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<sup>607</sup> See our discussion of police bail in Chapter 12.



head on the door after she had opened it onto him. Again Hilda found herself in the witness box being cross-examined by John's lawyer. Again, she found the process harrowing even though the judge believed her evidence, finding "that the incident occurred very much as the complainant claimed it did."

Almost a year after the assault, John was finally convicted and sentenced to 150 hours' community work for his assault. In addition, he was ordered to pay Hilda \$3,000 in reparation. John appealed against both conviction and sentence, but his appeals were dismissed. Not only was his sentence a non-custodial one but John immediately resumed breaching Hilda's protection order. In contrast, as we have seen from her case study, Hilda had months of medical treatment and surgery, suffered from depression, lost her job, and contemplated suicide.

In her interview with us, Hilda commented on her experience of the courts, especially the criminal court process in which she had no one to represent or advocate on her behalf and was not a party to the proceedings:

The [criminal] court is where I felt completely and utterly vulnerable, and completely unsupported and alone – whereas he, as the defendant, had a lot of support and he had rights ... It was very stressful. I wanted to fall apart. I felt like my whole body is stripped of skin and you are completely and utterly out there on your own. And somebody touches you – that's how I felt. I couldn't show that to the outside world because then ... they would really believe what he is telling them – that I was a controlling woman. It was the weight of the world on my shoulders trying to keep it all together, while I was being attacked from every angle. I would say to people, "I understand that he has rights, and I'm okay with it, but what are my rights?" Not one person has ever been able to answer me. I didn't have any rights.

From Hilda's perspective, John's sentence was clearly inadequate. We agree. On the basis of our reconstruction of the section 7 Sentencing Act 2002 purposes, we believe that none of the outcomes which might define "success" for Hilda have been achieved. For example, the community work sentence did nothing to enhance Hilda's safety. Neither did the \$3,000 reparation that John, a wealthy man who drives luxury sports cars, had to pay. As well, given the severity of the assault and its long-lasting impact on Hilda's physical and psychological health, the combination of community work and reparation sentence was in no way commensurate with the seriousness of the assault. Indeed, the sentence did not impart a clear or unambiguous message to John that the criminal courts would neither condone nor minimise domestic violence. The maximum penalty for male assaults female is two years in prison. Finally, and perhaps most importantly in terms of Hilda's future safety, John was not deterred by this community work plus reparations' sentence from committing further crimes against Hilda. Immediately after this sentence, he had begun to breach the protection order, doing so repeatedly.

### **Sentencing for Multiple Assaults and Breaches**

For several of women in our case studies, their abusers were charged with both assaults and breaches of protection orders arising out of the same series of actions. This is good practice: each and every offence committed should be charged. In these cases, however, while the prosecutions resulted in convictions, at times the women felt that the sentences did not reflect the serious psychological harm and physical injuries that they had sustained.

In Lyla's case study, Steve committed a life-threatening assault. He was charged with two counts of breaching Lyla's protection order, two counts of male assaults female, willful damage, injuring with intent to injure, and ultimately, perverting the course of justice. As part of a plea bargain, however, the second breach was withdrawn along with one count of male assaults female

Lyla describes the series of incidents that led to Steve being charged with breach of her protection order and male assaults female. It began with Steve assaulting her before work one day, after which Lyla asked him to return the keys to her flat. While Lyla was at work, however,

Steve returned to the flat, forced entry, then trashed the flat and destroyed Lyla's personal things. When Lyla came home from work, she placed a couch across the door to try to make her flat more secure. Steve was not deterred, however, and at 3 am, he forced his way in again. Lyla unsuccessfully tried to defend herself with a piece of broken glass. Steve punched her, but she managed to get out of the flat. Steve ran away. Lyla called the police, who took her statement and left. She barricaded her door again.

Early in the morning Steve returned, forced entry a third time and then smashed her head against the floor and the brick wall of the flat. She grabbed the hammer lying beside the couch. He wrestled it off her and she tried to escape through a window. He hit her from behind with the hammer and kicked her. She got as far as the laundry before he launched another attack with the hammer, followed by more kicks to her body.

She told us that she was lucky to survive:

The doctors were surprised that I was alive because of the knocks to my head. He knocked me out with the hammer. When they did a head scan in the hospital they were surprised that I had no internal bleeding, and I went to the dentist and got my jaw and mouth knocked back. My teeth had fallen out but they were surprised that I had not suffered a dislocated jaw from the hammer.

This attack left her unconscious but the neighbours had called the police. Lyla explained why she could not make the call herself:

I think I was afraid that this time he would catch me with the phone ... I was afraid he would see me because he had the axe and the hammer. If he saw me use my cellphone I would have been a goner, so I was afraid. I think I was saved by the neighbours because we were living in a flat situation and one of the neighbours had rung, and I was so glad. The neighbours came out and said they were going to ring the police. If the neighbours didn't come out, he would have done me over with the axe and the hammer, but the neighbours came out of their house. He dropped everything and ran, and then the police arrived. That was how he ended up inside for four years. I was lucky the neighbours rang that time. I was really afraid.

The police recorded Steve's explanation for his life-threatening assault on Lyla. He told them:

If she is going to fuck me around, I will fuck her around.

Again, as in Rachel's case, a male assaults female charge was laid in respect of a life threatening assault. However, Lyla's case represents one of the few sentencing outcomes that actually worked for our women. During the two years in prison that Steve actually served, Lyla learned to live independently of him. She took a protected persons programme, made good friendships, and found out about Women's Refuge and Family Start. When Steve moved back in after he finished his prison term, Lyla was able to end her relationship with him, even though she felt that she and her son needed to move into a refuge for the week after she told Steve to leave.

### **Sentencing for Serious Violence**

Patricia's story involves a very violent incident, the culmination of a relationship filled with George's "just everyday losing the plot" assaults. Not only was George violent to Patricia, he was also violent to his workmates. Because he was seen as "a brilliant worker", however, his workplace violence was never reported to the police. Furthermore, we have seen how Patricia's fear of stranger violence, as a result of her twice being raped in her own bed, contributed to her not reporting George to the police earlier. This last assault was different, however. George was violent to Debbie, their three-year-old daughter and Patricia believed that he might kill Debbie and then himself. After escaping from their home, Patricia called the police. George was arrested after an armed offenders squad call-out.

Patricia's story is significant because it allows us to look at how the criminal justice system deals with a very serious episode of violence. As a result of the incident, six charges were laid against George: two charges of possession of an offensive weapon, one charge of grievous bodily harm, one charge of assault with a weapon, and two charges of threatening to kill (one in respect of Patricia, one for Debbie). Two charges were subsequently withdrawn: assault with a weapon and threatening to kill Debbie. The grievous bodily harm charge was then plea bargained down to male assaults female.

This plea bargain was a successful strategy for both the Crown and the defence. George pleaded guilty and was sentenced to 180 hours' community service. The question remains, however, whether withdrawing the charges of assault with a weapon and threatening to kill in respect of Debbie represented a "successful" strategy in terms of Patricia, Debbie and Zane, the baby. As importantly, does the 180 hours' community service sentence carry out the sentencing purposes delineated in section 7 of the Sentencing Act 2002, no less our reconstruction of it? While the 180 hours' community service sentence George received may address the rehabilitation purpose set out in section 7(1)(h), how does the sentence carry out the other purposes under section 7(1): offender accountability; offender responsibility, providing for the interests of the victims (including safety enhancement), deterrence and community safety, and the sending of a strong signal to the community that domestic violence will not be tolerated. Moreover, does the sentence adequately express the community's opprobrium at George's violent actions? Finally, given the aggravating features involved in George's offending<sup>608</sup> – including George's use of a weapon, his position of trust vis-à-vis Debbie and Patricia's vulnerability because of his previous use of violence against her – how have they been accounted for in 180 hours? Finally, would we accept the same sentence outcome if George had committed the same assaults and threats against a stranger and that stranger's child?

The police rationale for withdrawing the assault with a weapon charge was that George had not used the knife to physically harm either Patricia or Debbie. However, there is nothing in section 202C of the Crimes Act 1961 which requires "physical harm" as an element of the offence. It is sufficient that the accused "uses any thing as a weapon in assaulting any person." Indeed, section 202C(2) states that the offence is proven if the accused "has any thing with him in circumstances that prima facie show an intention to use it as a weapon, when he is assaulting any person." As a minimum, George would have had to rebut the presumption that having a knife in his possession, he had not intended to use it.

### **Implications in the Family Court**

The decision to withdraw the threatening to kill charge in respect of Debbie, moreover, has had a significant impact on George's contact arrangements with Debbie and Zane. The rationale for withdrawing the threatening to kill charge seems to have been a desire to avoid Debbie having to give evidence at George's trial. As a result, all criminal charges relating to George's violence to her were dropped. This, in itself, is problematic as George has avoided any consequences for what for Debbie must have experienced as a terrifying incident. Anyone would be frightened to

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<sup>608</sup> The relevant paragraphs of s. 9(1) of the Sentencing Act 2002 are: "(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case: (a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon: (b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place: (c) that the offence was committed while the offender was on bail or still subject to a sentence: (d) the extent of any loss, damage, or harm resulting from the offence: (e) particular cruelty in the commission of the offence: (f) that the offender was abusing a position of trust or authority in relation to the victim: (g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender: ... (j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time."

have a knife held to his or her throat, no less a three-year-old whose father was the holder of the knife. What he was capable of doing would not have been lost on her. She had witnessed her father's violence against her mother on the day in question and on many other occasions.

The negative psychological impact on Debbie is corroborated by her developing the stress-related ailment alopecia. She was so frightened by the events she both witnessed and was subjected to that her hair began to fall out. Despite this, George already has supervised contact with Debbie and is applying for a shared parenting arrangement involving three nights per week of unsupervised overnight contact with her and Zane. It is easy to see how not having a threatening to kill conviction in respect of Debbie benefits George's case for unsupervised contact. The question for us is, how has the plea-bargaining agreement enhanced the safety of Debbie, Zane and Patricia? Is the minimisation of George's violence really in the welfare and best interests of Debbie and Zane?

The particular incident from which the charges arose was unusual in that it culminated in an armed offenders squad call-out. In other ways, it was not at all unusual. In our conversation with her, Patricia described George's actions as "just normal everyday losing the plot." She provided this account of her relationship with George:

He has elbowed me, slapped me. He loves to walk past me and elbow me. He has punched the wall beside my head as he held me against the wall. He used to be really bad at throwing things at me. He quite often threw the telephone to break it, leaving me with no outside communication. He pushes me about. His favourite thing is to grab me by the throat with one hand and push me up against the wall. He yells and screams at me, sometimes punches the wall beside my head waiting for me to crack.

He tries to get me to a stage where I just lose it altogether. I get hysterical and am just a blithering mess. He gets me to a stage where I am really terrified. He usually holds me up against the wall until I just can't do anything. I am taller than him and he usually grabs my throat with his right hand. He pushes upwards until I am on tiptoes and can't go any higher. He forces my head right up and back. On one occasion he squeezed so hard that I couldn't hardly breathe. It felt like I was choking. I was sort of gasping and coughing. He let me down pretty quickly, then told me that it was my fault.

He always calls me a slut, whore, bitch when we have these episodes. They usually end when he punches the wall and then he goes to bed or goes off to the shed. He usually goes to sleep in the spare room but [by] the next morning he has come to our bed. He is always very apologetic. He promises that it will never happen again.

Patricia recollected that George had threatened to kill her on many other occasions too. "He told me that he would kill me and burn my body at the incinerator", she recalled. On other occasions, George had told her, "I should kill you. It would be the end of this problem. I'm going to slit your gullet."

The most startling parts of Patricia's story are not the details – the threats, the punching the wall, the hauling on the handbrake while Patricia was driving with the children in the car (it crashed into a fence), the smashing of the phone, the constant accusations of having an affair, the control of her movements (she was not allowed to go to parties) – even the choking of her almost to the point of unconsciousness to demonstrate that he had the power of life and death over her. To us, the most startling part was the way the violence had been normalised as "normal everyday losing the plot." For Debbie, too, the violence has become normalised. She exhibited the psychic numbing that is sometimes associated with child witnesses. As Patricia told us:

[Debbie's] just used to it. It had been happening for as long as she can remember, you know. It's just another thing that happened. It never affected her. She just carried on doing whatever she was doing at the time – never looked twice.

The incident which involved the armed offenders squad began just like many of their other arguments. It ended, however, with Patricia being strangled, threatened with death and escaping

from the house with Zane. She could not get Debbie out because George was restraining her. To Patricia, the four hours it took before she got Debbie back were “the longest four hours of my life.”<sup>609</sup>

I thought that George was going to kill Debbie and then kill himself. I really believe that if I hadn't left, he would have stabbed Debbie and killed her.

While our account is drawn from our conversations with Patricia and her statements to the police, it largely coincides with the account George gave to the police. For example, he admitted holding a hunting knife while he told Patricia, “If I was a Nigger, I would slit your fucking throat.” The judge himself referred to that comment in his sentencing decision. George, however, claimed, that he then threw knife away – in a direction away from Patricia and that he was not holding it when he grabbed Debbie. He did not dispute at all that Debbie was a witness to what he did to Patricia. In a victim-blaming barb at Patricia, he told the police that she was “a drama queen ... She twists everything to her benefit.”

### **Delay and Bail**

George was initially remanded in custody but sought bail at his second appearance. Patricia was consulted for her views. The police and Women's Refuge agreed with her: she and the children would be much safer if George were held in custody. However, her parents said that opposing bail would make her look bad when it came to the Family Court making a determination on parenting issues.

I sort of felt like I was looking like I was trying to make life harder and worse for him and in the long run I knew it would come down to access to the kids which he will eventually want and the fact that his parents are very good to us and they'll want to see the kids. I didn't want to look like I was making things hard. [I wanted to] look like I was a good person in all this.

George was given bail, on the condition that he lived with his parents (several hundred kilometres away from Patricia) until the next court hearing. The non-association provisions extended to George not entering the street on which Patricia lived. At a subsequent hearing, the conditions of bail were altered. George was allowed to return to the general area, but not to live in the small town to which Patricia had moved. Although she was informed of this change, Patricia was not told about the next change to George's bail, which removed any restrictions on where he could live. The only restriction on him was that he not enter Patricia's street. He currently lives within four kilometres from her. Because it is a small town, Patricia sees him frequently.

George made ten appearances in court before the charges were finally resolved. He eventually pleaded guilty to all charges. Initially, he pleaded guilty to four of the charges but not guilty to the threatening to kill charge. Sentencing in respect of all the charges was delayed until the threatening to kill charge was determined. On that latter charge, he first elected trial by judge alone but on the day of the trial, he was able to delay the matter further by changing his election to trial by jury. Patricia had been summonsed to give evidence at the depositions hearing. After the five guilty pleas, sentencing was again postponed until after George completed a stopping violence programme. As we saw, ultimately he received a total sentence of 180 hours' community service.

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<sup>609</sup> Killing a child in the context of domestic violence is not unusual. See Domestic Violence Death Review Committee. (2004). *Annual report to the Chief Coroner*. Ontario. Retrieved 15 May 2006 from [http://www.mpss.jus.gov.on.ca/english/publications/comm\\_safety/DVDRC\\_2004.pdf](http://www.mpss.jus.gov.on.ca/english/publications/comm_safety/DVDRC_2004.pdf). See also Johnson, C. H. (2006). Familicide and family law: A study of filicide-suicide following separation. *Family Court Review*, 44, 448-463.

Despite the fact that George had earlier convictions for two drink-driving offences, one for possession of a knife in a public place, and a charge of resisting arrest, the judge found that:

On the face of it, **this incident will appear to be out of character**, subject to the fact that there appears to be a real issue for you as far as alcohol is concerned. [Emphasis added]

This finding of fact by the judge contradicts what Patricia told the police about George's almost daily violence. However, nowhere in his sentencing notes does the judge state that he does not find Patricia a credible witness. The judge then went on to state:

On balance, I think it would be in everybody's interests to sentence you to Community Work rather than sentence you to prison.

There is no statement about how Patricia's or the children's safety interests will be advanced by this "balance". And in another example of learned helpfulness among decision makers, the judge continued:

I hope that this incident has brought you to your senses. I take some comfort from the fact that there has been ongoing [supervised] access without further issues and there seems to be no suggestion of ongoing animosity, although I could imagine that your former partner will always be cautious of you, given your admitted offending.

The judge sentenced George concurrently on each of the five charges to 180 hours' community work. It needs to be stressed that threatening to kill carries a maximum penalty of seven years in prison and there were aggravating factors (such as the use of the knife) that had to be taken into account by the District Court judge in arriving at his sentence. Patricia took little solace in the judge's warning:

On each charge, the words "Final Warning" [will] go on your record. Any **further** offences of violence and you will go to prison. [Emphasis added]

The judge could have sentenced George to supervision as well. But because George has attended a stopping violence programme, the judge decided against it. Indeed, the judge had postponed sentencing on these five guilty pleas to allow George to complete the programme. The judge commented:

I do not think there is any point in forcing you upon Community Probation because you have already had assistance. If there is any further offending that will be dealt with in a very firm fashion. There is also an order for the destruction of the knife.

### **Patricia's Views**

Patricia became very disillusioned about the year it took to have the charges dealt with. As she saw it:

The longer this goes on for, the less the services seem to give a damn ... I keep thinking it is just about over and then it hits me that it isn't ... It is one thing after another.

Not surprisingly, Patricia has also become very disillusioned with the criminal justice system. The multiple hearings and the year-long delay took a serious toll on Patricia and on Debbie. As Patricia told a victim advisor:

I am very scared of George. Whenever I see vehicle similar to his I think it is him and become very anxious. I think that he will come looking for us and try to get to our children. I am now living on my own with my children and spend a great deal of my time worrying that George will suddenly appear to begin this whole nightmare again. I am too scared to go to the shops on my own and have to rely on friends to be around when I do actually go out. I won't walk anywhere as I want to be able to get away if George turns up ... I have a protection order in place but I believe that this won't stop him. I don't want to live my life looking over my shoulder all the time and feeling the way I do. My daughter, Debbie, is now very scared of the police. Every time she sees

a police car or a police officer she becomes very worked up and gets upset ... I taught her that if she was ever in any trouble to ring the police or find a policeman. She is now frightened of them as a result of this incident. I have had to go to the police station several times since George was arrested and each time Debbie has become very upset when told that I was going there. She should not have to feel this way ... she is not the same happy wee girl she was. I just want for George to leave us alone so that we can get our lives sorted without the continual worry of him once more ripping our world apart.

But George “leaving them alone” is just what will not happen. He is in their lives in many ways and seeking further involvement. Firstly, he makes nuisance phone calls to Patricia’s mother and harasses her sister at work. Patricia has complained to the police about these calls but has been told that the police will only take action if her mother or sister complains. By harassing her mother and sister, George arguably is engaging in behaviour which amounts to psychological abuse of Patricia.<sup>610</sup> That is the how the police in Elizabeth’s case handled Stephen’s threats against Elizabeth’s parents. As well, George has supervised contact with the children one and a half hours per fortnight and, as mentioned, is now applying for three days per week of unsupervised access.

When he was first charged, Patricia was told by some police officers that George would probably get five years in prison for what he had done. Each time he appeared in court, the police decreased the time that they thought he would get. No one, however, suggested to Patricia that a “successful prosecution” might result in community service as the outcome. Of course, neither the police nor Patricia would have characterised George’s violence as “out of character”, except insofar as Debbie too had become a direct target. Surprisingly, however, even counsel for the child took a similarly minimising approach to George’s violence when we talked to him. He told us, “George would never have been so violent had Patricia not been trying to leave and take the children with her.”

Even though George had been repeatedly abusive to Patricia in the past, his actions were construed through the prism of “out of character or separation engendered violence”, with the trivialisation of violence that results from that label. Who pays if we minimise the potentially life-long effects on Debbie (and Zane) of the incident they witnessed or were forced to participate in? Who pays if we minimise George’s potential for further violence against Patricia with the children witnessing or, given the co-occurrence of spousal abuse and child abuse, against the children themselves. Moreover, where is the strong denunciation of George’s threatening to kill and strangulation behaviour? Indeed, there is no denunciation of George’s behaviour in the judge’s sentencing notes at all.

### Use of Home Detention

Rachel’s story involved two successful prosecutions against Chris for life-threatening assaults. Chris’s sentence was ultimately decided in the High Court. Rachel said that she felt “voiceless” in the court process.

Rachel had been with Chris for many years but, in Rachel’s words, it all went “whoosh” one Sunday night, soon after their fourth child was born.

It was early evening. I had had enough. He had affairs, he would embarrass me in public and I had to beg his boss for money because he was spending it all. I was

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<sup>610</sup> Psychological abuse is prohibited under the standard conditions of a protection order (Domestic Violence Act 1995, s. 19(1)(d)). In Elizabeth’s case, this section was used to charge Stephen with breaching Elizabeth’s protection order after he made threats against Elizabeth’s parents (who were not themselves protected persons). The court accepted the prosecution’s contention that such threats amounted to psychological violence against the protected person.

breaking down. I'd just had a baby. I was taking too much dope. There was no family support from my family. Everything was going crazy in my head and this man was getting more and more violent and the cycle of violence was getting more and more out of control. So I went into town with the kids. I was so angry with him. He was a fisherman, and he had just come home and went out to spend all the money. I remember thinking, "Quick, I better go shopping before he goes and spends it all!" I got food for us and I brought a bottle of wine and I was drinking it, and I thought, "I know where you are. You prick, I'm going to tell you what I think of you."

Rachel drove to the pub where Chris was drinking with his mates outside. She rolled down the window and told him off in front of everyone. Immediately afterwards:

I remember he hauled me out of the car by my hair and just punched and punched me, kicked me and stomped my head into the concrete. He did this in front of all those guys and nobody came to my aide because I was too lippy in front of all of them.

Rachel managed to get back into her car and drove home but Chris followed and continued his attack. She was in the bathroom when he got to her again. She recalls:

It was an assault where you could do nothing, I could do nothing to protect myself and he was physically fit. He had shoes on. He was kicking me and dealing to me. I was thinking "I'm going to die. This is it. I'm going to die." It was absolute terror, and I remember thinking "I'm not going to survive this, I will not survive this." The whole time he was pounding me, kicking my head on the side of the bath, jumping on my head, stomping on it. He had sand shoes on because the imprints were all over my head. He fractured my cheekbone, he was hitting me full on. I remember thinking I can't go anywhere I'm totalled. I'm going to die.

As often happens, the children became involved in the assault. The noise of the beating woke the four of them, who began to scream. Chris left the bathroom telling Rachel he had not finished with her yet. At one point, Rebecca ran in between Chris and Rachel, trying to protect her mother. Chris moved her aside and continued to attack Rachel.

He was just smacking me in my nose, trying to break my nose, and yelling, "I'm going to break your nose, you fucking bitch." And I would reel back and just say, "I love you Chris, I love you" and then he would punch me again and he would rave on. I said, "Chris, the kids, the kids ... you are not going to lose the kids; I'm not going to leave you." He started to calm down. I said to him, "Come on. You've got to get your shit together. I'll make you a cup of tea."

By reassuring Chris that she was not going to leave him, Rachel defused the situation to the extent that the physical attack stopped. However, Chris continued threatening to kill her. She knew she had to escape from the house, but because she had injured her leg, she knew she was not going to manage the house's spiral staircase. She was so desperate that she threw herself down the staircase. She was lucky. The door was open and she was able to crawl out. She hid under the hedge and waited to see if Chris would follow. When she thought the way was clear, she crawled down the hill, hiding under bushes and hedges along the way. She crawled to a neighbour's door:

I crawl up to him and knock on his door, and he said, "No I'm not ringing the cops but you can have a joint. I'll go up there and smash him but I'm not ringing the cops ..."  
And I say, "no", and all I could say is, "my baby, my baby".

Rachel finally dialled the police and told them to meet her at her house. She remembers feeling hysterical. Then Rachel staggered up the pathway to her friends' place. Initially, they did not recognise her but once they did, they immediately took her in. However, the two youngest children, both under 18 months, were still in the house with Chris. She phoned the police immediately to find out why they had not arrived there yet. Rachel recalled being told, "Stop ringing us; we are on our way."



### **Prosecution and Sentencing**

Chris was given police bail despite the police knowing that Rachel held a protection order against him. Had Chris been charged instead or in addition with breaching Rachel's protection order,<sup>611</sup> then he would not have been released on police bail immediately. Section 23 of the Bail Act 2000 mandates that a person arrested for breaching a protection order "must not be" released on police bail for the 24 hours following the breach. Moreover, it needs to be remembered that the arresting officer commented to Rachel that he thought Chris had been trying to kill her, considering the way he had attacked her around the head. It is interesting to note that despite observation, Chris was only charged with assault with intent to injure, an offence which carries with it a maximum of three years in prison.

It is important to see that Chris's conduct fulfilled the elements for conviction under section 189 of the Crimes Act 1961 as well, injuring with intent to injure. Chris certainly intended his actions and acted with "reckless disregard" for Rachel's safety – and the safety of her children. The maximum penalty for injuring with intent to injure is five years. By charging Chris instead under section 193 of the Crimes Act, the maximum penalty Chris faced was only three years in prison.

Deciding which of several applicable charges to lay, whether to lay all charges possible or just a representative charge, or whether to lay a breach of protection order charge and a substantive criminal charge – all of these decisions have been discussed in Chapter 12. For the purposes of this discussion, however, they are also points at which "the gap" can be created. They represent non-transparent exercises of discretion which all too often minimise domestic violence incidents and result in unsafe non-victim-centred prosecutions.

In the end, the differences between the maximum penalties for these different offences became academic. Chris was sentenced to 12 months' imprisonment for assault with intent to injure but he never went to jail. The judge suspended Chris's sentence for two years. As well, even though Chris breached Rachel's protection order through his assault on her, he was not charged with that offence.

### **Reoffending**

The fact that the suspended sentence of imprisonment did not enhance Rachel's safety is clear. As we shall see, neither did it not deter Chris from further violence against her. Within a year, he was back in court on charges of male assaults female and breach of Rachel's protection order. This followed an incident in which he turned up drunk at Rachel's place.

He arrived in a drunken state, uninvited, on to my property so he was breaching the protection order ... I said "You need to go. You are not invited." Rebecca was the only child awake and this time I noticed he had steel cap boots on. All I remember is freezing, thinking how did I get here again? I was frozen in fear and Rebecca was freaking.

During this incident, Rachel's friend rang on the phone.

He said, "Are you alright? God just told me to ring you, are you okay?" and I said, "Listen to this", and he could hear Chris raving on, and he said, "We will be there in 20 minutes. Hang on Rachel. I'll put my wife on the phone ..."

Rachel kept her eyes lowered and worked really hard at not responding to Chris's anger.

I was being coached by this friend's wife and then he grabbed the phone out of my hand but still no response from me. So he proceeded to go get Rebecca and he said "You fucking useless bitch. You are a fucked up screw ball." She was terrified in the corner and I made little signs to her, but I knew that if I went in there and yelled at him,

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<sup>611</sup> Section 19(1)(a) of the Domestic Violence Act 1995 makes it a standard condition of every protection order for the respondent not to physically abuse the applicant.

that would have been the thing he needed. He wasn't getting any response from her so he ended up yelling in her face and trying to freak her out. She was six – seven maybe. He was so drunk he needed to go to the bathroom and I made signs for her to run so she ran out the door.

Rachel and the children were able to make a run for it to a neighbour's house. Chris followed them but did not attempt to break in. His threats continued, telling Rachel, "If I wake up in a cell tonight, you are fucking dead." He left to head into town, where the police later found him and arrested him. Rachel made a decision that night to break up with Chris:

When I saw what he did to Rebecca that was it for me. I didn't want to be in that situation again.

It took an entire year for the male assaults female and breach charges to finally be dealt with. Three scheduled hearings were deferred before Chris was sentenced to a total of 12 months' imprisonment by a District Court judge. The 12 months represented a nine-month sentence for the first life-threatening assault. It was to be cumulative upon the three-month concurrent sentences given to Chris for his convictions for male assaults female and breach of a protection order.

### **Leave to Apply for Home Detention**

The District Court judge declined Chris leave to apply for home detention, but Chris appealed against that aspect of his sentence. Rachel filed affidavits in the appeal stating why she did not think Chris should be allowed to apply for home detention. These affidavits contained details about Chris's repeated violence to her, Rebecca, and others. However, the High Court allowed Chris's appeal. He was not only granted leave to apply for home detention but the continuation of his imprisonment sentence was deferred until the Parole Board decision. Subsequently, the Parole Board granted Chris's application and he served the balance of his sentence on home detention. The Parole Board granted Chris's application for home detention despite the fact that Rachel attended the hearing to underscore Chris's history of repeated physical assaults on her and threats to kill.

Rachel discussed her experience of the trial process. She felt marginalised and silenced.

I got no lawyer to represent me in court. I was completely voiceless. I had pieces of paper that I wrote in trauma about what effect it had on me, but I wasn't able to stand in front of a judge and voice my concerns or have a lawyer.

On the other hand, Chris had hired what Rachel termed "a big, fat-cat lawyer". She believes that is why he was on bail until the court hearing and why three scheduled hearings of the charges were deferred. By the fourth hearing, however:

The judge claps his eyes on me, and he looked at me, and I think what he saw was a very small woman [Rachel is 5'4"] and an athletic guy [Chris is 6'3"] and suddenly Chris was remanded in custody.

Generally, Rachel is very disappointed with the justice system. She is angry about the failure of the police to charge Chris in respect of most of the breaches she reported. She felt quite powerless in the criminal court where she felt she was "just another case" and "voiceless". She resents the unsuccessful efforts she went to in opposing Chris's getting home detention. She also resents Chris being granted supervised contact to the children.

An in-depth look at the High Court appeal decision concerning Chris's home detention is quite instructive. We see again how some judges' concerns for rehabilitation can override concerns about the victim's safety. The judgment begins with an analysis of the relevant sentencing provisions, specifically subsections (1), (3), and (4) of section 97 of the Sentencing Act 2002, as it was at the time that Chris was sentenced. Subsection (1) required the judge to consider granting leave to apply for home detention whenever a court sentences an offender to two years or less.

Subsection (3), as it was at the time of Chris’s appeal, set out a presumption in favour of home detention.<sup>612</sup> It mandated the court to grant the offender leave to apply to the Parole Board for home detention **unless** the court was satisfied that it would be **inappropriate** to grant leave taking into account:

- (a) the nature and seriousness of the offence;
- (b) the circumstances and background of the offender;
- (c) any relevant matters in the victim impact statement in the case; and
- (d) any other factor that the court considers relevant.<sup>613</sup>

Subsection (4) states that the court must make an order guaranteeing leave or declining to grant leave.

It is an irony that section 97 comes within Part 2 of the Sentencing Act and that, therefore, section 31 applies. Section 31 states that:

- (1) A court must give reasons in open court—
  - (a) for the imposition of a sentence or for any other means of dealing with the offender; and
  - (b) for the making of an order under Part 2.

This statutorily mandated provision of the Sentencing Act that offenders be given reasons for determinations involving leave to apply for home detention contrasts markedly with judicial practice in the Family Court for temporary protection orders. As we explained in Chapter 9, there is currently no judicial obligation to provide a battered woman with the reasons for declining her temporary protection order application or placing it on notice. In this respect at least, battered women have fewer rights than the men convicted of abusing them.

While the new section 97 no longer creates a statutory presumption in favour of granting leave to apply for home detention, it is still interesting to look at the judicial decisions in Rachel’s case because the District Court judge had refused Chris leave to apply for home detention. Despite the fact that the then operative section 97(3) created a presumption in favour of home detention, the sentencing District Court judge had refused to grant Chris leave to apply for home detention. The District Court judge had stated:

In the circumstances, given the nature of the offending, I consider it inappropriate to grant leave to apply for home detention and such leave is accordingly refused.

In his sentencing comments, the District Court judge had specifically referred to the nature and seriousness of Chris’s second assault. He pointed out that Chris was verbally abusive towards Rachel and Rebecca, that there were other children in the house under five years old at the time and that:

... in the course of the verbal abuse, [Chris] grabbed [Rachel] tightly by the lower jaw or chin forcing her head upwards, apparently in an attempt to have her look him in the eye. This continued for some time.

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<sup>612</sup> Subsection (3) was substituted, as from 7 July 2004, by s.10 of the Sentencing Amendment Act 2004. Section 97(3) now reads: “The court **may** grant the offender leave to apply to the New Zealand Parole Board under section 33 of the Parole Act 2002 for home detention **only if the court is satisfied that it would be appropriate to grant leave**, taking into account: (a) the nature and seriousness of the offence; and (b) the circumstances and background of the offender; and (c) any relevant matters in the victim impact statement in the case” (emphasis added).

<sup>613</sup> Section 97(3)(d) has also been deleted by the 2004 amendment.

The judge accepted that in terms of actual physical violence, Chris's assault was at the lower end of the scale. He said, however, that because of the aggravating features of Chris's behaviour – his "standing over [Rachel] in the way that he did", attacking her in her own house, doing so in the presence of the children, and attempting to exert his will on her – the offending had to be regarded more seriously than most.

The District Court judge also referred in his sentencing comments to the fact that Chris was highly intoxicated at that time of the second assault, that he had previous convictions which included a breach of Rachel's protection order and assault with intent to injure, and that Chris's latest offending was almost exactly a year later than the offending for which the suspended sentence of imprisonment had been imposed.

The District Court judge considered Chris's pleas of guilty and commented that Chris "still had a long way to go before he could be said to have grappled successfully with his alcohol and anger management problems."

On appeal, the High Court judge criticised the District Court judge for not referring to the changes in Chris's circumstances since his last offending, almost a year before. Chris had gone for counselling, attended Alcoholics Anonymous meetings and taken a stopping violence course. His counsellor, though not a domestic violence specialist, had sent a letter to the District Court seven months earlier, stating that Chris "was honestly facing himself and his behaviours and had the intent to do what was necessary to bring about change." There was no updating letter filed in court, however. The counsellor also referred to an academic course that Chris had taken and told the court that it was "[Chris's] intention to carry on from there and seek work."

Chris had got a job since the counsellor's letter to the court. He had been employed for about six months and had proved to be "a hard working and responsible employee." The manager at Chris's workplace went onto say:

[Chris] had been honest with me about his past actions and has proved in his time with us that he was working towards a productive and completely different future.

The manager said that he would be extremely sad to lose Chris as an integral part of his team.

Chris's brother also wrote a letter to the court stating that "[Chris] is trying to piece together a new life ... he has not been abusing alcohol since living in [town]." And Chris's father wrote a letter confirming those statements. He asserted, "[Chris] has finally got hold of his life and his future looks bright." Chris himself wrote a letter to court in which apologised to Rachel and the children for his previous actions.

In granting Chris leave to apply for home detention, the High Court criticised the District Court for not dealing "more specifically with [Chris's] **impressive change in circumstances** since his offending" and indicated that the judge should have taken factors other than the nature of the offending into account. Furthermore, while the District Court judge had also considered the letters from Chris's family and his boss, the High Court judge stated that the District Court judge "had not given reasons at **a level of particularity appropriate to the case**" (emphasis added).

It is interesting that we are not asked to "infer", as we were in *D v D*, that an experienced District Court judge would make the correct decision on a home detention case. Another interesting point in his judgment is that the High Court judge does not discuss his thinking under any of the other section 97(3) factors except for section 97(3)(b), "the circumstances and background of the offender." For example, he does not comment, as the District Court judge had, on the nature and seriousness of the offences for which Chris had been convicted, nor on any relevant matters in the victim impact statement. Rachel's view are not even alluded to, certainly none of her concerns about her safety or that of the children. The High Court judgment focuses totally on Chris's prospects for rehabilitation.

Unlike the District Court judge, the High Court judge did not give reasons for, or make reference to, the mandatory section 9 factors dealing with the aggravating factors of Chris's assault. For example, the High Court judge did not tell us how he viewed the fact that the second assault and the breach of Rachel's protection order were committed while Chris was under a suspended sentence; the fact that the second assault involved an unlawful presence in Rachel's home; the fact that the "stand-over tactics" the District Court judge had referred to demonstrated a form of "particular cruelty in the commission of the offence"; the fact that the offender was abusing his position of trust in relation to the children who witnessed his violence, especially Rebecca who was also a direct target of his verbal violence; and the fact that Rachel was suffering from post-traumatic stress and, as such, was a "particularly vulnerable" victim. Nor did he refer to the numbers of, the seriousness of, the dates of, the relevance of, or the nature of Chris's previous convictions. Finally, there was no mention on the part of the High Court judge about the need to enhance Rachel's and the children's safety.

In the end, the High Court judge overruled the trial court judge. He had no trouble in finding that Chris's rehabilitation was the primary sentencing issue. He found:

... for humanitarian reasons and the fostering of rehabilitation reasons and in order that justice be done, I defer the continuation of the sentence of imprisonment for a period of two months or the period ending with the date on which the Parole Board determines an application for home detention, whichever is sooner.

The idea that "justice has been done" is quite problematic. Chris would not have been held accountable for a life-threatening assault targeting Rachel's head had he not again assaulted Rachel and breached her protection order. For the second assault and breach of protection order, he received a three-month sentence of imprisonment and then was sentenced consecutively to nine months in prison for the first assault. As a result of the High Court decision, except for the time that it took the High Court appeal to be heard, Chris has had no penalty but home detention for any of his convictions. Moreover, since his offending, he has furthered his qualifications and now has a good job. Rachel on the other hand, is a solo mother living on a benefit with their four children, with a head injury and suffering from post-traumatic stress.

At the end of her interview, Rachel gave us her overall assessment of the legal system:

The justice system did nothing and therefore I didn't feel validated and I felt unprotected while he was free ... For me the protection order let me down at a time in my life when me and my kids needed it most – when justice needed to be done ... I had to fight tooth and nail [for Chris] to do a tiny bit of jail. The effort it took to purse that while in post-traumatic stress and bring up four kids! It was a mammoth effort every time. The best interest of my family was not served.

We asked Rachel if she had any recommendations to improve the situation.

That men that are violent towards their partners and in front of their children are made accountable in every way and are shown what trauma does to kids and women and how bad it is. It is totally unacceptable to bash the living shit out of women and to murder them. And to bash your kids is totally unacceptable behaviour. [The message should be] "Our society will put you away and then we will re-educate you." Firstly, they need to be locked up and we need to be safe. So that is where I strongly come from.

