

# **DOMESTIC VIOLENCE AND RESTORATIVE JUSTICE INITIATIVES: WHO PAYS IF WE GET IT WRONG?**

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## **Introduction**

Restorative justice has been described as “a process of bringing together the stakeholders (victims, offenders, communities) in search of a justice that heals the hurt of crime, instead of responding to the hurt with more hurt.”(Braithwaite, 1999, p 1728) While to date most restorative justice initiatives have dealt with youth justice offenders, proponents of restorative justice initiatives have argued that the model is also appropriate for dealing with domestic violence cases. John Braithwaite, for example, has asserted that court processing of domestic violence cases “fosters a culture of denial”, while restorative justice “fosters a culture of apology.” And he comments, “Apology, when communicated with ritual seriousness, is actually the most powerful cultural device for taking a problem seriously, while denial is a cultural device for dismissing it.” (Braithwaite, 2000, p.189)

This discussion is situated in the historic debate surrounding the use of family mediation where one of the participants has been the victim of domestic violence.<sup>1</sup> Battered women’s advocates in New Zealand (Robertson and Busch, 1998) and overseas have argued that mediation is inherently unfair and unsafe for their clients. (Hart, 1990) They point to disparities of power between perpetrators and victims and question the autonomy of victims in negotiating agreements. They suggest that battered women are better served by using the court system than informal justice processes. Mediation proponents, on the other hand, argue that mediation is more empowering and effective for the victim than the adversarial process in all but the most violent cases. (Corcoran and Melamed, 1990)

The recent development of restorative justice initiatives in Australia and New Zealand has expanded the parameters of this debate from family mediation to the criminal justice arena and beyond. It is suggested by some writers (Carbonatto, 1995) that the restorative justice model offers opportunities for both victims<sup>2</sup> and perpetrators<sup>3</sup> to

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<sup>1</sup> The 1993 Review of the Family Court recognised domestic violence as “a reflection of power” and recommended that wherever it exists, “mediation should be avoided by the judicial process as a legitimate means of dispute resolution.” This perspective has been carried forward into the most recently implemented criminal court-referred restorative justice pilot programme announced in July 2000. Domestic violence offences have been specifically excluded from the category of offences which the programme will deal with.

<sup>2</sup> In this chapter, we refer to the abused spouse as a “victim”. We are aware that the term “victim” does not encapsulate the entirety of this person’s identity; s/he is clearly more than just a victim. Within the criminal justice context, however, we seek to differentiate between the violent offender and the target of his abuse. “Target of abuse” seems inappropriate because it de-personalises the recipient of the abuse. The use of the word “complainant” is not always an accurate description as police often lay charges in domestic violence-related offences. So, reluctantly and with full awareness of the live debates about this issue, we employ the concept of “victim”.

effectively address cases of domestic violence that come to the attention of the police, the community and the courts. The purpose of this chapter is to critically evaluate arguments about the use of a restorative justice model for domestic violence cases. We presume that the primary goals of any intervention in domestic violence situations - including restorative justice programmes - must entail the prioritisation of the safety and autonomy of victims over any other outcomes, including the re/conciliation of the parties. Safety and autonomy are the measures by which practitioners and researchers can monitor and evaluate the appropriateness and efficacy of domestic violence related interventions. (Pence, 1996)

From the work of Pennell and Burford (Pennell and Burford, 2000) it may be possible to envision a hybrid system appropriately incorporating restorative justice processes as a final step in a limited number of domestic violence cases, but we stress that such processes should only be utilised after safety mechanisms are first set in place that can be enforced through court sanctions. We also believe that for the incidence of domestic violence to be curtailed, clear and unambiguous messages must be given by our legal system that such violence is wrong.

Until the late 1980s in New Zealand, there were few consequences for acts of domestic violence. (Busch, Robertson and Lapsley, 1992) Rather than arresting and charging perpetrators of domestic violence, police saw themselves as mediating disputes. It is only in the past 15 years that there has been more than lip service on the part of the New Zealand criminal justice and Family Court systems to taking domestic violence seriously and since then, the public too has become more sensitised to issues of violence. New legislation in effect since 1995 allows the safety of a wide range of adult victims and children exposed to domestic violence to be prioritised over those of their abusers. (Busch and Robertson, 2000)

The author contends that if restorative justice processes are to be used to deal with domestic violence cases, it is imperative that facilitators are well trained in the power and control dynamics of domestic violence, knowledgeable about risk assessment issues, and understand the intersectionality of race and gender in the lived realities of battered victims' lives. (Crenshaw, 1994) I agree with Braithwaite's recent statement that:

it is unlikely that restorative justice processes in themselves are likely to have a major impact on the crime rate. The reason for the latter is that it is implausible that what happens during a one-or two-hour encounter will often turn around all

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<sup>3</sup> We use the words "offender," "abuser", and "perpetrator" interchangeably in this article. As well, we adopt the convention of referring to offenders as male and to adult victims as female. We recognise that there are male victims of domestic violence but as Gelles has stated:

It is categorically false to imply that there are the same number of battered men as there are battered women. Although men and women may hit one another with about the same frequency, women inevitably suffer the greatest physical consequences of such violence. Women victims of intimate violence also suffer more emotional and psychological consequences than do men. (Gelles, 1994).

the other variables operating during all the other hours of a person's life.  
(Braithwaite, 1999, p. 1747)

It is a wise caution, one which we ignore in the area of domestic violence at the peril of others' lives.

### **The Court System: Inadequacies and Recent Ameliorations**

Debates between those who support the utilisation of restorative justice processes for domestic violence situations and those who support handling these cases through the court system (possibly through proceedings in both the criminal and Family courts) sometimes take on a Zoroastrian spin, seeming to pit optimists against pessimists, healers against punishers, communitarians against adversaries. One aim of this chapter is to break down some of these binaries and attempt to bridge dichotomies while not forgetting that disagreements about perspective, practice and vision are real and need to be addressed.

The writer begins from a position against the use of restorative justice models for the vast majority of domestic violence cases. This does not mean I am blind to problems in the New Zealand legal system's handling of domestic violence cases. One does not have to search too far to discover the inadequacies of the court process for domestic violence victims. For example, the existing criminal justice system excludes victims from an active role in determining the outcomes of crimes committed against them or their property. Indeed in some American jurisdictions, mandatory arrest policies and no-drop prosecutions result in outcomes which can be destructive to victim's autonomy: all too often in States and cities with mandatory arrest and no-drop prosecution policies, the result of police attendance will be the dual arrest and prosecution of both perpetrators and victims. (Hanna, 1996) Alternatively, victim participation in criminal processes can be coerced, with the threat of imprisonment for refusal to testify against a perpetrator. Some writers have commented that under these mandated policies battered women are re-victimised by the very system which purports to act on their behalf. As well, research demonstrates that mandated participation of victims falls most heavily on women of colour and immigrant women. (Mills, 1999) As Hanna suggests, issues involving the intersectionality of race and gender are a root problem:

Afro-American women may often view cooperation with state officials against Afro-American men as a breach of loyalty. Also Afro-American women may be very suspicious of the criminal justice system because it has historically ignored violence against black women and perpetrated violence against black men.  
(Hanna, 1996, p.1180)

In other jurisdictions, the trend to trivialise domestic violence incidents, to blame the victim for the violence against her, to de-contextualise the violence by failing to take account of the disparity of power between the victim and the perpetrator, to minimise the victim's perception of the possibility of imminent danger, to see the violence as a

“symptom of a real problem in the relationship” but not a real problem of itself. (Busch, 1994) - these commonplace responses of police and courts all too often send messages to both the victim and her offender that domestic violence is not really criminal activity, that such violence may be an understandable (if regrettable) response to provocative actions by the victim, and that the legal system will not afford effective protection to “unworthy” victims, ie those who fight back, those who break racial and gender role norms, those who cannot forgive or look away or at least keep silent about the impact of abuse on their lives and/or the system’s failure to address it.

