EDITORIAL

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

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

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

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

> My conclusion is that under the law as it presently is and with the current practices of the family court the deaths in the circumstances of this case were not foreseeable and were not preventable.
>
> They were not preventable simply because the law and practices did not deal with a situation where a parent, although he had allegedly been violent to his spouse, was otherwise regarded by all who dealt

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

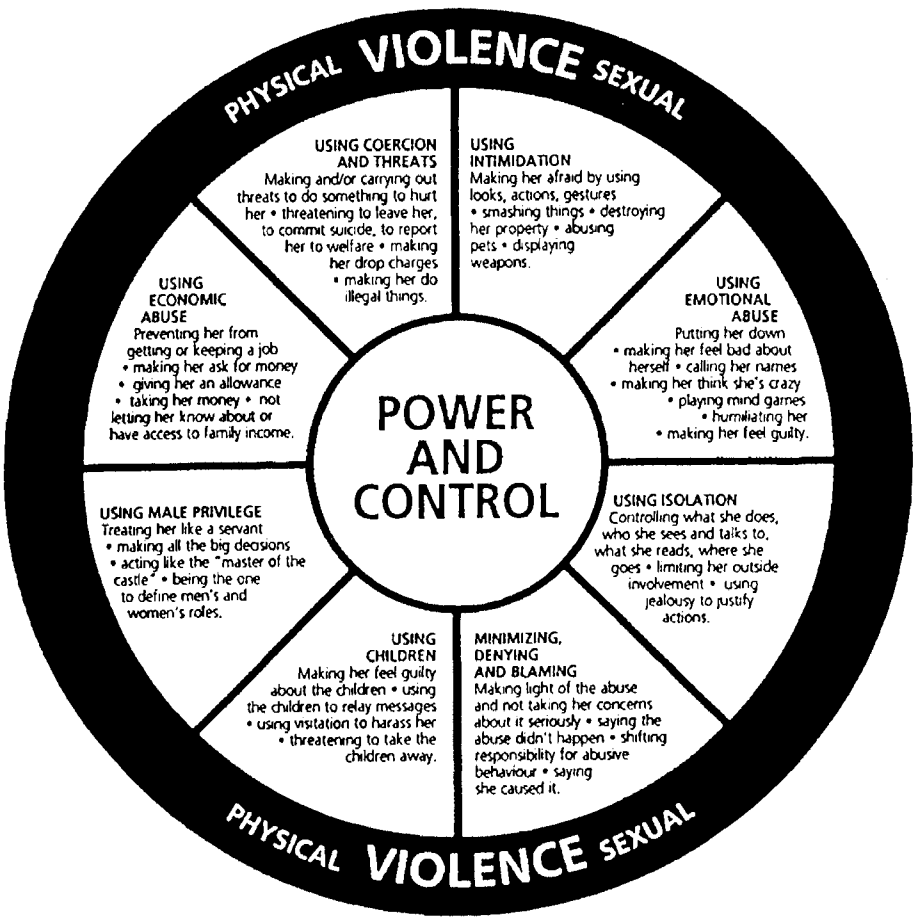
Abuse Intervention Project, the Hamilton Refuge and Support Services and Te Whakaruruhau—those who do the work seven days a week, 24 hours a day; who comfort the women and children and deal with the police, the courts, probation, hospital staff; who see the bruises and hear the heartaches; who get paid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

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

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

Lest we forget

Ruth Busch
15 September 1996



THE POWER AND CONTROL WHEEL

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