Rachel makes an ironic comparison.

A man dragged his dog down the road and it was big news and he got two years! But compared to what happens to kids and women ... A piece of toilet paper would have been more protection. It was a mockery. I was worth less than money and my kids were less than dogs.

### ***Psychological Violence via the Internet***

Jess's experience differs from the other case study women in that initially the charge against her ex-partner was dismissed. The police, however, appealed the District Court judge's decision and on appeal, it was reversed. As a result of the dismissal of the charge against Bruce for failure to disclose an offence, the police had decided not to charge Bruce with breaching Jess's protection order in respect of accessing and controlling her email account for more than a year. Perhaps now, in the face of the High Court decision, Bruce may yet be charged for his many breaches. Up until the time of this writing, he has not been held accountable in any way for his violence against Jess.

Obtaining a protection order against Bruce did not alter the power and control tactics that he used against Jess. Despite being told not to call or email Jess or he would be charged, he repeatedly did both. There were numerous hang-up calls. He was able to activate an old email account of Jess's and began using that. He found internet groups to which Jess belonged and logged on under an alias. He even sent emails to Jess's friends pretending to be her.

Initially, Jess did not go to the police when Bruce began to send emails to her. She told us, however, that she found the emails:

... disturbing, semi-threatening at times, and in some ways minimising of his abuse of me. I found them to be quite destabilising to read. I never went to the police about these communications as invariably he would make sure to put something of a defamatory or insulting nature about me and I wondered if they would believe his interpretation of things rather than my own. I felt quite humiliated by some of the things he said. So I usually just ignored his emails.

But as time went on, Jess did go to the police several times.

I never really got a response. They never did anything. It was like, "This isn't really serious" ... If it wasn't life-threatening, they didn't want to deal with it ... I have been told by other police that the courts have told them that they are only to prosecute breaches of the order that involve threats or serious offences as the courts are getting too clogged up with minor stuff.

It would seem that Bruce's actions fell into the "minor" or "technical" breach category because they did not involve physical abuse.

When Bruce got a job with her internet service provider, Jess became concerned about her privacy. After months, she finally contacted the company to see if Bruce might have access to her address through his job. She also asked if it was possible that he would be able to read her emails. As a result, a supervisor checked the computer logs and found that Bruce had been monitoring Jess's emails for about a year. That helped explain something else that Jess had wondered about. Some of her friends had been asking her why she never responded to emails they had sent her, but she knew she had never received them in the first place.

Jess again went to the police, "and fortunately for once, I got a constable who actually listened to me." Records of Bruce's accessing of Jess's email account were obtained. During the period of the investigation, Bruce rang to tell Jess he was going overseas for a month. Jess reported that call as a breach to the police too.

In the end, Bruce was arrested and charged with three offences. The first two related to the 36 occasions on which he had accessed Jess's email account. The other charge was laid under section 249(1) of the Crimes Act 1961, namely accessing a computer system for a dishonest purpose. After a night in the cells, Bruce was given police bail, with a direction not to contact Jess.

The most significant charge that Bruce faced was laid under section 249 of the Crimes Act 1961.

### Accessing computer system for dishonest purpose

- (1) Every one is liable to imprisonment for a term not exceeding 7 years who, directly or indirectly, accesses any computer system and thereby, dishonestly or by deception, and without claim of right,—
  - (a) obtains any property, privilege, service, pecuniary advantage, benefit, or valuable consideration; or
  - (b) causes loss to any other person.

Section 217 of the Crimes Act 1961 defines the applicable concept of “dishonesty”. It states:

In this Part,<sup>614</sup> unless the context otherwise requires—

**dishonestly**, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority

Here, the legal issue at the hearing had nothing to do with Jess’s safety. It did not focus on Bruce’s year-long accessing of Jess’s email account, controlling one of Jess’s principal means of communicating with friends, family, and workmates. The legal issue can be summarised succinctly: did Bruce obtain a “benefit” from his repeated accessing of Jess’s email account? Actually, the legal issue is even narrower. Bruce’s lawyer admitted that if the term “benefit” were not restricted in meaning to “a material benefit”, then Bruce was indeed guilty because he had committed all of the other elements of the offence. Bruce had dishonestly accessed and controlled Jess’s email account. He had had no belief, express or implied, that he was authorised to read her emails, or forward the ones onto her that he wanted her to see, or delete the ones he did not approve of, or less write emails which purported to come from her to anyone he chose.

After hearing submissions on what constituted a “benefit”, the District Court judge found that:

... the word “benefit” as used the section means one that could result in an advancement of a person’s material situation.

The judge invoked an old rule of statutory interpretation, *noscitur a sociis*,<sup>615</sup> to justify his reading down of the word “material” into the concept “benefit”.

Because the District Court judge interpreted the word “benefit” to refer only to “a material benefit”, the information against Bruce was found not to disclose an offence. He had neither materially benefited from his actions, nor caused Jess a “material loss”. Bruce’s lawyer had conceded that Bruce had clearly “benefited” from his being able to know what was going on in Jess’s life; indeed, by deleting emails to her and sending out emails composed by him but purporting to be from her, Bruce actually made decisions about Jess’s life without her knowing what he was doing.

It is ironic that because of the District Court judge’s interpretation, Bruce could have been convicted under section 249(1) if he had obtained more than an infinitesimal amount of money from information gleaned from Jess’s emails. Had he done so, he would have been construed as “materially benefiting” from information dishonestly obtained from Jess. Alternatively, if he had caused her to lose more than an infinitesimal amount of money through his accessing of her email account, he would have been convicted. “Loss”, however, in the District Court judge’s interpretation did not include loss of privacy. Only losses which had a monetary consequences were relevant to the District Court judge’s interpretation. The psychological benefit to Bruce of being able to control and monitor Jess’s life after separation was not, in the District Court judgment, a relevant benefit and so could not justify Bruce’s conviction.

<sup>614</sup> Which includes s. 249.

<sup>615</sup> Which translates as “a word is known by the company it keeps”.

The plain meaning of the word “benefit” encompasses the satisfaction that Bruce clearly derived from his actions. That is why he accessed Jess’s emails so frequently. Understanding this, one has to question why this District Court judge has so narrowed the plain meaning of section 249 to allow an abuser to be acquitted although his actions have a devastating psychological effect on his victim.

The District Court judge’s approach is even more troubling since the language of section 249 already includes “pecuniary advantage”, “privilege”, and “valuable consideration”? How does the judge distinguish “material benefit” from these other forms of gain? Why does “benefit” not have its dictionary meaning of “deriving an advantage”, which clearly Bruce did? Who benefits, victims or perpetrators, when statutory provisions are interpreted according to old Latin phrases<sup>616</sup> rather than giving the ambiguous words in a provision a purposive meaning, as mandated by the Interpretation Act 1999?

The decision in Bruce’s case is at odds with certain other somewhat analogous decisions. For example, *R v Millward*<sup>617</sup> involves the case of a man charged with circulating pornographic images of children to his internet chat group. He received no monetary compensation for these images but the District Court held that the definition of “gain” did not need to be limited to monetary or other material benefits. The court instead found that the defendant had “gained” by way of advantage, pleasure and satisfaction from the distribution and receipt of these images.<sup>618</sup> The court found:

The remaining issue to consider is the interpretation that ought to be placed on the word “gain”. There appears to be only one decision in New Zealand on this issue, and that is *Department of Internal Affairs v Benning*<sup>619</sup> and I adopt the view expressed therein by Judge McDonald that the word “gain” should be not limited in these cases to monetary or other material gain.

He was prepared to accept the dictionary definition of the word “gain” which is “to obtain something desired or advantageous.

... It must be remembered that the mischief aimed at in the statute is the prurient interests of people who traffic in various forms of objectionable material; in this particular case, child pornography of a particularly objectionable kind. The traffic in these publications presumably gives pleasure and some sort of satisfaction of those prurient interests to both those who distribute it and those who receive it.

In my view, however one may regard the morality of the matter, that amounts to a “gain” by those persons having regard to the purpose of the statute creating the offence. If that were not sufficient, it seems to me that one has to have regard to the fact that the word “supply” is defined in the Act as meaning among other things “to sell”. If distribution for “gain” meant simply to sell for monetary profit, then it would be superfluous to the purpose of s 123 because the offence of supplying the publication would obviously include distribution of it for gain. I am satisfied therefore that the word “gain” must be given the wider interpretation that I have described.

In another case, an information technology professional deleted files from the website of his previous employer. The court found that “revenge” constituted the benefit derived by the

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<sup>616</sup> *Noscitur a sociis*.

<sup>617</sup> *R v Millward* [2000] DCR 633.

<sup>618</sup> *Ibid*. The accused had been charged under ss. 124(1) and 123(1)(e) of the Films, Videos, and Publications Classification Act 1993. The elements of those offences are: (a) that the accused distributed; (b) for gain; (c) objectionable publications; (d) having reasonable cause to believe that the publications were objectionable.

<sup>619</sup> *Department of Internal Affairs v Benning* (District Court, Dunedin, CRN7012018045, 3 March 1998, Judge McDonald).



accused. The accused had obtained no material gain.<sup>620</sup> Neither of these cases, nor the issues raised in them, was cited in Bruce's case.

The dismissal of the section 249 charge did not coincide with Jess's views of the seriousness of what Bruce has done to her.

I feel violated that Bruce has been reading my emails. I feel scared that Bruce has had access to all the private email addresses of people I know through doing this. I hate the fact that he has all this personal information about me and could possibly find some way to use it against me as a way to cause further harm to me or to use what he has found to continue to monitor my life.

Shortly before we completed our report, we learnt that the police had appealed and won a High Court reversal of the District Court judge's decision. For reasons of confidentiality, we will not discuss this appeal judgment in detail or give a citation for it. However, in his decision, the High Court judge found that the word "material" did not need to be read down as an adjective to modify the word "benefit" in section 249 of the Crimes Act 1961. The High Court decision found that the information laid did disclose a charge that had to be answered and remitted the matter back to the District Court for trial. Jess, therefore, faces at least one more court appearance before this matter is finally resolved. However, we heartily endorse the police decision to appeal the District Court judge's decision. The High Court judgment definitely broadens the sorts of benefits that will be relevant when deciding whether a charge should be laid under section 249(1). As well, given that a conviction under section 249(1) of the Crimes Act 1961 carries a seven-year maximum sentence, it allows for a substantial sentence (commensurate with the harm suffered by the victim) to be meted out to the accused. As well, from all of our case studies, we can be certain that Bruce will not get the maximum sentence possible under this offence.

### **Evaluating Success**

At the opening of this chapter, we posited several questions which we think can be used to evaluate success in the criminal courts from the point of view of battered women. In our view, these questions are a reasonable test: they closely mirror the objectives of sentencing as set up in the Sentencing Act 2002. Addressing these questions in respect of the women who participated in criminal prosecutions against their abusers makes for sobering reading.

### **Safety<sup>621</sup>**

We asked, *How has the safety and protection of women been enhanced by their participation in criminal cases?* It is difficult to see how the prosecutions discussed above enhanced women's safety. In most cases, the abuser continued to assault, stalk and/or harass his ex-partner after being prosecuted. In many cases, such behaviour occurred during the often lengthy period it took for the courts to finalise the case. This was true for Katrina, Elizabeth, Hilda, Louise and Lyla, although at least in Lyla's case, the abuser was imprisoned for perverting the course of justice. Moreover, even women's safety in court was compromised. Hilda was subjected to John's power and control tactics in the court room, and, as a consequence, decided not to report some more recent breaches of her protection order. Stephen's prolonged and systematic intimidation of Elizabeth extended into the court room and its precincts. As Lyla put it, Steve was able to "mak[e] eyes" at her in court.

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<sup>620</sup> Mills, K. (2004). Man disputes damages caused in hacking case. *Computeworld*. Retrieved 17 May 2006 from <http://www.computerworld.co.nz/new.nsf>.

<sup>621</sup> Compare with Sentencing Act 2002, s. 7(1)(c) ("to provide for the interests of the victim of the offence").

### Denouncement<sup>622</sup>

We asked, *Have the messages conveyed by the judgments and sentences clearly and unambiguously signalled that the criminal courts will neither condone nor minimise domestic violence?* Lyla's ex-partner was sentenced to four and a half years' imprisonment. Of the partners featured in our case studies, he was the only one to receive a sentence which clearly denounced violence as unacceptable – but even then, one must ask if the sentence was commensurate with the harm he had caused. Fines of \$500 or less (the partners of Claire, Hilda, Louise), suspended sentences (Rachel's partner) and orders to come up if called upon (Jess's partner) do not clearly and unambiguously denounce violence. Neither does community service for a terrifying, knife-wielding attack on a woman and her child (Patricia).

### Accountability, Responsibility and Deterrence<sup>623</sup>

We asked, *Have abusers been held accountable for the harm they have done and have their sentences deterred them from committing further harm? Is there a consequence for every act of violence and do subsequent acts of violence engender increased consequences? Is the abuser's sentence congruent with the degree of harm suffered by the victim?* Given that most of the men who were prosecuted continued their psychological and physical violence, there is very little evidence of them being deterred, let alone held accountable or accepting responsibility. Hilda's ex-partner, John, was not deterred. His appeals against conviction and sentence suggest he has not accepted responsibility for his abuse, something which is also clear from the way he bad-mouths Hilda in the community. Claire's ex-partner, Robert, accepted no responsibility for his abusive behaviour as evident in his application for discharge of the protection order. Patti's ex-partner was ordered to undergo an anger management programme but did not complete it. That there were no consequences for failing to comply with this minimalist sentence indicates a serious failure to hold him accountable.

Finally, the women featured in our case studies not mentioned above also need to be remembered. Their partners often failed to attract as much as a police warning, regularly avoided arrest and escaped prosecution. That conviction and sentencing is near the end of a very long winnowing-out process underscores the importance of getting it right.

### Specialist Domestic Violence Courts

One attempt to address some of the problems described in the preceding sections has been the development of specialist domestic violence courts. Such courts provide a major opportunity for prosecutions that are genuinely supportive of victims and focused on their safety. Specialist courts have been developed in the US, Australia, Canada and the UK. For example, as discussed in Chapter 12, the San Diego specialist domestic violence court provides a “one-stop shop” where domestic violence victims can obtain protection orders, access victims advocacy, get medical assistance, talk to a prosecutor, apply for state benefits, and access other needed services. A specialist family violence court can also play a significant role in a coordinated justice system response to domestic violence.<sup>624</sup>

<sup>622</sup> Compare with Sentencing Act 2002, s. 7(1)(e) (“to denounce the conduct in which the offender was involved”).

<sup>623</sup> Compare with Sentencing Act 2002, s. 7(1)(a) (“to hold the offender accountable for the harm done to the victim and the community by the offending”), (b) (“to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm”) and (f) (“to deter the offender or other persons from committing the same or a similar offence”).

<sup>624</sup> Stewart, J. (2005). *Specialist domestic/family violence courts within an Australian context* (Issues paper no 10). Australian Domestic and Family Violence Clearinghouse. Retrieved from [http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper\\_10.pdf](http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper_10.pdf), at p. 12.

New Zealand is beginning to develop specialist family violence courts. One has been operating in Waitakere since 2001 and a second in Manukau since early 2005. These courts have been promoted by certain members of the judiciary as successful initiatives which should be replicated.<sup>625</sup> Indeed, they are being replicated. Another specialist court has recently been established in Auckland and three in the Wellington area. While such courts have much to offer, we have serious concerns about the way they are being implemented in New Zealand and believe that a re-examination of their models of operation is needed before further expansion.

We have already seen from Hilda's story how necessary such a coordinated response is for battered women. In her experience, there were multiple judges and lawyers handling different aspects of her case: defended proceedings in the Family Court in respect of her protection order, prosecutions in the District Court for breaches of that order and for the male assaults female charge, and proceedings in the Employment Tribunal following her dismissal as a result of the impact of the violence on her job performance. In fact, if Hilda had had children with John, she would probably also have been involved in parenting order proceedings in the Family Court.

More importantly, there was no coordination of the various aspects of her case. There was no linkage between Family Court proceedings and the ones in the District Court. John could say one thing in the Family Court and another in the criminal courts. In both, he could question Hilda's character and motivation. Moreover, these multiple proceedings were quite confusing to Hilda. Not only did she feel that John was not held sufficiently accountable for his breaches or his serious assault on her: Hilda considers that she "had to fight on two fronts" and had no advocate to support her in the criminal proceedings. She also complains about the delays in the court processes, and an inability to move on with her life because of the delay in proceedings. For instance, both prosecutions in which she had to testify took over a year from the time the charges were laid until sentencing. As well, John was able to plea bargain the initial grievous bodily harm charge against him down to male assaults female. Finally, Hilda pointed out that John had one lawyer throughout all the proceedings who coordinated every aspect of each proceeding. She feels that his ability to devise a unitary strategy, as well as her lack of knowledge about the various court processes, gave John a decided advantage over her.

These issues about multiplicity of proceedings and lack of victim advocacy are the very ones which could be addressed by specialist courts. As Sack has commented:<sup>626</sup>

**In an effective domestic violence court, the primary goal of promoting victim and child safety is actively considered at all levels, at all times. This emphasis on safety is manifested in a coordination of information and services so that the judge, attorneys, and victim advocate are all aware of a case history; there is better expertise on the part of all players, so that the dynamics of abuse are thoroughly understood and appropriately addressed, and there is the linkage of victims and their children to services while they are participating in the judicial process. **Victim and child safety must be the cornerstone of any domestic violence court; all values and principles that follow have the ultimate goal of keeping victims safe. All components of a domestic violence court should be designed with this goal in mind as well.** [Emphasis added]**

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<sup>625</sup> Johnson, R. (2005). *The evolution of family violence criminal courts in New Zealand*. Paper presented at the Police Executive Conference, Nelson, 8 November; Recordon, P. (2005). *The family violence (specialist) court*. Speech to Towards a Restorative Society symposium. Wellington, October. Retrieved 22 August 2005 from <http://www.vuw.ac.nz/ips/current-activities/downloads/Recordon%20paper.pdf>.

<sup>626</sup> Sack, E. (2002). *Creating a domestic violence court: Guidelines and best practices*. San Francisco, CA: Family Violence Prevention Fund, at p. 6.

In her recent literature review on Australian specialist family violence courts, Julie Stewart concurs with Sack and then sets out the “principles” which she says must represent the core values of a specialist family violence court.<sup>627</sup>

- victims’ interests need to be “at the heart of the process”.
- emphasis on the criminalisation of domestic violence.
- empowerment of victims.
- responsibility and accountability of offenders
- respect.

Stewart then concludes that “What is ‘new’ about the initiative is an intended vast improvement in the delivery of justice for victims.”<sup>628</sup>

We endorse the establishment of specialist family violence courts which adopt the perspectives of Sack and Stewart. We note, however, the caution which Sack stresses:<sup>629</sup>

A poorly conceived or administered domestic violence court can negatively impact a jurisdiction’s efforts to keep victims safe, hold batterers accountable and improve the justice system’s response to domestic violence.

In our analysis, the established specialist family violence courts in New Zealand seem to be doing precisely what Sack warns us about.

### Waitakere and Manukau Courts’ Use of a Typology of Batterers

With these preliminary thoughts in mind, we turn to a discussion about the current approaches of the Manukau and Waitakere Courts. Along with interviews with lawyers, police officers, and victims advocates who have worked in these two courts, our discussion draws heavily on judicial articles and speeches from judges. As an example, Judge Russell Johnson, the Chief District Court Judge, outlines the typology of batterers that Manukau is using for sentencing purposes. As stated by Judge Johnson, the categories are as follows.

- 1 Isolated, uncharacteristic incident, situational, not indicating a normal violent propensity.
- 2 Repeated violent incidents but not escalating.
- 3 Repeated escalating violence.
- 4 Dangerous psychotic, obsessive or sadistic violence, treating the victim as a possession.<sup>630</sup>

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<sup>627</sup> Stewart, J. (2005). *Specialist domestic/family violence courts within an Australian context* (Issues paper no 10). Australian Domestic and Family Violence Clearinghouse. Retrieved 8 May 2007 from [http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper\\_10.pdf](http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper_10.pdf), at p. 7.

<sup>628</sup> Ibid.

<sup>629</sup> Sack, E. (2002). *Creating a domestic violence court: Guidelines and best practices*. San Francisco, CA: Family Violence Prevention Fund, at p. 8.

<sup>630</sup> The wording here is drawn from Johnson, R. (2005). *The evolution of family violence criminal courts in New Zealand*. Paper presented at the Police Executive Conference, Nelson, 8 November. The same profiles, in slightly different words, also appear in Adams, J. (2005). *Family violence and the courts: Changing attitudes: The role of the court*. Speech to Rise Above It conference, Masterton, 2 May. Retrieved 16 August 2006 from <http://justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=rise-above-it-conference-masterton-2-may-2005.asp> and in Recordon, P. (2005). *The family violence (specialist) court*. Speech to Towards a Restorative Society symposium. Wellington, October. Retrieved 22 August 2005 from <http://www.vuw.ac.nz/ips/current-activities/downloads/Recordon%20paper.pdf>.

Judge Johnson's speech provides no reference for the source of this typology, but two key informants told us that they believed that it was based on the Johnston and Campbell work discussed in detail in Chapter 7. As we showed in that chapter, the typology is conceptually flawed. It has never been subjected to validation studies. Neither have there been any reliability studies to demonstrate that offenders can be consistently assigned to the "right" category. There is no empirical evidence that the categories are predictive of risk of any sort. Significantly, Johnston and Campbell have described the typology as "preliminary" and have made it clear that they never intended it to be applied to sentencing decisions.

However, continuing legal education materials<sup>631</sup> and three judicial speeches make it clear that the typology is indeed being used for sentencing. For example, according to Judge Johnson, the first two categories call for a "therapeutic approach" to sentencing, while the last two categories call for a punitive approach, although he allows that there is some overlap between categories 2 and 3.<sup>632</sup> Within this context, according to Judge Recordon, a therapeutic approach is seen to involve supervision, "restorative work", anger management counselling, addictions counselling, good behaviour bonds and relationship counselling.<sup>633</sup> Judge Adams comments that imprisonment is only "inevitable" for those in category 4 but allows that it will be appropriate for some in category 3.<sup>634</sup> Judge Recordon states that discharges without conviction coupled with "restorative or family work" is sometimes the sentence for categories 1 and 2<sup>635</sup>. The latter, it needs to be remembered, is the "repeated violence but not escalating" category. Judge Recordon further advises that community work and supervision may well be appropriate even in category 3 ("repeated escalating violence") offenders. He continues:

We need to balance the need to protect the public and victims with the realities that over 80% of victims will return to the relationship after a spell of Court enforced separation and the goal must be to rehabilitate/strengthen the abuser, the victim, and the family.

It is unclear what is meant by "Court enforced separation." It is also unclear on what basis he asserts that reconciliation occurs in 80% of relationships (he gives no citation for that statistic). More importantly, such a reconciliation statistic does not necessarily demonstrate that the victim freely chose to reconcile. She might reconcile for a myriad of reasons, as our case studies show.

It goes without saying that if the legal system does not provide the victim and children with enhanced safety, the likelihood of reconciliation between the victim and her abuser is increased. Chances of reconciliation are further increased by the granting of unsafe contact orders in the Family Court. Despite Jatinder's violence, for instance, Pinky still considers reconciliation with him. It would be one way to protect her children from having overnight, unsupervised contact

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<sup>631</sup> Ashmore, A. (2007). Theoretical underpinnings of the Domestic Violence Act. In A. Ashmore & E. Smith (Eds.), *The role of the lawyer in protection orders in the Family Court* (Seminar materials). Wellington: New Zealand Law Society, Continuing Legal Education.

<sup>632</sup> Johnson, R. (2005). *The evolution of family violence criminal courts in New Zealand*. Paper presented at the Police Executive Conference, Nelson, 8 November, at p. 10.

<sup>633</sup> Recordon, P. (2005). *The family violence (specialist) court*. Speech to Towards a Restorative Society symposium. Wellington, October. Retrieved 22 August 2005 from <http://www.vuw.ac.nz/ips/current-activities/downloads/Recordon%20paper.pdf>, at p. 5.

<sup>634</sup> Adams, J. (2005). *Family violence and the courts: Changing attitudes: The role of the court*. Speech to Rise Above It conference, Masterton, 2 May. Retrieved 16 August 2006 from <http://justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=rise-above-it-conference-masterton-2-may-2005.asp>.

<sup>635</sup> Recordon, P. (2005). *The family violence (specialist) court*. Speech to Towards a Restorative Society symposium. Wellington, October. Retrieved 22 August 2005 from <http://www.vuw.ac.nz/ips/current-activities/downloads/Recordon%20paper.pdf>, at p. 3.

visits with him. She knows from previous Family Court hearings that she will not be able to shield them in any other way from the fear and abuse which they face during these visits.

In terms of the aim of “strengthening the family”, moreover, we question the message from the court when the sentence for repeat but non-escalating violence is attending a stopping violence programme and relationship counselling. In our case studies, too often the outcome of relationship counselling was that the woman learned how to better placate her abuser. That certainly was the outcome of the Christian counselling in which Marjorie participated.

Finally, one of the most troubling aspects of category 1 cases is that the “out-of-character” nature of the offender may simply indicate that, in the past, the abuser may have primarily used psychological forms of domestic violence, like coercion and intimidation. Except for cases involving threatening to kill, it is unlikely that charges would have been laid in respect of psychological violence. For example, though Pita was never charged with wilful damage, his destruction of all of Alofa’s possessions was both terrifying and depressing for her. Rather than giving a clear and unambiguous message that all forms of domestic violence are unacceptable, category 1 seems to “understand” men’s use of physical violence when it appears to commence at separation.

One of our key informants who works at one of the specialist family violence courts stated that plea bargaining often reduces the seriousness of the charges the accused faced. For instance, an accused can move from category 3 to category 2 or even to category 1 as a result of plea bargaining about the charge or about the statement of facts of the offence. As well, this informant advised that the court rarely monitors fulfilment of the conditions it imposes.

In his speech, Judge Recordon gives us an insight into the workings of the Waitakere specialist family violence court. This leads us to worry both about the place of victims in this court and the minimisation of violence by the court itself. He lays out the following hypothetical discussion with an accused:

Question from the Judge: “Why plead not guilty? You did it right?”

And the accused responds, “Yeah, but she provoked me and she won’t give evidence against me.”

And the Judge then asks, “Do you want me to drag her in here? You aren’t married. She is compellable as a witness<sup>636</sup> Why deny what happened?<sup>637</sup>”

What do you want out of life? The victim adviser and the police say this is the first time in Court but probably the fifth reported incident.”

And the accused then responds, “I want my family life to continue.”

The Judge then says: “Ok—all of us here are wanting to support you. You’ve got to stop this pattern of abuse. We will help you and your family if you plead guilty. How about 20 weeks of anger management plus let’s have a look at drug and alcohol issues which I see from the police are issues. Now shoot upstairs to the Family Court office and sign up for relationship counselling. I see that your partner is here. The Court wants to strengthen your family to stop this happening again. Plead guilty and do the work and you may get nothing other [than] a conviction, certainly nothing more than a community based sentence.

And the accused answers, “What about a discharge?”

And the Judge answers, “Maybe, we will see!”

<sup>636</sup> Clause 71 of the proposed Evidence Bill would allow a judge to extend the privilege against testifying to de facto spouses, so when the Evidence Bill is passed, de facto partners, along with wives and civil union partners, will be non-compellable witnesses.

<sup>637</sup> The judge has a copy of the accused’s criminal record and a summary of the facts of the offence before him.

In this scenario, the judge himself states that this is not an out-of-character offence. He says that while this may be the first charge laid, the police and victim advisor think this is “about the fifth reported incident.” The judge also tells the accused that he needs to stop his “pattern of abuse”. Therefore, this hypothetical discussion is taking place with, at a minimum, a category 2 batterer.

What message does the judge give to the accused when he appears to negotiate a sentence with him? Or when the judge tells him that the court wants to strengthen his relationship with the victim? What message does the victim get from this statement and the statement that relationship counselling would be helpful for her and her batterer?

### The Precarious Position of Victim Advocates

There is an obvious gap in the above hypothetical example provided by Judge Reardon: the voice of the victim. At best, she is a passive bystander to a dialogue between judge and defendant.

As the work of Sack and Stewart makes clear, the provision of advocacy to give voice to victims is one of the core elements of an effective domestic violence court. Within the New Zealand context, its effectiveness has been shown by the experience of the Hamilton Abuse Intervention Pilot Project. A key part of that pilot was the role of the court advocate. As well as playing the sort of monitoring role described in Chapter 12, the court advocate provided a crucial link between victims and the court. Each morning, she attended initial hearings briefed with reports from call-out advocates who had visited victims the previous night as follow-up to police attendance at domestic violence incidents. Such reports allowed her to inform the court about the victim’s views when appropriate. For example, if the victim had told the advocate that she did not want the offender back in her home, the advocate could state this in court if the offender claimed that the couple were reconciling. The court advocate, moreover, reported back to the victim on the outcome of each hearing the victim did not attend, advising her of pleas, remand dates, bail conditions and the like. At sentencing, she was able to present to the court information about the impact of the offending.<sup>638</sup>

The court advocate also played a crucial role with victims whose testimony was needed in defended prosecutions. The advocate worked closely with such women, showing them the layout of the court, explaining to them the processes of a defended hearing, preparing them for the sorts of questions they might face and generally providing support for what is a potentially gruelling experience. Tellingly, during the pilot, not one woman whose evidence was required declined to testify, and prosecutions were significantly more likely to result in convictions than in other courts without advocates.<sup>639</sup>

The Waitakere and Manukau specialist family violence courts have had a chequered history in relation to victim advocacy. In the early days of the Waitakere initiative<sup>640</sup> the role of victim advocate quite quickly developed as an essential part of the “fast tracking” of domestic violence

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<sup>638</sup> Robertson, N. R., & Busch, R. (1993). *Hamilton Abuse Pilot Project: Two year review*. Report to the Family Violence Prevention Co-ordinating Committee; Robertson, N. R., Busch, R., Glover, M. P., & Furness, J. A. (1992). *Hamilton Abuse Pilot Project: The first year*. Report to the Family Violence Prevention Co-ordinating Committee; Robertson, N. R., & Busch, R. (1992). *The Hamilton Abuse Intervention Pilot Project: Six month evaluation report*. Report for the Family Violence Prevention Co-ordinating Committee.

<sup>639</sup> Specifically, 90% of prosecutions for male assaults female resulted in a conviction compared with a national average of 64%. Robertson, N. R. (1999). *Reforming institutional responses to violence against women*. PhD thesis, University of Waikato. Retrieved 11 June 2006 from <http://www.nzfvc.org.nz/PublicationDetails.aspx?publication=12704>, at p. 258.

<sup>640</sup> Although formally designated as specialist family violence court only relatively recently, the Waitakere initiative dates back to 1992, when Judge Coral Shaw instituted the “fast tracking” of domestic violence in the Henderson District Court, as it was then named. Morgan, M., Combes, L., & McGray, S. (2007). *An evaluation of the Waitakere Family Violence Court protocols*. Auckland: Massey University and WAVES Trust.

cases. As in the Hamilton pilot, the community-based victim advocate was granted speaking rights in court.<sup>641</sup> This is also the current situation in Waitakere, but the scope and nature of the role has been much contested over the years. For example, in 2001, the court manager decided that victim advisors, a newly created role within the Ministry of Justice, would take over responsibility for all victim services.<sup>642</sup> Although community-based advocates returned to the court under a protocol negotiated later in 2001, the precarious nature of their position was exposed in 2005 when a visiting judge revoked their speaking rights.<sup>643</sup> As a result of that decision, the Waitakere protocols were renegotiated, with the specific aim of restoring community-based victim advocacy.

According to a community-based domestic violence worker, there is no independent victim advocacy in the Manukau court. Victim advisors are present on family violence days. They may advise the court of the victim's views but cannot advocate for her. Preventing Violence in the Home, an Auckland-based domestic violence service, offered to provide victim advocacy in the Auckland court and to do so free of charge. It has been given permission for a representative to be in court but she has no speaking rights. We were told that this is an interim measure while policy for victim advocates is being developed by the Ministry of Women's Affairs. We think it crucial that victim advocates are empowered to speak on behalf of the victim and to provide risk assessment information to the court for consideration in bail decisions and in sentencing. This is consistent with the principles underlying best practice in specialist domestic violence courts, namely, ensuring that victims' interests are "at the heart of the process."<sup>644</sup>

That crucial role of victim advocacy is underlined in the recently completed evaluation of the Waitakere protocols. Many of the interviewees in that study were of the view that victim advocacy was the single most important component of the court. The authors describe the advocate as "a crucial source of information for the Court",<sup>645</sup> informing it of matters such as the history of the relationship, the context of the offence, the impact of the assault and the status of the relationship. She can convey to the court the victim's view's on the future of the relationship. She can provide victims with a safe environment in which they can express their feelings about what has happened. She can help victims deepen their understanding of the dynamics of domestic violence so that they are better equipped to protect themselves and their children in the future.<sup>646</sup> In addition, victim advocates can help women make safety plans, advise them about women's refuges, give them information about protected persons programmes, and help them apply for legal aid and benefits. Advocates can also inform women about the law. For example, if a woman thinks she will simply move to Australia with her children, the advocate can inform her about the Hague Convention.

As the authors of the Waitakere evaluation concluded:<sup>647</sup>

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<sup>641</sup> Ibid, at p. 10.

<sup>642</sup> Ibid, at p. 14.

<sup>643</sup> Ibid, at p. 14.

<sup>644</sup> Stewart, J. *Specialist domestic/family violence courts within an Australian context* (Issues paper No 10). Australian Domestic and Family Violence Clearinghouse. retrieved 8 May 2007 from [http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper\\_10.pdf](http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper_10.pdf), at p. 7.

<sup>645</sup> Ibid, at p. 53.

<sup>646</sup> Ibid.

<sup>647</sup> Morgan, M., Combes, L., & McGray, S. (2007). *An evaluation of the Waitakere Family Violence Court protocols*. Auckland: Massey University and WAVES Trust, at p. 54.



**Specialised** victim services and victim **advocacy** serve a protective function in the sense that victims are **represented** in Court without having to appear in person. [Emphasis added]

For the sake of clarity, it is important to emphasise that the role of a victim advocate is distinct from that of a victim advisor. In the context of domestic violence, an advocate is a specialist, with training in domestic violence, whereas a victim advisor is a generalist, expected to provide advice to victims of a crime, be it burglary, fraud or assault. As the term suggests, a victim advocate advocates for the victim – hence the importance of speaking rights in the court room – while an advisor’s role is limited to: “provid[ing] information to victims about the case that relates to them; advis[ing] victims about their rights in the court process; [and] help[ing] victims participate in the court system.”<sup>648</sup> It is not the role of the victim advisor to represent the victim. In fact, one victim advisor we spoke to recalled being given very explicit instructions on this point and being reprimanded for being too active in her support of domestic violence victims. As noted in the evaluation of the Waitakere protocols, one of the contentious issues in that court has been whether victim services should be guided by a principle of neutrality or a principle of advocacy.<sup>649</sup> It is quite clear what Hilda needed. She needed an advocate to speak for her and advocate for her interests, in much the way that John’s legal advocate did. Hilda did find the victim advisor helpful, but constrained by a need to be “neutral” – unlike John’s advocate – the advisor was never going to be able to provide what Hilda needed to ensure that her interests were “at the heart of the process.”<sup>650</sup> It is for these reasons that we have stipulated that the specialist domestic violence victim advocacy recommended in Chapter 8 (recommendation 12) must be community based. As we have suggested, there is a role for the Ministry of Justice to approve such services, but to be effective, the advocates must be independent of the courts. To ensure that the voices of battered women are heard requires advocacy, not neutrality.

### Restorative Approaches in Domestic Violence Courts

One of the most problematic aspects of Judge Recordon’s speech concerning the Waitakere specialist family violence court is his unsubstantiated claims for restorative justice and therapeutic jurisprudence when dealing with domestic violence. For instance, he states:

Restorative justice, therapeutic jurisprudence, the Karina Williams approach to family violence are, for me, so obviously right, there can be no quarrel with any of them – but there is.<sup>651</sup>

Despite the judge’s view, there is indeed a “quarrel” to be had about the implementation of restorative justice and therapeutic jurisprudence in cases of domestic violence. One of us has written on this point<sup>652</sup> but other critiques are available.<sup>653</sup> Briefly, restorative justice has been

<sup>648</sup> Ministry of Justice. (2003). *Court services for victims*. Retrieved 10 May 2007 from <http://www.justice.govt.nz/pubs/courts-publications/050-services-for-victims.html>.

<sup>649</sup> Morgan, M., Combes, L., & McGray, S. (2007). *An evaluation of the Waitakere Family Violence Court protocols*. Auckland: Massey University and WAVES Trust, at p. 24.

<sup>650</sup> Stewart, J. (2005). *Specialist domestic/family violence courts within an Australian context* (Issues paper No 10). Australian Domestic and Family Violence Clearinghouse. Retrieved 8 May 2007 from [http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper\\_10.pdf](http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper_10.pdf), at p. 7.

<sup>651</sup> Recordon, P. (2005). *The family violence (specialist) court*. Speech to Towards a Restorative Society symposium. Wellington, October. Retrieved 22 August 2005 from <http://www.vuw.ac.nz/ips/current-activities/downloads/Recordon%20paper.pdf>, at p. 3.

<sup>652</sup> Busch, R. (2002). Domestic violence and restorative justice initiatives: Who pays if we get it wrong? In H. Strang & J. Braithwaite (Eds.), *Restorative justice and family violence*. Sydney: Cambridge University Press.

