

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

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## I. INTRODUCTION

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

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

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

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

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

helpful but that a case-by-case determination of appropriateness must be made.<sup>4</sup>

Recent restorative justice initiatives in New Zealand and Australia have extended the parameters of this debate from family mediation to the criminal justice arena. It has been suggested that a restorative justice model offers opportunities for victims<sup>5</sup> and offenders<sup>6</sup> to effectively address domestic violence situations that have come to the notice of police, community groups and/or the criminal courts.<sup>7</sup> We suggest, however, that this conclusion should not be reached lightly. The purpose of this paper is to critically evaluate arguments about the use of a restorative justice model for domestic violence cases and to propose specific protocols which we believe should be implemented in the very limited number of domestic violence situations for which restorative justice may be applicable. Our analysis presumes that the primary goals of any intervention in domestic violence situations -including restorative justice programmes - must entail the prioritisation of the safety and autonomy of victims over any other

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

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

<sup>6</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 intimate violence but as Gelles has stated:

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

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

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

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

## II. THE MODELS OF RESTORATIVE JUSTICE

In devising the Hamilton restorative justice programme, two existing models were considered, namely victim-offender mediation<sup>8</sup> and the Family Group Conference model (renamed by the programme "the Community Group Conference")<sup>9</sup>. While a hybrid process was ultimately developed by Waikato Mediation Services, the attempt to decide which aspects of the two approaches would be utilised in the programme involved examining the perceived advantages and drawbacks of these existing models, especially their implications for cases involving domestic violence.

### 1. *Victim-offender Mediation*

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

To date, the victim-offender mediation process has mainly been used for property offences such as burglary<sup>10</sup> and then generally only after the offender has pleaded and been found guilty. While the process has typically been utilised for what may be categorised as minor or non-violent cases, it has at times been used to address the effects of more serious offences,

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

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

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

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

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

Research findings on existing victim-offender mediation projects have shown that they can deliver high levels of victim and offender satisfaction. Evaluations of these programmes have demonstrated excellent results in terms of both victims' and offenders' perceptions of the fairness of the mediation process relative to the Court process<sup>12</sup> and in relation to the successful performance of restitution agreements by offenders.<sup>13</sup> The model, moreover, appears to be able to generate satisfactory outcomes for the parties. The Umbreit study, for instance, indicated that those who chose to participate in victim-offender mediation programmes in four different American cities were able to negotiate restitution agreements in 95% of the mediations.<sup>14</sup> Eighty-six percent of the victims found it helpful to talk with the offender. In addition, they reported being significantly less upset

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

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

<sup>13</sup> *Ibid.*, 18-19.

<sup>14</sup> *Ibid.*, 8.

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

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

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

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

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

<sup>16</sup> Umbreit, *supra* n. 12, at 63.

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

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

<sup>19</sup> *Idem*.

not typically characterised by consensuality, honesty, mutuality and compromise.<sup>20</sup>

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

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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> Women who had been abused were more likely than women who had not to feel that they could be "out-talked" by their partners.<sup>26</sup> 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]".<sup>27</sup> This accords with comments made by some New Zealand women interviewed following their involvement in Family Court mediation and counselling.<sup>28</sup>

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<sup>20</sup> *Idem.*

<sup>21</sup> *Ibid.*, 152.

<sup>22</sup> *Idem.*

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

<sup>24</sup> *Ibid.*, 1.

<sup>25</sup> *Ibid.*, 15.

<sup>26</sup> *Ibid.*, 35-6.

<sup>27</sup> *Ibid.*, 14-15.

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

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

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

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

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<sup>29</sup> Newmark et al, *supra* n. 23, at 22.

<sup>30</sup> *Ibid.*, 22.

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

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

<sup>33</sup> *Ibid.*, 864.

<sup>34</sup> *Ibid.*, 865.

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

The traditional mediation process relies heavily on the judicial model of neutrality and impartiality. Like judges, however, mediators are not exempt from the politics of gender, class, race and culture. Moreover, it is naive to suggest that mediators, even with appropriate training, are immune from the minimising, trivialising and victim-blaming attitudes towards battered women which are so commonly found in judicial and psychological discourses about domestic violence.<sup>36</sup> 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.<sup>37</sup>

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

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

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

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

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

<sup>39</sup> Robertson and Busch, *supra* n. 36, at 84.



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

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

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

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

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

<sup>41</sup> *Idem*.

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

<sup>43</sup> Carbonatto, *supra* n. 7, at 4.

<sup>44</sup> Marshall and Merry, *supra* n. 37, at 243.