In addition to failing victims, the court system also often fails to hold offenders accountable for their violence. By focusing on offender actions in isolation, it neither acknowledges the context within which offending has occurred nor the social legitimisation for the sexist, classist and/or racist attitudes that philosophically underpin an offender’s use of violence against his victim. (Pence and Paymar, 1990)

But there are risks in discarding the court system without first establishing whether proposed alternatives are capable of providing as much protection as it presently does. As mentioned, in New Zealand, it has only been in the last decade or so that domestic cases have been dealt with in any numbers or at all effectively by either the criminal justice system or the Family court. Not until 1987 was the unsuccessful police approach of trying to defuse the conflict by supposedly mediating the dispute officially jettisoned (although continued in practice at the local and regional level long after that). (Police Commissioner Circular, 1987) Prior to that, the police as well as District Court judges and other practitioners saw domestic violence as relationship-based, not involving real police work, not deserving criminal censure. (Busch, Robertson, and Lapsley, 1992)

The New Zealand police now have a pro arrest policy and attempt to shield the victim from testifying at court through better investigative procedures and their own laying of charges against the perpetrator. (Busch and Robertson, 1994) As many victims are afraid of retributive violence if they pursue prosecutions against their abusers, the current police policies allow for successful prosecutions without the necessity for victims to be involved as witnesses at trial. One outcome of this policy is that offenders have less control than previously over the criminal justice system; their intimidatory tactics are no longer as effective in controlling whether an arrest or prosecution will occur. (Hanna, 1996) Coupled with these new police approaches, breaches of protection orders are now dealt with. Protection orders for victims are no longer simply pieces of paper as they had been at the end of the 1980s; they can be effective in stopping on-going harassment and threats, and have an impact on contact arrangements, a primary site of on-going abuse of both women and children once the abuser and his victim have separated. (Busch and Robertson, 1997)

Major initiatives in New Zealand since the early 1990s have led to the development of co-ordinated community responses to domestic violence and the broadening of public awareness about its negative developmental effects on child witnesses. In 1995, the statutory definition of violence under the New Zealand Domestic

Violence Act was expanded to include psychological as well as physical and sexual violence. That Act specifically names as child abuse a perpetrator's actions which cause a child to be exposed to violence against anyone with whom s/he has a domestic relationship including members of the child's extended family. (Section 3(3) DVA 1995) Amendments to the New Zealand Guardianship Act now allow courts to make orders to protect victims who have custody of children from being harassed or abused on access visits and mandates a risk assessment on the safety of the child to be carried out prior to unsupervised access being awarded to perpetrators. (Sections 16A-16C Guardianship Act 1968) Given what is now known about the deleterious effects on children of being the direct and intentional targets of violence or being exposed to witnessing it, a major category of invisible victims of domestic violence has (finally) been "outed". (Busch, 1995 and Busch and Robertson, 2000)

Rehabilitation of offenders, not punishment, is the major outcome of criminal court and/or Family court involvement in domestic violence cases, unless serious or repetitive violence has been used. (Robertson, 1999) Perpetrators' programmes are court mandated; perpetrators are required to attend programmes or risk prosecution. The content of the programmes allows perpetrators to look at the belief systems which underpin their use of violence and learn about the effects of domestic violence on children, including the ways violence has impacted on their own lives. There are regulation-mandated Maori principles which must be included in all programmes which are designed for or in which a majority of participants is Maori.<sup>4</sup> For adult and child victims of domestic violence, culturally appropriate, court-funded programmes provide safety planning, support and healing. Adult and child protected persons programmes can be accessed within 3 years of the protection order having been made, are voluntary and cost free to participants.

One conclusion that emerges is that the criminal justice/ Family Court system which deals with domestic violence situations in New Zealand is a far cry from notions of the traditional adversary system with its myopic concentration on punishment and rules of evidence and its lack of focus on victim's needs or victim's safety. Rehabilitation of perpetrators and protection for victims are primary focuses of the legal system's intervention in domestic violence cases. Solutions are seen to lie not only in changes by individual perpetrators or victims or government agencies but also in developing culturally appropriate coordinated community interventions which consistently challenge

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<sup>4</sup> Regulation 27 Domestic Violence (Programmes) Regulations. The regulation states that "Every programme that is designed for Maori or that will be provided in circumstances where the persons attending the programme are primarily Maori, must take into account Tikanga Maori, including (without limitation) the following Maori values and concepts:

- (a) Mana wahine (the prestige attributed to women):
- (b) Mana tane (the prestige attributed to men)
- (c) Tiaki tamariki (the importance of the safeguarding and rearing of children)
- (d) Whanaungatanga (family relationships and their importance)
- (e) Taha wairu (the spiritual dimension of a healthy person)
- (f) Taha hinengaro (the psychological dimension of a healthy person)
- (g) Taha Tinana (the physical dimension of a healthy person)"

societal attitudes which construct and legitimise the power disparities within which domestic violence occurs.

### **Victim/Offender Mediation and Domestic Violence: The Myth of Consensus Decision-Making**

Since about 1990 ideas about mediation and Alternative Dispute Resolution have permeated a range of areas from family and workplace conflict to environmental and international disputes. Hailed by many as a superior option for resolving conflict where there is an ongoing relationship, many proponents point to the benefits of informal processes over adversarial processes. It is claimed that because mediation is able to address underlying issues and break down problematic patterns of communication that hold the conflict in place, it offers a superior process to the traditional court-room.

While this claim may be justified in some family and workplace conflicts, great care must be taken not to globalise these gains into a general acceptance that these techniques are invariably superior to the court system. There are grave risks in assuming that all relationship conflicts can be patched by consensus. Since the consensual resolution of conflict requires an attitude of “give a little, take a little” to reach an agreement, there are risks in translating these principles unthinkingly into relationships affected by violence, especially if that approach sees a victim taking responsibility for her perpetrator’s abuse.

In the area of domestic violence, it is claimed (Carbonatto, 1995) that mediation enables the parties to focus on relationship issues in a way that is not possible during court proceedings. Because many women reconcile with their abusers or continue some form of relationship with them long after the court case has finished, it is said that mediation can help both parties to develop ways of achieving a relationship based on trust and non-violence.(Carbonatto, 1995) This claim highlights a number of important issues about mediation processes for domestic violence cases. For instance, to reach a consensus, the parties must have the capacity to negotiate with each other. There must be some capacity for accord, a willingness to be honest, a desire to settle the dispute and some capacity for compromise. (Astor, 1994) But the relationships between perpetrators and victims in domestic violence settings are typically not characterised by consensuality, honesty, mutuality and compromise.

It has been generally assumed that the mediation process works best where there is an existing personal, working or business relationship that both parties wish to preserve. It is therefore felt that in family cases mediation has major advantages over the adversarial process. However this assumption has not always been borne out. Having facilitated many conferences where the offenders and the victim or victims are family members, employers and employees or neighbours, a worrying pattern has emerged. In cases where there has been a prior relationship combined with high levels of victimisation, the conferences have been characterised by intense emotions and intractable conflict requiring long periods of intense work. The parties have high levels of

anger, fear and sadness. In effect the relationship has intensified the “conflict” rather than aided its resolution. In this context, it takes a high level of skill to facilitate outcomes that do not further re-victimise the victim.

In the domestic violence setting this has two implications. The first is that the assumption that the prior relationship will assist the mediation process does not apply. This is particularly so where one of the parties may not wish to continue the relationship because of previous violence. It also means that the facilitators must be highly skilled in the dynamics of domestic violence, lethality risk assessment, and domestic violence screening techniques in order to recognise the warning signs for further violence and address the high level of emotion involved.

In New Zealand, one philosophical problem has been the claim that any member of the community can act as a facilitator. (Mansill, 2000) This claim is dangerous in a domestic violence context where the risk of further violence is high and the need for expertise in handling issues of violence, relationships and victimisation is essential. We would propose that there be initial training and annual up-skilling requirements in the area of domestic violence for any one who acts as a facilitator in mediation or restorative justice conferences dealing with domestic violence, either as a primary or backdrop issue.