<sup>653</sup> Daly, K., & Stubbs, J. (2006). Feminist engagement with restorative justice. *Theoretical Criminology*, 10(1), 9-28; Cameron, A. (2006). Stopping the violence: Canadian feminist debates on restorative justice and intimate violence.

critiqued for being unsafe for victims who may be intimidated during restorative conferences. Such conferences tend to prioritise conciliation and reconciliation over offender accountability. These risks are not necessarily mitigated by the participation of members of the extended family, whānau and community, who themselves can be intimidated by the offender and/or collude with his violence. Moreover, in adopting an essentially mediation approach, modern Western manifestations of restorative justice have misunderstood its philosophical underpinnings in the indigenous cultures from which it has been (mis)appropriated. That is, traditional restorative approaches were attempts to restore the balance in the cosmos, a balance disturbed by the offending. As Moana Jackson has observed, in some iwi, if a man was found to have committed rape, nothing short of death or castration would be deemed sufficient to restore that balance.<sup>654</sup>

The critiques of restorative justice referred to above provide a useful lens through which to view Judge Recordon's discussion of a claimed exemplar of the approach. He described a case which he dealt with in early 2005.<sup>655</sup>

Earlier this year I discharged an All Black without conviction and suppressed his name and his family's details permanently on the basis that the family attended to issues they had to address to function securely and safely. The family wanted to go about the business of restoring and strengthening themselves away from the media spotlight. It worked. They are together and doing well.

The flak I copped from victims' groups was predictable. The almost complete lack of support from colleagues was not. Even months afterwards, I am targeted by certain persons at WAVES, our local coordinating community group. A letter arrived from them last Monday complaining about the number of s. 106 discharges at our court.

Here, rather than the offender being required to take responsibility for his violence, it is "the family" which has to "[attend] to issues they had to address to function securely and safely." This makes sense only if one believes that there are circumstances in which it is understandable that a man might hit his wife. It is "the family" which is to be "restor[ed]" and "strengthen[ed]", not the victim. In fact, where is the victim? She has ceased to be an individual in her own right and been absorbed into the generic category of "family". Moreover, should we read the fact that they are "together" as an indication of them "doing well" or as evidence that having taken the courageous step of reporting her partner's violence only to be told, in effect, that this an issue of family functioning, she has given up and "reconciled" in the way Pinky is contemplating doing and in the way countless generations of women have done in the past?

Rather than the forms of therapeutic jurisprudence described by Judge Recordon, we favour Sack's concept of "therapeutic jurisprudence" within a domestic violence court context:

therapeutic jurisprudence and preventive law to restore the mental and physical well being of domestic violence victims. For example, consistent enforcement of protection orders could restore women to the community without the fear and risk of violence that is present in the majority of domestic violence cases. Where desirable, consistent enforcement could include providing effective treatment for the offenders with the goal of reintegrating them in the community. This would not entail reconciling the family at all costs. Instead, the focus would be on having the community more involved and responsible for the fate of families in its midst. Restorative justice principles may warrant convicting and incarcerating the offender and providing social services to the

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*Theoretical Criminology*, 10(1), 49-66; Coker, D. (2006). Restorative justice, Navajo peacemaking and domestic violence. *Theoretical Criminology*, 10(1), 67-85; Herman, J. L. (2005). Justice from the victim's perspective. *Violence Against Women*, 11(5), 571-602; Zellerer, E. (1999). Restorative justice in indigenous communities: Critical issues in confronting violence against women. *International Review of Victimology*, 6(4), 345-358.

<sup>654</sup> Jackson, M. (1993). Key note address to the Australian and New Zealand Criminology conference, Wellington, June.

<sup>655</sup> *Ibid*, at p. 2.

victim that will facilitate the transition from economic dependence to economic and self-sufficiency

The recently published report of the Taskforce on Violence within Families calls for an evaluation of the Waitakere and Manukau family violence courts by the end of 2007.<sup>656</sup> But even prior to these evaluations, four more specialist family violence courts have been established. Before we initiate any more specialist family violence courts, the ones already in place must be properly evaluated. Such evaluations must examine victims' experience of these courts, addressing questions such as: have the courts improved support for victims? Are women and children safer in these courts than they are in the traditional criminal courts? How well have offenders been deterred from committing further acts of violence as a result of their participation in these specialist courts? Moreover, we agree with Sack that clear and consistent enforcement of protection orders and appropriate victim-centred sentencing – these are the most therapeutic outcomes for the victims of domestic violence (including the children who witness the battering of their mothers) and abusers alike.

### **Recommendation**

At the beginning of this chapter we reviewed the purposes of sentencing as set out in section 7(1) of the Sentencing Act 2002, and posited a set of questions which could be used to evaluate success in the context of domestic violence prosecutions. Our analysis shows that too often, the outcome of sentencing falls far short of achieving those purposes. It also shows that among the few women in our case studies who got as far as the criminal courts, the outcomes of the prosecutions of their partners or ex-partners could hardly be described as successful.<sup>657</sup> It seems that the long-recognised disparity between the way courts have treated violence by strangers and violence by men against their female partners and children has not noticeably diminished. It would be unfathomable if, for example, a man who was kidnapping an unrelated child by holding a knife to her neck, and who had subjected her mother to a brutal assault and threatened to kill her – as George did to Patricia and her daughter – was given 180 hours' community work. Similarly, if John had inflicted on an unrelated woman the horrific injuries Hilda suffered, it is inconceivable that 150 hours of community work would have been seen as commensurate with the harm caused.

On the other hand, overseas precedents suggest that many of the problems battered women face in the criminal jurisdiction can be ameliorated by specialist domestic violence courts. Equally, it is clear that unless such courts follow best practice, they may further endanger and marginalise victims, and, at least tacitly, collude with abusers. As we have shown, specialised, community-based victim advocacy is crucially important to the effectiveness of specialist courts, but there are serious concerns about the way specialist courts are being implemented in New Zealand. We recommend:

**THAT no more domestic violence courts be established until the present courts have been properly evaluated to identify both good and problematic practices. (#19)**

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<sup>656</sup> Taskforce for Action on Violence within Families. (2006). *Taskforce for action on violence within families: The first report* Wellington Ministry of Social Development, at p. 24.

<sup>657</sup> The prosecution which saw Lyla's partner sentenced to four and a half years' imprisonment might be considered a partial exception.

## 14: Immigration Issues in Domestic Violence

Our case studies show that immigration issues play a significant role in the lives of Pasifika and other ethnic minority women experiencing domestic violence. Uncertain immigration status can make women particularly vulnerable to abuse by men who exploit that uncertainty as a tactic of power and control over them. New arrivals in the country, particularly those with little English, can face significant linguistic and cultural barriers in getting effective protection.<sup>658</sup> Immigration issues involve a distinct set of authorities, procedures, statutes, rules and regulations. They introduce additional complexities and challenges to the goal of ending violence against all women. Yet we could find little research or policy analysis which focuses on the role of immigration status in domestic violence among immigrant communities in New Zealand. This chapter goes some way to filling that gap.

In this chapter we review the experiences of those women whose status as immigrants became a significant issue in the way they were treated, either by their abuser and/or by the authorities from whom they sought help. We provide an analysis of the Victims of Domestic Violence Policy and its implementation, identifying certain gaps which we believe need to be addressed if New Zealand is to meet its international obligations.<sup>659</sup> We conclude the chapter by examining the nexus between immigration policy and the Family Court.

### ***Immigration and Domestic Violence: Women's Experiences***

There were 17 women in our case studies for whom immigration issues formed an important part of their story. As the following typology shows, the contexts in which these issues were played out varied somewhat. That is, our case studies include:

- (a) Women who established a relationship in their home country and immigrated to New Zealand with their partner, who was the principal applicant for residence: Priya, Rowena Alice, Laura and Zaleha.
- (b) Women whose applications for residence depended on the sponsorship of a partner who was a New Zealand resident or citizen: Titiana, Amira, Amy, Eve, Pinky and Sripai. Amy met her partner while in New Zealand on a student visa. The other women entered New Zealand primarily to live with their New Zealand partner.
- (c) Women who came to New Zealand and got residence independently of the men with whom they formed relationships: Annie Wong, Lee Mei, Lin-Bao and Tina. (Annie Wong and Lin-Bao came to New Zealand with their partners, but, unlike the women mentioned in (a) above, they, not their partners, were the principal applicants.)
- (d) Women who were asylum seekers or refugees, whose partners were also asylum seekers or refugees: Nusrat.
- (e) Women who were long-term naturalised citizens of New Zealand and whose citizenship became the main “drawcard” for men entering into customary marriages from overseas: Sonal.<sup>660</sup>

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<sup>658</sup> These issues are discussed elsewhere in relation to the various institutions and services involved.

<sup>659</sup> See Chapter 1 for a brief discussion of New Zealand's obligations under the United Nations 1993 Declaration on the Elimination of Violence against Women. These apply to resident and non-resident women alike where the violence occurs in New Zealand.

<sup>660</sup> Our case studies include six other women who were born overseas or were first generation migrants (Hilda, Alofa, Mele, Rasela, Tessa and Tiare). They are not included in this discussion because their immigration status seems not to have been an issue, although, like the other women mentioned above, they did face cultural issues.

With the exception of Eve, who is from Russia, all of these women came from non-Organisation for Economic Co-operation and Development (OECD) countries. This is not unusual. Of the 47 applicants for residence under the domestic violence policy during the period from 2002/03 to 2005/06, 38 were from non-OECD countries.<sup>661</sup> Marriage, whether arranged by families or by the woman, entails economic as well as social consequences for the family as well as for the woman. For a woman from a “developing” country, the economic consequences of removal could mean going from personal violence to structural violence associated with economic underdevelopment in her home country.<sup>662</sup>

### Immigration Status and Tactics of Control

The case studies show the use of unresolved immigration status as a tool of psychological abuse including: (a) threats to strike off the name of the spouse/partner from the application for residence; (b) control over passport and travel documents; (c) threats of removal and consequently permanent separation from child; (d) fears of censure, shame, in some cases punishment and loss of dignity at home due to forced removal; and (e) hardships in resettling in the home country after the woman has uprooted herself to come to New Zealand to cohabit with her partner. Unfortunately, as our case studies also show, such use of an unresolved immigration status is not always recognised as psychological abuse; nor is it necessarily given serious consideration by agencies and service providers dealing with ethnic minority women who are subjected to domestic violence. More awareness needs to be generated about the ways in which uncertain immigration status issues can be used as weapons of psychological violence.

For example, Sripai felt vulnerable when Kevin took away her passport and other travel documents and those of her daughter. He threatened to, and eventually did, revoke his support for Sripai’s residence application. He made sure their daughter got a New Zealand passport, which introduced a new set of complications because Sripai and her daughter then had different citizenship status. Moreover, the Family Court did not see taking away travel documents as a form of psychological violence in terms of the Domestic Violence Act 1995. In declining her application for a final protection order, the Family Court judge said:

... for [Kevin] it was a matter of security while [Sripai] saw it as a matter of control. The evidence does not go far enough to indicate a desire or wish by [Kevin] other than to ensure he knew the whereabouts of the documentation.

At the time of the interview Sripai could not stay in New Zealand because she did not have residence but she could not leave New Zealand with her daughter because Kevin was successful in getting a non-removal order for Alana.

Amira has been removed, leaving her daughter, Zola, behind. This followed Barry withdrawing his support for Amira’s application for residence and obtaining an order preventing Zola’s removal from the country. Amira has little hope of seeing Zola again. As a person who has been removed, Amira will have great difficulty obtaining even a temporary permit to enter New Zealand, even if she could raise the money for her fare and to repay the cost of her removal, which would be required before any entry permit was issued.

Part of Barry’s psychological violence involved exploiting the consequences that might follow if Amira returned home. As the Victim Support worker recalled:

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<sup>661</sup> Immigration New Zealand. (2006). *Immigration New Zealand Statistics*. Retrieved 5 August 2006 from <http://www.immigration.govt.nz/statistics>.

<sup>662</sup> The Danish Research Centre on Gender Equality, Roskilde University (2005). *Trapped Between Law and Life: Report on Abused Minority Women in the Nordic Countries*, Copenhagen, Denmark, at p.57-58. Smaadahl Tove, Helene Hernes and Live Langberg (2002). *Dreaming of a Good Life: A Report on Foreign National Women, Married to Norwegian Men, Who Had to Seek Refuge in The Shelters in 2001* Krisesenter Sekretariatet, Oslo, Norway.

He then proceeded to tell me that the only place his wife was going was out of here in a plane and that when she got back to [country] she would be shot for adultery. He made it clear he would have her deported to [country]. He was laughing in a very menacing way. The parties' young daughter, Zola, was present throughout this incident.

Zaleha's husband, Hamid, similarly exploited social ostracism and community censure in their country of origin. That is, he threatened to send their daughter back to Iran. Zaleha was distressed and contacted the police. The police sent Hamid away after a warning. They do not appear to have appreciated the seriousness of the cultural issues involved in Hamid's threats and what it means for a girl raised in New Zealand to be sent to Iran where the constitutional status of women is explicitly discriminatory. Zaleha had to apply to the courts for an order preventing the removal of their children, which was granted.

In Titiana's case, her partner Alan took their baby's and her passports and handed them over to the police. The police did at least return Titiana's passport to her but gave their baby's passport to Alan. The police action implies that they did not think removing the passport was an act of psychological abuse. Like other men in these case studies, Alan threatened Titiana with deportation as a way of punishing her by separating her from her baby. He eventually withdrew his support for Titiana's residence application and her work permit was revoked. She has appealed but may well have to leave the country.

Amy too was subjected to psychological violence involving threats to withdraw sponsorship. Peter would say to her, "You'll be sent back to China. You'll never see Joy again." Fortunately, she did gain residence, this being a vital part of her ability to get herself and her daughter away from Peter's physical, psychological and sexual abuse.

For Eve, Richard's proposal for marriage came with a promise to sponsor her application for residence. Threats to withdraw such support subsequently became a powerful tactic as he tried to mould her into the "perfect Kiwi wife". Even after she gained residence, Eve's ignorance of immigration law meant that she believed he had the power to have her residence permit revoked and to send her and her daughter back to Moscow. Such threats were particularly powerful considering that Eve and her daughter had fled to escape gang violence.

Laura followed Paul to New Zealand. He was the principal applicant for residence and has exploited this enormously, removing her from the application after she confronted him about another of his deceits, diverting the proceeds from the sale of her house back in South Africa into an account he controlled. Moreover, although she knew about protection orders, Laura did not apply for one when Paul was physically violent because of her concerns about her non-resident status. Without a job or assets, Laura faces an uphill battle to stay in New Zealand. If she has to return to South Africa, she will face not only unemployment and poverty – without the safety net of a well-developed social security system – she will also face the negative attitudes of former friends who disapproved of her relationship with Paul.

Immigration issues increased women's vulnerability in other ways. For example, Priya, who followed Satya to New Zealand from Fiji, was far from family support, financially dependant on Satya and subjected to further isolation by his family. When he attacked her, she did nothing about it in case it jeopardised her application for residence.

Pinky came to New Zealand for an arranged marriage with Jatinder who had residence. He had got residence through marrying a New Zealand woman who he beat up subsequently. He also beat Pinky, who has had several years of struggling to keep herself and her children safe from his violence, a struggle made harder by the complicity of their community. Pinky did get a protection order but has recently been pressured into having it discharged in case it counted against Jatinder's application for citizenship.

Sonal was not an immigrant but a third generation New Zealander of Indian origin. Yet immigration issues affected her too. Her husband from India sponsored the residence applications of a number of friends and relatives so that they could work for him at rates much below the minimum wage. It was Sonal who bore the brunt of these sponsored immigrants. On top of extreme physical violence and two children to care for, Sonal was forced to cook and clean for them, live in a house with 10 to 12 men, and look after their financial and emotional needs, including teaching them English and helping them with immigration procedures.

Finally, there were those immigrant women for whom immigration status per se was not an issue but because they were recent migrants – or in the case of Nustrat, a refugee – were unfamiliar with New Zealand law and society. This meant seeking help with the violence was much harder, especially if they spoke little or heavily accented English.<sup>663</sup> For some, it also meant that they were vulnerable to prevailing attitudes within their respective immigrant communities, attitudes which sometimes meant they had to hide the violence and/or reconcile with violent partners. These issues are discussed in the following chapter.

In summary, the case studies show that immigrant women face particular barriers in trying to protect themselves and their children from male partner violence. Women whose partners were their sponsors for residence applications, or whose partners were the principal applicant on such applications, were particularly vulnerable. To all intents and purposes, such men had the power to have their partners removed from the country, notwithstanding the Victims of Domestic Violence Policy, which we discuss below. Moreover, such power is often wielded in the knowledge that women will face poverty and possible ostracism in their home communities should they return. Add, as for some of these women, the knowledge that if they return to their country of origin they will have to do so without their children, and it is easy to appreciate the almost total power and control their partners wield over them.

### ***Immigration Act 1987***

Immigration is governed by the Immigration Act 1987, the regulations framed under it, and the policy guidelines issued from time to time. Every person who is not a naturalised citizen and who wishes to remain in New Zealand permanently or temporarily must obtain a permit after complying with the requirements of the Act, unless exempted under the Act.<sup>664</sup> Permits are granted at the discretion of the Minister of Immigration. The minister delegates ministerial powers under the Act to officers who enforce the Act according to ministerial guidelines.<sup>665</sup> The minister is the final authority in decisions made by the immigration officers.<sup>666</sup> Thus, there is no “right” to a residence permit or a temporary permit to visit, work or study in New Zealand. The discretionary nature of the powers under the Act has important bearings on immigrant women who are victims of domestic violence.

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<sup>663</sup> See discussion of language and other issues in relation to the police (Chapter 12) and other agencies (Chapter 15).

<sup>664</sup> Immigration Act 1987, ss. 4, 11, 12 and 13. Usually the exemptions are related to diplomatic and other personnel who are in New Zealand as representatives of their countries, or citizens of countries with which New Zealand has special agreements, such as Australia. A resident permit allows the holder of the permit to reside in New Zealand indefinitely. A returning resident permit allows the holder of the permit to leave New Zealand temporarily and the right to return to and reside in New Zealand indefinitely. Temporary permits may be granted for fixed periods and for the purposes of visiting, working or studying in New Zealand (Immigration Act 1987, ss. 16, 18 and 24). The Act also provides for the removal of persons who are in New Zealand illegally without requirements of criminal prosecution.

<sup>665</sup> *Ibid.*, ss. 13A and 13B.

<sup>666</sup> *Ibid.*, ss. 8 and 9.

There are two categories under which spouses and partners may apply to reside in New Zealand. Firstly, a person making an application for residence under the business, skilled migrant or another category may include his or her spouse or partner and dependent children in the application. The principal applicant will be the main person assessed against the policy for the residence category under which they applied.<sup>667</sup> As is evident in the case studies, the inclusion or exclusion of a partner and/or children is for the principal applicant to determine.

Secondly, there is the Family category, sometimes referred to as the Family Reunion category. This category is designed to meet the needs of New Zealand citizens and permanent residents and to maintain the integrity of the family. The objective of the Family category is to allow individuals to maintain and be part of a family unit while reinforcing the Government's overall objectives in immigration policy.<sup>668</sup> The Partnership Policy, discussed further on, is a subcategory within the wider Family Category Policy.

Partners of New Zealand residents or citizens do not automatically qualify for residence in New Zealand.<sup>669</sup> They must apply for residence and provide evidence that they have lived "for 12 months or more in a genuine and stable relationship with a New Zealand citizen or resident."<sup>670</sup> The New Zealand partner must support the application for residence under the Partnership subcategory.<sup>671</sup>

If an application for residence is declined, the applicant may apply to the Residence Review Board for a review of the decision.<sup>672</sup> The board can reverse the decision, return the case to the immigration officer for reconsideration, or recommend that the case be heard by the Minister because of special circumstances that require an exception to the government policy to be made.<sup>673</sup> Thus, the Residence Review Board's role is to ensure that immigration officers have correctly applied the policies they administer.

If a residence permit is declined, the applicant, if already in the country, is required to leave.<sup>674</sup> If the applicant does not leave the country, the designated officer under the Immigration Act may issue a removal order.<sup>675</sup> Such orders may be reviewed only if exceptional humanitarian circumstances exist that would make the removal unduly harsh and it would not be against the public interest to allow the person to live in New Zealand. Such reviews are undertaken by the Removal Review Authority.

Finally, there are restrictions on the "repeat" sponsorship of a partner for residence. A person cannot be a sponsor if they have sponsored a successful applicant within the previous five years and cannot sponsor more than two applicants in total.<sup>676</sup> Anyone who was the perpetrator of

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<sup>667</sup> Immigration New Zealand. (2007). *Operations Manual* (issue date 10 April 2007). Retrieved 24 April 2007 from [http://www.immigration.govt.nz/nzis/operations\\_manual](http://www.immigration.govt.nz/nzis/operations_manual), at section R2.1.

<sup>668</sup> *Ibid*, at section F1.

<sup>669</sup> *Ibid*, at section F2.1.

<sup>670</sup> *Ibid*, at section F2.5(a).

<sup>671</sup> *Ibid*, at section F2.5(d).

<sup>672</sup> Immigration Act 1987, s. 18C. Immigration New Zealand. (2007). *Operations Manual* (issue date 10 April 2007). Retrieved 24 April 2007 from [http://www.immigration.govt.nz/nzis/operations\\_manual](http://www.immigration.govt.nz/nzis/operations_manual), at section R5.55.5.

<sup>673</sup> Immigration Act 1987, s. 18D.

<sup>674</sup> *Ibid*, ss. 4 and 45.

<sup>675</sup> *Ibid*, s. 46.

<sup>676</sup> Similarly, anyone who gained residence under the Partnership Policy cannot themselves be a sponsor for five years and can only ever sponsor one applicant. Immigration New Zealand. (2007). *Operations Manual* (issue date 10



domestic violence which resulted in a grant of residence under the special policy for victims of domestic violence cannot be a sponsor in any other application.<sup>677</sup> These, particularly the latter, are important protections against violence against women by serial abusers.

### **Victims of Domestic Violence Policy**

As we have mentioned, there is a special residence policy for victims of domestic violence. This has recently been updated and appears in Immigration New Zealand's *Operations manual* at section S4.5.<sup>678</sup> That section sets out who may apply for a residence permit on the grounds of domestic violence, what evidence is required to meet certain criteria and how applications are to be made. Broadly similar provisions apply to the other special policy for victims of domestic violence that enables officials to grant a special work permit. These permits, valid for three months, allow non-resident victims of domestic violence to support themselves while their applications for residence are being processed.<sup>679</sup>

The Victims of Domestic Violence Policy seems to be little used. In 2005/06, just seven applicants gained residence under the policy.<sup>680</sup> Interestingly, it does not have a general statement of purpose or objectives to be achieved through the policy, a point we address later. Under the policy, victims of domestic violence may be granted residence under certain circumstances. To qualify, applicants must be people

- a.
  - i. who are holding a work permit granted under W15.30 Special work permits for victims of domestic violence, or<sup>681</sup>
  - ii. who are, or have been, married to a New Zealand citizen or resident, **or**
  - iii. who have been living together in an established relationship with a New Zealand citizen or resident, **and**
- b. had intended to seek residence in New Zealand on the basis of that marriage or relationship, **and**
- c. that marriage or relationship has ended due to domestic violence by the New Zealand citizen or resident, **and**
- d. has been, or would be, if they returned to their home country, disowned by their family and community as a result of their marriage to or relationship with the New Zealand citizen or resident which has ended, **and**
- e. if they returned to their home country, would have no means of independent support (e.g. state financial support) or ability to gain that independent support (e.g through employment or marriage) for whatever reason, **and**
- f. meet health and character requirements policy. [Emphasis in original]<sup>682</sup>

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April 2007). Retrieved 24 April 2007 from [http://www.immigration.govt.nz/nzis/operations\\_manual](http://www.immigration.govt.nz/nzis/operations_manual), at section F2.10.

<sup>677</sup> Immigration New Zealand. Residence Policy. In *Operations Manual* (dated 24 April 2006), Chapter 69, p. 2, section F2.10.10(a)(ii). Similarly, under section F2.10.10(b) someone who is granted residence under the partnership subcategory, cannot, if that relationship breaks down, sponsor another partner within five years.

<sup>678</sup> Immigration New Zealand. (2007). *Operations Manual* (issue date 10 April 2007). Retrieved 24 April 2007 from [http://www.immigration.govt.nz/nzis/operations\\_manual](http://www.immigration.govt.nz/nzis/operations_manual).

<sup>679</sup> *Ibid*, at section W15.30.

<sup>680</sup> Merwood, P. (2006). *Migration trends*. Wellington: Department of Labour, at p. 100.

<sup>681</sup> These permits are discussed below.

<sup>682</sup> Immigration New Zealand. (2007). *Operations Manual* (issue date 10 April 2007). Retrieved 24 April 2007 from [http://www.immigration.govt.nz/nzis/operations\\_manual](http://www.immigration.govt.nz/nzis/operations_manual), at section S4.5.

For the sake of clarity, it worth emphasising that all six criteria listed above must be met. Moreover, to fully appreciate what is required to meet these criteria, one needs to understand the accompanying evidential requirements. Of particular importance are the requirements to prove domestic violence and the requirements to prove an inability to return to one's home country.

### Evidence of Domestic Violence

The Victims of Domestic Violence Policy includes rules about the evidence of domestic violence which is required of applicants. Here, it should be noted that domestic violence is held to have the same meaning as in section 3 of the Domestic Violence Act 1995.<sup>683</sup> That is, it is not limited to physical assaults but includes psychological and sexual violence. While we think this is laudatory, as we discuss below, there are problems with how this definition is implemented – or not implemented – and with other aspects of the evidential requirements. These requirements are set out in section S4.5.1 of the *Operations manual*.

Evidence of domestic violence means:

- a.
  - i. a final Protection Order against the New Zealand citizen or resident partner or intended partner under the Domestic Violence Act 1995, or
  - ii. a relevant New Zealand conviction of the New Zealand citizen or resident partner or intended partner of a domestic violence offence against the principal applicant\* or a dependent child of the principal applicant; or
  - iii. a complaint of domestic violence against the principal applicant or a dependent child investigated by the New Zealand Police where the New Zealand Police are satisfied that domestic violence has occurred; and
- b. referral to the New Zealand Immigration Service by a Child, Youth and Family approved Refuge Organisation.

Note: For the purpose of this policy, “domestic violence” has the meaning set out in s.3 of the Domestic Violence Act 1995.

Again, for the sake of clarity, it should be emphasised that while an applicant needs to meet just one of the three alternate tests for subsection (a), she must also meet the test for subsection (b). That is, whatever other evidence there is of domestic violence, the criteria will not be met unless the applicant has been referred by a “Child, Youth and Family approved Refuge Organisation”. We think this is unnecessarily restrictive. As we show in Chapter 15, knowledge of refuges is not high among immigrant women, and there are few refuges which provide culturally appropriate services for women other than Māori and Pākehā women.

We think there are also problems with subsection (a). In relation to option (i), as we have seen in Chapter 8, immigrant women are often reluctant to apply for protection orders and, if the women in our case studies are typical, are less likely to be successful if they do. Here, it is instructive to review what happened to the women who faced the circumstances which the policy was designed to address; that is, women whose application for residence depended on their abuser (that is, he was the principal applicant or a New Zealand resident or citizen). Of the 11 women in this situation, only 4 obtained a final protection order (Priya, Alice, Pinky and Zaleha), and one, Pinky, was subsequently pressured into having her order discharged.

Similar considerations apply to calling the police when one's abuser is also one's immigration sponsor. For, example Amy, who eventually did get residence, told us:

Because I didn't have my permanent residency [earlier], I didn't involve the police. But now that I have it, I would use the police. I was so afraid then that I would be sent back to China without my child. When the mother doesn't have New Zealand

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<sup>683</sup> Ibid, at section S4.5.1.

residency and only has a work permit or a visitor's visa, she loses her children unless she's willing to go back to her husband.

In many ways, Amy has summed up the dilemma faced by women whose immigration status is effectively controlled by their abuser. Of the 11 women whose abuser was a sponsor, 4 never called the police, even after they had obtained residence.<sup>684</sup> More tellingly, of the 11 abuser/sponsors, only 2 were ever arrested (the partners of Rowena and Zaleha) and in the case of one of those, the arrest followed a 111 call not by the woman (Zaleha) but by a neighbour. As far as we can tell, neither man was ever convicted, so none of the women would have met criterion (a)(i) above.

Criterion (a)(iii) is broader, requiring only "a complaint of domestic violence" in which "the New Zealand Police are satisfied that domestic violence has occurred." However, given the generally inadequate police service provided to the women of unresolved immigration status, it is unlikely that many of them would have met this criteria either.

For example, because they could not easily understand her, police officers brushed off Alice on the two occasions she reported Harry's violence. On one occasion, police helped Eve get back into her house, but there is no indication they saw her as a victim of domestic violence. Laura twice consulted the police but made no specific complaints out of fear for what it would do for her immigration status. When Pinky called the police, they took Jatinder away but did not charge him, possibly, Pinky thinks, because they found her difficult to understand. When Sripai called the police, they took her to a women's refuge and asked her if she wanted to file a complaint but she declined. Kevin was not arrested. Zahela's partner was generally seen by the police as mentally ill. Thus it is doubtful if any of these women would have met criterion (a)(iii).

### **Review Board Decisions**

A decision by the Residence Review Board<sup>685</sup> provides insights into how the requirements of a police investigation operate in practice. In that case, an Indian woman was being forced to leave the country by her husband who took her to the airport with her travel documents and checked her onto a flight to India against her will. Someone tipped off the police and a police constable intervened at the airport. A complaint was registered by the police about the incident at the airport. On a request by the woman's solicitor in support of her application for residence under the special domestic violence policy, the constable wrote a letter recording the facts regarding the incident he attended at the airport. In his letter the police constable informed Immigration New Zealand that:

- the constable had been called out to attend to an incident at the airport;
- the constable interviewed the woman who told him that she was being forced to return to India and that she did not want to go;
- her husband had flown her forcibly from Wellington to put her on a flight from Auckland, he was in charge of her ticket and passport, and that he had checked in her baggage;
- the constable asked the husband to hand over the ticket and passport;
- the constable told the husband that he could not force his wife to leave the country as she had a valid visitor's permit;

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<sup>684</sup> We were not always able to determine the sequence of events but it does appear that most of the other seven women called the police only after they had obtained residence.

<sup>685</sup> *Residence Appeal No 13609* (Residence Review Board New Zealand, Wellington (D. J. Plunkett, senior member), decision dated 2 March 2004, Category: Special policies (victims of domestic violence), decision outcome: section 18D(1)(a)). Retrieved from [http://www.residencereviewboard.govt.nz/Pages/RES\\_Home.aspx](http://www.residencereviewboard.govt.nz/Pages/RES_Home.aspx)

- the constable removed the checked-in baggage from the flight;
- the husband told the constable that the wife had to go because the husband was her sponsor;
- the constable informed the woman that she may be entitled to apply for residence without the support of her husband.

The police constable called Immigration New Zealand and passed on the advice he received to the woman, which was that she had the right to remain in New Zealand until the expiry of her visitor's permit. The woman had not made any police complaint about the violence prior to the incident at the airport because she said she was new to the country and did not know how and where police complaints could be made. Besides, she could not learn about the process in New Zealand as her husband did not let her leave the house. There was medical evidence and reports from refuge organisations, however. Immigration New Zealand wrote to the police constable requesting the constable to report on whether domestic violence within the meaning of section 3 of the Domestic Violence Act 1995 had occurred. The police constable did not undertake any investigation or examine all the other evidence of domestic violence that was available such as the medical certificate, and the reports of refuge organisations. The police constable reported there was no domestic violence within the meaning of section 3 of the Domestic Violence Act 1995 based solely on his involvement with the incident at the airport. The police constable did not refer to the evidence test in the policy that he was being asked to respond to. Immigration New Zealand accepted the report of the police. The Residence Review Board confirmed Immigration New Zealand's decision that there was insufficient evidence of domestic violence in terms of the criteria set out in section S4.5.1a.<sup>686</sup>

Another case decided by the Residence Review Board throws light on the procedures and practices followed by the police and Immigration New Zealand in cases where a woman does make a criminal complaint about partner violence. In *Residence Appeal No 14897*, the issue for the board was whether domestic violence had occurred in the appellant's marriage.<sup>687</sup> The case involved a Fijian woman. The violence was so severe that the woman's mother came to her aid and helped her file a complaint to the police.

The police officer completed a Family Violence Report (POL400). In the section "Action Taken" the officer had ticked the boxes marked "Reported" and "Insufficient Evidence".<sup>688</sup> There was a medical report on record as well as a letter from a refuge and a protection order.<sup>689</sup> After the woman made her application for residence under the Victims of Domestic Violence Policy the immigration officer asked the police to complete a declaration confirming that they had investigated a complaint and their finding on whether or not domestic violence had occurred. The domestic violence co-ordinator from the police district concerned did not affirm or deny if they were "satisfied that domestic violence had occurred." Instead the coordinator noted that there were two incidents but no criminal action. Later the coordinator sent an email to Immigration New Zealand informing them that the question was discussed with others in the police district and they had come to the conclusion that no domestic violence had occurred. The woman and her representative had difficulties contacting the police officer concerned and

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<sup>686</sup> Immigration New Zealand. (2007). *Operations Manual* (issue date 10 April 2007). Retrieved from [http://www.immigration.govt.nz/nzis/operations\\_manual](http://www.immigration.govt.nz/nzis/operations_manual).

<sup>687</sup> *Residence Appeal No 14897* (Residence Review Board, Wellington (P. Millar, member), 23 February 2006, Category: Special policies (victims of domestic violence), Decision outcome: Section 18D(1)(e)) retrieved from [http://www.residencereviewboard.govt.nz/Pages/RES\\_Home.aspx](http://www.residencereviewboard.govt.nz/Pages/RES_Home.aspx).

<sup>688</sup> There is a third box in this section for "Arrested".

<sup>689</sup> Note that at that time, a protection order did not satisfy the evidential requirements for domestic violence. That was introduced in a revision to the special policy issued 10 April 2007.

informed the immigration officer of their difficulties. Immigration New Zealand repeated its request for a declaration from the police on whether or not they were satisfied that domestic violence had occurred and once again the police confirmed their earlier statement that they were not satisfied that domestic violence had occurred. The immigration officer declined her application for residence on the grounds that the evidential requirements had not been met.

The outcome in this second case would presumably have been different under the new policy which, as mentioned above, includes a final protection order as meeting the evidence requirement that there has been domestic violence. However, we include the case because it suggests that the effective working of the policy in relation to criterion (a)(iii) relies on police understanding what is being asked of them. Providing police with better guidelines on how they should respond in situations of domestic violence involving women with uncertain immigration status may improve the workings of the present policy. It will not, however, provide effective administrative mechanisms for implementing the Victims of Domestic Violence Policy. This is because the immigration officer who has primary responsibility for implementing the policy will still be fettered by the decisions of the police. If the immigration officer is to be responsible and accountable for implementing the Victims of Domestic Violence Policy under the Immigration Act 1987, then it is only logical that the officer should have the powers to determine all matters pertaining to the policy and make the decision taking into account the totality of the woman's circumstances.

We think immigration officers should be empowered to consider a wider range of information indicative of domestic violence as defined by section 3 of the Domestic Violence Act 1995. Here, we are referring to things such as affidavits, any complaint made by the victim, any call-out attended by the police, any statements or reports from any refuge, and any medical evidence. Allowing such a broader range of information to be considered would be consistent with the rules which apply in the UK,<sup>690</sup> Norway,<sup>691</sup> and other Scandinavian nations.<sup>692</sup> Moreover, we think that for the purposes of determining the residence application of a victim of domestic violence the statements of her partner/husband should **not** be considered.

We therefore recommend:

**THAT immigration officers considering applications for residence under the Victims of Domestic Violence Policy be given powers to consider a wider range of evidence in determining whether domestic violence within the meaning of section 3 of the**

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<sup>690</sup> In the UK the victims of domestic violence applying for residence under the special domestic violence policy are required to provide "satisfactory evidence" of domestic violence. "Satisfactory evidence" means any two types of evidence which may include: a medical report or letter from a general practitioner confirming injury, a court undertaking that the perpetrator will not approach the victim, a police report confirming attendance at the home, a letter from social services confirming involvement or a letter of support from a women's refuge. See Humphreys, C., & Carter, R. (2006). *Co-ordination Action on Human Rights Violations: The justice system as an arena for the protection of human rights for women and children experiencing violence and abuse: Final report*. Co-ordination Action on Human Rights, European Commission, 6th Framework Programme, Project No 506348, section 7.2.1.

<sup>691</sup> The "abuse clause" in the Norwegian immigration regulations requires the immigration officer to take the woman's statement as the starting point to make a determination together with all other evidence that may be available. The immigration officer may not interview the male partner and is required to take into account the best interests of any children likely to be affected by the decision. The "abuse clause" applies only to women and children. See Danish Research Centre on Gender Equality. (2005). *Trapped between law and life: Report on abused minority women in the Nordic countries*. Copenhagen: Danish Research Centre on Gender Equality, Roskilde University, at pp. 30-40.

<sup>692</sup> Similar provisions permitting an immigration officer to consider different types of evidence from doctors, refuge workers and other independent sources exist in Denmark and Sweden. *Ibid*, at pp. 24-25 and 54-55.

**Domestic Violence Act 1995 has occurred, but that the rules be drafted to specifically exclude consideration of information from the abuser. (#38)**

### Evidence of an Inability to Return to the Home Country

Coming within the eligible group of people (section S4.5(a) to (f) of the *Operations manual*) and having the required evidence of domestic violence (section S4.5.1) is not enough to gain residence. Applicants must also:

- a. ... provide evidence in the form of documents and/or information provided at an interview with an Immigration Officer, that they:
  - i. have been, or would be, if they returned to their home country, disowned by their family and community as a result of their marriage to or relationship with the New Zealand citizen or resident which has ended, and
  - ii. if they returned to their home country, would have no means of independent support (e.g. state financial support) or ability to gain that independent support (e.g. through employment or marriage) for whatever reason.<sup>693</sup>

The manual also makes it clear that the Immigration Service “may refer to any relevant information when determining the ability of the applicant to return to their home country.”<sup>694</sup>

Like the earlier tests, **both** criteria (a)(i) **and** (a)(iii) must be satisfied. Taken together, the two criteria impose a socio-cultural as well as a socio-economic test. In cases involving ethnic minority women, it is often difficult to separate the socio-cultural from the socio-economic factors in family matters.

In many Asian, Middle Eastern and African cultures the extended family remains an important economic, social and cultural structure within which rights, obligations and expectations of men and women are defined. Men are expected to be the providers of economic and material wellbeing of the extended family and women are expected to provide for the social and cultural cohesion and wellbeing of the extended family. Within those social structures, extended families provide for the economic and material wellbeing of women through marriage.<sup>695</sup> Marriages therefore involve an economic dimension by way of dowry or bride-money in return for guarantees for economic security for the woman.<sup>696</sup> Moreover, the structures of families evolve and adapt to wider socio-economic contexts. Thus, transnational marriages are part of the processes of adaptation to a globalising world. Men working overseas are often seen as a “good match” because they are more likely to provide for the economic and material wellbeing of the woman. It has been argued by some that traditional arranged marriages provide the labour markets in developed countries with cheap male labour.<sup>697</sup> This means that the societies receiving

<sup>693</sup> Immigration New Zealand. (2007). *Operations Manual* (issue date 10 April 2007). Retrieved 24 April 2007 from [http://www.immigration.govt.nz/nzis/operations\\_manual](http://www.immigration.govt.nz/nzis/operations_manual), at section S4.5.15.

<sup>694</sup> Ibid.

<sup>695</sup> Pillai, S. (2001). Domestic violence in New Zealand: An Asian immigrant perspective. *Economic and Political Weekly*, 38, 965-974, at p. 970; Charsley, K. (2005). Unhappy husbands: Masculinity and migration in transnational Pakistani marriages. *Journal of the Royal Anthropological Institute*, 11, 85-105; Timmerman, C. (2006). Gender dynamics in the context of Turkish marriage migration: The case of Belgium. *Turkish Studies*, 7(1), 125-143.

<sup>696</sup> Kalpagam, U. (2005). “America Varan” marriages among Tamil Brahmins: Preferences, strategies and outcomes. *Indian Journal of Gender Studies*, 12(2&3), 189-215; Sheel, R. (2005). Marriage, money and gender: A case study of the migrant Indian community in Canada. *Indian Journal of Gender Studies*, 12(2&3), 335-356; Anderson, S. (2003). Why dowry payments declined with modernization in Europe but are rising in India. *Journal of Political Economy*, 111(2), 269-310; Charsley, K. (2005). Vulnerable brides and transnational ghar damads: Gender, risk and ‘adjustment’ among Pakistani marriage migrants to Britain. *Indian Journal of Gender Studies*, 12(2&3), 381-405.

<sup>697</sup> Biao, X. (2005). Gender, dowry and the migration system of Indian information technology professionals. *Indian Journal of Gender Studies*, 12(2&3), 357-379.

skilled and professional migrants benefit from such marriages. It could be argued that when such marriages break down there is societal responsibility towards the women on the part of the host society. When a marriage fails it is often difficult to separate the economic issues from the social and cultural issues in an extended family's decision to disown a woman or refuse to support her.

The social structures of the family within the wider socio-economic context are open to criticism from gender perspectives. At an individual level, however, for the purposes of immigration and the residence status, an ethnic minority woman whose marriage has failed must be assessed contextually within the social structures in which she lives and to which she will have to return if denied residence.

### **Proving One Will Be Disowned by Family and Community**

The Victims of Domestic Violence Policy appears to require evidence of cultural practices as well as evidence of an event that has not happened. The likelihood that the woman will be disowned must be based on judgements made from the facts and circumstances of her situation. The policy does not provide guidelines on how officers must evaluate evidence on this requirement and how the woman must satisfy this test.

Our case studies show cultural issues acted as barriers in ending violence among ethnic minority women even when they were living in New Zealand. Barry's comment to the victim support worker showed he understood the barriers Amira faced: "she would be shot for adultery." Annie Wong was a qualified professional in China but put up with abuse for decades because she wanted her family and friends to think of her as a "good wife". Priya found the extended family around her a contributing factor in her abusive relationship.

However, as certain residence appeals show, the special policy seems to require more than the woman's perception of what might happen to her if she returns home. *Residence Appeal No 14850*<sup>698</sup> involved a residence application under the special domestic violence policy by a Muslim woman from Fiji. Her application for residence under the policy had been declined. In her case the police had charged her husband with assault, and, by the time the appeal was heard, he had been convicted. That is, there was clear evidence to show domestic violence had occurred.<sup>699</sup> The woman had to meet the next test, that she was unable to return home.

The woman's family lived in a small rural community in Fiji. She produced letters from them which said that she, as a Muslim woman, would bring shame on them if she returned home with a baby without the father. The woman had a brother in New Zealand who was willing to support her in New Zealand but less willing to do so in Fiji. The woman produced articles on the status of women in Fiji from academic journals and newspapers, including an article from the *New Zealand Herald* to show her actions would not generally be acceptable in her community. These corroborated the evidence of her family's position.

On the other hand, Immigration New Zealand produced evidence that Fiji was a signatory to the Convention on the Elimination of Discrimination against Women. And in an earlier letter, it had told the woman:

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<sup>698</sup> *Residence Appeal No 14850* (Residence Review Board (M. A. Malaghan, member), Wellington, decision dated 27 February 2006, Category: Special policies (victims of domestic violence), Decision outcome: Section 18D(1)(a)). Retrieved from [http://www.residencereviewboard.govt.nz/Pages/RES\\_Home.aspx](http://www.residencereviewboard.govt.nz/Pages/RES_Home.aspx).

<sup>699</sup> The woman provided evidence of the conviction against her husband, along with evidence relating to a protection order, a parenting order in her favour, and accident compensation payments for the injuries suffered as a result of the violence. She also produced documentary evidence in the form of letters from a refuge and from her husband to prove abuse.

Fiji now has women's refuges in three different towns and the Government is taking active steps to protect and encourage women in society. Therefore support is available outside your family network, should it be required.

In declining her appeal the Residence Review Board held that:<sup>700</sup>

[We are] satisfied that the appellant does have contact with her family in Fiji, and while they may be embarrassed, even ashamed of the situation she now finds herself in, the evidence does not establish that they would go so far as to disown her.

The decision declining her application was confirmed, notwithstanding the fact that the violence occurred in New Zealand and that the perpetrator was a New Zealand citizen who had been convicted for domestic violence. The decision arguably falls short of New Zealand's obligation under the United Nations Declaration on the Elimination of Violence against Women.<sup>701</sup>

From the woman's point of view, it would appear that the test here is the extent of indignity she must suffer in her home country to be eligible for residence under the special domestic violence policy. The policy requires her to prove that she will be disowned by her family **and** her community. If the Government in Fiji has set up three refuges it does not follow that her family and community will not disown her. The test for assessing if her family and community will disown her depends on her personal circumstances and her own perceptions of her situation. Immigration New Zealand appears to have concluded from the fact that she has contact with some members of her family that there was no merit to her claim that she will be disowned by them.

Contact with family can often become a double-edged instrument for an ethnic minority woman facing domestic violence. If she decides not to put up with indignities from her extended family and community she risks putting more strains on her relationship with them and she will have nowhere to go should her residence application fail. On the other hand, if she decides to endure those indignities from her birth family she could fail the evidence test required to prove she will be disowned by her family if she returns to her home country.

One of our key informants, a female Muslim social worker, told us that the evidence requirements are such that a woman must make statements that tend to show her culture, religion and country in a bad light. She has to do so because of the violence that her partner has perpetrated on her. But the woman is also part of that culture, religion and country. She may well be reluctant to speak ill of such things simply because of what she regards as her partner's deviant behaviour.

The current verification processes do not treat the woman's statement about herself and her situation as the basis for assessing her application. The verification process often requires a woman to provide evidence that goes beyond proof of facts within her personal knowledge. The evidence required includes the status of women in her country and community. In other jurisdictions, immigration officers assessing the status of women take into account the constitutional status of women in the country concerned and reports of international

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<sup>700</sup> *Residence Appeal No 14850* (Residence Review Board (M. A. Malaghan, member), Wellington, decision dated 27 February 2006, Category: Special policies (victims of domestic violence), Decision outcome: Section 18D(1)(a)). Retrieved from [http://www.residencereviewboard.govt.nz/Pages/RES\\_Home.aspx](http://www.residencereviewboard.govt.nz/Pages/RES_Home.aspx), paragraph 38.

<sup>701</sup> For example, Article 4(g) requires states parties to: "Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation." Retrieved 20 July 2006 from [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.104.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.104.En?Opendocument).



organisations such as the United Nations High Commission on Refugees, Amnesty International and similar organisations which regularly monitor the status of human rights in general and of women in particular. The practice for Sweden and some other European countries is for diplomatic staff to report regularly on the status of women in the countries in which they are stationed.<sup>702</sup> The reports provide immigration authorities with information and knowledge about the social context of the applicants about whom they are required to make decisions. The knowledge assists in helping them to verify the credibility of the woman's perception of her own situation.

### Proving One Will Lack Independent Means

The second leg of the inability to return home test requires the woman to prove that she will "have no means of independent support (e.g. state financial support) or ability to gain that independent support (e.g. through employment or marriage) for whatever reason."<sup>703</sup> There are no guidelines in the *Operations manual* on how evidence of these circumstances can be ascertained. Moreover, it is not enough to show that the woman will not be able to have the standard of living she was accustomed to before leaving the country to come to New Zealand.

In *Residence Review No 14850*, referred to above, the Fijian woman's parents were not in good health and were unable to support her financially. The board held that she could find work in Fiji because she had worked there before her marriage, was qualified and spoke English. The woman's situation had changed since she left Fiji to marry a New Zealand citizen because she had a child from her failed marriage. That fact meant she would need additional support to enable her to work. Her husband did not pay maintenance.

Evidence relating to independent financial support was also canvassed in *Residence Appeal No 13609*, which was also referred to above. The woman told Immigration New Zealand that her family lived in a small village and that they were being abused by her husband's family who lived in the same village. The board observed:

The appellant is a 25-year-old single woman. [...] It is accepted that, in terms of Indian culture, the appellant will suffer shame. Her chances of finding a husband, as a divorcee, may be reduced but the Board cannot accept the bald allegation that she would be unmarriageable. She remains a young woman. She has no children.<sup>704</sup>

The observations in both cases show a gap in the knowledge of decision makers about the social context of the person whose lives they are making important decisions about. Remarriage for Indian women is rare regardless of whether the woman is a widow or a divorcee.<sup>705</sup> A widow's

<sup>702</sup> Danish Research Centre on Gender Equality. (2005). *Trapped between law and life: Report on abused minority women in the Nordic countries*. Copenhagen: Danish Research Centre on Gender Equality, Roskilde University, p. 58.

<sup>703</sup> Immigration New Zealand. (2007). *Operations Manual* (issue date 10 April 2007). Retrieved 24 April 2007 from [http://www.immigration.govt.nz/nzis/operations\\_manual](http://www.immigration.govt.nz/nzis/operations_manual), at section S4.5.15.a.ii.

<sup>704</sup> *Residence Appeal No 14850* (Residence Review Board (M. A. Malaghan, member), Wellington, decision dated 27 February 2006, Category: Special policies (victims of domestic violence), Decision outcome: Section 18D(1)(a)). Retrieved from [http://www.residencereviewboard.govt.nz/Pages/RES\\_Home.aspx](http://www.residencereviewboard.govt.nz/Pages/RES_Home.aspx), paragraph 58.

<sup>705</sup> Kapur, R., & Cossman, B. (1996). *Subversive sites: Feminist engagements with law in India*. New Delhi: Sage; Choudhary, J. N. (1988). *Divorce in Indian society: A sociological study of marriage disruption and role adjustment*. Jaipur, India: Printwell; Amato, P. R. (1994). The impact of divorce on men and women in India and the US. *Journal of Comparative Family Studies*, 25(2), 207-221; Agarwal, B. (1998). Widows versus daughters or widows as daughters? Property, land and economic security in rural India. *Modern Asian Studies*, 32(1), 1-48; Akhtar, S. (2001). The status of widows in Bangladesh. In P. Grimshaw, K. Holmes, & M. Lakes (Eds.), *Women's rights and human rights: International historical perspectives* (pp. 220-228). Houndmills, Basingstoke, Hampshire; New York: Palgrave; Chen, P. A. (2000). Indian widows: In search of dignity and identity. In R. Jhabvala & R. K. A Subrahmanya (Eds.), *The unorganised sector: Work, security and social protection* (pp. 146-160). New Delhi: Sage; Doss, M. (2002). The status of widows in Tamil Nadu. In M. V. Giri (Ed.), *Living death: Trauma of widowhood in India* (pp. 157-162). New Delhi: Gyan; Firth, S. (1999). Hindu

situation may be attributed to fate. A female divorcee is likely to be held responsible for being unsuccessful in fulfilling her responsibilities to her extended family, just as a man would be shamed and censured if he did not provide for the family. A woman in the situation of the appellant in *Residence Appeal No 13609* may assume that everyone knows about the status of female divorcees and widows, something that for many in Asian societies would be common knowledge.

Family and community play a lead role in marriage. In both of the Residence Review Board cases we have discussed, the fact that the women had not severed ties with their families completely and had brothers were factors that went against them in the “independent means” test. In both cases, the women had had arranged marriages. It is possible that the families might reluctantly take their daughters back because their residence applications have been declined. Neither woman had any choice except to return to unwilling and hostile families because of the evidence threshold required to prove that they were “disowned” and had “no means of independent support either through marriage or employment”.

Moreover, to stipulate marriage as a means of independent support is inconsistent with the overall aims of international law for the protection of women. Far from empowering women, the policy may have the effect of forcing women into undesirable marriages as their only means of support. Some cultures do not permit remarriages even though it is not prohibited under the law.<sup>706</sup> In some cultures marriage becomes the only means of support for women.<sup>707</sup> We therefore recommend:

**THAT when an application for residence under the Victims of Domestic Violence Policy is being considered, the woman’s own perception of her circumstances should be the basis for the verification of evidence in support of her claim of an inability to return home, that her husband’s or partner’s views should not be considered, and that the burden of proving the general status of women in a society should not depend exclusively on evidence provided by the applicant. (#39)**

### Objective of the Special Policies on Domestic Violence

Neither the Immigration Act 1987 nor the *Operations manual* has a clear statement of reasons for including special domestic violence policies within the overall immigration policy. Likewise, there is no clear statement on the objectives to be achieved through the Victims of Domestic Violence Policy.

This is in contrast to another special residence policy, namely that relating to refugees. Section 129A of the Act states the reasons for the provisions for refugees.

#### **129A Object of this part**

The object of this Part is to provide a statutory basis for the system by which New Zealand ensures it meets its obligations under the Refugee Convention.

By analogy there is a well-developed body of international law that requires states to protect women from violence and discrimination, including the 1993 United Nations Declaration on the Elimination of All Forms of Violence against Women.<sup>708</sup> A clear statement in the Immigration

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widows in Britain: Continuities and change. In R. Barot, H. Bradley, & S. Fenton (Eds.), *Ethnicity, gender and social change* (pp. 99-114). Basingstoke: Macmillan.

<sup>706</sup> See note 106. Deepa Mehta’s film *Water* is about the status of widows in India.

<sup>707</sup> Mand, K. (2005). Marriage and migration through the life course: Experiences of widowhood, separation and divorce amongst transnational Sikh women. *Indian Journal of Gender Studies*, 12(2&3), 407-425. Also see note 106.

<sup>708</sup> Declaration on the Elimination of Violence against Women General Assembly Resolution 48/104 of 20 December 1993. Retrieved 20 July 2006 from

Act and in the *Operations manual* is required to clarify beyond doubt that the Victims of Domestic Violence Policy is to give effect to New Zealand's international obligations to women living within its jurisdiction, whether permanently or temporarily. The Victims of Domestic Violence Policy is analogous to the special policy for refugees in the Immigration Act. A clear statement of objectives will enable policy administrators to put the domestic violence policy into perspective and draw from the international statutes and conventions when enforcing the provisions on domestic violence. They will also be able to assess situations where immigration issues are abused by perpetrators of violence against women.

Therefore, we recommend:

**THAT a clear statement should be included in the Immigration New Zealand *Operations manual* to the effect that the purpose of the Victims of Domestic Violence Policy is to give effect to New Zealand's international obligation to end violence against women. (#41)**

### ***Informing Women***

Our case studies show that many of the immigrant women knew little about immigration policies, and almost nothing about the Victims of Domestic Violence Policy. They often did not know where to access information. They learnt these things through chance. Amy's mother-in-law from Canada advised her to go to the Citizens Advice Bureau. Amira and Eve did not know where to turn for advice on immigration matters. Laura went to the police, who directed her to a community law centre. Sripai found out about legal help to address domestic violence from the refuge workers but she did not learn much about immigration issues.

This is hardly surprising. After all, immigrant women are new to New Zealand and are usually unfamiliar with its institutions and legal system. Some are not fluent in English. Typically, they lack the social networks from which they might learn about the institutions and laws of New Zealand. Where the principal applicant is the husband or partner of the woman, he makes the application and follows through the procedures required under the Immigration Act 1987, and may control her access to information. For example, Laura never got to see the information pack sent to her partner. But even if Laura had seen it, it would have been of limited help: the packs new immigrants receive do not provide information on the Victims of Domestic Violence Policy. Moreover, some of the information is less helpful than it might be. Where migrant resource centres organise workshops or seminars they are most often designed for the couple attending together. Many of our ethnic minority key informants emphasised the importance of disseminating the policy.

Where the New Zealand sponsor supports the residence application of his spouse or partner, the very fact that she is a foreigner and he is a New Zealand resident means that he is in a more advantageous position. He has knowledge of the institutions and the laws, and has social and professional connections. The spouse/partner is dependent on the New Zealand sponsor for her

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[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.48.104.En? Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.48.104.En?Opendocument). Other international conventions make it obligatory for states to take measures to protect women from violence. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women. It has been argued by some that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment includes all forms of violence against women including violence by families and communities. Radhika Coomaraswamy (United Nations Special Rapporteur on Violence against Women) in United Nations Children's Fund, Innocenti Research Centre. (2000). Domestic violence against women and girls. *Innocenti Digest* (6). New Zealand is a signatory to all of the above conventions, declarations and policy statements following the conventions and declarations.

knowledge of New Zealand institutions and law. Often as our case studies show, isolation becomes an effective strategy in domestic violence.

There also seems to be an information gap for women whose partners remove them from their residence application or, in the case of New Zealand resident men, withdraw their sponsorship. It took five months for Laura to discover that she and the children had been removed from Paul's application for residence. She only discovered the truth by visiting an Immigration New Zealand office.

To implement the Victims of Domestic Violence Policy, it is necessary to publicise it as extensively as possible and to provide information about agencies and authorities who may be contacted if required. It is also crucial that where sponsorship is withdrawn, women are contacted immediately, informed what has happened and given good advice about their options, including, of course, applying for residence under the special policy for victims of domestic violence.

We therefore recommend:

**THAT Immigration New Zealand works with relevant migrant communities to:**

- (a) **make information about the Victims of Domestic Violence Policy available in a simple form and in languages understood by the major immigrant groups in New Zealand;**
- (b) **ensure that such information is provided to women when they arrive in New Zealand or make an application for residence;**
- (c) **distribute that information in places where immigrant women are most likely to go; and**
- (d) **ensure that orientation programmes for new immigrants allocate time exclusively for women where they are informed about the Policy as well as other relevant New Zealand law and services. (#40)**

***Advocacy for Non-resident Women***

No legal aid is available for appeals to the Residence Review Board or the Removal Review Authority under the Immigration Act 1987.<sup>709</sup> On the other hand, legal aid is available to refugees for appeals to the Refugee Status Appeals Authority.<sup>710</sup> Similarly, women with uncertain immigration status may qualify for legal aid in respect of proceedings in the Family Court for protection orders or parenting orders. These provisions seem inconsistent.

There are very few appeals to the Residence Review Board in respect of the decisions made under the special residence policy for victims of domestic violence. In the period 1998 to 2006, there were only six such appeals.<sup>711</sup> In some ways, this is not surprising given the rather small number of applications under the special residence policy for victims of domestic violence in the first place. But legal aid is a basic requirement for exercising a woman's right to judicial remedies and for access to justice. Given the relative poverty of many migrant women, the lack of legal aid is likely to be an important factor for the underdevelopment of the law on domestic violence and immigration law. Extending legal aid to cover these matters will have the added benefit of ensuring that policies and their application are tested through judicial review and therefore refined

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<sup>709</sup> Legal Services Act 2000, s. 7(4)(f) and (g).

<sup>710</sup> *Ibid.*, s. 7(1)(j), (k), (l) and (m).

<sup>711</sup> Of these six reviews, one resulted in the matter being referred back to Immigration New Zealand for reconsideration, three in the matter being referred to the minister and in two cases, the original decisions were confirmed. Personal communications from a representative of the Residence Review Board, 7 and 8 December 2006.

through interpretation. The possibility of testing administrative decisions through judicial processes ensures that policies and principles are stable and can be applied consistently by decision makers. Access to judicial processes is therefore important not only for the victims of domestic violence but also for the stable and effective administration of policies.

We therefore recommend:

**THAT legal aid should be available to women who wish to appeal against decisions of Immigration New Zealand under the Victims of Domestic Violence Policy. Additionally, or alternatively, this work could become one of the roles of the free domestic violence victim advocacy services we have recommended. (#27)**

### ***Immigration Issues and the Family Court***

Women with uncertain immigration status are faced with difficult choices when their children have New Zealand citizenship or residence. Unless the women themselves gain residence, they may lose their children as a result of orders made in the Family Court. Several of our case studies show what can happen when women are subject to insular decision making by immigration officers on the one hand and the Family Court on the other.

Amira was clearly caught between the two authorities. In terms of immigration, Barry withdrew support for her application for residence. In the Family Court, he obtained an order preventing the removal of their daughter, Zola, from the country. He also applied for Zola's day-to-day care. The Care of Children Act 2004 and other proceedings in the Family Court took many months to resolve. In the meantime, without residence status, Amira was unable to support herself financially or receive a benefit. She lived variously in a women's refuge, a caravan parked on a river bank and a pup tent. Such circumstances hardly made her suitable for her having the day-to-day care of her daughter, so to that extent, it is not surprising that day-to-day care was awarded to Barry. But Amira was in such circumstances precisely because of decisions made by, firstly, Barry, and then, Immigration New Zealand. As we know, Amira has been removed and has now had even telephone access to Zola terminated by Barry.

Sripai and her daughter may yet face the same fate. When Sripai applied for a protection order, her partner Kevin responded by applying for a non-removal order for their daughter, who is a New Zealand citizen. Sripai wanted to return home to Thailand with her daughter but cannot because of the order made by the Family Court. Sripai may have to leave her daughter behind if she cannot obtain residence. Here, the Family Court has not considered what Sripai's uncertain immigration status might mean for the best interests of the child, especially when Kevin remained out of the country for long periods.

Titiana was successful in obtaining an order from the Family Court giving her the day-to-day care of her daughter. When we interviewed her, Immigration New Zealand had already revoked her temporary residence permit and her work permit and her lawyers were appealing the revocation order. Should the Residence Review Board confirm Immigration New Zealand's decision, Titiana will be the primary caregiver for their child but without residence, giving Alan, her partner, the option of applying for a non-removal order as a means of power and control over Titiana. He had already withdrawn his sponsorship for her residence application.

### ***DPC v OFR***

The tensions between Family Court decisions involving women with uncertain immigration status and the best interests of children is exemplified by the lengthy litigation involving a woman from the Ukraine. Three related unreported judgments, two by the Family Court and one by the

High Court, highlight the gaps between the scope of the Family Court jurisdiction and the special policy for victims of domestic violence under the Immigration New Zealand *Operations manual*.<sup>712</sup>

The woman, Ms R, met her New Zealand partner, Mr C, through the internet. After corresponding for some time, Mr C went to the Ukraine where the couple formed a relationship. Ms R, who had two sons from her previous marriage, soon became pregnant to Mr C. The couple moved to New Zealand during the pregnancy, bringing Ms R's (then) younger son, A, from the previous marriage with them. The older boy was left in the care of his Ukrainian grandfather.

The couple's son, L, was born in New Zealand and is a New Zealand citizen. Within three months of his birth, his parents' relationship had ended. Ms R had been subjected to abuse by Mr C, who, she discovered, had sexually abused her Ukraine-born son. She applied for protection orders for herself and her son. In what we now recognise as an all too common tactic, Mr C revoked his sponsorship of Ms R's application for residence and obtained an order from the Family Court preventing L's removal from the country. Immigration New Zealand subsequently served Ms R and A (the Ukrainian-born son) with a removal order but delayed implementing it until the Care of Children Act 2004 proceedings were resolved in the Family Court. The Children and Young Persons Service also became involved. L was placed in the guardianship of the court, with the Children and Young Persons Service acting as its agent.

Protracted litigation followed. In fact, it continues as we write, and it is not our intention to canvas all the details. Instead, we wish to focus on the nexus between the Care of Children Act 2004 determinations and the operation of the Immigration Act 1987.

In a judgment of 20 December 2005, the Family Court found that Mr C had sexually abused L and that while it was not possible to prove conclusively that he had sexually abused A, there was an unacceptable risk in either child having unsupervised contact with the father.

The Family Court proceeded to consider whether Ms R should have custody of the children. The Family Court's observations exemplify the gaps in the law relating to family and immigration matters.<sup>713</sup>

Hanging over the head of Ms R like the sword of Damocles is the removal order and the fact that she and A have to return to the Ukraine. The Immigration Department has not proceeded on removing Ms R from New Zealand because custodial issues have not been determined. Ms. Bentley, witness for the Immigration Department has given evidence and from her evidence I note the following.

A removal order must be carried out because it has been served unless there is a High Court judicial review of the decision or the Immigration Minister changes his mind. The Minister does have a discretion to do so if representations are made to him. Ms R does not qualify to remain in New Zealand just because she has a child born here. [...] The Immigration Department is awaiting the outcome of this case but may deport Ms R and A no matter what the outcome is.

Thus notwithstanding anything the Family Court may decide about parenting arrangements, Immigration New Zealand can still remove her – only ministerial discretion could save Ms R.<sup>714</sup>

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<sup>712</sup> *DPC v OFR* (Family Court, Auckland and Tauranga, FAM-2002-070-772, 8 September 2005, Judge Somerville); *R v C* (Family Court, Auckland and Tauranga, FP070/232/02, 20 December 2005, Judge Somerville); *C v R* (High Court, Rotorua, CIV2006-470-27, 7 August 2006, Keane J).

<sup>713</sup> *R v C* (Family Court, Auckland and Tauranga, FP070/232/02, 20 December 2005, Judge Somerville), at paragraph 103.

<sup>714</sup> Her application under the special domestic violence policy had not been determined finally at the time of writing as the case has been remanded back to the Family Court.

The consequences of removal raised issues regarding New Zealand's international obligations under the United Nations Convention on the Rights of the Child. The Family Court observed:<sup>715</sup>

If Ms R is removed from New Zealand she is prevented from returning to New Zealand for five years but she could apply for a special direction which would give her as a prohibited immigrant a permit or a visa to come back to New Zealand to keep up a special relationship with any child left behind in New Zealand. This would mean she would be a visitor only. Ms R would have to apply to Moscow for a visa and that may be granted at the discretion of the Moscow branch. One of the conditions for the visa being granted is that she has repaid all the removal costs and that she must return to the Ukraine at the end of the first visit. [...] I am not confident Ms R would be in a position to do that financially. Also if a visit to L once a year at his age I question whether the attachment he has now would be able to be sustained with such restrictive contact.

To the witness testifying for the Immigration New Zealand, the rights of a child and the conditions required for parental attachments to be sustained were not matters for consideration. In this regard, the Family Court observed:

Ms Bentley [witness for Immigration New Zealand] stated in her evidence *this case unfortunately is not unique, there are people who regularly are removed from New Zealand who have New Zealand born children and they become estranged from those children.* [Emphasis in original]

The testimony of the immigration officer that the case was not unique and people with uncertain immigration statuses are “regularly removed from New Zealand” and “become estranged from those children” is significant. Going by that testimony it is doubtful if women in that situation can succeed in any review by the Minister of Immigration on the grounds that special circumstances exist that require an exemption to be made from the regular policy.

Like Sripai, Ms R pleaded that the non-removal order against her New Zealand son be lifted so that she could take both her children home to the Ukraine. Mr C initially agreed to her request but changed his mind. The Family Court was not prepared to allow the mother to leave with both her children. The court agreed that if Ms R returned to Ukraine without L, his father was unlikely to take him the Ukraine to visit his mother.<sup>716</sup>

I have no confidence that he [the father] will take L to the Ukraine, therefore the contact will cease and that goes against the [United Nations Convention on the Rights of the Child] articles. L will also cease to have contact with A [the Ukraine-born son] the sibling to whom he is attached.

On the other hand if I allow L to go the Ukraine with his mother and lift the order allowing him to go there would be nothing to stop Mr C going to the Ukraine to visit L. Again I have no confidence that Ms R would feel kindly to such visits. So if L goes to Russia with his mother it is likely he will cease to have any contact with his father thus going against the [United Nations Convention on the Rights of the Child] again and dismissing the fact that L is not attached to his father.

It is probable that either way L will lose contact with one parent unless both parents continue to have contact with him in New Zealand. Accordingly these are also factors that the Immigration Department has to consider and no doubt they will be faced with the similar dilemma I have of trying to resolve L's best interests.

<sup>715</sup> *R v C* (Family Court, Auckland and Tauranga, FP070/232/02, 20 December 2005, Judge Somerville), at paragraph 103.

<sup>716</sup> *Ibid*, at paragraphs 106-108. Note too that Mr C appears to have a history of a similar pattern of behaviour of undermining a child's relationship with their mother. He did not allow his previous wife from England to take their child to England even for a short holiday.

At the time of writing the High Court had remanded the matter back to the Family Court to reconsider the appropriateness of the appointment of Mr C's friends as caregivers and to reconsider the suitability of Ms R to be the primary caregiver. She remains without residence status after four years. She has maintained all along that she is prepared to return to the Ukraine if she is given custody of her child. The approach of the various state agencies has created a stalemate.

One reason for the stalemate is that while the meaning of domestic violence in the Domestic Violence Act 1995 includes violence against children, the special domestic violence policy under the Immigration Act 1987 does not address the issue of children. There is a gap between the Family Court procedures and the immigration procedures which needs to be bridged to make the Victims of Domestic Violence Policy workable, to ensure the safety and autonomy of women, and to help provide a secure and safe environment for children. It is a gap Amira and Zola slipped through. Sripai and her daughter, Titiana and her baby, and Ms R and her son L, may well follow. It is a gap which can be bridged by including the interests of children as one of the considerations for the immigration officer when applying the special domestic violence policy.

We, therefore, recommend:

**THAT the Victims of Domestic Violence Policy be aligned with the Domestic Violence Act 1995 by including the interests of the children as one of the factors that must be considered when determining whether a woman's application for residence and/or a work permit should be granted. (#37)**

### **Conclusions**

This chapter is one of the few attempts to provide an analysis of the experiences of immigrant women in New Zealand who are subjected to domestic violence. Besides being the victims of men's violence, such women are multiply disadvantaged. They often face community attitudes which prioritise maintaining the family unit over women's safety and autonomy. They are typically ill-informed about the remedies available to them. Even if they do know about them, they are typically reluctant to use them, especially if their abuser is also their sponsor for residence. If they do seek help, cultural and linguistic barriers often mean that they receive an inadequate response. And, as some of the case studies show, seeking help can sometimes make matters worse as they face community condemnation and possible removal, in the worse cases, having to leave their children behind them



## 15: Allied Agencies and Other Sources of Support

Thus far we have discussed those state agencies for whom violence against women can be considered among their “core business”, the police and the courts. In addition, as the previous chapter show, the exercise of the statutory powers of immigration officials also has important implications for certain groups of battered women. In this chapter, we turn to other agencies and services, both statutory and non-statutory, which have figured in women’s stories, as well as discussing other sources of support women accessed.

### **Lawyers**

Although it is possible to apply for a protection order without the help of a solicitor, none of the women in our case studies did so. This is consistent with what key informants told us: very few applicants apply on their own behalf, because the documentation required to be completed is very lengthy and Family Court staff are not permitted to provide any assistance. Thus, finding a family law practitioner is, in effect, the first concrete step in seeking a protection order.

Chapter 8 has canvassed some of the main barriers to accessing protection orders. As shown in that chapter, the cost of legal fees and the high thresholds for legal aid were significant barriers for some women. Key informants have told us that in some centres, there are virtually no family law practitioners prepared to do legal aid work. Marama faced a different sort of barrier to accessing legal services. She had to ring every lawyer in town listed in the *Yellow pages* before she found one prepared to interrupt his Christmas holidays to prepare her application for a protection order.

The way women found a lawyer varied significantly. Here there seemed to be a difference between the Pākehā and other women. That is, most of the Pākehā women found a lawyer themselves, whereas most of other women were put in touch with a lawyer by other people they had gone to for help. As we discuss later in this chapter, Women’s Refuge played a crucial role in this regard, recommending lawyers, setting up appointments and, in some cases, taking women to the lawyer’s office.<sup>717</sup> Other women were referred to lawyers by the police (Crystal), Victim Support, (Te Rina) and a counsellor (Rasela).

As the case studies show, some of the women who consulted lawyers had only minimal contact with them. That is, they had just one appointment – to prepare their without notice application for a protection order. If the application was successful, if the respondent did not oppose the granting of a final order and if there were no (or no further) Care of Children Act 2004 proceedings, these women had no further need for legal advice. On the other hand, some women found themselves involved in lengthy litigation as their ex-partner opposed the granting of a final protection order (for example, Claire, Hilda, Amira, Amy and Lee-Mei), pursued applications in relation to the children (for example, Amanda, Louise, Patricia, Amira and Amy) or sought the discharge of the protection order (for example, Claire). For Amanda and Louise, these proceedings went on for so long, and began to cost so much, that in the end, they dispensed with their lawyers’ services and represented themselves.

Lawyers were often spoken of in very positive terms. For example, Rachel, who got her protection order without notice, described her lawyer as “really, really good ... she was young too; she had a passion for what she was doing.” Tessa, who described obtaining her without notice protection and parenting orders as “easy”, compared going to see her lawyer with going to the doctor. She told us that her lawyer “Was really lovely ... really patient and concerned.” Hilda, who faced extended litigation in the Family Court as John opposed the granting of a final

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<sup>717</sup> It was not always clear how women found their lawyers but Women’s Refuge definitely put Halle, Lyla, Roimata, Tessa and Patricia in touch with lawyers.

protection order, was also really pleased with her lawyer. In fact, the service she received from her lawyer was the only positive note in an otherwise gruelling, exhausting and abusive process.

### Providing Information

The case studies show that an important role of family law practitioners is providing information to women about protection orders – and indeed about other options open to them. For example, although she was clearly eligible, Amanda had not thought about getting a protection order against Raymond when she consulted a lawyer about getting custody of her daughter. After discussing the options, she applied for both a protection order and an interim custody order, getting both without notice to Raymond. For reasons we discuss below, Amanda later became dissatisfied with her lawyer but she did appreciate this initial information and advice.

Te Rina's lawyer did a good job of explaining things to her. Victim Support put her in touch with a lawyer who:

... was great. She broke it all down for me. She spoke with big words at first, till I asked her what she was talking about ... She said, "We're going to take custody out on them [her children], so he doesn't run away with them. We're going take out a protection order so he doesn't come anywhere near you. And if he ever trespasses, we'll put that out on him too, and if any of that is broken you can have him charged."

As we have noted earlier, protection orders are reasonably complex documents with "big words." Unless lawyers take the time to explain the conditions and how they can be enforced, a protection order will be no more than the proverbial piece of paper. Te Rina got both her temporary protection order and an interim custody order without notice, and while she still faced considerable challenges, she was able to have her order enforced, at least to the extent of the police removing her ex-partner from her property.

Trudy benefited considerably by strategic legal advocacy. Because of Shane's extensive criminal contacts in Australia, there was little hope of escaping the violence if she remained in Australia. In what could reasonably be called a carefully planned escape, mounted with help from her mother and timed to perfection, she managed to get herself and her children on a plane to New Zealand. By "accidentally" taking Shane's passport with her, she was able to delay his pursuit. Once in New Zealand, she had support while Shane, when he did arrive, lacked the networks he had used to keep her under surveillance. But while that was a considerable advantage, Trudy was vulnerable in other ways. Shane was the father of Sam, the younger of her two children. Because she had removed Sam from Australia, Trudy was vulnerable to an application from Shane under the Hague Convention to have the boy returned to Australia.

Domestic violence is not recognised as a reason for non-compliance with the Convention. Shane's criminality was the best hope for arguing against Sam's return to Australia, should Shane apply. On the other hand, including details of his criminal activities in affidavits was thought likely to make things worse if, and when, Shane next visited. Moreover, it was felt that Shane might have a less strong case if Trudy was seen as promoting his contact with Sam.

In a strategic move, Trudy got a temporary protection order, an order preventing Sam's removal from New Zealand and an interim parenting order giving her day-to-day care. This order specified that there was to be no contact until further order of the court when "supervised contact [would be] on such terms as shall be approved by the Court when and if respondent comes to New Zealand." Trudy was given leave to file a second affidavit omitting references to Shane's criminal activities. When Shane returned on another visit, an urgent memorandum was put before the court proposing that Shane would have contact with Sam at a local childcare centre under the supervision of Trudy's mother. Supervised contact went ahead as proposed and Shane returned to Melbourne. As time goes by, it has become less likely that an application under the Hague Convention would succeed as Trudy can now show that the children are settled and

that Shane has de facto consented to the children's living in New Zealand. He maintains regular contact with them, ringing once a week and emailing them.

Another example of effective legal advocacy concerned Tiare. She experienced extensive physical and psychological violence from Fetu, who was extremely demanding of her. On one occasion, he came home drunk after a lengthy drinking session and got angry because the food was cold. He got Tiare out of bed and beat her. Their daughter called the police, but in the meantime, Tiare, in self-defence, had grabbed a frying pan and hit Fetu with it. He was unconscious on the floor when the police arrived. Tiare was arrested, spent the night in cells, and was taken to court the next morning. Fortunately, the duty solicitor talked through the situation and requested an adjournment. He obtained Tiare's medical records, which showed a long history of injuries resulting from Fetu's violence, and presented these in court. The judge dismissed the charges. Tiare's lawyer then applied to the Family Court for an occupation order. When that was unsuccessful, he then helped her obtain a Housing New Zealand home. He also helped her get a benefit.