Violence often escalates at the time of separation. Indeed, domestic homicides are most likely to occur when a woman first attempts to separate or during the first year after separation. (Hart, 1993) Mediations occurring during this period take place when the perpetrator is often using particularly aggressive efforts to control his estranged partner. (Liss and Stahly, 1993) These mediations may have the consequence of suggesting that domestic violence is inherently a “couple problem” which can be addressed by offering conciliation to the parties. In one case which ended in a murder/suicide at a counselling centre in New Zealand (Busch, Robertson, and Lapsley, 1992), it became clear that the perpetrator’s hopes of reconciliation had been raised by the fact that he and his wife had been ordered to attend Family Court ordered conciliation sessions. The centre itself appears to have shared a similar belief. Although the wife specifically stated in her court affidavits that she “feared for her life” and there were several violent incidents at the woman’s workplace and parents’ home, the centre inadvertently advised the perpetrator of the time of his wife’s appointment. The discourse of “couples counselling” had led the centre to fail to prioritise precautions about divulging such information. Interestingly in this case, the husband was being treated as a potential suicide risk and was known to be purchasing guns but none of the mental health professionals involved seemed to have been alert to obvious lethality risk assessment factors in dealing with this case.

The primary goal of any dispute resolution process must be the protection and prevention of further harm to both the victim and the offender during - and after - the session. From the past experience, it is clear that some perpetrators use mediation as an opportunity for further contact with the victim. This tendency, referred to as “negative intimacy”, is a recognised basis for refusing to continue a family mediation. (National Working Party on Mediation, 1996) Of particular concern in relation to cases of domestic

violence is the reality that there is often insufficient safety planning and a lack of available resources to guarantee the protection of the victim during the mediation itself, let alone after the session is completed or after she has returned home. (National Committee on Violence Against Women, 1991)

There are, obviously, significant differences in the types, severity and frequency of violence used in domestic violence cases. As well, there are important differences in the forms and quality of resources available to victims of such violence. However, due to the power imbalances and dynamics of control that characterise many domestic violence relationships, in most instances, the victims of violence do not have the capacity to negotiate freely and on an equal footing with their abusers. (Astor, 1994) Frequently the perpetrator's pattern of dispute resolution is characterised by coercion and intimidation. In an attempt to avoid further violence, the victim's responses often involve compliance with and placation of his wishes.

The mediation process requires victims to assert and negotiate for their own needs and interests. Mediation carried out against the backdrop of domestic violence, therefore, requires the victim to negotiate effectively on her own behalf although her experiences have in all likelihood led her to renounce or adapt her needs in an attempt to avoid repetitions of past violence. There is a strong likelihood, therefore, that a battered woman will negotiate for what she thinks she can get, rather than for what she actually wants. (Astor, 1994)

In 1994, Newmark, Harrell and Salem carried out a research study in the Family Courts of two centres in the United States, Portland, Oregon and Minneapolis, Minnesota. The purpose of the study was to assess the perceptions of men and women involved in custody and access cases where there had been a history of domestic violence. The study found that there were significant differences in the perceptions of women who had been the victims of violence as opposed to those who had not been abused during their relationships. Women who had been abused were more likely than women who had not to feel that they could be "out-talked" by their partners. (Newmark, Harrell and Salem, 1994) They also felt that their partners were more likely to retaliate against them if they held out for what they wanted. Newmark et al reported that abused women were "afraid of openly disagreeing with [their partner] because he might hurt [her] or the children if [she did]". (pp 14-15)

These findings accord with comments made by some New Zealand women interviewed following their involvement in Family Court mediation and counselling. (Busch, Robertson, and Lapsley, 1992) They also are congruent with the findings of a very recent Australian report on the effects of the 1995 Family Law Reform Act. (Rhoades, Graycar, and Harrison, 2000) In that latter study, the authors conclude that many women agree to consent contact arrangements that do not provide them with the level of protection they had wanted (eg they agree during mediation conferences to unsupervised contact with neutral hand-over arrangements although they had wanted supervised contact), either because of the intransigence of their estranged violent partners

during the conferences or alternatively because of pressure by their own lawyers to agree to orders that the lawyers advise are the “usual” ones for the court to make at the interim contact stage.

The traditional mediation process relies heavily on the judicial model of neutrality and impartiality. Like judges, however, mediators are not exempt from the politics of gender, class, race and culture. Moreover, it is naive to suggest that mediators are immune to the minimising, trivialising and victim-blaming attitudes towards battered women that are so commonly found in legal and psychological discourses about domestic violence. In addition, because mediation techniques are unfamiliar to most parties, there is the danger that a mediator’s own goals will predominate during a mediation session. The parties may tend to rely on the claimed expertise of the mediator and the latter may be tempted to steer the meeting in his or her own direction rather than in that of the parties. (Marshall and Merry, 1990) This is especially true if the mediator is untrained in domestic violence issues and perceives the problem as being relationship based, with each party contributing in different ways to the perpetrator’s use of violence.

It is claimed that the issue of power balancing can be addressed by process changes, such as dictating who goes first or ensuring that the less dominant party has access to adequate legal advice. (Moore, 1991) Extensive experience as a mediator has shown one of the authors that while these interventions can compensate for minor differences in power, they are not capable of re-establishing equality where violence has occurred. In these cases, the power imbalances may be extreme, depending on the severity and frequency of the tactics of violence used.

Several final issues about mediation need to be mentioned. First, the labelling of “crime” as “conflict” is an integral part of the mediation process. In situations of domestic violence, it can be misleading to define violent acts as simply an escalation in the conflict level. This labelling tends to have the effect of masking the perpetrator’s responsibility for the behaviour. Rather than an escalation in conflict, the use of violence by a party suppresses the conflict.<sup>5</sup>

It is one thing to have a difference of opinion. It is quite another to intimidate someone physically or psychologically. (Zehr, 1990) Most importantly, until recently there had been tacit or overt acceptance of spousal violence by the legal system and society at large. Rather than having seen such violence as criminal behaviour, the focus had instead been on marital privacy and the desire to preserve the family as an intact unit.<sup>6</sup> All of these factors have contributed to the trivialisation of domestic violence and the creation of a veil of secrecy which is only now being lifted. There is a danger that

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<sup>5</sup> This comment was made by Heather McPherson, an experienced co-facilitator of Men’s Stopping Violence groups at the Hamilton Abuse Intervention Project. In addition, we would like to thank Heather for reading and commenting on this article as it progressed through its various drafts.

<sup>6</sup> Rowe, (1985) *Comment: The Limits of the Neighbourhood Justice Center: Why Domestic Violence Cases Should Not be Mediated* 34 **Emory Law Journal** 855, 863.

outdated paradigms of secrecy and marital privacy may be legitimised by the confidentiality of the mediation process at a time when they seem to be losing their hold.

Some argue that power imbalances can be addressed through the use of “shuttle” mediation.<sup>7</sup> It is suggested that this will contribute to the protection of the victim by ensuring that the parties do not come face-to-face with one another. Although the use of the shuttle process is not uncommon in mediation, research has shown that it is time consuming and ultimately less effective than a direct meeting between the parties.<sup>8</sup> This is because a key purpose of the process is to enable the victim and the offender to become directly involved in discussing what response is necessary to “put things right”. The use of shuttle mediation, moreover, fails to address an even more significant issue. If the parties are unable to negotiate face-to-face because one party fears confronting the other, does the use of shuttle mediation merely mask power disparities and provide an illusion of safety? For instance, if the perpetrator makes it clear that he desires a specific outcome to result from the mediation, how can a mediator ensure that a victim’s fear of post-mediation retaliation has not coerced her into agreeing to the provisions of the apparently consensual outcome?

At its worst, shuttle mediation places the mediator in the invidious position of having to decide whether to pass on a threat by the perpetrator to the victim. If the mediator passes the threat on “word for word”, he or she colludes in the possible re-victimisation of the victim. What can one think of an agreement reached as a result of the mediator communicating the perpetrator’s threats verbatim to the victim? If the mediator refuses to pass on the threats, however, the real danger to the victim should she refuse to reach the agreement desired by offender may be invisibilised. No matter which option is selected, victim safety and the integrity of the process are compromised.