### **Misinformation and Bad Advice**

Some women were less well served by the family law practitioners they consulted. An example of this was the lawyer Caitlyn went to. Caitlyn was told that she was ineligible to apply for a protection order because she was still living with her partner, Bernard. This advice was quite incorrect. Protection orders are available to applicants living with the respondent (in which case the "non-contact" conditions of section 19(2) are suspended and are activated only if the parties separate).

Amanda, who initially was grateful that her lawyer told her about protection orders, subsequently received what she later came to recognise as very bad advice. As mentioned above, when she left Raymond and returned to her home town with her daughter, Katie, Amanda got a temporary protection order and an interim parenting order, both without notice to Raymond. However, unbeknown to Amanda, Raymond, anticipating her leaving, had already gone to the Family Court in the city a few days earlier and got, without notice to Amanda, an interim order for joint custody and an order preventing Katie's removal from the city. By the time the order was sealed, Amanda was well on her way home.

These were just the opening shots in a protected litigation battle waged by Raymond. He went on to file notice of his intention to oppose the granting of a final protection order. He sought a warrant to enforce "his" custody order. And he applied for a variation to that order. In seeking a variation to the earlier custody order, he put forward three alternative proposals. The first was for him to have sole custody of Katie. The second was for Amanda to have custody on the condition that Katie lived in the city, with immediate access for Raymond. The third was for Amanda to have custody of Amanda on the condition that Katie lived in the city, with custody to revert to Raymond should Amanda leave the city. Far from showing flexibility on Raymond's part, the three alternatives had a common purpose, to control Amanda. That is, were the court to adopt any one of them, Amanda would have been forced to return to the city or face losing Katie, who, it will be recalled, was still being breastfed.

While Raymond did not win custody, his aggressive, litigious response paid dividends, largely because Amanda's lawyer played right into his hands. She saw in Raymond a level of aggressiveness she had not seen before. In her analysis, the protection order was aggravating Raymond's anger. She recommended Amanda drop the order rather than defend it. On Amanda's behalf, she prepared an application for discharge of the order. Among other things, the affidavit said:

... that the respondent is feeling so pressured over the threat of the domestic protection order being made final that this fear is blocking his willingness to negotiate

a suitable custody and access arrangement between us ... There are times when I still feel frightened of the respondent but since our separation he has not behaved in a physically threatening manner towards me.

That is, despite being afraid of Raymond, on her lawyer's advice, Amanda gave up her protection order. In the affidavit framed by the lawyer, the protection order was no longer something to protect Amanda and Katie. Instead, it was characterised as a threat. Of course the only threat Raymond faced because of the protection order was the possibility of being prosecuted for further physical or psychological violence. The order was not a threat to negotiation, nor to his access to Katie. He had been able to negotiate access visits with Katie while it was in place. To all intents and purposes, Raymond's psychological violence, along with the impact of his earlier physical violence, had worked to help him get his way, at least to the extent of removing the protection order.

But that was just the beginning. For the next two and a half years, Raymond waged what Amanda described as "One of those top 10% of most aggressive legal battles." In mediation, she was bullied into consenting to an order giving Raymond shared care of Katie. Because Katie was being breastfed, Raymond's access was to be in three-hour blocks, sometimes in the town where Amanda lived, sometimes in the city where Raymond lived.

Katie was just six months old – and still being breastfed – when Amanda had to take her to the city for the first access visit there. Amanda dropped her off with Raymond. When she returned later to feed Katie, Raymond told her that he wanted to keep Katie overnight, contrary to the terms of the order. Amanda went to leave with Katie, but Raymond and his mother insisted that Katie stayed.

And they pulled her out of my arms. I had her in my arms. They backed me up against a car and then I got him and his mother pulling her out of my arms. It was the most awful thing. So she starts screaming. Then they got her and took her into the house. I said, "Give me back my baby." And I had to walk half an hour to my friend's house – luckily it's only half an hour. Then he refused to give her back all weekend. He let me feed her a couple of times. He wouldn't give her back, he said, "You are an unfit mother. You are stark raving mad." And I had to go to court to get her. It took a week. I lost half a stone.

But this was only part of it. In what was clearly a "set up", part of the struggle was captured on video camera by Raymond's brother. The recording, which Raymond later used to bolster his custody case, showed Amanda biting and hitting Raymond, but, as was noted by counsel for the child, what happened immediately beforehand was not recorded. For her part, Amanda admitted that she had "lost it" but said that she was concerned about Katie and her feeding routine, and that Raymond had acted in an arbitrary, overbearing and belligerent manner.

However, the video recording was evidence that Amanda had "used violence" against Raymond, triggering the mandated risk assessment mandated under the Care of Children Act 2004<sup>718</sup> to ascertain whether Katie would be safe if Amanda had her in her care unsupervised. In the end, the judge ruled that Amanda's actions needed to be seen in context and while he did not condone them, neither did he consider that they reflected adversely on her. Accordingly, Katie remained in Amanda's care. However, it is ironic that because of this one incident, video-edited and decontextualised, it was Amanda on whom the section 61 risk assessment was carried out, not Raymond. Despite the extensive physical, sexual and psychological violence he had used against Amanda – violence to which Katie was exposed – Raymond was never subjected to the section 61 risk assessment. As the Family Court judge explained in his decision, this was because:

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<sup>718</sup> Care of Children Act 2004, ss. 59-63. In fact, this litigation predated the Care of Children Act. The relevant provisions were then found in s. 16B of the Guardianship Act 1968. For simplicity, we refer here to the legislation in its current form. The risk provisions are identical.

... there was no attempt to support the initial allegations of Raymond's alleged violence to Amanda or in some way to suggest that it impacted upon Raymond's ability to care.

In other words, if Amanda had not been persuaded by her lawyer to have her protection order discharged, the judge would have had to conduct the mandatory risk assessment to determine if Katie would have been safe in his unsupervised care. Moreover, contrary to the vain hope that withdrawing the protection order would encourage Raymond to be more reasonable, it left Amanda unprotected from his bullying and violent ways. We agree with Amanda's analysis:

Once that protection order was out of the way [I was] perceived as being no different from him. He could argue all he liked. I had no protection from him and he was still abusing me.

Amanda is angry at the bad advice she received. We think she has every right to be.

### Handing Advantage to the Respondent

The first lawyer Claire went to provided similarly bad advice. In fact, in many ways, he was more helpful to Robert than to Claire.

After a trespass order proved ineffective in keeping Robert away, Claire consulted a lawyer about getting a protection order. Considering the continual harassing phone calls Robert made, it was hardly surprising that when he rang Claire was in the lawyer's office. She recognised the number and told the lawyer that it was Robert calling. He took the phone and talked to Robert. In what seems an almost unbelievably stupid move, he told Robert that he was in the process of preparing a without notice application for a protection order. Of course, what he had just done, was to give Robert notice, albeit informally, negating the advantage of a without notice application. It certainly gave Robert a considerable advantage. Although a temporary order was made against him, he managed to evade service for two weeks.

Claire's lawyer was to be helpful to Robert in other ways. Robert filed a defence against the protection order, an objection to the condition that he attend a programme, and a counter-application seeking a protection order against Claire. In the end, he agreed to a deal in which his application for a protection order was dismissed and Claire's application was granted. Thus there was no need for a defended hearing. To have got her final order without having to go through a hearing might have been seen as a good outcome for Claire but it is important to describe what she lost in this deal.

Firstly, Robert got the direction for him to attend a respondents programme discharged. This was on the understanding that he was attending individual counselling. As described in greater detail later in this chapter, the counsellor was ill-prepared for dealing with perpetrators of domestic violence. Instead of working to help him accept responsibility for his violent and controlling behaviour, the counsellor saw Robert as the victim.

Secondly, Robert was allowed to retain his firearms licence. This would be scary for most applicants. It was more so for Claire considering the history of her former husband.

Thirdly, Claire's lawyer offered two undertakings on her behalf. The first was that she not approach Robert. Probably, her lawyer did not consider that a concession at all. After all, Claire wanted the relationship to end. Robert's refusal to accept that was part of the reason she had sought an order in the first place. But of course Robert was able to use Claire's undertaking to tell people in their community that the court had ordered Claire to stay away from him. Again, he was able to position himself as the victim.

The second undertaking was to not oppose the discharge of the protection order in 12 months' time if Robert had complied with it. This undertaking has also been used by Robert. Despite the

fact the he did breach the order, he later succeeded in having it discharged, partly on the grounds that it had been 12 months since he had been charged with a breach of the order.

Claire came to feel quite uncomfortable with her lawyer, Firstly, there was his ribald language. Secondly, there was the way he would sit very close to her. Then there was his flippant attitude. When Claire asked him after the first hearing what she should do with the list of Robert's telephone messages, he said that it might be a good idea to keep them for the police, "in case there was ever blood on the floor." She thinks the lawyer was keen to settle because of the capped legal aid grant. She had certainly felt pressured by his advice: "Give him what he wants." This was an apt description of the agreement for Robert indeed got what he wanted.

### Feeling Marginalised

In effect, Clair had been marginalised. The agreement was organised between the lawyers. She was not the only woman who felt this way. Patricia "consented" to George having supervised contact with her children, although, as the court noted, her consent was given "reluctantly." It is difficult to understand what benefit Debbie gains from such contact with the man who has held a knife to her throat and threatened to kill her – not to mention the many times he has attacked her mother in front of her. Debbie, it might be recalled, developed alopecia from the stress of these events. Patricia's lawyer advised her not to oppose supervised access or it would look bad for her. As Patricia told us, "All three lawyers said I had no choice."

Similarly Louise, had this to say about her experience of the Family Court.

What I found out about that process was that it was very, very hard and very, very cold. And there were no children in the family court. There were lawyers making lots of money and a judge doing I know not what ... They were cold and heartless and they were not there for the wellbeing of my children.

On the other hand, women did appreciate lawyers who gave clear and assertive advice. Marjorie, chose her lawyer on the basis of the photograph in the *Yellow pages*.

I looked at her face. I wanted a woman lawyer and a strong personality. She looked like a strong, assertive type; I knew nothing about her ... I told her this is what's happening in my relationship and she said "You need to get out, you need to separate."

Marjorie appreciated such direct advice. Similarly, Patti's lawyer was assertive too. When Tim dropped her off at her lawyer's office to organise a discharge of her protection order, the lawyer refused. In retrospect, Amira's solicitor regrets that Amira did not "stick to her guns" and pursued her application for a protection order after it was put on notice.

On the whole, what seemed to distinguish good practice by lawyers from poor practice was an appreciation of the dynamics of domestic violence. Lawyers who, in effect, appeased perpetrators by recommending the discharge of protection orders appeared not to understand that what they were doing was reinforcing the respondent's power and control tactics. A similar comment could be made about lawyers who recommend women accept undertakings from respondents in return for withdrawing an applications for a protection order (see case study Amy). Domestic violence is a specialist field. It is inappropriate to apply to it many of the assumptions that underlie good practice in other family law proceedings (for example, that disputes can be best resolved by mediation). Domestic violence work requires well-trained practitioners of family law. Thus we have included them in our recommendation (in Chapter 11) for mandatory, regular training for professionals associated with the Family Court (recommendation 13).

In addition, we want to emphasise the inappropriateness of recommending to women that they withdraw their application for a protection order in return for an undertaking from the respondent that he will leave them alone, attend a stopping violence programme or meet other promises. Such promises are unenforceable in court. They can make things worse by giving the

appearance of safety. In the worse cases, undertakings can be used against women who subsequently reapply for a protection order. Such women risk having the respondent characterise them in court as erratic and as not knowing their own mind. It should be remembered that an increase in the use of undertakings was one of the concerns reported in the Hahn report.<sup>719</sup> We recommend:

**THAT family law practitioners not recommend undertakings in situations where there is a potential for future physical, sexual, or psychological violence. (#24)**

### **Women's Programmes**

One of the positive innovations associated with the implementation of the Domestic Violence Act 1995 was that funding was provided for protected persons programmes. Previously, women usually had to pay for such programmes. Programmes for survivors of domestic violence have been found to enhance social support, reduce the severity of trauma-related problems (such as depression) and reduce the rate of re-victimisation.<sup>720</sup>

Almost without exception, the women who attended protected persons programmes were very positive about them. For example, Hilda found the programme she attended to be "very restorative." Lyla felt the programme gave her "strong foundations." Programmes were particularly appreciated for the understanding of the dynamics of power and control they brought. As Louise said, "When you are emotionally involved in it, you can't see the wood for the trees." Programmes developed solidarity, as women reported making friends with other participants and realising that what had happened to them was not unique. As Patti said, "You realise that you are not stupid." The only negative comment came from Jess who found the first church-based programme she attended not particularly helpful. In contrast, she considered the programmes she later attended at a specialist domestic violence agency to be "incredibly helpful."

Evaluations of "general" programmes<sup>721</sup> and programmes for Māori women<sup>722</sup> have been very positive, both for women and their children/tamariki. Likewise, family law practitioners we spoke to said their clients almost always found programmes to be of considerable benefit. Some key informants were of a view that women who attended programmes were much more likely to have their protection orders enforced, if that was necessary, because they knew how to go about it.

### **Improving Take-Up**

There was concern from some key informants that too few women were taking up the opportunity to attend a protected persons programme. Of the 28 women in our cases studies

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<sup>719</sup> Hann, S. (2004). *The implementation of the Domestic Violence Act 1995*. Wellington: National Collective of Independent Women's Refuges. Retrieved 7 June 2006 from <http://www.nzfvc.org.nz/PublicationDetails.aspx?publication=12835>.

<sup>720</sup> Constantino, R., Kim, Y., & Crane, P.A. (2005). Effects of a social support intervention on health outcomes in residents of a domestic violence shelter: A pilot study. *Issues in Mental Health Nursing*, 26, 575-590; Pratt, R. (1997). *Mutual support groups for battered women*. Unpublished master's thesis, University of Waikato; Tan, C., Basta, J., Sullivan, C. M., & Davidson, W. S. (1995). The role of social support in the lives of women exiting domestic violence shelters: An experimental study. *Journal of Interpersonal Violence*, 10, 437-451; Zust, B. L. (2006). Meaning of insight participation among women who have experienced intimate partner violence. *Issues in Mental Health Nursing*, 27, 775-793.

<sup>721</sup> Maxwell, G., Anderson, T., & Olsen, T. (2001). *Women living without violence*. Wellington: Ministry of Justice.

<sup>722</sup> Cram, F., Pihama, L., Jenkins, K., & Karehana, M. (2002). *Evaluation of programmes for Maori adult protected persons under the Domestic Violence Act 1995*. Wellington: Ministry of Justice.

who obtained protection orders, just 9 (32%) had gone to a programme. This is very similar to the 36% uptake of programmes nationally.<sup>723</sup>

From our key informant interviews, it seems that the Family Court's promotion of protected persons programmes varies around the country. In some places, the Family Court coordinator simply provides women with basic information about programmes in their area. In other places, Family Court coordinators are much more active in encouraging women to attend. For example, some coordinators phone women a few weeks after the order has been made to encourage them to attend. The value of such follow up is well demonstrated by Louise. Initially, she was not inclined to attend and did so only with the encouragement of the coordinator and was subsequently very grateful for that encouragement.

As some of our key informants pointed out, women are typically in crisis when they apply for a protection order. It is not an ideal time for absorbing information about programmes when there are typically other pressing practical issues to deal with. These key informants argued that good practice requires not only providing information and encouragement at the time the order is granted but also following up women two or three months later. Interestingly, this was one of the suggestions arising from the 2001 evaluation of general women's programmes.<sup>724</sup> We would hope that between them, Family Court staff and the free, independent specialist domestic violence advocates we have recommended (recommendation 12) should be able to increase the take-up of women's programmes.

### Availability of Programmes

Among the women in our case studies, it was mainly the Pākehā women who attended a programme. That is, while 6 of the 11 Pākehā women who had orders<sup>725</sup> attended a programme, only 2 of the 7 Māori women, 1 of the 3 Pasifika women and none of the 7 other ethnic minority women who got a protection order did so. This is possibly attributable to a combination of language difficulties and a lack of culturally appropriate programmes for women other than Pākehā women. Certainly, several of our key informants were concerned about the lack of programmes capable of meeting the needs of diverse groups of women. The challenges facing the development of programmes for Māori women were canvassed in the 2002 evaluation in which the authors noted that good practice required programmes that valued tradition and culture.<sup>726</sup> Similar comments could be made about the development of programmes for Pasifika and other ethnic minority women for whom the lack of culturally specific programmes is even more marked.

The regulations made under the Domestic Violence Act 1995 provide for protected persons programmes to be approved as either "general" programmes or as "tikanga Māori" programmes. There is no mechanism for approving Pasifika or other ethnic programmes. While most women who take up the option of attending a programme attend a group programme, individual

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<sup>723</sup> This percentage is calculated from figures provided by the Ministry of Justice relating to the 1,478 orders granted between 1 October 2003 and 31 March 2004. By the time the figures were collated 22 months later, 532 protected persons had begun a programme. Because protected persons have three years to take up the opportunity to attend a programme, it is theoretically possible more might have done so after the figures were collated. In practice, this is unlikely. Programme uptake is highest in the month after the order was granted and drops off over the following months. For example, 92% of those recorded as starting a programme did so with a year of getting their order, and no "new" protected persons began a programme after 15 months.

<sup>724</sup> Maxwell, G., Anderson, T., & Olsen, T. (2001). *Women living without violence*. Wellington: Ministry of Justice.

<sup>725</sup> Although one, Amanda, had her order for just two months.

<sup>726</sup> Cram, F., Pihama, L., Jenkins, K., & Karehana, M. (2002). *Evaluation of programmes for Maori adult protected persons under the Domestic Violence Act 1995*. Wellington: Ministry of Justice.



programmes are also available. These are particularly important for women in small centres where there are insufficient numbers for a group programme or for women with special needs.

According to figures provided by the Ministry of Justice, of group programmes available nationally, 76 are approved as general programmes and 27 as tikanga Māori programmes. Of the individual programmes available nationally, 210 are approved as general programmes and 36 as tikanga Māori programmes. The ministry informs us that among the general providers, there is one who offers two group programmes for people of Asian descent and two providers who offer one programme each for Pasifika peoples.<sup>727</sup> As our case studies show, cultural and religious beliefs and practices are important factors in women's attempts to free themselves and their children from violence. There is a clear need to make better provision for the diversity of battered women in New Zealand.

Similar considerations apply to programmes for respondents. While there is now reasonable coverage of general and Māori programmes, key informants involved in such work were concerned about the ability of such programmes to provide for the cultural needs of the increasingly diverse groups of men being referred to them. We recommend:

**THAT the Ministry of Justice works with relevant community organisations to ensure linguistically and culturally appropriate protected persons and respondents programmes are available for diverse groups, and that these be actively promoted in appropriate ways. (#28)**

### ***Respondents Programmes***

The Domestic Violence Act 1995 introduced a significant change in relation to programmes for respondents. With the 1986 amendment to the Domestic Protection Act 1982, the court was given the discretionary power to direct respondents to a programme (called "counselling" in the Act).<sup>728</sup> In the Domestic Violence Act, this provision became a presumption that respondents would be directed to attend a programme. That is, under section 32, the court "must direct the respondent to attend a specified programme, unless the Court considers that there is good reason for not making such a direction." Failure to attend a programme in accordance with such a direction is a breach of the protection order for which the maximum penalty is six months' imprisonment or a fine of \$5,000.<sup>729</sup>

As we show below, both the case studies and our interviews with key informants raise significant concerns about the operation of respondents programmes. However, before discussing those concerns, it is useful to review the role of programmes for men who batter, and the contribution they may make to the safety and autonomy of women and children. It is important to do so because these have been quite contentious matters.

### **The Value of Batterer Treatment Programmes**

Providing programmes for respondents has a certain appeal. Faced with a growing recognition of the enormity of violence against women, ever-increasing numbers of men coming before the courts and the fact that many such men go on to become serial abusers, treatment programmes have provided both judges and clinicians with the hope that something is being done to reduce

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<sup>727</sup> There are also two individual programmes specifically for Asian people and two for Pasifika people.

<sup>728</sup> Section 3 of the Domestic Protection Amendment Act 1986 inserted a new section, s. 37A, into the principal Act. "the Court **may** ... direct the respondent to participate in counselling" (emphasis added).

<sup>729</sup> Domestic Violence Act 1995, s. 49(1) and (2). Note that unlike other breaches, a repeated conviction for failure to attend a programme does not attract a higher maximum penalty.

the cycle of violence.<sup>730</sup> However, there has been considerable debate about the value of treatment programmes.

For example, treatment programmes have been opposed because they divert resources away from services for battered women, which are held to be more effective in ending battering.<sup>731</sup> They have been opposed because they give the impression that something is being done about the problem of violence against women, diverting attention from the need for fundamental social change.<sup>732</sup> That is, by emphasising “treatment” or “rehabilitation”, programmes suggest that the problem of men’s violence against women is one of individual pathology – rather than reflecting the fact that men are violent towards women because, by and large, society tends to allow it.<sup>733</sup>

There is an argument that programmes may actually make things worse for battered women. Men may appropriate the language of the programme to further abuse their partner, for example, by accusing her of “isolating” him for asking where he is going. Men may also make contrasts between themselves and other men to convince their partners that they have nothing to complain about (as Jess’s partner did). Programmes which emphasise communication skills and assertiveness may be particularly dangerous, in effect producing a better educated batterer.<sup>734</sup> Moreover, men may use participation in a programme, particularly voluntary participation, to bargain their way back into the relationship.

Self-referred participants are often given credit for their willingness to attend, their initiative and their commitment to change. When this credit is given by the partner he abused, it understandably results in her postponing safety and protective plans, grounded in the depth of her hope, not in the reality she has been living. It also lulls others around him (both within his family, social network and those within the larger community) into a period of waiting and hoping.<sup>735</sup>

Empirical research confirms that women are much more likely to stay in their relationship if their abuser is attending a programme.<sup>736</sup> Thus, there is a very real possibility that the provision of batterer treatment programmes, by implying that women’s partners will change, may simply expose women to further danger.<sup>737</sup> Here it is relevant to note that key informants working in men’s programmes observed that it is quite rare for men who promise to complete a programme in order to convince their partner to withdraw an application for a protection order actually complete the programme. An experienced coordinator of one large stopping violence programme could not recall a single instance in which a man completed a programme as part of his undertaking.

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<sup>730</sup> Feder, L., & Wilson, D. B. (2005). A meta-analytic review of court-mandated batterer intervention programs: Can courts affect abusers’ behavior? *Journal of Experimental Criminology*, 1, 239-262.

<sup>731</sup> Ritmeester, T. (1993). Batterer’s programs, battered women’s movement, and issues of accountability. In E. Pence & M. Paymar (Eds.), *Education groups for men who batter: The Duluth model*. New York: Springer.

<sup>732</sup> Tiffit, L. L. (1993). *Battering of women: The failure of intervention and the case for prevention*. Boulder, CO: Westview Press.

<sup>733</sup> Frank, P. B. (2005). *NY model for batterer programs*. C/o VCS Inc, Community Change Project. Retrieved 23 September 2006 from <http://www.nymbp.org>.

<sup>734</sup> Robertson, N. R. (1999). Stopping violence programmes: Enhancing the safety of battered women or producing better educated batterers? *New Zealand Journal of Psychology*, 28, 68-78.

<sup>735</sup> Frank, P. B. (2005). Role within the community. In *NY model for batterer programs*. C/o VCS Inc, Community Change Project. Retrieved 23 September 2006 from <http://www.nymbp.org>.

<sup>736</sup> Gondolf, E. W. (1988). The effect of batterer counselling on shelter outcome. *Journal of Interpersonal Violence*, 3, 275-289.

<sup>737</sup> See also Montreal Men against Sexism. (1995). *Limits and risks of “programs” for wife batterers*. Montreal: Montreal Men against Sexism.

Evaluations of the effectiveness of programmes for batterers have tended to produce mixed results. While some studies have reported up to 80% of men to be free of violence six months after completing treatment, other studies have reported a rate of only 50%.<sup>738</sup> Generally, while programmes often show a reduction or cessation of physical violence, they tend to be less successful in ending threats and intimidation.<sup>739</sup>

Positive evaluation findings need to be read with caution because of certain common methodological problems. Relevant here is the very significant problem of dropouts. That is, men who fail to complete the programme and/or cannot be contacted for follow-up by evaluators are typically excluded from analyses, although both are likely to be among the highest risk participants.<sup>740</sup> The rigor of many evaluations is weakened by short follow-up periods<sup>741</sup> and reliance on self-reports or re-conviction data.<sup>742</sup> Some evaluations have very loose definitions of success such as reduced levels of anger or jealousy. Some evaluators take a decrease in the frequency of violence to be indicative of success. However, it is difficult to see a reduced frequency of assault as a significant improvement in a woman's quality of life or as an adequate protection of her rights.<sup>743</sup>

Where evaluations have produced positive findings, it is usually difficult to disentangle the effect of programme participation from other events in participants' lives, such as the effect of arrest and other sentences which may be imposed. Here, randomised experiments provide useful, and sobering, insights. For example, a US study comparing outcomes for men randomly assigned to either probation plus a treatment programme or to probation alone found no significant differences in frequency of re-assault.<sup>744</sup> A similar randomised study comparing judicial monitoring (meetings with a judge, either monthly or on a graduated schedule depending on compliance) plus treatment programme with judicial monitoring alone also failed to detect any

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<sup>738</sup> For recent reviews, see Babcock, J. C., Green, C. E., & Robie, C. (2004). Does batterers' treatment work? A meta-analytic review of domestic violence treatment. *Clinical Psychology Review, 23*(8), 1023-1053; Feder, L., & Wilson, D. B. (2005). A meta-analytic review of court-mandated batterer intervention programs: Can courts affect abusers' behavior? *Journal of Experimental Criminology, 1*, 239-262.

<sup>739</sup> Gondolf, E. W. (2004). Evaluating batterer counseling programs: A difficult task showing some effects and implications. *Aggression and Violent Behavior, 9*(6), 605-631.

<sup>740</sup> Researchers who have reported follow-up data for men who drop out of programmes have typically found them to be up to twice as likely to be violent post-treatment as men who have completed, with one study reporting 75% of drop-outs violent at follow-up. Babcock, J. C., Green, C. E., & Robie, C. (2004). Does batterers' treatment work? A meta-analytic review of domestic violence treatment. *Clinical Psychology Review, 23*(8), 1023-1053.

<sup>741</sup> Evaluations with short follow-up periods tend to have fewer drop-outs but tend to overestimate effectiveness as there is less time for re-assaults to occur. The longer the follow-up, the more violence is detected. See Gondolf, E. W. (2004). Evaluating batterer counseling programs: A difficult task showing some effects and implications. *Aggression and Violent Behavior, 9*(6), 605-631; Hendrick, B., & Turinetti, G. J. (2006). Recidivism among spousal abusers. *Journal of Interpersonal Violence, 21*(6), 703-716.

<sup>742</sup> Both men's self-reports and official recidivism data systematically underestimate the frequency of re-assaults. Partner reports reveal re-assault rates two to three times higher than police reports. Victim interviews provide more complete information but even such interviews may overestimate effectiveness because there are typically high rates of attrition in follow-up samples, with the strong probability that women facing the highest levels of violence are less likely to be re-interviewed. See Babcock, J. C., Green, C. E., & Robie, C. (2004). Does batterers' treatment work? A meta-analytic review of domestic violence treatment. *Clinical Psychology Review, 23*(8), 1023-1053.

<sup>743</sup> For a review of the problems in evaluations of men's programmes, see Robertson, N. R. (1999). Stopping violence programmes: Enhancing the safety of battered women or producing better educated batterers? *New Zealand Journal of Psychology, 28*, 68-78.

<sup>744</sup> Feder, L., & Dugan, L. (2002). A test of the efficacy of court-mandated counseling for domestic violence offender: The Broward experiment. *Justice Quarterly, 19*(2), 343-375.

advantages associated with programme attendance.<sup>745</sup> As a recent meta-analysis of treatment evaluations suggests, the more rigorous the evaluation the less promising the outcomes.<sup>746</sup>

One evaluation of New Zealand Domestic Violence Act-accredited respondents programmes has been published.<sup>747</sup> This relied on both self-reports and partner reports of participants' behaviour before and after the programme and showed generally positive outcomes. Perhaps the most impressive finding was that 51% of the women interviewed described themselves as "not at all safe" before the programme while 27% reported feeling "slightly unsafe." In follow-up interviews, three to six months after the programmes, these figures were reduced to 5% and 15% respectively. Similarly, when asked about their children's safety, 30% considered their children "not at all safe" and 20% "slightly unsafe" before the programme. These percentages had dropped in follow-up interviews to 0% and 10% respectively.

These results should be considered in light of the following considerations. Firstly, the follow-up period was quite short. Secondly, we do not know what happened to men who dropped out of the programmes. Thirdly, the researchers were able to interview only half the partners or ex-partners of the participants (and almost half of those could not be contacted for follow-up interviews). Fourthly, for a substantial number of the women interviewed at follow-up, there was either no change or things had actually got worse.<sup>748</sup> Moreover, the question remains, to what extent were the improvements attributable to the programme as opposed to the other factors such as the making of a protection order?

Despite such concerns, optimism about men's programmes continues, both among battered women and among decision makers. For example, as we show in Chapter 11, judges may see programme completion as sufficient evidence to justify awarding day-to-day care or unsupervised contact.<sup>749</sup> In the case of Priya's partner, merely beginning a programme, along with alcohol counselling, was seemingly enough for him to be given unsupervised contact with the children. In the criminal jurisdiction, as we show in Chapter 13, completing a programme may be seen as justification for imposing a minimal sentence.<sup>750</sup> The optimism about men's programmes is reflected in a phrase we have heard many times over the years, "Any programme is better than no programme."<sup>751</sup> In fact, if one appreciates the risks involved, one would turn this around. Far better to not have a programme than one which further endangers women and children.

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<sup>745</sup> Labriola, M., Rempel, M., & Davis, R. C. (2005). *Testing the effectiveness of batterer programs and judicial monitoring: Results from a randomised trial at the Bronx Misdemeanor Domestic Violence Court: Final report submitted to the National Institute of Justice*. New York: Center for Court Innovation.

<sup>746</sup> Feder, L., & Wilson, D. B. (2005). A meta-analytic review of court-mandated batterer intervention programs: Can courts affect abusers' behavior? *Journal of Experimental Criminology*, 1, 239-262.

<sup>747</sup> McMaster, K., Maxwell, G. M., & Anderson, T. L. (2000). *Evaluation of community based stopping violence prevention programmes*. Wellington: Department of Corrections.

<sup>748</sup> For example, when asked what difference the programme had made to their (ex-)partner's behaviour overall, 26% said that it had made no difference and 13% said that the behaviour was a lot worse. McMaster, K., Maxwell, G. M., & Anderson, T. L. (2000). *Evaluation of community based stopping violence prevention programmes*. Wellington: Department of Corrections, at p. 101.

<sup>749</sup> For example, see our of discussion of *B v M [Guardianship]* [2005] NZFLR 1036. For a general discussion of caution in using programme completion as evidence of safety as a parent, see Freckleton, I. (1995). Custody and access disputation and the prediction of children's safety: A dangerous initiative. *Psychiatry, Psychology and Law*, 2, 139-154, at p. 150.

<sup>750</sup> See also the comments on treatment in the context of specialist domestic violence courts by the Chief District Court Judge: Johnson, R. (2005). *The evolution of family violence criminal courts in New Zealand*. Paper presented at the Police Executive Conference, Nelson, 8 November.

<sup>751</sup> For a critique of this contention, see Holtzworth-Munroe, A. (2002). Standards for batterer treatment programs: How can research inform our decisions? *Journal of Aggression, Maltreatment & Trauma*, 5(2), 165-180.

However, programmes which meet best practice standards can make a useful, if modest, contribution to ending men's violence against women. Best practice programmes:

- i. Incorporate an explicitly feminist analysis of battering as a means by which the batterer maintains power and control over his partner.
- ii. Prioritise the safety and autonomy of women over the confidentiality of participants.
- iii. Have a primarily educational approach (as opposed to therapeutic) in which the cultural and social context of battering is addressed.
- iv. Within that framework, incorporate cognitive-behavioural techniques to help men learn non-violent behaviours.
- v. Emphasise the need for participants to take responsibility for their own behaviour.
- vi. Monitor participants, particularly their use of violence, through regular victim contact.
- vii. Have well-developed links with battered women's organisations to whom they are held accountable.
- viii. Are well integrated with the criminal justice system [or other culturally appropriate mechanism of social control], such that there are clear consequences for the use of violence.<sup>752</sup>

The last point is particularly important. The value of programmes for men who batter may lie less in their ability to change individual men and more in the message they give to participants – and to the public in general – that battering is unacceptable. This message will be effective only if the courts are consistent in applying penalties for non-compliance with orders to attend programmes.<sup>753</sup> Without that consistency, the message is that men will not be held accountable for their violence.

### Women's Experiences of Respondents Programmes

While the women in our case studies had strongly positive views about protected persons programmes, they were generally critical of the failure of respondents programmes to hold men accountable for their violence. Of the 28 women who got a protection order, only one reported that the respondent had completed his programme, although two more were still attending at the time of our interview.<sup>754</sup> The other 25 men can be accounted for in the following ways. Three were not formally required to attend. That is, the ex-partners of Te Rina, Tina and Claire had the

<sup>752</sup> Robertson, N.R. (1999). Stopping violence programmes: Enhancing the safety of battered women or producing better-educated batterers? *New Zealand Journal of Psychology*, 28, 68-78.

<sup>753</sup> What are known as New York (NY) Model programmes are quite explicit on these points. "The purpose of the NY Model for Batterer Programs is to provide a service to the civil and criminal court systems, for men who appear as a result of their acts of domestic violence. As a service to the courts, a NY Model batterer program is utilized to extend judicial monitoring (both pre-disposition and post-disposition) and as a mechanism for offender accountability. To function effectively it is crucial that: [a] A NY Model batterer program is not used as a diversion from a more serious consequence. [b] Orders to attend a NY Model batterer program are made only when the court will issue a consequence to the offender who does not comply. [c] Voluntary participants are not accepted to attend a NY Model batterer program. The key role of a NY Model batterer program is to provide the courts with an opportunity to assess an offender's seriousness about following the conditions of a court order. From point of referral, each participant's adherence to program policies and procedures is rigorously monitored. Compliance reports, tailored to the request of each court, are sent to the court in a reliable and meticulous manner. The role of a NY Model batterer program as a mechanism for accountability and monitoring is of primary significance." Frank, Phyllis, B. (2005). Overview. In *NY model for batterer programs*. Retrieved 23 September 2006 from <http://nymbp.org>.

<sup>754</sup> It is possible that some men may have attended, or even completed, a programme without their ex-partner knowing about it. But in fact, nearly all the women in our case studies had some continuing contact with the respondent and were in a good position to comment on what was happening.

direction to attend a programme discharged, in the later case, in favour of counselling with what appeared to be a very sympathetic and collusive counsellor. Of the 22 men who were required to attend, only 11 were believed to have actually begun a programme. As far as we know, none of these men who failed to begin a programme, and none of those who began a programme but later dropped out, faced any consequences for their non-attendance or non-completion.

This is consistent with earlier research. The review of 335 files conducted in the 2000 process evaluation of the Domestic Violence Act 1995 included 253 cases from 1998 in which a referral to a respondents programme was made. Thirty-three of the respondents were subsequently excused from attending, 44 subsequently succeeded in having either the protection order or the direction to attend discharged, and one had his direction suspended. Of the remaining 175, 80 had completed or were still attending such a programme, leaving at least 95 liable for prosecution for non-attendance.<sup>755</sup> This represents a maximum completion rate of 46% if measured against the total number of respondents whose directions to a programme remained in place. If those excused are included in the calculation, it represents a maximum completion rate of 38%.<sup>756</sup> Whichever way the completion rate is calculated, it is clear that non-completion was the norm for the men included in the evaluation.

The file review did not include an analysis of what penalties, if any, were imposed for non-attendance.<sup>757</sup> However, national statistics from that time suggest few men were being prosecuted for non-attendance. For example, the report noted that during that calendar year (1998), just 194 men were prosecuted for failing to attend a programme across the entire country.<sup>758</sup> National statistics for programme referrals and completions are not available, but if it is assumed that the evaluation sample reflected what was happening throughout the country, then it could be expected that the 6,970 applications for the 1998/99 year would have generated a minimum of 1,977 respondents in breach of their direction to attend a programme.<sup>759</sup> In this context, 194 prosecutions for not attending a programme indicates a very significant failure of enforcement.

Unfortunately, the situation does not seem to have improved since 1998. Those key informants who work in respondents programmes told us that, currently, many respondents fail to even begin their programme. Those who do begin often fail to complete. Moreover, according to these key informants, it is rare for men to be prosecuted for failing to attend a programme. For example, one programme coordinator told us that his local Family Court did not prosecute men who attended for a few sessions and then stopped as they were viewed as having at least “made

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<sup>755</sup> Barwick, H., Gray, A., & Macky, R. (2000). *Domestic Violence Act 1995: Process evaluation*. Wellington: Ministry of Justice, at p. 91. The sample comprised of nearly all the applications made to the Family Court in the selected sites (Whangarei, Auckland Central, Lower Hutt and Christchurch) between 1 July and 30 September 1998. The 335 files selected represented approximately 20% of applications made nationally during that period.

<sup>756</sup> Unfortunately, in reporting the number of discharges, the authors did not distinguish cases in which the protection order was discharged from cases in which the direction to attend was discharged but the order itself remained. The second group represents another source of “slippage” from requiring men with protection orders against them to complete an approved programme.

<sup>757</sup> Although it is noted that approximately 20% of the 220 who were “originally” required to attend were summoned to appear before the court.

<sup>758</sup> Barwick, H., Gray, A., & Macky, R. (2000). *Domestic Violence Act 1995: Process evaluation*. Wellington: Ministry of Justice, at p. 150. Of the 194 prosecuted, 179 were convicted.

<sup>759</sup> Our calculation is as follows. The 335 applications in the evaluation produced a minimum of 95 men liable for prosecution or 28 per 100 applications. (This is a minimum because some of the men attending at the time of the evaluation may not have completed their programme subsequently.) Applying this multiplier to the national figure of 6,970 applications for the 1998/99 year produces 1,977 non-completers.

an effort”.<sup>760</sup> Others spoke of being very frustrated by the inadequate enforcement of attendance by the Family Court. One reported being told by a court manager that the court lacked the resources to prosecute respondents for non-attendance.

There seem to be no publicly available statistics on programme completion or on prosecutions for failing to attend a programme, so we do not know the extent of the problems discussed above.<sup>761</sup> We are, however, left with the impression that the pattern of non-attendance and non-completion evident in our case studies is not unusual; nor, we believe, is the fact that the respondents seem to have escaped consequences for failing to complete their programme. These problems in enforcing attendance undermine the objective of the Domestic Violence Act 1995, “to reduce and prevent violence in domestic relationships by ... recognising that domestic violence, in all its forms, is unacceptable behaviour”.<sup>762</sup>

The procedure set out in the Domestic Violence Act 1995 for enforcing attendance at respondents programmes seems unnecessarily cumbersome. That is, while it is possible to proceed directly to a prosecution for breaching the conditions of the protection order, the Act sets out a two-stage process which is presumably intended for first-time absentees. According to section 39, once a notice of absence is received, the registrar must bring the matter to the attention of a judge to decide whether further action is necessary (section 39(2)). The judge may then decide to call the respondent (section 42) using the powers set out in section 82. When the respondent appears, the judge may “confirm, vary or discharge the direction” (section 42(2)). Where the order is confirmed, the judge must warn the respondent that non-compliance with the direction is an offence punishable by imprisonment (section 42(4)). Some Family Court staff we spoke to considered this cumbersome procedure to be a disincentive to enforcing attendance.

Accordingly, we recommend:

**THAT much higher priority be placed on prosecuting non-attendance at respondents programmes, that the procedure be streamlined, and that statistics for programme completion and enforcement action taken be routinely collated and published.**  
(#29)

### Barriers to Safe Programme Practice

Programme providers reported that state agencies made it difficult to carry out the kind of victim contacts vital to running a safe and accountable programme. Some programme providers have informed us that the Family Court had expressly prohibited programme staff from contacting protected persons. Similarly, we were informed by some providers that the Department of Corrections, citing the Privacy Act 1993, was failing to pass on the information needed to undertake victim checks.<sup>763</sup> In our view, and in the view of the domestic violence specialists we

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<sup>760</sup> It is not clear whether it may be judges or court officials making such calls. The enforcement of directions to attend respondents programmes is covered by s. 39 of the Domestic Violence Act 1995. This requires programme providers to give notice of absences (s 39(1)). On receipt of such a notice “the Registrar must, without delay, bring the matter to the attention of a Judge so that the Judge may consider whether or not the power conferred by s. 42 of this Act should be exercised in relation to the respondent, or, as the case requires, the associated respondent” (s. 39(2)).

<sup>761</sup> There are statistics on prosecution of breaches but these do not disaggregate breaches for failure to attend programmes from other breaches.

<sup>762</sup> Domestic Violence Act 1995, s. 5(1).

<sup>763</sup> This seems to be an overly restrictive reading of the Privacy Act 1993. Passing on to a programme provider the name and contact details of a partner or ex-partner of a programme participant seems to fit at least two of the exceptions to the general principle 11 that: “An agency that holds personal information shall not disclose the information to a person or body or agency”, namely exceptions (a) (“That the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in

spoke to, such contact is vital to address the isolation typically imposed by batterers, to facilitate safety planning, to provide information about resources and services, and to ensure that women have accurate information about the programme, including a realistic view of the possibility of change in their (ex-)partner.<sup>764</sup> Victim contact also means that the impact of the programme can be monitored, and the aggregated feedback from women used to modify the programme. (Feedback from individual women cannot be used to hold their (ex-)partners accountable as that can endanger the woman.) Without victim checks and victim advocacy, providing a treatment programme for batterers is dangerous. Indeed, it is considered unethical in some jurisdictions.<sup>765</sup>

Jess's experience is instructive here. Her ex-partner appears to have been the only respondent in our case studies to have completed a programme, although she only has his word for this as she was never contacted by the programme provider. Moreover, he attempted to use his participation to his advantage, contrasting himself with the other men who had "really beat their wives". Later, he said that the programme staff were so pleased with him that they had asked him to train as a facilitator after completing the programme. Of course, we do not know if he was actually invited to be a facilitator or not but the not knowing is at least part of the point. Unless there is victim contact by programme providers, or by advocates working in collaboration with programme providers, respondents are able to use programme participation to their advantage.

The Domestic Violence Act 1995 and its associated regulations include provisions for protecting the confidentiality of information disclosed to a programme provider (section 43). The provisions do not preclude passing on to providers the names and contact details of the relevant protected person yet we were told by programme providers that the regulations are cited as the reason the court cannot pass on such information. This needs to be addressed if programmes are to be effective in promoting the safety of protected persons. Prioritising confidentiality over accountability undermines the ability of respondents programmes to contribute to important objectives of the Act, namely to provide effective protection to victims of domestic violence (section 5(1)(b)) and to stop and prevent domestic violence (section 5(2)(d)).

Accordingly we recommend:

**THAT protocols be developed so that providers of respondents programmes are routinely given names and contact details of protected persons to facilitate victim contact. (#30)**

### **Child, Youth and Family**

Nearly all the women in our studies are mothers. Keeping themselves safe was inevitably bound up with their desire to keep their children safe. Clearly, the state has a responsibility to both women and children to protect them from men's violence. Unfortunately, our case studies suggest that too often, the statutory child protection agency, Child, Youth and Family (CYF), was often part of the problem.

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connection with which the information was obtained") and (f) ("That the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to ... the life or health of the individual concerned." Alternatively, applicants could be asked for permission to pass on their contact details to the programme provider should the respondent be directed to a programme.

<sup>764</sup> Campbell, J. C. (2002). Safety planning based on lethality assessment for partners of batterers in intervention programs. *Journal of Aggression, Maltreatment & Trauma*, 5(2), 129-143; Murphy, C. M. (2002). Toward empirically based standards for abuser intervention: The Maryland Model. *Journal of Aggression, Maltreatment & Trauma*, 5(2), 249-264.

<sup>765</sup> For example, see Hart, B. J. (Ed.). (1992). *Accountability: Program standards for batterer intervention services*. Reading, PA: Pennsylvania Coalition against Domestic Violence.



## Women's Fears about Child, Youth and Family

As is clear from the previous chapters, our participants encountered various barriers to seeking protection. One of the barriers was a fear that disclosing abuse to officials might lead to their children being taken into care. For example, this is exactly why Titiana and Elizabeth did not call the police. When she sought medical treatment, Tiare did not tell hospital staff that her injuries resulted from domestic violence because she was afraid that CYF would take her children. Nusrat told us that the people she knows in her community are scared of the same thing. These are realistic fears. Crystal, Katrina and Elizabeth all had their children taken into care and when we spoke to her, Nusrat's children were to be the subject of a Family Group Conference. Moreover, the role of CYF was exploited by some of the men in the case studies. Priya and Amanda were subject to malicious notifications made to CYF by their ex-partners. Priya and Titiana were told by their partners that they would lose their children if they rang the police. Kevin, and his parents, did the same to Sripai.<sup>766</sup> There is some basis to such assertions. Police officers and NGO workers told us that police in most districts now routinely make referrals to CYF whenever they find children present at domestic violence incidents. According to some of our key informants, this has resulted in the children of battered women being uplifted from the refuge.

The role of CYF in Elizabeth's life is particularly noteworthy. She was aware of the power of CYF to instigate the removal of her children. This acted as a strong disincentive to calling the police. Subsequently, pressure from a CYF social worker was the main reason she got a protection order. The protection order did almost nothing to improve her safety, or the safety of her child. Both that child, and his younger brother born after the protection order was made, are now in CYF's care.

Presumably, the social worker's action in pressuring Elizabeth to get a protection order recognised that the threat to the child's safety came from Stephen, not Elizabeth. Yet, the responsibility for taking action against Stephen was placed squarely on Elizabeth's shoulders. Moreover, once she got the protection order she was effectively left to her own devices in her efforts to keep her children safe. In effect, by having her children removed from her, Elizabeth was punished for Stephen's violence.

In short, some of our case studies show that CYF was generally viewed not as an ally of battered women but as an enemy who might take their children. As shown above, this meant that some women did not call the police when they were assaulted. Similarly, some of our key informants thought that some women were reluctant to get a protection order for the same reason. These are not new problems;<sup>767</sup> neither are they unique to New Zealand.<sup>768</sup> But unless these problems are addressed, both women and children will continue to be placed unnecessarily at risk if the state is seen, not as a source of protection, but as the potential alienator of one's children. Indeed, if, as our key informants tell us, CYF is uplifting children from refuges after receiving notifications from the police, then the state is not only failing to protect – it is actually punishing women for taking steps to protect themselves and their children. The perpetrators, meanwhile, remain

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<sup>766</sup> As Lundy Bancroft and Jay Silverman have pointed out, threats to report women to the state's child protection service(s) is a common tactic of the batterer. Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. Thousand Oaks, CA: Sage, at p. 74.

<sup>767</sup> For a New Zealand study of this issue, see Corbett, L. (1999). *Child protection workers' interactions with women abused by their male partners: Five women's stories*. Unpublished master's thesis, University of Waikato.

<sup>768</sup> Schechter, S., & Edleson, J. L. (1994). *In the best interest of women and children: A call for collaboration between child welfare and domestic violence constituencies*. Briefing paper prepared for Domestic violence and child welfare: Integrating policy and practice for families conference, Racine, Wisconsin, 8-10 June. Also Findlater, J. E., & Kelly, S. (1999). Child Protective Services and domestic violence. In Domestic violence and children [Special issue] *The future of children*, 9(3), 84-96.

unaccountable and free to abuse, if not the particular women and children involved, then future partners and their children.<sup>769</sup>

It need not be so. As CYF has demonstrated in the case of sexual abuse, it does have the resources and processes to support the effective prosecution of abusers. Despite the challenges of securing convictions in cases of child sexual abuse, the joint efforts of CYF social workers, specialist interviewers and police sexual abuse teams frequently succeed in having sexual abusers convicted. It seems anomalous that similar effort is not put into the prosecution of men who abuse children physically.<sup>770</sup> However, CYF guidelines make it clear that referral to the Police for prosecution is envisaged only in “serious” cases of child physical abuse.<sup>771</sup>

CYF workers have another mechanism by which they can help to make men accountable for their violence, namely, initiating action under the Children, Young Persons, and Their Families Act 1989 to have restraining orders made against offenders. Such orders have much the same effect as a protection order<sup>772</sup> but have a significant advantage in that it is the state – in the form of a social worker – who makes the application, not a battered woman. This was an option open to the CYF social workers who were investigating the risks Elizabeth’s children were facing. Had the social workers initiated proceedings for a restraining order against Stephen, Elizabeth might have seen CYF as an ally and a source of support, not as an organisation to be avoided. Instead, the social workers’ actions tended to drive Elizabeth into an alliance with Stephen against the statutory child protection system. Stephen used this to his advantage. During one of her stays in hospital, he wrote to Elizabeth, “We get your tubes untied and have another baby in a new town where SYPS [*sic*] can’t find us because you are so beautiful when you are pregnant.”

While greater use of restraining orders of itself will not solve the problem of child abuse, this approach locates responsibility with the violent party, recognising that typically, women and their

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<sup>769</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. Thousand Oaks, CA: Sage, at p. 19. While Bancroft and Silverman write from a North American context, locally, members of Care and Protection Resource Panels have told us of their concern about recidivist perpetrators coming to notice in their second or third families.

<sup>770</sup> In 2005, there were 1,366 convictions for sexual offences against children 16 or younger. In the same year, there were 287 convictions under s. 194(a) of the Crimes Act 1961 (assault on a child under 14 years). (Soboleva, N., Kazakova, N., & Chong, J. (2006). *Conviction and sentencing of offenders in New Zealand 1996-2005*. Wellington: Ministry of Justice. Retrieved from <http://www.justice.govt.nz/pubs/reports/2006/conviction-sentencing1996-2005>.) The age groups mentioned above are not strictly comparable and there are charges other than those listed which are sometimes laid in respect of physical assaults on children, but clearly convictions for the sexual abuse of children heavily outnumber convictions for physical abuse. In contrast, data from the Christchurch Child Development study suggest that overall, physical abuse is about as common as sexual abuse (although there are significant gender differences in that sexual abuse is more common among girls while physical abuse is more common among boys). (Fergusson, D. M., Horwood, L. J., & Woodward, L. J. (2000). The stability of child abuse reports: A longitudinal study of the reporting behaviour of young adults. *Psychological Medicine*, 30, 529-544.)

<sup>771</sup> Waldegrave, S., & Coy, F. (2005). A differential response model for child protection in New Zealand: Supporting more timely and effective responses to notification. *Social Policy Journal of New Zealand*, 25, 32-48, at p. 47.

<sup>772</sup> The provisions relating to restraining orders are set out in the Children, Young Persons, and Their Families Act 1989. Restraining orders may be made when a child is declared to be in need of care or protection (s. 67). The grounds for making such a declaration include “being, or likely to be, harmed (whether physically, emotionally or sexually), ill-treated, abused or seriously deprived” (s. 14(1)(a)) and the “physical or mental or emotional wellbeing is, or is likely to be, impaired” (s. 14(1)(b)). Thus, restraining orders are potentially available to protect children from witnessing violence as well as from direct physical victimisation. The conditions of a restraining order include prohibitions against residing with the child, against using violence or threats against the child and against “watching or besetting the child’s or young person’s place of residence, work or education or by following or waylaying that person in any public place.” In respect of the later, there is a parallel prohibition in relation to the person with whom the child is residing (s. 87). Breaches of a restraining order carry a maximum penalty of \$2,000 or three months’ imprisonment (s. 89).

children are victims of a common perpetrator. Currently, relatively few restraining orders are issued (80 in 2004) yet they are an obvious mechanism for simultaneously protecting children and holding perpetrators accountable for their violence.<sup>773</sup>

As with protection orders, the effectiveness of restraining orders depends largely on their enforcement. Here, police have a crucial role. It is likely that the best results will require effective collaboration between CYF and the police. In conjunction with the courts, these are the two agencies with statutory powers to impose penalties and restrictions on perpetrators. As noted above, there is already some collaboration between these two agencies of the state. Unfortunately, as the experience of Crystal, Katrina and Elizabeth shows, collaboration between services sometimes mean that battered women are held responsible for the violence perpetrated against their children. What is needed is a significant change to collaboration focused on perpetrator accountability, through the use of both restraining orders and criminal prosecutions.

**THAT Child, Youth and Family places greater priority on perpetrator accountability through the use of restraining orders and the prosecution of perpetrators, and works collaboratively with the police to ensure the effective prosecution and enforcement of restraining orders. (#43)**

### Risk Assessment

There needs to be a move away from what appears to be a victim-blaming approach to child protection. Victim blaming is implicit in the risk assessment methodology used by CYF workers. The current risk estimation (or assessment) system (RES) pays little attention to battering despite the fact that battering is the most common context of child abuse and neglect.<sup>774</sup> The RES does make some oblique references to violence against women,<sup>775</sup> but these fail to adequately address the dynamics of domestic violence or the constraints under which battered women live their lives. Instead, implementation of the RES is likely to see battered mothers positioned not as victims of abuse but as co-perpetrators. Specifically, the RES manual notes:

In families with two caregivers in the home, where one is the perpetrator of abuse and the second has not attempted to protect the child, the second must be assessed as a

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<sup>773</sup> Bartlett, E. (2006). *Family Court statistics 2004*. Wellington: Ministry of Justice. Retrieved 1 August 2006 from <http://www.justice.govt.nz/pubs/reports/2006/family-court-statistics-2004>.

<sup>774</sup> At least 60% of abused children have been found to have mothers who are themselves victims of abuse, although significantly, where social worker reports are used, the reported co-occurrence rate tends to be lower. Calculating the co-occurrence rate in the reverse direction – that is, the percentage of battered women whose children are being abused – has produced estimates as high as 100% (depending on criteria and source of information). Appel, A. E., & Holden, G. W. (1998). The co-occurrence of spouse and physical child abuse: A review and appraisal. *Journal of Family Psychology, 12*(4), 578-599; Whitney, P., & Davis, L. (1999). Child abuse and domestic violence in Massachusetts: Can practice be integrated in a public child welfare setting? *Child Maltreatment, 4*(2), 158-166; Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. Thousand Oaks, CA: Sage.

<sup>775</sup> For example, the introductory pages mention “violent behaviour” as one of several “complicating factors” in child abuse (along with substance abuse, mental illness, intellectual capacity and social isolation) (p. 26). There are similar references in the instructions for some of the seven sections of the RES manual. For example, in considering the “history of violence” social workers are informed that “Caregivers who have a history of violence against another adult have the potential to behave in a similar manner against their own child” (p. 63). In considering the “spousal (partner) relationship” they are informed that “Families in which abuse occurs are often characterized by a partner relationship which is hierarchal, where decisions are not shared, where force and/or conflict maintain the relationship, and where there is an open expression of antagonism” (p. 78). There are other references in the section in which social workers assess the extent to which there is an “Adequate protector present” (pp. 38-39). Child, Youth and Family Services. (2000). *RES: Risk estimation system reference manual*. Wellington: Child, Youth and Family Services.

perpetrator of neglect. The level of severity assigned to the abuse by the first caregiver determines the severity of the neglect by the second caregiver.<sup>776</sup>

This is obviously at odds with the analysis of the Domestic Violence Act 1995. According to section 3(3), exposing a child to the abuse of a person with whom that child has a domestic relationship constitutes psychological abuse. However:

the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.<sup>777</sup>

That is, the Domestic Violence Act definition is explicit that perpetrators, not victims, should be held accountable for children's exposure to violence. In contrast, the RES effectively decouples the interests of battered women and their children by holding battered mothers responsible. The RES plays into the hands of the perpetrator, adding credibility to his threats that his partner will lose her children if she reports his violence.

The RES fails to meet the *New Zealand standard for screening, risk assessment and intervention for family violence including child abuse and neglect* developed to provide "a common language" for screening, risk assessment and safety planning with families living with family violence, child abuse or neglect.<sup>778</sup> In particular, it seems to violate three of the standard's 13 "principles/guidelines" of risk assessment. That is, by implicitly considering battered women as co-perpetrators of abuse or neglect, the RES fails to "[r]ecognise that family/whanau violence, in all its forms, is unacceptable behaviour" (principle (a)). While the standards require risk assessment to "[n]ot compromise the safety of people affected by any risk of family/whanau violence" (principle (b)), the operation of the RES does exactly that, as the case studies mentioned above show. By not directing social workers to consider the experiences of battered mothers, the RES fails to "[t]ake seriously the fears, concerns and perceptions of any client" (principle (i)).

The RES needs to be revised to reflect the more holistic, integrated approach indicated in the standard. It needs to be revised to ensure child protection workers pay close attention to battering as the most common context for child abuse and neglect. It must include consideration of the dynamics of battering. For example, if a home visit detects little food in the house or children in need of medical attention, child protection workers should establish if the primary caregiver's access to money or a vehicle is being controlled by an abusive partner.<sup>779</sup> Similarly, a mother's use of physical punishment to discipline her children needs to be evaluated within the (possible) context of battering. As some of our key informants observed, some battered women may hit their children in an attempt to get them to conform to the batterer's expectations so that they will be saved from worse violence should he become angry with the children's behaviour. In short, the RES needs to be revised to recognise abused mothers and children as victims of the same perpetrator. We recommend:

**THAT Child, Youth and Family adopts risk assessment protocols which:**

- (a) are consistent with the definition of domestic violence in the Domestic Violence Act 1995, especially section 3(3) where the victim of the violence is not**

<sup>776</sup> Ibid, at p 33.

<sup>777</sup> Domestic violence Act 1995, s. 3(3).

<sup>778</sup> Standards New Zealand. (2006). *New Zealand standard for screening, risk assessment and intervention for family violence including child abuse and neglect: NZS 8006:2006*. Wellington: Standards New Zealand, at p 5.

<sup>779</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. Thousand Oaks, CA: Sage, at p. 206.

**construed as having caused the children to hear or see the abuse meted out against her;**

**(b) require social workers to screen for domestic violence; and**

**(c) require social workers, where domestic violence is detected, to evaluate battered women's parenting in the context of the constraints imposed by such violence.**

(#42)

### Working Collaboratively with Non-Government Organisations

A third area needing attention involves the relationship between CYF and the NGO sector, specifically non-statutory child protection agencies and women's refuges. As Bancroft and Silverman have observed:

A useful guiding concept that has emerged from collaborations between child protective services and battered women's programs is that the best way to contribute to the safety of the children of battered women is to further the safety of their mother.<sup>780</sup>

While the answers are necessarily speculative, it is relevant to ask how much better off the children of Crystal, Katrina, and Elizabeth would have been if CYF social workers had worked collaboratively with women's advocates to help ensure the safety of the mothers. Such collaboration requires overcoming historic tensions between mother-focused and child-focused service providers so that each may contribute their specialist expertise to a common cause.<sup>781</sup> It requires professionals to develop respect for battered women rather than the condescension and impatience which sometimes characterises their response.<sup>782</sup> But without such changes, the problems reflected in the case studies are likely to remain. And the only people who benefit will be the perpetrators of violence.

Collaboration between CYF and the NGO sector can help to ensure that the best use is made of their respective strengths. We note that there has been a rapid increase in the number of care and protection notifications to CYF over the past three years.<sup>783</sup> While we could find no published data on the source of notifications, key informants told us that a large proportion of the increase is attributable to police making routine notifications whenever children are located at domestic violence incidents. However, it is a moot point whether such routine referral is making the best use of the resources and statutory powers of CYF. Unless the children are the direct victims of violence, these powers need not be employed in the majority of family violence cases which come to attention via the police or other means. Indeed, as our case studies show, in many ways, those statutory powers merely serve to alienate women. Instead, as advocated by both local and overseas experts – and many of our community-based key informants – much of the non-emergency child protection work can be carried out by relevant NGOs, whose workers are

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<sup>780</sup> Ibid, at p. 190.

<sup>781</sup> Beeman, S., Hagemester, A., & Edleson, J. (1999). Child protection and battered women's services: From conflict to collaboration. *Child Maltreatment*, 4(2), 116-126; American Psychological Association Presidential Task Force on Violence and the Family. (1996). *Violence and the family: Report of the American Psychological Association Presidential Task Force on Violence and the Family*. Washington, DC: American Psychological Association.

<sup>782</sup> Bancroft, L., & Silverman, J. G. (2002). *The batterer as parent: Addressing the impact of domestic violence on family dynamics*. Thousand Oaks, CA: Sage, at p. 190. It should be noted that these authors, like us, recognise that quick, decisive action to remove children may be required when they face imminent danger of serious harm.

<sup>783</sup> Care and protection notifications increased from 31,781 in 2002/03 to 43,314 in 2003/04 and 53,097 in 2004/05. Child, Youth and Family Services. (2005). *Annual report for the year ended 30 June, 2005*. Wellington: Child, Youth and Family Services. Retrieved 6 October 2006 from [http://www.cyf.govt.nz/documents/annual\\_report\\_05.pdf](http://www.cyf.govt.nz/documents/annual_report_05.pdf).

usually better able to develop alliances with battered women precisely because they do not carry statutory powers.<sup>784</sup>

This is beginning to happen. For example, in Hamilton, weekly meetings consider records of police domestic violence callouts involving children. These meetings are attended by local NGOs (refuges and non-statutory child protection agencies) as well as a CYF social worker. They are essentially triage meetings which identify high-risk cases requiring immediate referral to CYF and, for the rest, determine which NGO agency is best placed to follow up the family. The outcome of follow-up action is reviewed at subsequent meetings. Such reviews are important because they serve to monitor the services provided and plan further action if needed. For example, NGO workers may conclude that the level of risk in a particular case has reached the point where the statutory powers of CYF are needed. Through such collaboration, duplication of services is largely avoided, cooperation between child advocates and women's advocates is enhanced, and families receive help from the agency best suited to meet their needs. Only a small proportion of cases are referred to CYF.<sup>785</sup> The recent report of the Taskforce for Action on Violence within Families suggests this model will be adopted nationally.<sup>786</sup> We certainly think it should be.

The model we have described is similar to the differential response model introduced in three sites in 2005 but has one important difference (at least as implemented in one of the sites). As described by Waldegrave and Coy, under the differential response model, the triage function is exercised exclusively by CYF social workers who decide which cases are to be referred to NGOs for "family well-being assessments" or other informal follow-up.<sup>787</sup> In Hamilton, this decision making is shared between the statutory and non-statutory agencies, making the most of the knowledge NGOs have of the families they work with, and generally enhancing collaboration. According to information received from CYF collaborative decision-making is the practice in other differential response model sites. Such collaboration is consistent with long-standing calls for better collaboration in family violence intervention.<sup>788</sup> We recommend:

**THAT Child, Youth and Family places greater priority on working collaboratively with community agencies which specialise in domestic violence work. This must include working in partnership with such organisations to assess cases, determine priorities and allocate the follow-up of children exposed to domestic violence.**  
(#44)

According to some of our key informants, the changes we have recommended in relation to CYF will require a significant mind shift for many social workers whose view of child protection does not necessarily encompass perpetrator accountability. Similarly, key informants tell us that many social workers have a poor understanding of the dynamics of domestic violence. Social workers

<sup>784</sup> Waldegrave, S., & Coy, F. (2005). A differential response model for child protection in New Zealand: Supporting more timely and effective responses to notifications, *Social Policy Journal*, 25, 32-48.

<sup>785</sup> Balzer, R. (2006). *Whakapapa to recent violence intervention initiatives in Hamilton, Aotearoa*. Unpublished manuscript, Hamilton.

<sup>786</sup> Taskforce for Action on Violence within Families. (2006). *The first report*. Wellington: Ministry of Social Development. Retrieved 1 August 2006 from <http://www.msd.govt.nz/work-areas/families-whanau/action-family-violence/>, at p. 24.

<sup>787</sup> Waldegrave, S., & Coy, F. (2005). A differential response model for child protection in New Zealand: Supporting more timely and effective responses to notification. *Social Policy Journal of New Zealand*, 25, 32-48, at p. 41.

<sup>788</sup> Beeman, S., Hagemester, A., & Edleson, J. (1999). Child protection and battered women's services: From conflict to collaboration. *Child Maltreatment*, 4(2), 116-126; American Psychological Association Presidential Task Force on Violence and the Family. (1996). *Violence and the family: Report of the American Psychological Association Presidential Task Force on Violence and the Family*. Washington, DC: American Psychological Association. Lafferty, P. (2005). A personal view on a Child, Youth and Family initiative. *Social Work Now*, 32, 19-22.

need to appreciate that, typically, battered women and their children are co-victims of a common perpetrator. They need to know that helping women live lives free of violence will usually offer the best hope of protecting children. They need to understand that effective protection includes making perpetrators, not victims, accountable for the violence. To be effective, the sorts of change we are proposing will need to be accompanied by training. Therefore, we recommend:

**THAT social worker training, both pre-service and in-service, pays greater attention to the dynamics of domestic violence, the co-occurrence of violence against children and women, the role of the state in holding perpetrators accountable and the importance of interagency collaboration. (#45)**

### **Whānau and Community Support**

While our focus thus far has been on the role of the state, as the case studies show, women also turn to whānau, family and community groups for help in ending male partner violence. Research in both New Zealand<sup>789</sup> and Australia<sup>790</sup> indicates that women are far more likely to seek help from family, friends and neighbours than from formal helping agencies, the police or the Family Court.

### **Combating Isolation**

The importance of family and community support is underlined by the way perpetrators typically isolate their victims. Without exception, all the women in our case studies were subjected to this tactic one way or another. Often, it was quite obvious as men placed restrictions on who their partners could talk to, where they could go and who could visit them (for example, Priya, Tiare, Tessa, Titiana, Zaleha and Amanda). Sometimes, the isolation was achieved by relocation away from the women's family (for example, Rachel). Some perpetrators isolated their ex-partners by going to great lengths to discredit them within their circle of friends (for example, Hilda and Claire). In other cases, charm was used to isolate women from their families. This happened to Lyla, Maria and Sonal (at least initially), whose families were so charmed by their respective partners that the men gained the loyalty of the women's families. In other cases, the man's family actively colluded with the violence and isolation and/or helped him keep his partner under surveillance (Crystal, Roimata, Te Rina Trudy, Tiare, Priya, Alice, Lin-Bao and Sripai). In the case of Alice and Lin-Bao, this extended to active participation in the violence. In some instances, the collusion involved the wider community, as was evident with Marjorie's difficulties in finding support within the church community to which she belonged. Similarly, some women became estranged from their respective ethnic communities for making a stand against their partner's violence (Lin-Bao, Tina and Pinky) or failed to make a stand through fear of the reaction of their community (Nusrat).

But on the other hand, there were numerous instances of whānau and family rallying around and providing vital support. In some instances, this involved directly challenging the perpetrator and providing physical protection. Acting in accordance with tikanga,<sup>791</sup> Halle's brothers confronted her abuser, provided practical support, and made sure that there was always a male with her until she felt safe from her ex-partner. A nephew played a similar role for Tiare. The mothers of Te Rina and Tessa directly confronted their daughters' partners. As Te Rina's mother told Pera: "We never gave her a hiding, why should you?" Practical help was important as shown in the way

<sup>789</sup> Morris, A. (1997). *Women's safety survey 1996*. Wellington: Victoria University, at p. 57.

<sup>790</sup> Mouzo, J., & Makkai, T. (2004). *Women's experiences of male partner violence: Findings from the Australian component of the International Violence against Women Survey (IVAWS)*. Canberra: Australian Institute of Criminology, at p. 101.

<sup>791</sup> Code, convention, custom, obligations or (legal) provisions.

whānau or family members helped some of the women move and/or set up a new home (Te Rina, Alice, Amy and Trudy). In other cases, they gave welcome advice (Amy, Patti and Rachel).

Despite the comments above, sometimes it was members of the perpetrator's whānau or family who provided support. On one occasion, Halle rang her partner's uncle, who gave her partner a very clear message about the unacceptability of violence. Katrina found her mother-in-law to be very supportive. After her mother-in-law died, other whānau of her partner took her in and provided a period of stability, putting her "on the right track". In what Amy described as a miracle, her mother-in-law moved to New Zealand to set up house with her.

Sometimes the help came not from whānau or family but wider networks. Crystal was very appreciative of the help she received from her local iwi-based health and social service agency. For Maria, what made the crucial difference was not the police but the hapū and community networks which supported her. (In time, those same networks played a role in supporting Eru to change his behaviour.) Despite her generally negative experiences, Marjorie found a few people within the church who were supportive. Neighbours, too, were often supportive, as they helped women move, called the police, provided shelter and kept women company in times of crisis (Marama, Te Rina, Zaleha and Rachel).

Such informal sources of support can be crucial, especially where seeking help from statutory agencies is particularly difficult as may be the case for women who have criminal records, who are involved in gangs, whose previous experiences have made them anxious about state agencies, who have experienced racism from state agency officials, or who do not have residence (and/or whose partners do not have residence).

### Support in Diverse Cultural Contexts

For Māori, whānau and hapū have traditionally been central for resolving violence issues. Violence against women was seen as an attack on whakapapa and retribution was swift.<sup>792</sup> Three of our case studies show how strong whānau continue to have both a protective function for women and children and to hold perpetrators accountable for violence (Halle, Katrina and Te Rina).<sup>793</sup> A recently published study confirms that Māori women often have primary reference to the whānau in their efforts to protect themselves and tamariki from violence.<sup>794</sup> Ten years ago, other researchers called for measures to strengthen the ability of whānau and hapū to respond to family violence, including public education campaigns, violence-free marae programmes, resourcing whānau and hapū initiatives to prevent violence, creating bonds between kaumātua and kuia and younger Māori working in family violence, and developing specifically Māori resources for education and intervention.<sup>795</sup> These proposals are still relevant today.<sup>796</sup>

<sup>792</sup> Balzer, R., Haimona, D., Henare, M., & Matchitt, V. (1997). *Māori family violence in Aotearoa*. Wellington: Te Puni Kōkiri.

<sup>793</sup> Specific examples include helping women move, confronting the perpetrator, providing shelter, calling the police. We include Katrina here because, despite other negative experiences, at one stage, part of Rana's whānau provided a home and support for Katrina.

<sup>794</sup> Hand, J., Elizabeth, V., Rauwhero, H., Selby, S., Burton, M., Falanitule, L., & Martin, B. (2002). *Free from abuse: What women say and what can be done*. Auckland: Auckland Healthcare Services.

<sup>795</sup> Balzer, R., Haimona, D., Henare, M., & Matchitt, V. (1997). *Māori family violence in Aotearoa*. Wellington: Te Puni Kōkiri.

<sup>796</sup> Some initiatives had been implemented. For example, Mauri Ora (see Second Māori Taskforce on Whānau Violence. (2004). *Transforming Whānau Violence: A conceptual framework*. Wellington: Te Puni Kōkiri. Retrieved 20 September 2006 from [http://www.tpk.govt.nz/publications/docs/whanau\\_violence.pdf](http://www.tpk.govt.nz/publications/docs/whanau_violence.pdf)) and family violence-free hapū and marae (State Services Commission. (2005). *Family violence free hapū and marae*. Retrieved 20 September 2006 from [http://www.ssc.govt.nz/upload/downloadable\\_files/Health\\_-\\_Report\\_on\\_Family\\_Violence-free\\_Hapu\\_Marae.pdf#](http://www.ssc.govt.nz/upload/downloadable_files/Health_-_Report_on_Family_Violence-free_Hapu_Marae.pdf#)).



Broadly similar initiatives are needed to address the needs of other communities. For example, among the Pākehā women, Marjorie's sense of shame made it difficult to talk to people within her church community about Alistair's violence, and when she did talk about it, church leaders were mostly unhelpful. Similarly, the attitudes of some of Claire's friends were such that she felt ashamed to admit that she was still with Robert despite what had happened. Amanda's friends had noticed how her partner had "virtually excluded" her from friends and family but only talked to her about it **after** she had separated from him. Each of these Pākehā women might have been less isolated than they were if people within their circle had a better understanding of domestic violence, had communicated that understanding and were proactive in providing support. Instead, prevailing cultural values about the privacy of the family and ignorance about the tactics of batterers provided barriers to safety.

These sorts of problems can be amplified in small immigrant communities. Because they are cultural minorities struggling to maintain their identity, such communities may be less tolerant of airing matters which may cast them in a negative light. Moreover, cultural practices protective of women and children may be less well preserved. In such situations, women can carry enormous shame for their partner's violence.<sup>797</sup>

This was certainly evident in our case studies. Alice's partner, Harry, was able to exploit the fact that marriage was seen as shameful within their (Chinese) community. Largely because of the shame she felt, Alice became alienated from other members of the Chinese community in the city in which they lived. Similarly, because of her shame, Lee-Mei did not know who to turn to. She told us.

In my culture if a pregnant woman is thrown out of the house, then she is not considered to be a good woman. She is looked down upon and isolated from the rest of the community.

Pinky faced the wrath of her community when she went to the refuge. The view among her community, migrants from Northern India, was that she had let them down and "shamed" them in the eyes of the wider New Zealand community. She came under intense pressure to reconcile with Jatinder – which she did.

Similar problems faced Pasifika women. Rasela knew that it was pointless, if not dangerous, to talk to anyone in her congregation about the way she was being treated.

No one will help you. No one will be on your side. Everyone will immediately think, "What did you do to your father to make him feel like that?" No one would even dare to cross my father and disagree with him to his face. No one would voice it; no one would dare take my side over his; no one would. There is no hope because there is no way of getting out.

Rasela understood the role of cultural values which support male dominance:

My brothers ... feel that it's ok that my father is the man of the house and controls everybody, and at some stage they will run their house in the same way.

For Alofa, too, certain cultural values served to bolster Fetu's violent and controlling behaviour. She told us:

In the real Samoan way, the wife must listen to the head of the family and that is the man, so you must obey what they say.

Sonal's experience demonstrates what can happen when migrant families' attachment to their culture of origin becomes tenuous. Like her parents, Sonal was born in New Zealand but her parents were anxious to retain aspects of their culture. Consequently, they arranged a marriage

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<sup>797</sup> Family and Domestic Violence Unit. (2006). *A review of literature relating to family and domestic violence in culturally and linguistically diverse communities in Australia*. Perth: Department for Community Development.

for her with a man from the Punjab, Ranjit. Although Sonal had corresponded with him for two years, Ranjit's family said it would be against tradition for her to meet him before the wedding. Despite having misgivings, Sonal's family went along because nobody really knew what the correct tradition was. As Sonal told us, "We just did not know what 'culture' was." They did not know, for example, that marriage practices in India had changed. They accepted the word of Ranjit's family's on "tradition" and failed to negotiate the terms of the marriage or appreciate their ongoing role in it, as is often the case in arranged marriages. Consequently, Sonal only discovered afterwards that Ranjit spoke no English – someone else had been writing "his" letters to her. Similarly, she learnt later that Ranjit had come to New Zealand on a six-month visa and that marriage was going to be his key to getting residence. Isolated from protective cultural practices, such as the continuing role of her family in the marriage, she was vulnerable to the way Ranjit and his family exploited other traditional cultural values – and consequently, to Ranjit's manipulation and violence.

### Strengthening Family and Community Support

The goal of ending men's violence against women and children is unlikely to be achieved without a multilevel approach, including the involvement and participation of community workers and community leaders, people who are actually involved with their respective communities and are highly regarded by members of those communities.<sup>798</sup> Generic campaigns or messages targeted at the "mainstream" are likely to be less effective than more nuanced initiatives which address the needs, aspirations and values of diverse communities. For Māori women, the target may be iwi, hapū, and pan-iwi urban Māori organisations. For Pākehā women, the community groups may be victim support groups, churches, neighbourhood watch groups and similar community organisations. In the case of Pasifika women, it may be necessary to bring on board sympathetic church ministers and prominent members of the Pacific community to lend their voices to stopping violence against women in their communities. Churches and synagogues will be the most relevant way to reach many people.<sup>799</sup> For Muslims it may be necessary to involve sympathetic imams and Muslim women's organisations in the educational programmes. In the case of ethnic minority women generally, it may be necessary to target community leaders, both men and women, within existing organisations. Such leaders may need education and resources to help them in their work. The common factor is the principle that addressing the problem of domestic violence is essential to building stronger communities.<sup>800</sup>

Within each target group the message of ending domestic violence needs to be communicated through culturally comprehensible language, idioms and counter-cultures within dominant cultural practices. It is important, therefore, to ensure that the message "No to domestic violence" is presented in a variety of different cultural forms. This is not a matter of simply translating the same material into various languages. Such an approach conflates language with culture. The challenge instead is to develop educational materials that are grounded in the precepts, values and traditions of the relevant cultures.<sup>801</sup>

<sup>798</sup> Krug, E., Dahlberg, L., Mercy, J., Zwi, A., & Lozano, R. (2002). *World report on violence and health*. World Health Organization. Retrieved 20 September, 2006 from [http://www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en](http://www.who.int/violence_injury_prevention/violence/world_report/en).