## **THE MODELS OF RESTORATIVE JUSTICE**

### **A. The New Zealand Family Group Conference**

On each occasion when restorative justice programmes are being established, a detailed discussion ensues over the process options that are available. Of course any programme will ultimately be a hybrid of the most successful features of other national and international projects. The difficulty is that success in some areas is seen as a licence to expand perceived gains into other arenas without fully exploring the consequences and the unique context within which particular crimes or acts of violence occur. Not all offending or violence is alike. It cannot be assumed that instances of successful resolution of property offences or of one-off stranger assaults necessarily signifies that utilisation of the same dispute resolution processes can safely and effectively resolve domestic violence cases. The conclusion becomes even less persuasive unless there have been long-term, methodologically-sound evaluations of the “successes”.

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<sup>7</sup> Carbonatto, *supra* note 8, at 4.

<sup>8</sup> Marshall, T and Merry, S, *supra* note 54, at 243.

In the main, where restorative justice processes have been utilised in Australasia, the New Zealand conferencing model has been used as a base. In New Zealand, Family Group Conferences arose from the frustrations encountered with the existing criminal justice model in addressing the problem of youth offending. It had become clear that the existing punishment model was not working and that an alternative was needed especially for Maori offenders. After the success of the Te Atatu Maori Tribunal in West Auckland, the Family Group Conference approach was adopted in New Zealand in 1989 as the centrepiece of youth justice initiatives codified in the Children, Young Persons and Their Families Act (CYP&F Act) Under that Act, the conferencing process applies to children and young offenders under 17 years of age.

Within the CYP&F Act, there is both a formal and an informal system, with Family Group Conferences having a central role in each process. (NZ Ministry of Justice, 1995) In the informal process, the police direct a youth justice co-ordinator to convene a Family Group Conference without reference to the Youth Court. If the family achieves an agreement and the offender completes the plan, the matter may not be referred to court. If a young offender is arrested, the formal youth justice process operates. If the charge is not denied, the judge will direct the youth justice co-ordinator to convene a Family Group Conference.<sup>9</sup>

Once a case has been referred for conferencing, the co-ordinator sets up an appointment to meet with the young person and his or her family. The process is explained to the family and young person. The young person's attitude to the offence is assessed and he or she is briefed about the meeting processes, including with the victim. The co-ordinator will outline possible outcomes, including the resources, programmes and facilities available.<sup>10</sup>

When all parties to the conference are present, it begins with introductions. In some areas this is preceded by a prayer or karakia and a welcome in Maori.<sup>11</sup> The co-ordinator then explains the procedures to be followed. In addition to providing a necessary opportunity for the parties to ask questions and settle in, this step allows the co-ordinator to assess the "mood" or atmosphere of the conference.<sup>12</sup>

The Youth Aid Officer then reads a summary of the facts and asks the young offender whether the facts are accurate.<sup>13</sup> The young person is then asked to state clearly whether he or she accepts responsibility for the offence. If the information in the summary of facts is disputed, it is possible to correct an error at this time. If the young

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<sup>9</sup> Maxwell, G and Morris, A (1993) **Family, Victims and Culture: Youth Justice in New Zealand** (Victoria Institute of Criminology) 69.

<sup>10</sup> Stewart, T, (1996) *Research on Family Group Conferences with Young Offenders in New Zealand* in Hudson, J, Morris, A, Maxwell, G and Galaway, B (eds) **Family Group Conferences: Perspectives on Policy and Practice** (Federation Press) 75.

<sup>11</sup> Maxwell, G and Morris, A, supra note 62, at 87.

<sup>12</sup> Stewart, supra note 63, at 75.

<sup>13</sup> Maxwell, G and Morris, A, supra note 62, at 87.

person denies responsibility for the offence, the Family Group Conference is terminated and the matter referred back to the police.<sup>14</sup>

Once an admission is made, the co-ordinator asks the victim to speak.<sup>15</sup> If the victim is not present, the reported views of the victim are read to the conference.<sup>16</sup> The young offender is asked to listen to the victim's statement about the offence and its impact on her without interruption but the young person's family may ask questions. At the conclusion of the victim's presentation, there is often an emotionally charged silence. [73] The young offender is then asked to explain how he or she felt upon hearing the victim's side of the story.[74]

The co-ordinator will ask family and then other participants in the process to provide information relevant to the formulation of a decision of the issues. Once all of the information has been presented and after a discussion of possible conference outcomes, the family is left in private to consider and resolve the issues.<sup>17</sup> A plan, in theory generated by the family, is then formulated.<sup>18</sup> The plan commonly covers three main elements.<sup>19</sup> First, "putting things right" in the form of an apology. Second, addressing the issue of reparation. For example, the family may suggest that there be regular payments to the victim from part-time earnings or the sale of an asset. The third element of the plan involves a penalty. This may entail the young person engaging in unpaid work either for the benefit of the victim or for an organisation suggested by the victim. There may be some negotiation between all the conference participants about the content of the plan. The victim and the police may veto the terms of the proposed plan. In that event, the matter is referred back to the court for resolution. If the plan is accepted by the victim and the police, its exact details are finalised and recorded by the co-ordinator and a review date is set for one week prior to the young person's fulfilling the plan's requirements.<sup>20</sup> Participants are asked to make final comments and the meeting is closed with a final statement thanking the parties for participating.<sup>21</sup>

One of the principles underlying the Family Group Conferencing process is that the rights infringed by the offender in committing the offence are not just those of the individual victim but also the rights of the victim's family and community.<sup>22</sup> This family

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<sup>14</sup> Maxwell, G and Morris, A, (1994) *The New Zealand Models of Family Group Conferences* in Alder, C and Wundersitz, J (eds) **Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?** 21.

<sup>15</sup> *Idem*.

<sup>16</sup> Maxwell, G and Morris, A, *supra* note 62, at 27.

<sup>17</sup> Fraser, S and Norton, J (1996) *Family Group Conferencing in New Zealand Child Protection Work* in Hudson J et al, *supra* note 63, at 39.

<sup>18</sup> In some regions, social workers, police and facilitators have not withdrawn from the Family Group Conferences. This raises the concern that these professionals may have "construct[ed] the family's decisions" by selecting the issues to be addressed and influencing the outcomes. Maxwell, G and Morris, A, *supra* note 55, 113-115.

<sup>19</sup> Stewart, T, *supra* at note 63, at 79.

<sup>20</sup> *Ibid*, 80.

<sup>21</sup> Maxwell, G and Morris, A, *supra* note 62, at 88.

<sup>22</sup> Davis, G, (1992) **Making Amends: Mediation and Reparation in Criminal Justice** (Routledge) 9.

and community must, therefore, have some input into the process. The strength of the conferencing process is that it engages the multiple concerns of the community in its approach to problem resolution with families and communities an essential part of the process.<sup>23</sup> To do this, information must be shared with the extended family. Secrecy is removed and the parties can be supported by the community in dealing with the effects of the offence.<sup>24</sup>

The Family Group Conference relies on the participants to contribute ideas and options and to generate a solution. As opposed to proceedings within the adversarial system, solutions are not seen as imposed by others. However, it must be remembered that the police and the social worker have the power to veto a conference plan. With a community base, outcomes can be designed that are culturally appropriate, derive from a wide range of local knowledge and networks, and are flexible towards particular needs.