<sup>799</sup> See the Faith Trust Institute website for resources for working in faith communities. Retrieved 7 August 2006 from <http://www.faihttrustinstitute.org>.

<sup>800</sup> For examples of relevant Australian initiatives, see Family and Domestic Violence Unit. (2006). *A review of literature relating to family and domestic violence in culturally and linguistically diverse communities in Australia*. Perth: Department for Community Development

<sup>801</sup> Sullivan, M., Senturia, K., Negash, T., Shiu-Thornton, S., & Giday, B. (2005). "For us it is like living in the dark": Ethiopian women's experiences with domestic violence. *Journal of Interpersonal Violence*, 20(8), 922-940; Kamateros, M.

We understand that the Ministry of Social Development, in conjunction with the Families Commission, recently commissioned market research to support the development of a mass media campaign at changing men's attitudes and that the campaign is due to start soon. While such a campaign may make a useful contribution our case studies suggest that education should also include information which will help friends, family and community respond in a positive and effective manner when women disclose that they are being abused. Moreover, while the mass media does have a role to play, the best results are likely to be achieved by education efforts which are more localised and conducted *kanohi ki te kanohi*.<sup>802</sup> While published information about what is planned is sketchy, it appears that the media campaign will indeed be accompanied by localised prevention initiatives.<sup>803</sup> It is to be hoped that such initiatives will not only address men's attitudes but also help to build the sort of supportive community networks which our case studies show can be mobilised to provide effective support to battered women.<sup>804</sup>

### **Women's Refuge**

Women's Refuge featured large in our case studies. That is, 30 of the 43 women had contact with Women's Refuge.<sup>805</sup> Often this contact was facilitated by police referral, and, as we have described in Chapter 12, such referrals often provided extremely valuable. It was often left to Women's Refuge to play the role of providing safety to women, with some women staying in a refuge for quite long periods. For example, Pinky and Sripai spent three and four months in a refuge respectively, while Amira spent most of the three years between separating from Barry and being removed in a refuge or in a caravan provided by Women's Refuge. In some cases, relocation was needed, with Women's Refuge helping both Katrina and Marama to move out of town to another refuge.

While Women's Refuge provided a vital physical and psychological barrier between women and their abuser, this was not the only important role refuges played. Refuge advocates often helped women by supporting them in their interactions with statutory agencies, most notably, the Family Court, Work and Income, the police, and Child, Youth and Family. For example, Crystal felt that it was not until Women's Refuge got involved that the police started taking her situation seriously, and it was likely that the presence of refuge workers was crucial in ensuring that she did not get intimidated at a Family Group Conference. For some women, particularly immigrant women, it was only through Women's Refuge that they found out about protection orders. Routinely, it was refuge workers who helped women get a benefit, find a lawyer or get a state house. They provided support in custody hearings. They accompanied women to medical and lawyers appointments. They helped women move house. They helped women develop safety plans and ensured that they and their children had food and clothing. They provided transport

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(2004). The Ethnic Media Outreach Project: "Canada is a country for women". In P. G. Jaffe, L. L. Baker, & A. J. Cunningham (Eds.). *Protecting children from domestic violence: Strategies for community intervention* (pp. 141-152). New York: Guilford; Oliver, W. (2000). Preventing domestic violence in the African American community: The rationale for popular culture interventions. *Violence against Women*, 6(5), 533-549; Bent-Goodley, T. (2004). Perception of domestic violence: A dialogue with African American women. *Health & Social Work*, 29(4), 307-316; Second Māori Taskforce on Whānau Violence. (2002). *Whānau violence: A Māori conceptual framework*. Report to Hon Tariana Turia, at p. 21.

<sup>802</sup> Face to face.

<sup>803</sup> Taskforce for Action on Violence within Families. (2006). *Taskforce for action on violence within families: The first report* Wellington Ministry of Social Development, at pp. 16-17.

<sup>804</sup> See also the Community Action to Prevent Family Violence initiative, which provides funding for community projects. Retrieved 8 January 2007 from <http://www.nzfvc.org.nz/communityaction>.

<sup>805</sup> In one instance (Trudy), this was in Australia.

and helped them move house. For some women, going to a refuge meant that they made new friends and extended their social support networks.

Overwhelmingly, our participants spoke highly of the help they received from Women's Refuge. This included women who sometimes felt challenged by what refuge workers said. This was well illustrated by Lyla who felt workers "pushed" her into getting a protection order, "even though I didn't want to, but lucky they did, because that was my back-up." In fact, only three women had any criticism of the way they were treated by Women's Refuge. Both Priya and Tessa felt lonely while in the refuge and Caitlyn was not impressed by receiving a standard letter when she was already seeing a refuge worker.

As our case studies show, refuges are a primary source of information about protection orders and can play an important role in encouraging women to apply for an order. In fact, certain key informants suggested that some refuge workers were so disillusioned about the effectiveness of protection orders that they no longer recommended women apply for them. We do not know how common this is but we found the analysis of one experienced refuge worker quite compelling. Asked if she recommended protection orders to women, she said that she did but only if all three of the following conditions were met. Firstly, the woman had to be absolutely committed to separating from the respondent. Secondly, she had to have good support systems in place. And finally, she had to live within the town (or city) limits so that there was a reasonable chance of a timely response to a 111 call. In this analysis, the Domestic Violence Act 1995 is some way from achieving its objective of providing effective legal protection to victims of domestic violence (section 5(1)(b)).

### Refuges and Immigrant Women

Key informants pointed out to us that although refuges are now available in most parts of the country, there is a serious lack of safe houses and advocacy services for Pasifika and other ethnic minority women, particularly outside Auckland. Our case studies are consistent with overseas research: women from ethnic minority groups face challenges in leaving violent partners and accessing appropriate support which are distinct from the challenges facing dominant group women.<sup>806</sup> Local research has confirmed the need for services specifically for Pasifika women.<sup>807</sup> The development of ethnically specific services is clearly a priority

Both "general" and specialised refuges have an important role to play in respect of women with unresolved immigration status. As described in the previous chapter, to be eligible to apply for residence under the special domestic violence policy, women must be referred to Immigration New Zealand by a CYF-approved refuge.<sup>808</sup> Refuges need to have good systems for recording relevant information to support such referrals. They also need to be properly funded for the work they do with non-resident women. Such women are typically ineligible for the benefits needed to contribute to their living costs while at a refuge.

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<sup>806</sup> Liang, B., Goodman, L. A., Tummala-Narra, P., & Weintraub, S. (2005). A theoretical framework for understanding help-seeking processes among survivors of intimate partner violence. *American Journal of Community Psychology*, 36(1-2), 71-84; Latta, R. E., & Goodman, L. A. (2005). Considering the interplay of cultural context and service provision in intimate partner violence: The case of Haitian immigrant women. *Violence against Women*, 11(11), 1441-1464.

<sup>807</sup> Koloto, H. A., & Sarma, S. (2005). The needs of Pacific women when they are victims of family violence. *Social Policy Journal of New Zealand*, 26, 84-96.

<sup>808</sup> Immigration New Zealand. (2007). *Operations Manual* (issue date 10 April 2007.) Retrieved 24 April 2007 from [http://www.immigration.govt.nz/nzis/operations\\_manual](http://www.immigration.govt.nz/nzis/operations_manual), at section S4.5.1.b

## Health Services

We did not specifically ask women about their use of health services; neither did we collect systematic information about the impact violence had on their health, but as the case studies reveal, men's violence against women causes significant, sometime irreparable, physical and psychological harm. This includes bruises, broken bones, smashed teeth, gynaecological problems, vision problems, black-outs, weight loss, headaches, back problems, and fractures of the skull and face. Thirteen of the women reported being assaulted during pregnancy, and although we cannot be certain that the violence was the cause, at least two miscarried (Katrina (repeatedly) and Sonal), while in other cases the baby was born prematurely (Sonal and Marjorie – in the latter case, with a disability). In terms of psychological health, many of the women reported being depressed, three reported suicide attempts and many reported symptoms consistent with post-traumatic stress disorder. Fourteen women reported being hit about the head and/or being rendered unconscious by blows or strangulation, which raises the possibility that at least some of them may have a permanent neurological impairment as a result.

Battered women are high users of health services<sup>809</sup> and health workers are one of the groups of professionals to whom women are most likely to disclose abuse. On the other hand, health services often fail to identify those women who are victims of male partner violence, with the consequent risk that symptoms, especially depression, may be treated without the violence which is producing those symptoms being addressed.<sup>810</sup> Increasingly, screening and referral protocols are being used to enhance the way health services respond to violence against women.<sup>811</sup>

There is little evidence of routine screening in the case studies. However, the case studies do reveal examples of health services making helpful referrals to Women's Refuge and/or the police. For example, Crystal got her protection order after hospital staff contacted Women's Refuge and the police. Similarly, it was hospital staff who put Lin-Bao in contact with refuges. Medical staff played a useful role in recording injuries, with the records later used to good effect in prosecuting abusers (for example, Lyla), obtaining a protection order (for example, Hilda) or having charges withdrawn when a woman was charged for violence used in self-defence (Tiare). Similarly, some health professionals helped to provide a barrier between women and their abusers, by calling in security guards (for example, Titiana and Sonal) or simply telling the abuser to go away (Sonal).

On the other hand, there were instances in which health services failed to act in helpful ways. For example, the father of Crystal's partner usually made sure he accompanied her whenever she sought medical help, effectively isolating her from a potential source of help. Good practice would have meant that staff would have insisted on talking to her in private. Hospital staff made no effort to separate Katrina and Rana when they ended up in hospital together, despite the fact that it was obvious that their injuries were the result of violence. Elizabeth was unnecessarily exposed to abuse while in a psychiatric unit when Stephen was able to phone her there. On another occasion, Stephen was able to arrange for a friend to intimidate Elizabeth after he engineered events so that the friend was transferred into the same ward as Elizabeth.

It is likely that routine screening for domestic violence, along with appropriate protocols relating to safety and referral, would have prevented these problems. Various New Zealand studies have

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<sup>809</sup> Fanslow, J., & Robinson, E. (2004). Violence against women in New Zealand: Prevalence and health consequences. *New Zealand Medical Journal*, 117(1206). Retrieved from <http://www.nzma.org.nz/journal/117-1206/1173>.

<sup>810</sup> For a New Zealand study on women's experiences of health professionals, see Flaherty, E. M. (1996). *Pills, platitudes and positive practice: Health workers' responses to women abused by their male partners*. Unpublished master's thesis, University of Waikato.

<sup>811</sup> For New Zealand guidelines, see Fanslow, J. (2002). *Family violence intervention guidelines*. Wellington: Ministry of Health.

recommended the adoption of such practices.<sup>812</sup> Currently, the effectiveness of a screening and brief intervention protocol is being evaluated in study funded by the New Zealand Health Research Council,<sup>813</sup> but evidence of the useful contribution screening protocols can make is beginning to accumulate.<sup>814</sup>

### **Counselling**

In Chapters 8 and 10, we discussed women's experiences of court-referred counselling aimed at reaching agreement about the care of children. The case studies show that women accessed counselling in other ways, mostly through domestic violence agencies and churches.

Five women (Pinky, Hilda, Claire, Marjorie and Jess) found at least one counsellor who was extremely helpful. For example, Pinky appreciated the way the counsellor she consulted helped her become more aware of what was happening and what her options were. Jess, after some negative experiences, found specialist trauma counselling extremely helpful. Similarly, Marjorie, for whom counselling was mostly unhelpful, was pleased to eventually find a counsellor who was prepared to challenge Alistair's controlling behaviour. Claire found her counsellor to be very empowering.

However, the majority of women's experiences of counsellors were negative, including other experiences of some of the women just mentioned. Often, the negative experiences reflected counsellors' naivety about the dynamics of domestic violence. This was well illustrated by the counsellor Claire's ex-partner accessed through the Family Court. As described in Chapter 8, the counsellor wrote a glowing report for Robert which he was able to use to his advantage in various ways. But other counsellors also actively colluded with perpetrators' violence. Alofa was told to "be good and do what your husband says." Marjorie got similar messages from most of the church counsellors she consulted. Couples counselling was unsafe for Marama whose partner was angry that she had told the counsellor about his violence. And as discussed earlier, Family Court counselling was a disaster for Amy who felt the counsellor was racist, judgemental and trivialised the harm caused by Peter having sex in front of her daughter – and then attacked Amy for asking to be reassigned to another counsellor.

These are not new problems. In our 1992 report, we drew attention to serious problems in counselling, which tended to expose women to further violence, often colluded with the abuser, and put women in the invidious position of having to choose between risking retaliation if they disclosed violence to the counsellor and not having the violence addressed if they did not. In addition we reported on widespread concern about the lack of counsellors competent to meet the cultural needs of other than Pākehā women.<sup>815</sup> Similarly, many of the 45 women interviewed by

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<sup>812</sup> Koziol-McLain, J., Gardiner, J., Batty, P., Rameka, M., Fyfe, E., & Giddings, L. (2004). Prevalence of intimate partner violence among women presenting to an urban adult and paediatric emergency care department. *New Zealand Medical Journal*, 117(1206). Retrieved 7 October 2006 from <http://www.nzma.org.nz/journal/117-1206/1174>; Aldridge, A., & Coombes, L. (2005). It's really quite a delicate issue: GPs talk about domestic violence. *Women's Studies Journal* 19(2), 56-78; Virtue, P. (2001). *General practitioners and violence intervention: Why not leave well alone? A qualitative study*. Thesis submitted in partial fulfilment of the requirements for the degree of Master of Arts (Applied) in social science research, Victoria University of Wellington.

<sup>813</sup> Fanslow, J. (2005). *Beyond zero tolerance: Key issues and future directions for family violence work in New Zealand*. Wellington: Families Commission, at p. 44.

<sup>814</sup> Macfie, B., & Lensen, A. (2003). Plunket faces up to family violence. *Kai Tiaki: Nursing New Zealand* 9(7), 18-19; Berman, S., Barlow, K. A., & Koziol-McLain, J. (2005). Family violence prevention education programme for midwives: An Auckland evaluation. *New Zealand College of Midwives Journal*, 32, 21-26.

<sup>815</sup> Busch, R., Robertson, N. R., & Lapsley, H. (1992). *Protection from family violence: A study of breaches of protection orders*. Wellington: Victims Task Force.

Jennifer Hand and her colleagues talked about counselling.<sup>816</sup> They too had mixed experiences of counselling. Some counsellors were reported to be ignorant about violence, and some colluded with perpetrators. Couples counselling was generally reported to be unhelpful. On the other hand, counsellors who quickly picked up that women were being abused, and modified their approach accordingly, were appreciated.<sup>817</sup>

Counselling in relation to domestic violence is a specialist area. It is vital that counsellors understand the dynamics of battering and the complex factors influencing battered women.<sup>818</sup> These include: the immediate environment (for example, the impact of the batterer's behaviour, the role of the justice system, and financial dependency); family and socio-cultural roles (for example, expectations of being a good woman, religious beliefs and beliefs about divorce); the consequences of the battering (for example, brainwashing, post-traumatic stress, self-doubt and Stockholm syndrome); and intra-psychic forces (for example, a history of abuse, resiliency, and personality changes as a result of battering.)<sup>819</sup> There may be crucial issues of separation violence and safety planning to consider, and counsellors and their employing agencies need to ensure that their procedures do not endanger women and children.<sup>820</sup>

Counselling needs to take into account the particular needs of battered women who have suffered neurological damage from the battering which may affect their ability to process complex information quickly.<sup>821</sup> Other complexities apply to counselling men who batter, who frequently present to counselling for issues other than violence. Therapeutic models which have proved useful for other issues have serious limitations when applied to men who batter. Victim safety and perpetrator accountability should take precedence over insight, catharsis, communication training, relationship skills and other common counselling goals.<sup>822</sup> Only counsellors who understand these issues and have the requisite skills ought to work with survivors and perpetrators of violence.

It is not realistic to expect that all counsellors will have the knowledge and skills to work with survivors and/or perpetrators of domestic violence, but it is realistic that all counsellors routinely screen for domestic violence and make appropriate referrals when it is identified.<sup>823</sup> As demonstrated in the case studies, counselling is provided in a range of settings (for example, generic social services, specialist domestic violence services, churches and private practice) by a wide range of people. While many counsellors (or other professionals who provide counselling)

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<sup>816</sup> Hand, J., Elizabeth, V., Rauwhero, H., Selby, S., Burton, M., Falanitule, L., & Martin, B. (2006). *Free from abuse: What women say and what can be done*. Auckland: Auckland Healthcare Services.

<sup>817</sup> Ibid, at pp. 145-147.

<sup>818</sup> Harway, M., & Hansen, M. (2004). *Spouse abuse: Assessing and treating battered women, batterers and their children* (2nd ed.). Sarasota, FL: Professional Resource Press.

<sup>819</sup> McCloskey, K. A., & Fraser, J. S. (1997). Using feminist MRI brief therapy during initial contact with victims of domestic violence. *Psychotherapy: Theory, Research, Practice, Training*, 34(4), 433-446.

<sup>820</sup> DePorto, D. (2003). Battered women and separation abuse: A treatment approach based on "knowing". In M. Kopala & M. A. Keitel (Eds.), *Handbook of counseling women* (pp. 279-308). Thousand Oaks, CA: Sage.

<sup>821</sup> Jackson, H., Philip, E., Nuttall, R., & Diller, L. (2004). Battered women and traumatic brain injury. In K. A. Kendall-Tackett (Ed.), *Health consequences of abuse in the family: A clinical guide for evidence-based practice. Application and practice in health psychology* (pp. 233-246). Washington, DC: American Psychological Association.

<sup>822</sup> Adams, D. (1988). Treatment models for men who batter: A profeminist approach. In K. Yllö & M. Bograd (Eds.), *Feminist perspectives on wife abuse*. Newbury Park, CA: Sage.

<sup>823</sup> Standards New Zealand. (2006). *New Zealand standard for screening, risk assessment and intervention for family violence including child abuse and neglect NZS 8006:2006*. Wellington: Standards New Zealand.

hold relevant qualifications and are subject to regulation and oversight,<sup>824</sup> neither the term “counsellor” nor “counselling” is restricted in any way. Anybody can call themselves a counsellor and provide counselling, whether or not they have relevant qualifications. Moreover, they can do so without being subject to any form of accountability.

Given the diversity of settings in which counselling is provided, it will be difficult to ensure that all counsellors adopt good practices in relation to screening for domestic violence and making appropriate referrals. For those groups of professionals subject to statutory regulation, the regulatory authorities may be well placed to ensure practitioners have at least a basic competence in screening and making referrals. For other groups, professional associations may be encouraged to promote safe and effective practice. Many NGOs that provide counselling are at least partially funded through District Health Boards and/or the Ministry of Social Development. Such funding could be made contingent on demonstrating that appropriate screening and referral protocols are in place. The sort of general educative approach in relation to the community we have already advocated will be helpful in reaching some individuals and organisations in the NGO sector to ensure safe practice in counselling. We recommend:

**THAT counselling and generic social service agencies adopt domestic violence screening and safety protocols and ensure that only counsellors with training in domestic violence work with perpetrators and victims of domestic violence. (#47)**

### **Summary**

The preceding chapters have focused mainly on those state agencies which have a central role in granting and enforcing protection orders. As this chapter shows, other government and non-government agencies, community organisations, whānau and families can also play an important role in helping to end men’s violence and providing support to women and children.

The case studies reveal widely varying experiences of family law practitioners. Good lawyers provided clear and assertive advice. They took care to explain things to their clients. On the other hand, other lawyers tended to appease perpetrators by recommending women’s acceptance of an undertaking and/or the discharge of protection orders, or by suggesting potentially unsafe contact arrangements. In some cases, they effectively marginalised women.

Of the various services and supports discussed here, women’s programmes received the most consistently positive evaluations from the women in our case studies. Such programmes were typically described as restorative and empowering. Women enjoyed the sense of solidarity engendered by group programmes. Given the positive way these programmes are viewed, it is unfortunate that relatively few women take advantage of them. More needs to be done to promote programme attendance. There is also a need for programmes to be developed to better cater for the cultural and linguistic diversity of women seeking protection orders.

In contrast to women’s programmes, programmes for respondents were described in quite negative terms by the women in our case studies. Most women reported that their ex-partner had not completed his programmes, yet none appeared to have faced any consequences for failing to

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<sup>824</sup> For example, some psychologists and social workers undertake counselling. Both groups operate under statutory registration regimes with well-developed mechanisms for ensuring competent practice. The former are governed by the Health Practitioners Competence Assurance Act 2003, which protects the term “psychologist” and provides the statutory framework for the regulation of the profession, including procedures for handling complaints and ensuring the continuing competence of practitioners. The Social Workers Registration Act 2003 provides a broadly similar framework but only the term “registered social worker” is protected. (Any one may call themselves a social worker.) The New Zealand Association of Counsellors provides for accreditation and accountability mechanisms for its members, but membership is voluntary. (New Zealand Association of Counsellors. Retrieved 8 October 2006 from <http://www.nzac.org.nz>.)



attend. Our conversations with key informants suggested that this is a wide-spread problem. Much greater priority needs to be placed on prosecuting respondents for non-attendance. In addition, certain misguided Family Court policies about privacy were described as making it very difficult for programme providers to follow up with the partners or ex-partners of respondents to ensure that they are safe. Such follow-up is essential to counter the dangers inherent in running programmes for men who batter.

CYF was almost uniformly viewed negatively by the women who had had dealings with CYF social workers. Several of the women had had children taken into care. In our view (based on the case studies and our analysis of CYF policies), the general approach of CYF is to hold battered women responsible for their children's exposure to violence, an approach very much at odds with that of the Domestic Violence Act 1995. The CYF RES needs to be revised. CYF, in collaboration with the police, needs to place much greater emphasis on holding perpetrators accountable for their violence. The best outcomes for children will be achieved if CYF social workers collaborate with women's advocates to promote the safety of battered mothers.

Many women turned to family, whānau, friends, and community and faith groups for support in ending the violence they faced. Their experiences varied. For some Māori women, whānau played a protective role, in much the way it did pre-colonisation. In other cases, whānau proved to be collusive. A similar range of experiences was evident in the other three streams of case studies. We believe that community education aimed at diverse cultural, ethnic and religious communities can play a role in enhancing informal systems for supporting victims of violence and holding perpetrators accountable for their behaviour.

The assistance of Women's Refuge often played a crucial role for women in our case studies, both in terms of providing immediate safety, help in accessing other services, and general support. On the whole, women thought that Women's Refuge provided a valuable service, but there is a need for an expansion of refuge services to meet the needs of an increasingly diverse population.

Health services too often played a crucial role in facilitating support for women, although, in some cases, opportunities to intervene effectively were lost. We recommend that health services institute routine screening for domestic violence.

Some of the women in the case studies accessed counselling. Again, experiences varied. Some counsellors were helpful; others were collusive and/or easily manipulated by perpetrators. As with health services, counsellors should be routinely screening for domestic violence, and making referrals to specialist services where violence is detected.

Achieving the Domestic Violence Act 1995's objective to "reduce and prevent violence in domestic relationships" (section 5) requires examining community, as well as institutional, responsiveness. The best results are likely to come from genuine partnerships between government and community groups.

## Appendix 1: Statistical Analysis

Interpreting trends in data relating to the criminal justice system is subject to significant limitations. For example, changes in the public's willingness to report crime can mask changes in actual crime rates or suggest that changes have occurred when in fact crime rates have been stable. Similarly, inconsistencies in the way events may be coded by police officers mean police statistics often tell only part of the story. A further complexity is that New Zealand Police and Ministry of Justice statistics are not necessarily comparable. Nevertheless, analysis of such data can help identify broad trends and fill in some of the wider background issues relating to women's attempts to seek protection within the justice system.

In the following pages, we present statistics relating to applications for protection orders and the outcomes of such applications. These are followed by statistics relating to the enforcement of protection orders and to prosecutions for male assaults female (the most common charge laid against domestic violence offenders).

### ***Applying for Protection Orders***

#### **Gender**

There is no doubt that women are overwhelming the applicants for protection orders and men are overwhelmingly the respondents. In 2004, the latest year for which published data are available, 91% of applicants were women compared with just 8% men (the remaining 1% are accounted for by applications made on behalf of more than one person.) In the same year, 89% of the respondents were men compared with just 10% women (the remaining 1% are accounted for by applications made against more than one person).<sup>825</sup>

#### **Trends Over Time**

The implementation of the Domestic Violence Act 1995 was marked by a significant increase in applications for protection orders compared with the number of applications under the Domestic Protection Act 1982 for the predecessor of the protection order, the non-molestation order. In recent years however, there has been a steady decline in the number of applications and a corresponding decline in the number of orders made. For example, the last five years have seen a 30% decrease in the number of protection orders made (from 3,699 in 2000 to 2,603 in 2004). This decrease is shown in Figure A1.

It is difficult to say with confidence what factors might be contributing to the decline in the number of applications. However, one possible explanation can probably be discarded. There is no evidence that the underlying incidence of domestic violence has declined. As Elizabeth Bartlett has shown, various other indices of domestic violence derived from police data show no such decrease.<sup>826</sup> These include the number of recorded offences flagged as family violence and the number of offences in the category male assaults female.<sup>827</sup> In fact, some police data are suggestive of an increase in domestic violence. For example, over the past few years, there has been a slight increase in the number of recorded offences for domestic common assaults.

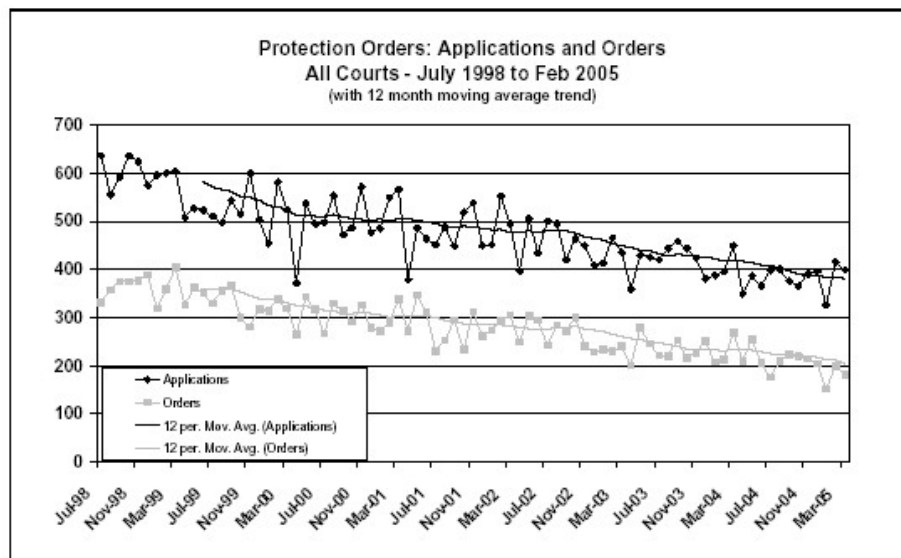
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<sup>825</sup> Bartlett, E. (2006). *Family Court statistics 2004*. Wellington: Ministry of Justice, at p. 36.

<sup>826</sup> Bartlett, E. (2005). *Is domestic violence increasing or decreasing? Various measures of trends in domestic violence*. Unpublished report. Wellington: Ministry of Justice.

<sup>827</sup> Crimes Act 1961, s. 194. Most, but not all charges laid under this section are domestic related.

Figure A1: Protection orders – monthly trends in applications and orders made



Source: Bartlett, E. (2006). *Family Court statistics 2004*. Wellington: Ministry of Justice. Retrieved from <http://www.justice.govt.nz/pubs/reports/2006/family-court-statistics-2004/chapter-2-2.html#223>.

One concern raised by many of our key informants is that, compared with the early days of the Domestic Violence Act 1995, the Family Court has become less willing to make protection orders without notice, with a corresponding increase in the number of without notice applications being put on notice. It has also been argued that such developments in turn discourage family law practitioners from making without notice applications.<sup>828</sup> In effect, critics have argued that the threshold for granting a protection order without notice has been raised.

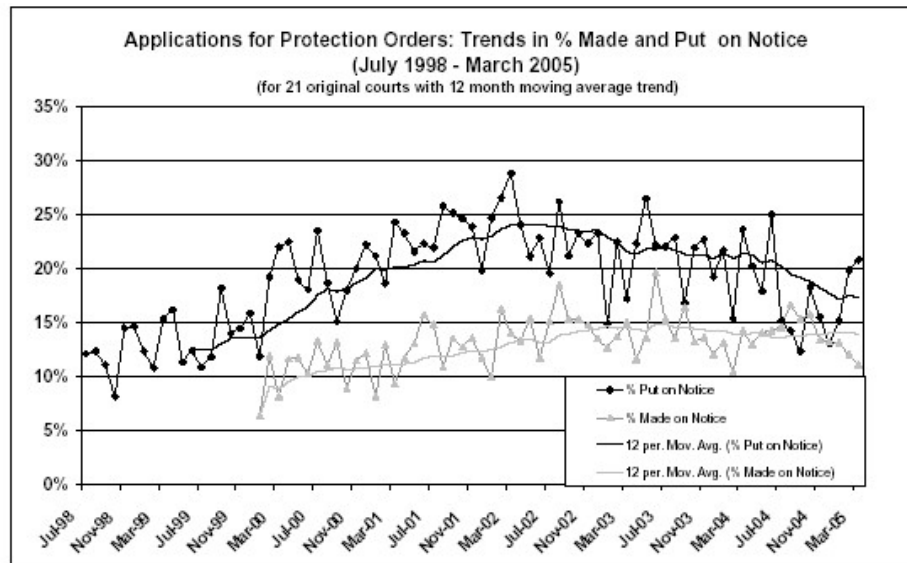
The provision for temporary protection orders to be made without notice to the respondent was in recognition of the dangers which may face battered women if their applications proceed with notice. Applying for a protection order is a major step. To paraphrase Barbara Hart, it is breaking two of the four fundamental rules of battering: (1) “You cannot leave this relationship unless I am through with you.” (2) “You may not tell anyone about my violence or coercive controls.”<sup>829</sup> Giving notice of an application can place women in grave danger of retaliatory action, intimidation or worse. Leaving a relationship increases the risk of death by homicide by a factor of four.<sup>830</sup> Having an application placed on notice means that women face these dangers without any legal protection. Indeed, the Domestic Violence Act 1995 specifically empowers the court to make a protection order without notice where it is “satisfied that the delay that would be caused by proceeding on notice would or might entail ... a risk of harm”.<sup>831</sup> Any raising of the threshold would mean more women being exposed to unnecessary danger.

<sup>828</sup> See, for example, Hann, S. (2004). *The implementation of the Domestic Violence Act 1995*. Wellington: National Collective of Independent Women’s Refuges. Retrieved 7 June 2006 from <http://www.nzfvc.org.nz/PublicationDetails.aspx?publication=12835>.

<sup>829</sup> Hart, B. J. (1996). Comment on *I am not your victim: Anatomy of domestic violence* by Beth Sipe and Evelyn J. Hall, Sage Publications. Unpublished paper distributed by internet (FIVERS), 14 October 1996, paragraph 2.

<sup>830</sup> Wilson, M., & Daly, M. (1993). Spousal homicide risk and estrangement. *Violence and Victims*, 8, 3-16.

<sup>831</sup> Domestic Violence Act 1995, s. 13(1).

**Figure A2: Trends in applications made and put on notice**

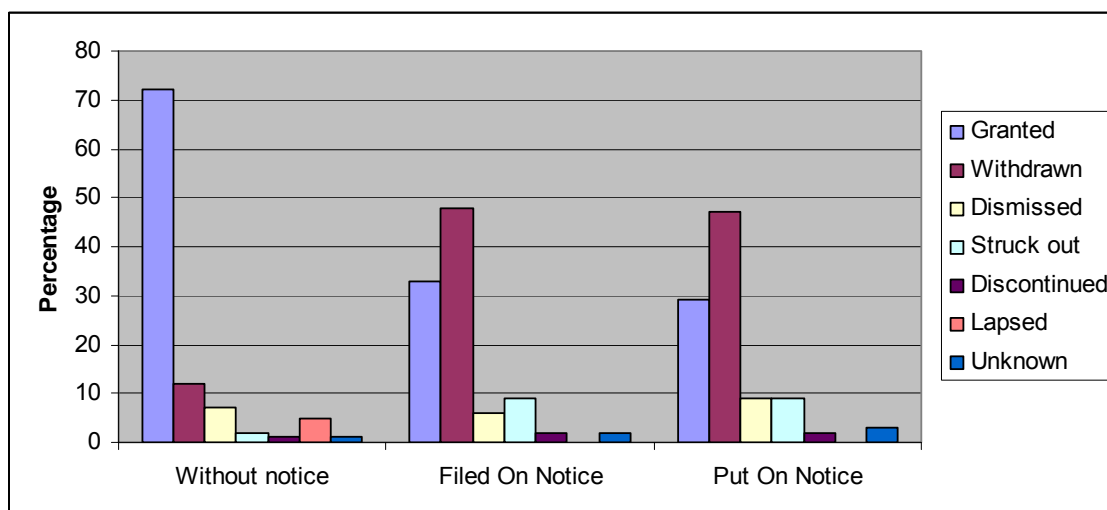
Source: Bartlett, E. (2006). Family Court statistics 2004. Wellington: Ministry of Justice, at p. 34.

Although we cannot be absolutely certain that the threshold has been raised, the statistical data we have been provided with is consistent with such a conclusion. As Figure A2 shows, at the end of the last decade, about 12% of without notice applications for protection orders were subsequently put on notice by the court. By mid-2002, this had increased to about 24%. It has since reduced to approximately 17%.<sup>832</sup>

It is of considerable concern that currently 17% of applications made without notice are put on notice. That this is a decline from an April 2002 “high” of 28% is not reassuring. Key informants have informed us that the increase in the number of orders being put on notice during the period 1999-2002 influenced the approach taken by family law practitioners. That is, as more and more without notice applications were put on notice by the court – as many as one in four over the last months of 2001 and early months of 2002 – family law practitioners became less and less inclined to make such applications. Rather than risk being seen to be constantly out of line with judicial thinking, it seems very likely that many would have adopted a more conservative approach, reserving without notice applications for only the more severe cases. Indeed, it would be irresponsible of them not to modify their approach, as continuing their earlier practice would result in more of their clients being unprotected while waiting for their applications to be heard. Certainly, our key informants have suggested that this is exactly the sort of feedback mechanism by which the threshold for granting orders without notice has been raised. The statistics are consistent with their analysis.

<sup>832</sup> Here we are referring to the “12-month moving average”, which “smoothes out” the fluctuations in the monthly figures shown in Figure A2. For example, in April 2002, about 28% of applications were put on notice, but the 12-month moving average at the time was about 24%.

**Figure A3: Applications for protection orders by filing methods and outcomes for applications made between October 2003 and 31 March 2004**



Source: Bartlett, E. (2006). *Family Court statistics 2004*. Wellington: Ministry of Justice.

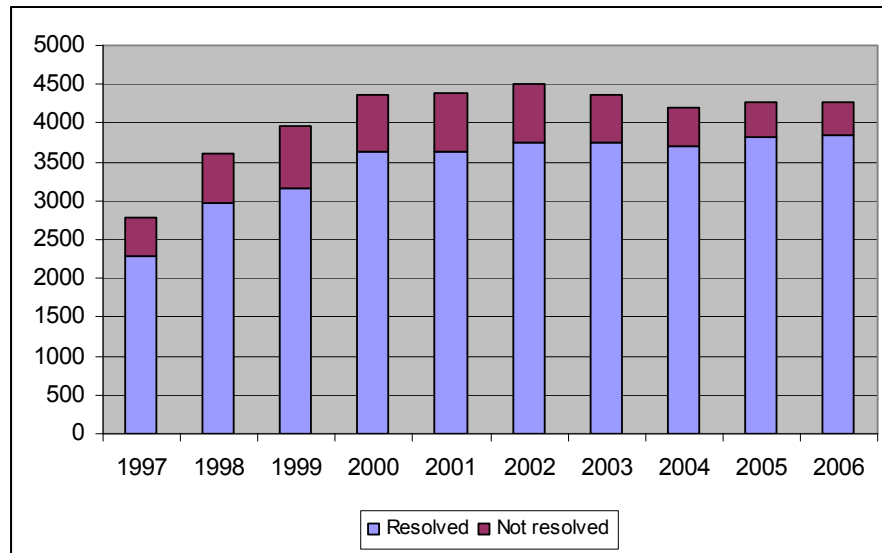
The disadvantages of having to proceed on notice are underlined by an analysis of the outcomes of applications. Figure A3 shows the outcomes of applications which proceed without notice, which are filed on notice, and which are put on notice by the court.<sup>833</sup> Where the court proceeds without notice, a final protection order is made in 72% of the cases. In comparison, of applications made on notice, just 33% result in an order being made. Of without notice applications put on notice by the court, just 29% result in an order being made. The difference is largely accounted for by the fact that almost half of applicants withdraw their applications if those applications are dealt with on notice. These data tend to confirm the experience of those women in our case studies who found defended hearings of their applications extremely stressful and/or who came under extreme pressure to withdraw their applications.

### **Enforcement of Protection Orders**

If protection orders are not to be “just a piece of paper”, they must be enforced effectively. The five years following the implementation of the Domestic Violence Act 1995 saw a rapid increase in the number of breaches of protection orders reported to the police. This was unsurprising as initially, there were relatively few orders in place to be breached. As Figure A4 shows, the number of breaches recorded by police has been relatively steady since 2000, ranging between 4,204 and 4,504 per year.