### **The Limitations of Family Group Conferences in the Youth Justice Area**

A satisfactory Family Group Conference comprises at least the young offender, a family member, a co-ordinator, the victim, a youth worker and a member of the Department of Social Welfare. Despite this view, some Family Group Conferences surprisingly continue in the absence of a number of these key stakeholders, including the offender.<sup>25</sup> In those conferences, there is a lack of participation by the offenders and their families in the decision-making processes. Only 67% of the families and 34% of the young offenders report feeling that they were involved in the process.<sup>26</sup> Participants' assessment of who had decided the outcome of the conference were similarly disappointing. Young offenders and family members felt that the young person had only a limited input into the decision-making process. Only 9% of the offenders felt they were involved in the decision.<sup>27</sup>

Researchers have expressed the view that the victim's presence is to be encouraged and is indeed the key to the conferencing process.<sup>28</sup> Although it was clear that the victim's presence was important as part of healing, reconciliation and accountability, only 46% of the Family Group Conferences in the Maxwell sample included the victim or a representative of the victim.<sup>29</sup> This clearly runs contrary to the ideal position with little possibility of the offender understanding the victim's perspective on the violence and its impact.

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<sup>23</sup> Braithwaite J (1993) *What is to be done about Criminal Justice* in Brown, B (ed.) **The Youth Court in New Zealand: A New Model of Justice** (Legal Research Foundation ) 38.

<sup>24</sup> Barbour, A, (1993) *Family Group Conferences: Context and Consequences* 5 **Social Work Review** 16, 18.

<sup>25</sup> Maxwell, G and Morris, A, *supra* note 62, at 75.

<sup>26</sup> *Ibid*, 109.

<sup>27</sup> *Ibid*, 112.

<sup>28</sup> McElrea, F (1993) **The Youth Court in New Zealand: A New Model of Justice** (Legal Research Foundation) 8.

<sup>29</sup> Maxwell, G and Morris, A, *supra* note 62, 117.

The most disturbing part of the research findings about Family Group Conferences is that over one third of the victims who attended conferences felt worse than before participating.<sup>30</sup> Victims reported feelings of depression, fear, distress and unresolved anger. The researchers linked this to dissatisfaction with the outcomes in terms of the victim's reasons for participating in the process. The most common reason for dissatisfaction was that the victim did not feel that the offender or his or her family were truly sorry.<sup>31</sup> Other victims felt that they had not been heard, were unhappy that the offender was not able to pay compensation or felt that the participants were uninterested in them or unsympathetic to them. Some felt that they were viewed as the “problem”.<sup>32</sup>

Low victim participation figures and satisfaction rates may reflect the foci of the Children, Young Persons and their Families Act, which are the young offender and his family. They also may be a reflection on the processes used. Clearly more preparation work needs to be done to ensure that the offender is prepared to accept responsibility for his actions at the conference. From the experience of one of the writers in running conferences in New Zealand and Australia, there is a direct relationship between offender acceptance of accountability and satisfaction with the outcome of the conference. If the offender enters the process attempting to justify his or her behaviour, the victim will respond by moving quickly towards a punishment focus, demanding higher levels of penalty, whether by way of compensation or community work. In turn, the offender becomes either more withdrawn from the process or more aggressive in the defence of his or her position. However, if the offender is encouraged before the meeting to accept responsibility for his or her actions without blaming someone or something else, this elicits a more empathetic response from victims who tend then to talk about times that they themselves have made mistakes. The victims' perspectives seem to shift from punishment to restitution for the harm done.

Difficulties were noted when the offenders and the victims were from different ethnic groups. Pakeha victims in the Family Group Conference process on occasions commented that they felt intimidated by the presence of large numbers of whanau. These victims also stated that they resented the discussions in Maori and felt alienated in a Maori environment.<sup>33</sup>

Research indicates that victim involvement in Family Group Conference decision-making process is very minor. Only 2% of participants felt that the victim had decided the outcome.<sup>34</sup> As a restorative justice programme can operate only if the victim is actively involved in the decision-making process, this is a major drawback. The problem may arise at the point when the young person's family withdraws to determine a

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<sup>30</sup> Ibid, 119.

<sup>31</sup> Maxwell, G and Morris A, supra note 62, 100.

<sup>32</sup> Maxwell, G and Morris, A, supra note 67, 33.

<sup>33</sup> Maxwell, G and Morris, A, supra note 62, 127.

<sup>34</sup> Maxwell, G and Morris, A, supra note 67, 112.

resolution plan. The victim has no role/input into the development of the plan and only a limited right of veto of it.

Social workers, police, lawyers and the conference coordinators were viewed by the parties as having a major effect on the process and its outcomes.<sup>35</sup> It was almost always the professionals who provided the information for the decisions made by the parties. Sometimes they were perceived as arguing strongly against the proposed preferences of the family.

The monitoring of the outcomes of Family Group Conferences was viewed as poor.<sup>36</sup> Little attention was paid to whether the plan was carried out, few victims were informed of the eventual outcome. This is a source of considerable anger for the victims.<sup>37</sup>

Since the inception of Family Group Conferencing in New Zealand, a large percentage of young offenders dealt with by this process have been Maori. One of the concerns about Family Group Conferences is that, although at times the process used has been able to transcend tokenism and embody a Maori process, the process has often failed to reach outcomes in accordance with Maori philosophies and values. The process of the Family Group Conference has been labelled by both Maori and Pacific Island parties to be Pakeha and Maxwell and Morris conclude that the Family Group Conference model has remained largely unresponsive to cultural differences.<sup>38</sup> Rather than conferencing being seen as a successful incorporation of Maori values into the legal system, to some Maori legal researchers the process represents an illusion of bi-culturalism, with Pakeha social workers and police holding the power despite lip service being paid to the importance of whanau decision-making.<sup>39</sup> What is advocated for in the name of social justice is the development of parallel legal systems for Maori and non-Maori, with Maori control over who, what, and how offences will be dealt with.<sup>40</sup>

### **Limitations of the Conferencing Approach in relation to domestic violence offences**

There are several aspects of the Family Group Conference model which make its use problematic for domestic violence offences. Some concerns have already been raised in terms of discussion about mediation. The emphasis of the Family Group Conference is on consensus decision-making with the conference facilitator fulfilling the role of the mediator who negotiates between parties who may have widely differing perspectives on the offending.<sup>41</sup> Problems already discussed in terms of traditional mediation and its

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<sup>35</sup> Hudson, J, Morris, A, Maxwell, G, and Galway, B, *Introduction* in Hudson et al, supra note 63, 4.

<sup>36</sup> Maxwell, G and Morris, A, supra note 62, 123.

<sup>37</sup> Idem.

<sup>38</sup> Need to get citation

<sup>39</sup> Personal discussions with Te Piringa, the Maori law staff at the University of Waikato. There is a great deal of cynicism expressed by Maori legal academics about the claims that Family Group Conferences represent a positive step for Maori.

<sup>40</sup> Jackson, M, (1988) *The Maori and the Criminal Justice System: A New Perspective* (Ministry of Justice)

<sup>41</sup> Maxwell, G and Morris, A, supra note 62, at 87.

application to domestic violence are, therefore, inherent in the conferencing process. Other problems are specific to the conferencing model itself: concerns about community support for victims in domestic violence situations, safety of participants at conferences, and participation by and empowerment of victims to express themselves freely. These concerns are heightened where the victim is not a stranger to the perpetrator but his partner or a family member and has been the repeated target of his violent behaviour and/or intimidation. The risks of getting the process wrong, moreover, are far more serious than in cases of one-off, non-violent property offences involving young offenders and strangers.

Two-thirds of Family Group Conference facilitators describe hostility being directed either at family members or at Department of Social Welfare staff during the conferences.<sup>42</sup> This hostility has included shouting, verbal abuse, threats and even physical violence. Over half of the facilitators reported that the safety of at least one party had been threatened during Family Group Conferences.<sup>43</sup> Anecdotal evidence also exists to support these views. A facilitator reported to one of the authors that she had had to hurriedly abort a care and protection conference when a husband told his battered wife: “One more f..... word from you and I’ll throw you out this bloody window”.<sup>44</sup> Another facilitator described how at a conference held to deal with the effects on the children of witnessing their mother’s repeated beatings, the perpetrator was able to force his partner to forego the support of her family by simply snapping his fingers and pointing to the empty chair next to him. The wife, who had initially sat down with her family, moved “automaton-like to his side” immediately after his gesture. A year later, the woman was killed and her partner was found guilty of her murder.