Figure A4 also shows the proportion of reported breaches which have been resolved. “Resolution” covers a number of outcome including prosecution, diversion, warning, and a referral for a Family Conference or to Youth Aid. Resolutions have increased slightly of the past ten years, from 82% in 1997 to 90% for 2006. It should be noted that for each of the years shown, between 2% and 4% of breaches were coded as involving firearms.

<sup>833</sup> These figures cover applications for protection orders made during a six-month period between 1 October 2003 and 31 March 2004. They were compiled for us by the Ministry of Justice in mid-2005, by which time nearly all the applications had been finalised.

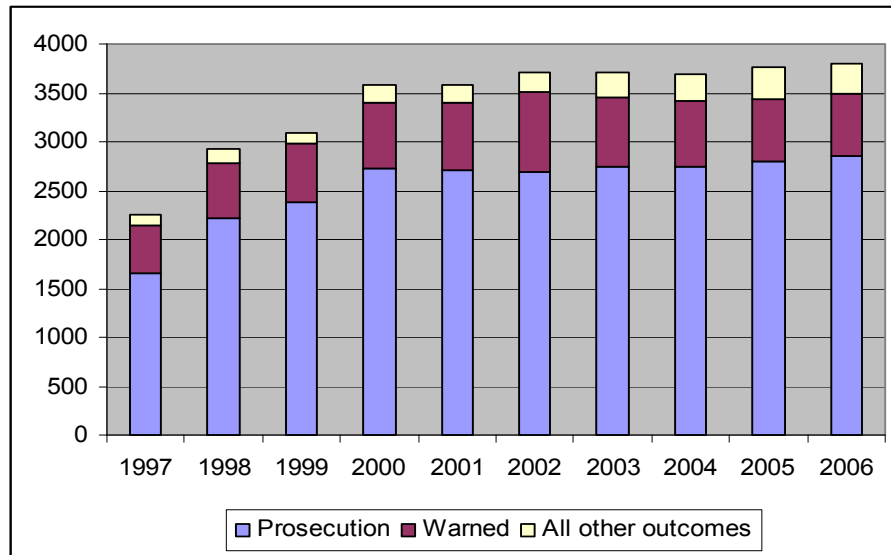
**Figure A4: Number of breaches reported to the police and their resolution**

Note: Excludes breaches of s. 49(c) (relating to programme non-attendance) and breaches of s. 125 (relating to restriction on publication). Offences are counted as resolved if one or more alleged offenders have been identified and recorded, whether or not such offenders have been proceeded against. “Resolutions” are undercounted because offences recorded in one year which are resolved in the following year are recorded as “unresolved”.

Source: The “table builder” available on the Statistics New Zealand’s website. Retrieved 18 May 2007 from <http://www.statistics.govt.nz>.

While “resolution” rates provide one index of police performance, it is not particularly meaningful for protected persons or, for that matter, for respondents. More meaningful is what happens to the offender when breaches are “resolved”. Figure A5 summarises the outcome of breaches recorded by the police as being resolved for the period 1997-2006. For the last five years of this period, the proportion of resolved breaches which were subsequently prosecuted has been quite consistent, ranging between 73% and 75%. While there may not be sufficient evidence to support a prosecution for every breach of a protection order (especially when a victim does not wish to testify), the case studies suggest reveal numerous examples of police failing to prosecute when there appeared to be good grounds for doing so.

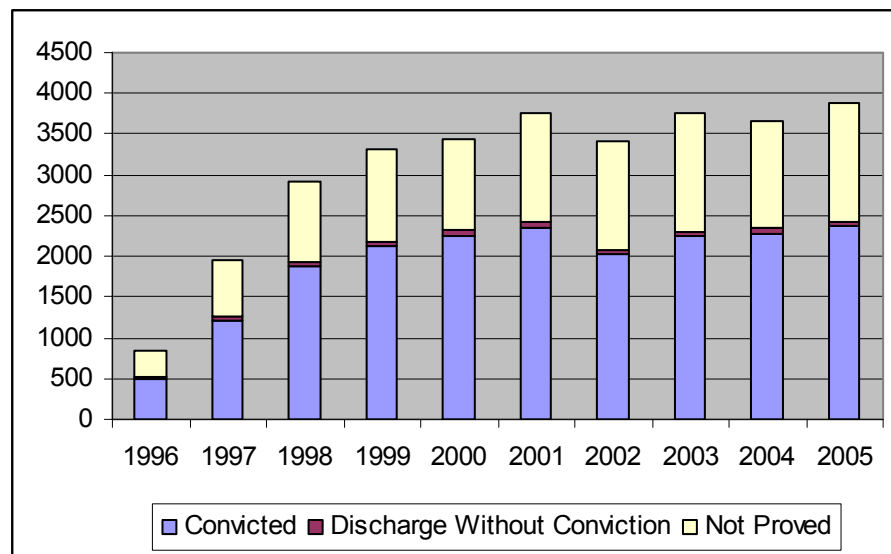
**Figure A5: Disposition of resolved breaches reported to the police**



Source: The “table builder” available on the Statistics New Zealand’s website. Retrieved 18 May 2007 from <http://www.statistics.govt.nz>.

Figure A6 shows the number of convictions for breaching protection orders since the implementation of the Domestic Violence Act 1995. For the last five years for which data is available, between 59% and 63% of prosecutions resulted in a conviction.

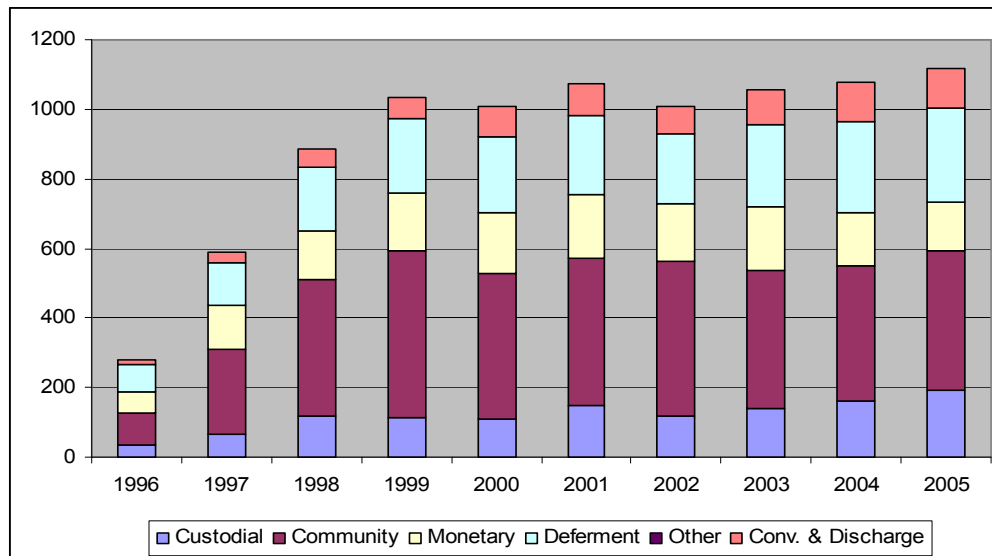
**Figure A6: Outcomes of prosecutions for charges of breach of a protection order**



Note: Data relating to prosecutions is slower to be published than data related to recorded and resolved crime. Thus 2005 data is the latest available here and for the following figures. Note that unlike the earlier figures, this figure includes prosecutions under section 49(1)(c) of the Domestic Violence Act 1995, relating to failure to attend a respondents programme. As discussed in Chapter 14, such prosecutions are relatively rare.

Source: The “table builder” available on the Statistics New Zealand’s website. Retrieved 18 May 2007 from <http://www.statistics.govt.nz>.

**Figure A7: Sentences imposed on convicted cases of breach of a protection order, 1996-2005**



Note: Like Table 6, this includes prosecutions under s. 49(1)(c) of the Domestic Violence Act 1995, relating to failure to attend a respondents programme.

Source: The “table builder” available on the Statistics New Zealand’s website. Retrieved 18 May 2007 from <http://www.statistics.govt.nz>. Like Table 6, this includes prosecutions under s. 49(1)(c) of the Domestic Violence Act 1995, relating to failure to attend a respondents programme.

Figure A7 sets out an analysis of the sentences imposed on those respondents convicted of breaching a protection order. In 2005, the most common type of sentence, imposed in 36% of cases, was a community-based sentence (that is, community work, supervision or probation, periodic detention, community service or a community programme). Deferments<sup>834</sup> (24%), imprisonment (17%) and monetary penalties (13%) were the next most common outcomes respectively. In 10% of cases, the respondent was convicted and discharged.

It should be noted that unlike the earlier data related to breaches, Figure A7 shows cases, not charges. That is, a respondent who appears for sentence on two or more charges on any one occasion is counted only once – as receiving the sentence imposed on the most serious offence. Thus, Figure A7 does not include those breaches which were dealt with at the same time as a more serious offence. For example, an offender who appeared on a breach and male assaults female would be counted as a “case” only under the second charge.

The use of each of the sentencing outcomes shown in Figure A7 has been reasonably stable over the past ten years. However, the use of imprisonment has increased over the past three years from 13% in 2003, to 15% in 2004 and 17% in 2005. This increase coincides with the introduction of the Sentencing Act 2002, although whether the increased use of imprisonment can be attributed to the Act or to other factors (or some combination of factors) is difficult to say.

<sup>834</sup> This means that no sentence is imposed at the time. Instead, a time period (no more than one year) is stipulated during which the respondent is liable to be recalled to face sentence should he fail to comply with any conditions imposed or be convicted of a qualifying charge (one carrying a maximum penalty of more than three months’ imprisonment). Note that before the Sentencing Act 2002, deferments could also be by way of a suspended term of imprisonment.



A longer term change is apparent in relation to monetary penalties. The use of these has decreased from 21% in 1996 to 13% in 2005. On the other hand, the use of conviction and discharge has doubled over the same period, from 5% in 1996 to 10% in 2005. This last increase is of concern. Like most offenders given deferments, a respondent convicted and discharged faces no substantial penalty. Combining these two categories, we can see that in the last two years, over a third (34%) of offenders convicted of breaching a protection order received no substantial penalty.

### **The Criminal Justice “Funnel”**

The criminal justice system can be thought of as funnel. At the top, the wide end, are all the offences which are committed. At the bottom, narrow end, are the considerably fewer offences which result in meaningful consequences for the offender. Along the way, offences and offenders are winnowed out. They are lost to the system because many offences are never reported, many reported offences are never resolved, many resolved offences do not lead to a prosecution, many prosecutions fail to result in a conviction, and many of the offenders who are convicted still avoid meaningful consequences as they are dealt with by way of deferment or discharged without further penalty. While the “dimensions” of the “funnel” may vary, the general principle applies to all classes of offending.

In respect of the enforcement of protection orders, the 190 respondents imprisoned in 2005 for breaching their protection order can be thought of as being at the narrow end of that funnel.<sup>835</sup> We cannot calculate the precise dimensions of the funnel. Firstly, we do not know how many breaches of a protection order occur, although our case studies suggest that many more breaches occur than are reported.<sup>836</sup> Secondly, differences in the way police and the Ministry of Justice report data mean that their figures are not strictly comparable.<sup>837</sup> However, the figures presented above do provide some indication of what is happening. That is, using the latest available figures,<sup>838</sup> we know that of:

- reported *breaches*, 90% are recorded as resolved;
- resolved *breaches*, 75% are prosecuted;

<sup>835</sup> We do not suggest that every breach should result in a term of imprisonment but that so few do and that so many offenders face no consequences is a serious concern. It should be remembered that respondents who breach their protection order have already been found (on the balance of probabilities) to have used domestic violence. By no means are they first offenders in the common-sense meaning of the term.

<sup>836</sup> Crime victimisation surveys could potentially address this question but the regular New Zealand survey does not ask about breaches of protection orders. It does ask about domestic violence assaults. The 2001 survey indicated that fewer than one in five (18%) of assaults on women by their male partners is reported to the police. Whether breaches of protection orders are reported with a similarly low frequency is unknown. See Morris, A., & Reilly, J. (2003). *The New Zealand National Survey of Crime Victims 2001*. Wellington: Ministry of Justice. Retrieved 8 June 2006 from <http://www.justice.govt.nz/pubs/reports/2003/victims-survey/chapter-3.html#3.2%20Reporting%20victimisation%20to%20the%20Police>.

<sup>837</sup> Police statistics undercount the number of offences resolved and prosecuted because such outcomes achieved outside the calendar year in which the offence occurred are not included in annual figures. However, such prosecutions do appear in the subsequent year's figures for the Ministry of Justice. In addition, during the prosecution process, some charges are withdrawn and substituted by other charges. Such events are not necessarily captured in police data. The difference between police and Ministry of Justice figures can be illustrated by comparing Figure A5 with Figure A6. The later, based on Ministry of Justice figures, shows that in 2005, 3,870 charges of breach of a protection order were prosecuted. This is more than 1,000 more (2,800) than the number of such prosecution recorded by the police and summarised in Figure A5. Some of the difference will be accounted for by prosecutions for non-attendance at programmes, which are prosecuted by court staff, not the police, but it is unlikely that these would account for all of it.

<sup>838</sup> That is, 2006 figures for the police, 2005 figures for the Ministry of Justice.

- prosecuted *breaches*, 62% result in a conviction; and
- *cases* resulting in a conviction, 17% result in the respondent being imprisoned.

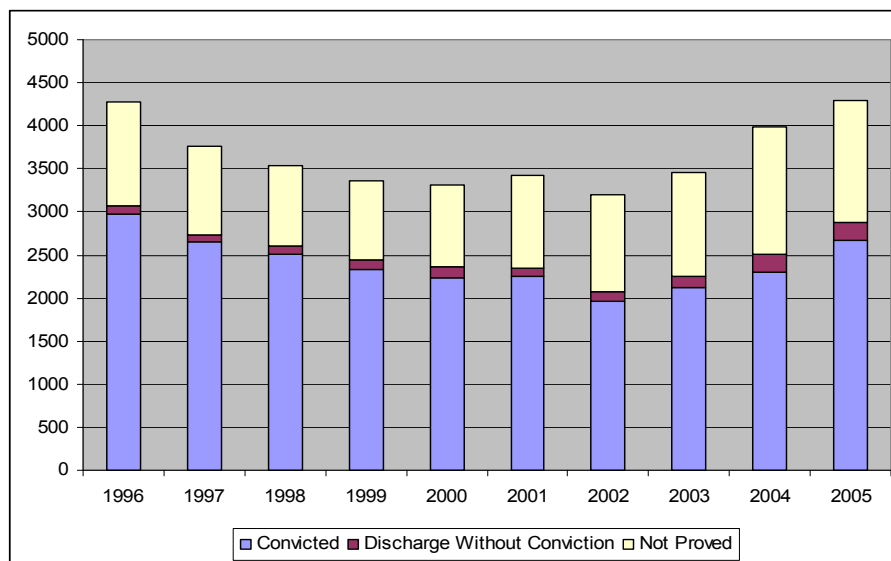
While imprisonment is not the only meaningful consequence,<sup>839</sup> the extent to which the criminal justice system winnows out offences and offenders raises serious concerns about its current ability to hold respondents accountable for breaches of protection orders.

### **Prosecutions for Male Assaults Female**

Breaching a protection order is, by definition, domestic violence. Of course, a man who assaults his female partner can potentially face any one of a number of charges, from common assault to murder. However, such charges are also laid in respect of violence which is not domestic related and, unfortunately, there is no simple way of disaggregating domestic violence offences from other offences. There is a partial exception. Men who assault their female partners are often charged under section 194(b) of the Crimes Act 1961 with male assaults female. While this section is sometimes used to charge men who assault women who are not their partners, in fact, the vast majority of men who face this charge do so as a consequence of their domestic violence. Thus, an analysis of section 194(b) charges provides some insights into the policing and prosecution of domestic violence offenders.

As can be seen in Figure A8, the number of cases in which men were prosecuted for male assaults female fell during the second half of the 1990s (from 4,279 to 3,307) and but has risen again this decade (to 4,290 in 2005). It is difficult to tell exactly why this has happened, especially as the number of charges for male assaults female has remained remarkably stable over the past few years.<sup>840</sup>

**Figure A8: Outcomes of prosecutions (cases) for male assaults female, 1996-2005**



Source: The “table builder” available on the Statistics New Zealand’s website. Retrieved 18 May 2007 from <http://www.statistics.govt.nz>.

<sup>839</sup> For example, of the 100 offences, 24 would result in the respondent being given a community-based sentence. See Figure A7.

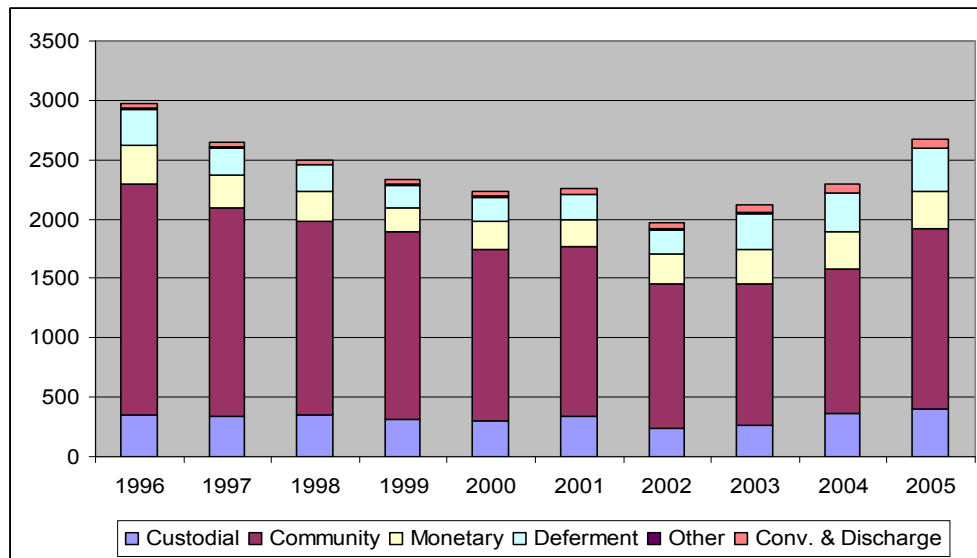
<sup>840</sup> Bartlett, E. (2005). *Is domestic violence increasing or decreasing? Various measures of trends in domestic violence*. Unpublished report. Wellington: Ministry of Justice.. Figure 3.

Figure A8 provides the statistical context for some of the issues discussed in Chapters 11 and 12. That is, prosecutions of domestic violence offenders do not have a very high success rate. In fact, the proportion of prosecutions resulting in a conviction has fallen over the past eight years from 71% in 1998 to 62% in 2005. This is a worrying trend. In Chapter 11, we make recommendations which might lead to more effective prosecutions.

Less dramatic, but no less worrying, is the increase in the proportion of charges resulting in the offender being discharged without conviction. Over the last ten years, this has more than doubled (from 2% to 5%).

Finally, Figure A9 shows the sentences imposed on offenders convicted of male assaults female. As with Figure A7, the data refer to cases, not charges. Here, although the number of offenders receiving each type of sentence has varied over the years, this is mostly a reflection of the number of prosecutions. That is, by and large, the proportion of men receiving each type of sentence has been quite consistent. For example, the proportion of men imprisoned has varied just 4% (between 12% and 16%). A partial exception is an increase in the proportion of men being dealt with by way of deferment. This increased markedly between 2001 (9%) and 2003 (14%) but has stabilised since.

**Figure A9: Sentences imposed on convicted cases for male assaults female, 1996-2005**



Note: Like Table 6, this includes prosecutions under s. 49(1)(c) of the Domestic Violence Act 1995, relating to failure to attend a respondents programme. Source: The "table builder" available on the Statistics New Zealand's website. Retrieved 18 May 2007 from <http://www.statistics.govt.nz>.

## Appendix 2: Risk and Lethality Assessment Worksheet

RISK & LETHALITY ASSESSMENT WORKSHEET																																																	
Subject Name: _____	Date: _____																																																
File Number/Reference: _____	QID: _____																																																
<p><b>A</b></p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;"></td> <td style="text-align: right; font-size: small;">CIRCLE IF TRUE</td> <td></td> </tr> <tr> <td>1. This is first or only serious act of domestic violence (ask about non-reported cases)</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>2. Offender has no other criminal history</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>3. Offender has stable employment</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>4. Offender does not have a drug or alcohol problem</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>5. Offender's relationship with victim appears stable</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>6. Offender takes responsibility for his abusiveness</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>7. Offender is co-operative with police, court, probation</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>8. Offender has never threatened victim</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>9. Offender has never breached a protection order</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>10. Offender has no history of suicide attempts</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>11. Offender has no history of serious depression</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>12. Offender has no diagnosis of mental illness</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>13. Offender is in reasonably good health</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>14. Offender has no weapons in his possession or proximity</td> <td style="text-align: right;">1</td> <td></td> </tr> <tr> <td>15. Offender is not on psychotropic* medications <small>(* Having an altering effect on perception, emotion, or behaviour.)</small></td> <td style="text-align: right;">1</td> <td style="vertical-align: bottom;">Total A =</td> </tr> </table>		CIRCLE IF TRUE		1. This is first or only serious act of domestic violence (ask about non-reported cases)	1		2. Offender has no other criminal history	1		3. Offender has stable employment	1		4. Offender does not have a drug or alcohol problem	1		5. Offender's relationship with victim appears stable	1		6. Offender takes responsibility for his abusiveness	1		7. Offender is co-operative with police, court, probation	1		8. Offender has never threatened victim	1		9. Offender has never breached a protection order	1		10. Offender has no history of suicide attempts	1		11. Offender has no history of serious depression	1		12. Offender has no diagnosis of mental illness	1		13. Offender is in reasonably good health	1		14. Offender has no weapons in his possession or proximity	1		15. Offender is not on psychotropic* medications <small>(* Having an altering effect on perception, emotion, or behaviour.)</small>	1	Total A =	
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## **Appendix 3: Information sheet for potential case study participants**

### **What is the project about?**

The aim of our project is to describe women's experiences in obtaining protection orders, the impact of protection orders and the response to breaches of protection orders. We would like to identify those aspects that are working well as well as identify areas for improvement including barriers that prevent women from applying for and obtaining protection orders in the first place.

We want to speak both to women who have applied for protection orders and to women who have not applied for protection orders. We want to talk to women who have had problems with protection orders and to women who have found orders to have worked well.

The Ministry of Women's Affairs has asked us to do this research so that it can assist them in providing policy advice to reduce violence against women and it can also inform government strategies in this area.

### **Who are the researchers?**

Our research team is based in the Department of Psychology and the School of Law, at the University of Waikato. It includes Maori and non-Maori women who are survivors of abuse; it includes ethnic women who understand cultural and family norms in diverse Asian and African cultures; it includes domestic violence advocates and domestic violence academic researchers.

Our procedures will be subject to the approval of the Ministry of Women's Affairs and the University of Waikato's committee on ethical conduct of research.

### **What will I be asked in the interview?**

We are really interested in your experiences of protecting yourself from violence and abuse. The interview will be a chance to tell your story. The exact questions we have will depend a little on whether or not you applied for a protection order, whether or not you obtained an order, and whether or not the order was breached. But broadly, we will be interested in learning about

- your experience of violence and abuse in your relationship(s).
- your experience of trying to keep yourself protected from violence.
- what you knew about protection orders and what differences (if any) you thought a protection order might make.
- your reasons for applying for an order – or for not applying for one.

If you applied for a protection order, we would like to hear about your experiences of making an application.

If you applied for a protection order without notice and it was placed on notice, we would like to hear what impact that had on your pursuing your application.

If you were not granted a protection order, we would like to know why you think that happened and what implications resulted from your not obtaining one.

If you obtained an order, we would like to hear how effective it was in ensuring you and your children's safety.

In addition, we will ask you if there are other people you feel we should talk to about your case. In our experience, it is often useful to talk to people like advocates, lawyers and police officers who can comment on what happened from their perspectives.

If there are any questions you do not want to answer, it is perfectly okay to skip them.

It is perfectly okay to bring anyone you wish with you to the interview.

### **What will happen to my information?**

We will write up your story in a case study. Initially, this will be contained in our report to the Ministry of Women's Affairs. Later, we will use the information to publish articles in journals for lawyers, psychologists, social workers, and other domestic violence related practitioners and researchers. The information you give us will be stored for up to 5 years for the purpose of publishing academic articles.

### **Can I check my information?**

Yes. Once we have written up your case study, we will return it to you for your approval. We will discuss a safe way of doing this at the end of your interview.

### **Will other people know who I am?**

No. In writing up your case study, we will use pseudonyms and omit or disguise potentially identifying information such as place names, occupations and easily identifiable events. However, while we will take all possible care in protecting your privacy, it is possible that you may be recognised by people closely involved in your case – people like your lawyer, close family members or your (ex)partner. You should bear this in mind when checking your case study.

### **What if I agree to participate and then change my mind?**

You may stop the interview at any time. You may withdraw from the research at any stage up until the time you approve your case study. If you change your mind after that, we will be able to withdraw your case study only if we haven't already submitted our report. If you do withdraw from the project, any information recorded about you will be immediately returned or destroyed.

### **How can I find out about the results of the study?**

We expect that the Ministry of Women's Affairs will publish our report. In addition, we will send you a summary of the project – if you so wish.

At any time, you are very welcome to contact any member of the project team to find out about our progress.

### **Who can I speak with about my participation in this project?**

If you have further questions or concerns, any member of our project team will be happy to discuss these with you. Contact details for the project team are attached.

### **Will I be asked to sign anything?**

Yes. Before you begin, the interviewer will ask you to sign a consent form acknowledging that you have been adequately informed about: a) the study, b) what you are being asked to do, c) what will happen to your information, and d) your right to withdraw without being disadvantaged or penalised.

### **What do I need to do now?**

If you would like to participate in our study, please complete the attached profile sheet. We will use the information to select women for the study. That is, **we cannot interview everyone who volunteers.**

We will compile 44 case studies; 11 of Māori women, 11 of Pasifika women, 11 of Ethnic women and 11 of Pakeha women. In addition, we want ensure that we include women of different ages and locations. We want to include women who have obtained an order as well as women who haven't. We want women who have had positive experiences and women who have had negative experiences.

Send your profile sheet to us. We will let you know if we can interview you or not. If we can interview you, we will make arrangements for a time and place which suits both you and the interviewer.

---

### **The Research team and contact information:**

Ruth Busch, School of Law, University of Waikato, PB 3105, Hamilton. *Phone* 07-838 4466 ext 8569 *Email* rwb1@waikato.ac.nz

Roma Balzer, Family Violence Technical Assistance Unit, PO Box 1219, Hamilton. *Phone* 07-834 3148 *Email* roma@fvtau.co.nz

Radha D'Souza, School of Law, University of Waikato, PB 3105, Hamilton. *Phone* 07-838 4466 ext 8219 *Email* r.dsouza@waikato.ac.nz

Neville Robertson, Maori & Psychology Research Unit, University of Waikato, PB 3105, Hamilton. *Phone* 07-838 4466 ext 8300 *Cell* 021 408 558 *Email* scorpio@waikato.ac.nz

Karen Whiteman, Family Violence Technical Assistance Unit, PO Box 1219, Hamilton. *Phone* 07-834 3148 *Email* karen@fvtau.co.nz

Reynu Anand, Family Violence Technical Assistance Unit, PO Box 1219,, Hamilton. *Phone* 07-834 3148 *Email:* anandreynu@hotmail.com

Fiona Lam Sheung, Family Violence Technical Assistance Unit, PO Box 1219, Hamilton. *Phone* 07-834 3148 *Cell* 027 658 4223 *Email* fiona@fvtau.co.nz.

Dulcie Paina, Māori and Psychology Research Unit, University of Waikato, PB 3105 Hamilton. *Phone* (07) 856 5973 *Email* dt12@waikato.ac.nz

*Our research is supported by the Ministry of Women's Affairs.*

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## Profile Form

Name: \_\_\_\_\_ Age: \_\_\_\_\_

**Contact details.** Please include here only ways of contacting you which are safe. If it is not safe to have us contact you directly, give the name and contact details of someone else we can contact you through.

<b>Your details</b>	<b>Contact person's details (if relevant)</b>
Address: _____  Home phone _____ Work phone _____ Cell phone _____ Email _____	Address _____  Home phone _____ Work phone _____ Cell phone _____ Email _____ Their name _____

When we contact you, are there any particular measures we need to take to ensure your safety? (e.g. the time or day of week we should ring)

**Employment:** Are you employed at present?

- No  
 Yes → What is your job?

**Education:** Up to what level have you studied?

- Primary  
 Secondary  
 Polytechnic/ Wānanga/ University

**Family circumstances:** Do you have children?

- No  
 Yes → How many?  
 → What are their ages?

**Ethnicity:** Are you (Please tick all which apply and, if you wish, underline the group you primarily identify with)

- Pakeha/European  
 Māori →  
 Pacific Peoples →  
 Asian →  
 Middle Eastern/Latin American/African  
 Other ethnicity →
- } Please state Iwi affiliation.  
} Please state specific ethnic origin

**Religion:** Do you identify with a particular religion?

- No  
 Yes → Which religion?



**Were you born in New Zealand?**

- Yes
- No → Where were you born?
  - How long have you lived here?
  - Did you come to New Zealand as
    - An immigrant?
    - A refugee?

**Experience of violence:** What forms of violence or abuse have you received from a male partner?

- Physical violence
- Sexual violence
- Threats of violence or death
- Psychological/verbal/emotional abuse

**Seeking protection:** Have you ever sought help regarding the violence from any of the following?

- Women's refuge
- Police
- Lawyer
- Family Court
- Church, mosque, temple or other religious organisation
- Community organisation
- Family members
- Others → Please state

**Experiences of protection orders.** Have you ever **applied** for a protection order under the Domestic Violence Act 1995?

- No
- Yes → How often?
  - Have you ever **obtained** an order?
    - No
    - Yes → How often?
      - Was it ever breached?
        - No
        - Yes → How often?
          - Did you report the breaches?
            - No
            - Rarely
            - Sometimes
            - Most times

**Arrangements for interviewing.** Is it okay to interview you in English?

- Yes
- No → What language do you wish to use?

Is there anything else you think we should know?

---

Thank you for filling in this form. Please send it to: Fiona Lam Sheung, c/o Hamilton Abuse Intervention Programme, PO Box 19051, Hamilton

## **Appendix 4: Interview Protocol**

The purpose of the interview is to have conversations with the woman about her experience of seeking protection from male partner violence, particularly as it relates to protection orders. That is, we want to learn what she expected from a protection order, why she applied (or did not apply) for an order, and (where relevant) what the experience of applying for an order was like. If she was granted an order, we want to know how effective it was, in her experience, including her experiences of any enforcement actions. We also want to know whether or not she would apply again for another protection order, if the need arose and/or whether because of her experiences in not previously obtaining an order, she would now apply for one, if the need arose.

Because the use made of protection orders will vary from woman to woman (some will not have obtained orders, some will not have had them breached etc) the specific matters to be discussed will vary. In addition, we want the interview to develop as a free-flowing conversation – to give the interviewee an opportunity to tell her story. For these two reasons, keeping to a rigid script is inappropriate. Instead, we will use this protocol to help us guide the interview with a “light” touch. Thus, the questions listed below are sample ones only which we will use as appropriate to keep the conversation going but ensure that the women’s issues of interest (given her particular circumstances) are covered. The basic structure is chronological.

### **1. Introductions**

In the initial stages of the interview the interviewer will introduce herself and the research project. She will also:

- Explain what the interview will cover and its general structure.
- Explain why we are conducting the research – to assist MWA to provide policy advice to reduce violence against women
- Ensure that she understands the use to be made of the information – that is, that it will form the basis of a case study to be included in a report for publication and, possibly, in other academic publications.
- Explain the measures we will take to protect her privacy (use of pseudonyms, omitting place names and omitting or disguising other identifying information).
- Explain that while we will take all care, it is possible that people who know her situation well (e.g. her lawyer, family members, her (ex) partner) may be able to recognize her – and explore the risks such recognition might pose.
- Inform her that she will have an opportunity to review a draft of the case study and that we will use it only if she approves it.
- Inform her that she does not have to answer any questions she does not want to, that she can end the interview at any stage and that she has the right to withdraw from the research at any stage up (at least until the submission of our final report to the Ministry of Women’s Affairs).
- Gain consent for the interview to be audio taped and get the consent form signed.
- Check that the background information we have from the profile sheet is (still) correct.
- Clarify relationship history and current relationship status – and in which relationship(s) did abuse occur.

### **2. Background to seeking protection**

Invite the interviewee to begin her story by describing the circumstances in which she was seeking protection. While the focus is not on the violence per se, to adequately understand the

experience of seeking protection, it is necessary to know something about the behaviour (including threats) she was trying to protect herself from. Sample questions include:

- *Tell us about the relationship(s) and what happened.* If necessary, probe for
  - (a) Financial status of interviewee and partner (at start, during and after the relationship)
  - (b) Children –children of the relationship, other children living with them.
  - (c) Dates, duration of relationship(s), including periods of separation and reconciliation.
  - (d) The level/nature of violence in the relationship If necessary, probe for
    - i. Chronology - when it began, frequency, changes over time.
    - ii. Nature – physical, sexual, psychological, threats, use of weapons, isolation, imprisonment, destruction of property, controlling tactics.
    - iii. Involvement of children – witnesses, unintended victims, intended victims, threats involving children.
    - iv. Fears for her safety, for children’s safety.
    - v. Help sought – police, refuge, other services, church, community, family, friends, other people – and effectiveness of such help.
    - vi. Involvement of child protection agencies.
- *(As appropriate) Tell us about leaving the relationship. (Was there a particular incident? Had there been physical, psychological, sexual abuse before this incident? How frequently?)*

If necessary, probe for

- (a) Precipitating event(s).
- (b) Support – people spoken to, help sought.
- (c) Partner’s reactions.
- (d) Dates, relocations, including accommodation issues
- (e) How many times tried to leave.
- (f) For instance, were there problems she had after separation about getting on the Domestic Purposes Benefit or finding affordable housing that motivated her to try reconciliation(s).

### 3. Seeking a protection order

Here the intention is to explore the interviewee’s knowledge of protection orders and her decision-making regarding applying for an order (or not) – and, where relevant, her experience of applying for an order. Sample questions from this part of the interview are:

#### (A) For women who did not apply for an order...

- *I understand that you did not seek a protection order. Did you know about protection orders at the time? What did you know?* If necessary, probe for
  - (a) Source of knowledge and advice.
  - (b) Cost.
  - (c) Expectations of protection orders
- *Did you seriously consider applying for an order? Why/why not?* If necessary, probe for
  - (a) Advice from lawyer family, friends, advocates etc.
  - (b) Cost.
  - (c) Expectations of partner’s reactions.
  - (d) Concerns about own protection and/or child protection issues.
- *Has your partner assaulted you, threatened or harassed you since the separation? Tell us about that...*
- *Looking back, do you wish now that you had applied for an order? Why is that?*

#### (B) For women who did apply for an order...

- *What did you know about protection orders?* If necessary, probe for

- (a) Source of knowledge and advice.
- (b) Expectations of protection orders
- *Tell us about the process of applying for an order...* If necessary, probe for
  - (a) Experience of dealing with lawyer(s).
  - (b) Application made/put on notice.
  - (c) Outcome of application.
  - (d) Who was covered by the order (children, current partner, family members, associated respondent(s).)
  - (e) What difference protection order expected to make.
  - (f) Cost of applying?
- *Was the application granted? Without Notice? On notice?* If necessary, probe for
  - (a) Had you applied on a without notice/on notice basis?
  - (b) Was the application placed on notice?
  - (c) Implications of having application on notice.
  - (d) Her experience of a defended hearing
  - (e) Length of time taken to process.
  - (f) Her experience of the court process – judiciary, lawyers, court staff, police etc
- If order granted, *So what did the order say?* If necessary, probe for
  - (a) Who was covered by the order.
  - (b) Any associated respondent named.
  - (c) Any special conditions.
  - (g) Respondent directed to a stopping violence programme.
  - (h) Was the order served? When?
- If order not granted, *What did you feel about that?* If necessary, probe for
  - (a) Respondent's reaction.
  - (b) Implications for other proceedings.
  - (c) Respondent's subsequent behaviour.

#### 4. Effectiveness of the protection order

Here the intention is to explore the interviewee's experience of having a protection orders, including any breaches and the response to such breaches. Sample questions from this part of the interview are:

##### **(A) For women who reported no breaches.**

Check understanding of breaches

- *I see on the profile sheet that you ticked the box saying that the protection order was not breached. Does that mean that your(ex) partner left you alone?*

Where no breaches confirmed

- *Why do you think that was?*
- *Do you think that the protection order was useful in getting your (ex)partner to stop harassing/abusing you?*
- *Has having the order been a problem in any way? How?*

##### **(B) For women whose orders were breached.**

- *I understand from your profile sheet that your order was breached. Is that right? Tell us about that.* If necessary, probe for
  - (a) Events, dates, nature of breaches.
  - (b) How did the breaches impact on her life?

- (c) Other events which may not have been recognized as breaches (uninvited visits, phone calls etc)
- (d) Whether interviewee reported breaches (and why/why not).
- (e) Whether others reported breaches (Who?).
- (f) Police and court responses, including timeliness, warnings, arrest(s), bail decisions, gathering of evidence, charging for breach, charging for concurrent offences, prosecution(s), outcome of prosecution(s). Respondent's subsequent behaviour.
- (g) Help provided by lawyers, family, friends, advocates etc.
- (h) Extent to which breaches were considered in other proceedings.
- (i) Throughout – *How satisfied were you with that response?*

**(A) and (B) (i.e. whether order breached or not)**

- *In retrospect, do you feel that obtaining a protection order served you well in terms of increasing the safety of you and your children? Why/why not?*
- *Has the order been useful in any other ways? (e.g. has it changed the way other people view you/him?)*
- *Would you get a protection order again if the need arose?*
- *What advice would you give any one thinking about getting a protection order.*

**5. Closing**

In this part of the interview we will

- Check if there is anything else the interviewee wants to add.
- Discuss with her who else we would like to interview to round out her case study (e.g. lawyer, case worker, police officer) and ask her permission to interview the individuals concerned and to access relevant files relating to her case. Get written authority.
- Negotiate safe and convenient arrangements for reviewing the draft case study.
- Ensure that she has information about where she can go for further support/advice/counseling if needed .
- Tell her we will give her a follow up phone call (and check safe way of doing this).