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

Facilitators themselves may be fearful of challenging abuser’s behaviours and belief systems because of worries about their own safety. As an example, one of the authors facilitated a conference involving an assault. After openly confronting the offender about his use of violence, the mediator immediately began to feel nervous about pressing on with that line of questioning. The offender had a history of explosive episodes of violence and the mediator was concerned about putting himself at risk.

What is the message to a perpetrator and his victim if the conference facilitator and participating family members refuse to challenge his use of power and control

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<sup>42</sup> Robertson, J, (1996) Research on Family Group Conferences in Child Welfare in New Zealand, in Hudson et al, *supra* note 63, at 54.

<sup>43</sup> *Idem*.

<sup>44</sup> Personal interview between Ruth Busch and a Care and Protection conference facilitator, February 1996.

tactics? If threats are made or violence is used, what should the facilitator do to ensure the safety of the victim and other conference participants? If an appropriate approach is for the facilitator to abort the conference, what additional steps are put into place to ensure the safety of the victim after the conference is terminated? In interviews by one of the authors with youth justice conference facilitators, a repeated observation has been that often the perpetrator's violence is neither confronted nor dealt with at Family Group Conferences, precisely because of the fear factor. If the approach is to bar known batterers from the conference, this calls into question the utility of holding a conference at all.

### **Remembering Who Pays The Price if We Get It Wrong: A Cautionary Note About Craig Manukau**

A final caution about Family Group Conferences can be found in the Report of the Commissioner of Children on the Death of Craig Manukau.<sup>45</sup> Craig was kicked to death by his father on the 18th of November 1992. He had attended a dance despite his father having told him he wasn't allowed to go. In his videotaped confession, Craig's father asserted that he hadn't intended to kill the boy, but "he was never going to dance again." During this incident Craig's mother testified that she sat in the kitchen with the radio turned up, banging her head against the wall. A jury acquitted her of manslaughter on the basis of battered women's syndrome.

Over the 2 years since Craig had come to the attention of the then named Children Young Persons Service (CYPS), issues involving his safety had been seen as secondary to the primary focus, "relationship problems" between the adults.<sup>46</sup> Even after Craig was known to have been afraid of his father and it was reported that he had recently been "given a hiding", no medical reports were called for, no formal investigations were initiated. It was felt that Craig and his siblings would be at greater risk of violence from their father if anything but informal processes were used. There had been a whanau hui (a meeting of Craig's extended family) but there was no record of what was discussed or decided. The Child Protection Coordinator was committed to the principle of "the least intrusive action."<sup>47</sup>

In the two years prior to his death, Craig had been the subject of at least two Family Group Conferences. But Craig's safety and his father's violence were never the central issues of those conferences. Despite worries that Craig was being abused and knowledge that he was afraid of his father, the first notification about Craig was about his behavioural problems, ie his stealing, his swearing, refusal to work at school, poor achievement, and his relationship with his mother. Adult relationship issues between the parents, the whanau history of drug and alcohol abuse, unemployment and criminal behaviour, the desire to develop/maintain trust between the public health nurse and

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<sup>45</sup> 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 ( Commissioner for Children)

<sup>46</sup> Ibid, 5.

<sup>47</sup> Ibid, 7.

Craig's mother -- these issues were also the foci of the conference. As the Commissioner for Children commented:

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.'<sup>48</sup>

In the end, the Commissioner concluded that Craig's death was "foreseeable and possibly preventable."<sup>49</sup> These words echo the conclusions of at least two more recent inquiries into the deaths of children at the hands of their caregivers, the Bristol children<sup>50</sup> and James Whakaruru<sup>51</sup>. It behoves us to learn from these cases, to "get it right, right away". Not to be captured by "the rule of optimism", that expectation held by Craig's social worker and others that things will work out well, despite all the evidence of abuse to the contrary.<sup>52</sup>

There was no monitoring by CYPS in the 8 months from the second Family Group Conference until his death.<sup>53</sup> Lack of monitoring of the conference plan is an all too common Children Young Person and Family Service (nee CYPS) resourcing problem, among a myriad of others. And it came out in trial testimony that whanau conference participants had themselves witnessed and/or experienced Craig's father's abuse and were very reluctant to challenge him. But perhaps the most significant comment for the purposes of this chapter is found in the Commissioner's discussion of the results of Craig's first Family Group Conference which was held on the 20th of December 1991. He concluded:

Through lack of preparation, lack of an understanding of its purpose and a lack of awareness of the options available, the first Family Group Conference may have achieved nothing except to warn those members of the whanau with a mind to, to better conceal their activities and to convince them of the New Zealand Children and Young Persons Service's ineffectiveness. It may also have discouraged the social worker and whanau members from taking this route

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<sup>48</sup> Ibid, 16.

<sup>49</sup> Ibid, 12.

<sup>50</sup> Davison, R, (1994) **Report of Inquiry into Family Court Proceedings Involving Christine Madeleine Bristol and Alan Robert Bristol** (Department of Justice). For a fuller discussion of the events leading up to the deaths of the Bristol children, see Busch, R and Robertson, N, (1994) *I Didn't Know Just How Far You Could Fight: Contextualising the Bristol Inquiry* 2 **Waikato Law Review** 41.

<sup>51</sup> McLay, R, (2000) **Final Report on the Investigation into the Death of Riri-O-Te Rangi (James) Whakaruru, 1994-1999** (Office of the Commissioner for Children).

<sup>52</sup> Hassall, supra note 98, at 20.

<sup>53</sup> Ibid, 16.

again...A failed Family Group Conference may not simply be ineffective but by demonstrating its failure may discourage future efforts to protect the children.<sup>54</sup>

## **B. The Community Group Conferencing Process**

In Queensland and in other States of Australia, the New Zealand Family Group Conferencing process has been adapted into a process known as the Community Group Conference. As discussed, the Australian community group conference posits a communitarian approach to offender accountability. Relative to its New Zealand counterpart the results have been nothing short of spectacular, with high levels of participant satisfaction and very low re-offending rates.<sup>55</sup>

The Australian community conference relies on the notion of a family, or community of people, with shared values who are capable of exercising surveillance and control over the offender's future behaviour.<sup>56</sup> The conferencing process is a reflection of re-integrative shaming proposed by Braithwaite who purports to approach the issue of what causes offending from a different direction. Rather than examining why people offend, Braithwaite argues that we must explore what factors prevent the majority of people from offending.<sup>57</sup>

Braithwaite argues that there are two components which stop most people offending. The first is that people in the community do not offend because of their private sense of right or wrong. As a result of their "conscience" they would be personally ashamed if they offended or victimised others. The second reason people do not offend is because they would experience embarrassment or shame in the eyes of those they care about. According to Braithwaite the key ingredient in preventing offending is "shaming" and he argues that those countries which have low reoffending rates utilise shaming in a positive way to bring about change.

A crucial distinction is drawn between reintegrative and disintegrative or stigmatising shaming. Reintegration requires expressions of community disapproval of the behaviour followed by gestures of reacceptance of the offenders back into the community.<sup>58</sup> The aim is to reaffirm that the offender is part of a community that cares for him or her despite the community's disapproval of his or her behaviour. This can

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<sup>54</sup> Ibid, 9-10.

<sup>55</sup> Palk, G, Pollard G, and Johnson L, (1998) *Community Conferencing in Queensland*, a conference paper presented to the International Conference of the Australian and New Zealand Society of Criminology 8-10 July, 4.

<sup>56</sup> Stubbs, J, (1996) '**Communitarian' Conferencing and Violence Against Women: A Cautionary Note**, unpublished paper, 17.

<sup>57</sup> Braithwaite, J, (1989) *Reintegrative Shaming*. See also Braithwaite, J and Pettit, P (1990) *Not Just Deserts: A Republican Theory of Criminal Justice*

<sup>58</sup> Braithwaite, *ibid*, 55

occur only if the shaming takes place in a context of close community attachment, interdependency and respect.<sup>59</sup>

It is claimed by Braithwaite that the existing retributive system stigmatises offenders.<sup>60</sup> The use of prisons is seen as the ultimate form of disintegration of families and communities. Separating the offender from his or her support erects barriers against those people who could assist the offender to change and this carries with it the risk that the offender will seek approval from those who are also outcasts. This leads to gang activity and entering of criminal “sub cultures”.

Braithwaite and Pettit also reaffirm that crime is ultimately an attack on the rights of the victim.<sup>61</sup> They emphasise that the criminal justice process must recognise this aspect of offending and place a greater emphasis on reparation for the damage done. The importance of Braithwaite’s work lies in its emphasis on the restoration of the victim and role of the community as a means of ensuring that offenders leave offending behind. The theory acts as a reminder of the importance of involving the community of the offender in determining what should happen as a result of the offending. This reflects something of the purpose of reintegrative shaming: to allow offenders to fully understand that although they have made mistakes they remain an integral part of their community. They are accepted even though their behaviour is not acceptable. The process allows families and communities to be involved in the process in a positive way.

However, as with all attempts to develop theories which aim to capture the diversity of human beings, it is difficult to establish an all encompassing theory of why some people commit offences and others do not. As well, there are a vast array of offences and communities clearly vary in their responses to these offences, depending on social concepts about gender issues, family autonomy, and the use of violence to maintain those values.

A first difficulty lies in the definition of who is the offender’s community. The usual definition relates to the offender’s community of concern: those people who have a belief in the offender as a person and a willingness to support the offender during any meeting with the victim. Usually this is limited to family members and occasionally includes teachers or counsellors working with the offender. However it may be that when working with teenage offenders, the most powerful influence is their peer group. This group does not “cause” the crime but their influence acts as a life support system for the offending. The peer group supports the “habit” by encouraging the offending.

This was graphically demonstrated in one of the writers’ dealings with a 17 year old offender who identified his peer group as one factor contributing to his offending. At the end of a joint family session with him, the boy stated that he felt capable of standing up to peer pressure, this would not be a problem. Within two weeks of this joint meeting

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<sup>59</sup> Ibid, 56.

<sup>60</sup> Ibid, 81.

<sup>61</sup> Braithwaite, J and Pettit, P, supra note 110, at 91.

he was enticed by one of his colleagues to steal a car. It is clear that we must explore a wider definition of community than those previously adopted.

The second difficulty is whether these concepts of shaming require an integrated community. As we increasingly move about within our respective countries and overseas the concept of a close-knit community has become more problematic. The absence of a clearly defined community makes it more difficult to generate a clear community of concern. This is even more apparent when dealing with adult offenders. No longer do they necessarily have the support of parents or siblings as part of their network. In the Hamilton project both authors were involved in, it was common for adult offenders to attend conferences with few support people. In the absence of support people, reintegration becomes a difficult task.

Most importantly in terms of domestic violence conferencing, the concept of reintegrative shaming requires a uniform community view of right and wrong. It operates on the assumption that there is a “core consensus ... that compliance with the criminal law is an important social goal”.<sup>62</sup> It therefore relies on an assumption that those offences which are criminalised are universally accepted to be wrong.<sup>63</sup> This can create problems where there is no universal condemnation of a particular offence. One case in the Hamilton project involved an assault by a father on his son. In this case the father struggled to acknowledge any form of embarrassment or shame for his actions. He did not appreciate that the assault on his son was wrong and neither did several of the other conference participants. Without community condemnation, a process relying on reintegrative shaming cannot operate effectively.

### **Community Group Conferencing and Domestic Violence**

One concern about the conferencing process is the assumption that the offender in a domestic violence situation will be shamed into changing his behaviour. In domestic violence cases, the concept of re-integrative shaming posits the view that each member of the offender’s community will accept that domestic violence is unacceptable.<sup>64</sup> It needs to be acknowledged, however, that in New Zealand at present there is no such societal consensus about domestic violence. Instead, as already discussed, researchers have found that an offender’s abusive behaviour takes place within a social context which often legitimises, condones and even supports his use of violence. There is no reason to believe that violent men will readily be shamed into accepting that their violent acts are wrong.<sup>65</sup> As well, the parties’ families or communities may not be supportive of a victim’s attempts to hold the perpetrator accountable for his actions.

In order to see the use of the conferencing model as appropriate in domestic violence cases, it is necessary to understand how a family or community seeks to

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<sup>62</sup> Braithwaite, *supra* note 110, at 38.

<sup>63</sup> *Ibid*, 95.

<sup>64</sup> Stubbs, J, *supra* note 109, at 17.

<sup>65</sup> *Ibid*,

“explain” the occurrence or causes of abuse. Some of these explanations may attribute the responsibility for violence wholly, or in part, to the victim. She may be seen as provoking him by not living up to expectations of her as a mother or a partner. Others may assume that the use of violence may, in certain circumstances, be an acceptable response to a conflict situation. To others, the violence may seem “understandable” because of the perpetrator’s jealousy or hurt pride or even because of his own apparent victimisation as a result of racism, unemployment etc. In a recent worrying comment, Braithwaite himself posits that:

With an incident of (stranger) violence at a pub, there may be a girlfriend who can commit to sorting out a relationship problem that was engendering jealousy.<sup>66</sup>

The perpetrator is solely responsible for his violence and his jealousy is not necessarily a symptom of a relationship problem which he and his girlfriend need to work on. His jealousy is the problem. It is a power and control tactic which in all likelihood keeps his girlfriend “in her place” as well as serving as a convenient and societally condoned excuse for his pub violence.

Given that the conferencing model relies heavily on the participation of the victim’s and offender’s communities for solutions to the offending, the discourses of the community about gender roles and violence will influence the discussion of causes of the violence and proposals to resolve the abuse. The definition of causality clearly determines the options perceived as solutions.

The same issue arises in terms of the conference facilitators’ discourses as well. For instance, if the facilitator is a social worker in New Zealand, s/he will be trained to assess risk of further violence against children in terms of the Manitoba Risk Estimation Instrument. That tool describes battered women who will not/cannot leave their abusers as “co-perpetrators” of violence against their children in that they “cause” their children to witness their own abuse.<sup>67</sup> One of the writers who has done extensive training of social workers about domestic violence has often heard a battered woman described as a “hostage” and/or a “co-perpetrator” in respect of the violence meted out against her. Similar results have been seen when the conference facilitators’ analyses of violence involve the use of the conflict tactics scale which counts “slap for slap” but does not distinguish between violence used in a premeditated attack versus violence used in self defence and does not count injury or fear of further violence as relevant factors in assessing who the more violent partner is.<sup>68</sup> Even the Minnesota Multi-Phasic Instrument

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<sup>66</sup> Braithwaite, *supra* note 1, at 1748.

<sup>67</sup> See fuller discussion of this risk assessment model in Reid, G, Sugurdson, E, Christianson-Wood, J and Wright, A (1996) *Basic Issues Concerning the Assessment of Risk in Child Welfare Work*, (University of Manitoba)

<sup>68</sup> See Busch, R and Robertson, N, *supra* note 28, fn 157 which states:

The Conflict Tactics Scale asks how often in the past 6 months the respondent has used specific violent acts. Ellen Pence has illustrated the absurdity of this decontextualised approach by the hypothetical example of a man who had ‘grabbed his partner around the neck and is trying to

which is often used by custody evaluators to determine mental health issues of parents vying for custody has been critiqued for labelling women who are actually being stalked by their perpetrator partners as “paranoid”.<sup>69</sup>

If the community discourse about domestic violence sites the cause of abuse in the relationship between the partners, the conference outcomes will, in all likelihood, reflect commonly held justifications and excuses for violence, eg “she provoked him”, “it takes two to tango”, “what can you expect from that family?” A focus on the relationship as the cause of violence fails to identify the ways in which social attitudes legitimise the use of power and control tactics, including male privilege and may fail to hold the perpetrator accountable for his violence.

Conciliation or reconciliation may be prioritised over the victim’s need (and legal right) to safety. Given the high incidence of continuing abuse by perpetrators after separation, a focus on the relationship as the cause of the violence may lead to a minimisation of the well documented risks of separation violence once the relationship has broken down. In New Zealand, for example, approximately 40% of female homicide victims are killed by their estranged partners, typically during access changeover times.<sup>70</sup> If the community believes that the violence will stop when she leaves, what safety mechanisms will be put into place to protect the victim from on-going abuse during visitation arrangements? To illustrate, about two years ago one of the writers was advocating for the New Zealand government to fund professional supervised access sessions in situations where one of the parents had been violent to the other parent or to a child. The response of the then Minister of Justice to a question concerning this elicited the following response: “Why would you need that? The couple’s separated, aren’t they?”

Finally, from our experiences in dealing with domestic violence cases, it seems just as likely that shaming will produce further alienation and more violence than integration. It may be dangerously naive to believe that shaming and a process of apology and forgiveness will result in the perpetrator abandoning his use of violence. Can we believe that empowering the victim to describe the impacts of the violence on her and the children will engender a life-changing epiphany in the perpetrator? This assumption posits that the perpetrator does not already know the power of his violence, that he will be surprised and moved by the consequences of his actions. While this may occur, one author’s experiences in dealing with abusive men in perpetrators’ programmes has been that they know the power of their violence. They know violence works, that it controls the victim’s behaviour and typically results in her doing what he wants her to do. Or, that it punishes her for doing what he’d told her she couldn’t do. It “teaches her a lesson” for

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throttle her. She ‘bites’ his arm in an attempt to make him loosen his grip. Under the Conflict Tactics Scale, the partners will be scored as equally violent.

<sup>69</sup> Lenore Walker made this observation as part of her (still unpublished) presentation at the Custody Evaluations and Domestic Violence workshop, International Conference on Family Violence, San Diego, California, July 2000.

<sup>70</sup> Davison, R, *supra* note 103, at 35.

the future. One facilitator of an anti-violence programme has commented that it can take 6 to 8 weeks for perpetrators to move from feeling that they are the victims of their partners' "nagging" or "disobedience" or "uncooperativeness" to accepting even partial blame or responsibility for their actions. A typical statement in groups is, "I'm not a violent person/ I'm not an abuser. But she made me so angry..."

One of the writers was informed of an example of the conferencing process producing greater risk of violence. A Family Group Conference was held concerning whether a couple's children were in need of care and protection. The background to the conference was severe and repetitive physical and psychological violence against the then estranged female partner, often in the presence of the children. Many of the participants at the conference had witnessed that violence and also had direct experiences of his violence. The central issue of the conference, however, was about whether children should be placed with other family members because the mother "wasn't coping" with them.

In the initial stages of the conference, the male partner talked at length about how "hopeless" the woman was as a wife, mother, and sexual partner. The conference facilitator then introduced the issue of his violence. Because of her fear, the woman's response was to state that the social worker had exaggerated the violence, that it was mutual, and when it wasn't, she provoked it by her actions. Interviewed later, the social worker advised the writer that this often happened at Family Group Conferences. Women recanted what they'd said during the conference preparation time after issues of violence were raised in the conference in the presence of their abusers.

This conference took a different turn, however, because the perpetrator's sister then stated that she had witnessed the violence against her sister-in-law and had herself been the target of her brother's physical and sexual violence. After the conference, the brother threatened the sister. He related that he had been very ashamed by what she'd said in front of their family and other respected community members. That it had been much worse for him than any of his previous appearances in court; in fact, it had been one of the worst experiences of his life. He clearly had gone through the shaming process in front of respected community members. But rather than being contrite, his statement to his sister was "So I'm really going to get you now." The outcome of that conference was that his estranged wife and children were no safer and his sister left town and went into hiding.

### **C. The Pennell and Burford Conferencing Model and Domestic Violence**

Joan Pennell and Gale Burford have trialed the use of the family group decision making conference project for child abuse and family violence cases in Newfoundland and Labrador. The results from 37 conferences are promising. They found that in the main the conferences enhanced family units, increased safety for families within the project, and reduced abuse for project children and women. Two important points

emerged from the study. First, though the project primarily received referrals concerning child abuse and neglect, there was a backdrop of violence against women, cross-generational violence, and cross-generational violence within the subject families. As well, a great deal of time and preparation went into planning the conferences to ensure safety of participants. As Burford and Pennell state:

Given the extent of violence against child and adult family members, careful negotiations were crucial for ensuring that the right people were invited to the conferences, that family group and professional participants were adequately prepared for their roles at the conference, that necessary measures were put into place to protect participants, and that practical arrangements were made such as plans for travel to the conferences or a neutral place in which to hold the conferences.<sup>71</sup>

Because of this careful planning, no violence occurred during the conferences and no violence was reported as a result of the conferences. Pre-conference meetings with the parties' support people ensured that the victim's supporters would be prepared to stand up for her against the perpetrator, if need be. Those meetings also revealed what gaps in safety might arise and allowed for the development of strategies to ensure safety. In addition, monitoring of the implementation of the plans reached by families and follow-up monitoring after a year was carried out. Unexpectedly but worthy of note, in those families where the conference plans had been carried out completely or at least partially implemented, families reported that the conferencing had made them "better off". In the few cases (7) where the plans were not carried out at all, half the interviewees stated that the family was "left the same or worse off."

Under the Pennell and Burford model, the conferencing was one stage of a process of providing safety for women and children and enhancing their abilities to live without violence. Many of the victims already had protection orders in place and there was resort to the criminal justice system and Child Protection Services when the need arose, even after the conference had occurred. Indeed, the family case referrals were made by Child Protection Services and there was collaboration between government agencies and community groups throughout.

### **Conclusion**

Sadly, the Canadian government has ceased its commitment to the Pennell/Burford project. Echoing the fears of many who worry that restorative justice models provide "cheap justice", the Canadian government saw the project as too expensive and it was terminated. The approach, however, is an important contribution to bridging the hiatus between restorative justice proponents and battered women's advocates. Its emphasis on protection of victims through extensive pre-conference preparation, through ensuring that victims will not be isolated or silenced during

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<sup>71</sup> Supra note 12, at 139.

conference, the researchers' willingness to use the criminal justice system's protections when necessary, their commitment to on-going monitoring and evaluation of families who've been through the conferencing process --these demonstrate that restorative justice processes may be useful in some domestic violence cases, at a late stage, after safety issues have been dealt with, in conjunction with other measures also aimed at providing safety and autonomy for victims. The model demonstrates again the necessity for integrated, coordinated government and community responses to domestic violence.

One of the strengths of the Pennell and Burford model is its commitment to culturally appropriate processes to deal with violence. I support this commitment. While domestic violence may sometimes manifest itself in similar ways across ethnic lines, violence is often expressed in culturally specific ways and the meaning of and/or risks entailed in certain behaviours can only be fully understood by someone from within that cultural group. Because violence is socially constructed, moreover, the solutions to such violence must be found in the stories and values of the participants' cultures. Processes used by one cultural group are not necessarily appropriate in resolving issues which arise in other groups. Successes cannot be "taken on the road" and tried out on totally disparate cultures. What works for Navajo or Maori are not necessarily exportable to resolve conflicts among Kosovarians or East Timorese. The processes are a reflection of cultural understandings and values. They cannot be separated from those cultures without loss and disrespect to those cultures.

A Maori legal activist recently gave a lecture where he explored the concept of "post colonialism." He raised his eyebrows and asked, "Oh, have they gone then?" We need to watch out for manifestations of neo-colonialism even in this supposedly post modernist, post gendered, post identity politics age. John Braithwaite states that we need "a culture of apology, rather than a culture of denial."<sup>72</sup> I suggest what is needed is the creation of a culture of safety. In domestic violence literature, a cycle of apology and forgiveness has long defined the "cycle of "violence". It's time to envision new dance steps to the now discredited "tango" of violence.

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<sup>72</sup> Supra note 2, at 188.