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

In the area of domestic violence, it is claimed<sup>45</sup> that mediation enables the parties to focus on relationship issues in a way which is not possible during Court proceedings. Because many women do reconcile with their abusers or, even if not, the relationship between the parties may continue long after the court case has finished, it is said that mediation can help both parties to develop ways of achieving a relationship based on trust and non-violence.<sup>46</sup> This claim ignores an important fact about domestic violence. It is one of the characteristics of men who are violent towards their partners that their violence often escalates at the time of separation. Indeed, domestic homicides are most likely to occur when the woman first attempts to separate or during the first year after separation.<sup>47</sup> Mediations occurring during this period, including restorative justice mediations, take place when the perpetrator is often using particularly aggressive efforts to control the target of his violence.<sup>48</sup> These mediations also have the consequence of suggesting that domestic violence is inherently a “couple problem” which can be addressed by offering conciliation to the parties. The use of violence reflects a serious social problem on the part of the batterer rather than a defect in the relationship.

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

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<sup>45</sup> Carbonatto, *supra* n. 7, at 4.

<sup>46</sup> *Ibid.*, 8.

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

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

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

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

### *3. Family Group Conferences*

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

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

<sup>50</sup> National Committee on Violence Against Women, *supra* n. 40, at 24.

<sup>51</sup> Zehr, H, *Changing Lenses* (1990) 183.

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

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

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

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

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

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

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

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

<sup>56</sup> *Ibid.*, 87.

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

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

The co-ordinator then explains the procedure to be followed. It is important that all of the participants have a clear understanding of what will happen during the conference.<sup>64</sup> 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>65</sup>

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

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

<sup>58</sup> Idem.

<sup>59</sup> Idem.

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

<sup>61</sup> Stewart, supra n. 57, at 76.

<sup>62</sup> Ibid., 75.

<sup>63</sup> Maxwell and Morris, supra n. 55, at 87.

<sup>64</sup> Stewart, supra n. 57, at 77.

<sup>65</sup> Ibid., 75.

<sup>66</sup> Maxwell and Morris, supra n. 55, at 87.

<sup>67</sup> Ibid., 87.

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

Once an admission is made, the co-ordinator asks the victim to speak.<sup>71</sup> Alternatively, if the victim is not present, the reported views of the victim are read to the conference.<sup>72</sup> The purpose of this step is to allow the victim to detail the effects of the offending on her and to raise questions about what happened and why. The young offender is asked to listen to the victim's statement without interruption. The young person's family may, however, ask questions. At the conclusion of the victim's presentation, there is often an emotionally charged silence while conference participants await the response of the young offender<sup>73</sup> who is then asked to explain how he or she felt upon hearing the victim's side of the story.<sup>74</sup>

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

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

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<sup>68</sup> Stewart, *supra* n. 57, at 75.

<sup>69</sup> Maxwell and Morris, *supra* n. 60, at 21.

<sup>70</sup> *Idem*.

<sup>71</sup> *Ibid.*, 27.

<sup>72</sup> Maxwell and Morris, *supra* n. 55, at 88.

<sup>73</sup> Stewart, *supra* n. 57, at 78.

<sup>74</sup> *Idem*.

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

<sup>76</sup> *Idem*.

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

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

Once the plan is formulated by the family, there may be some negotiation between all the conference participants about the content of the plan. The victim and the police may veto the terms of the proposed plan. In that event, the matter is referred back to the court for resolution. If the plan is accepted by the victim and the police, its exact details are finalised and then recorded by the co-ordinator and a review date is set for one week prior to the young person's fulfilling the plan's requirements.<sup>82</sup> The participants are asked to make any final comments<sup>83</sup> and the meeting is closed with a final statement thanking the parties for participating in the process.<sup>84</sup>

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

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

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

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<sup>78</sup> Stewart, *supra* n. 57, at 79.

<sup>79</sup> *Idem.*

<sup>80</sup> *Idem.*

<sup>81</sup> *Idem.*

<sup>82</sup> Stewart, *supra* n. 57, at 80.

<sup>83</sup> *Idem.*

<sup>84</sup> Maxwell and Morris *supra* n. 55, at 88.

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

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

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

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

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

<sup>87</sup> Barbour *supra* n. 85, at 19.

<sup>88</sup> *Idem*.



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

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

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

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

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

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<sup>89</sup> Ibid., 18.

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

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

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

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

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>95</sup> It needs to be acknowledged, however, that in New Zealand at present there is no such societal consensus about domestic violence.<sup>96</sup> Instead, researchers have found that an offender's abusive behaviour takes place within a social context which often legitimises, condones and even supports his use of violence.<sup>97</sup> There is no reason to believe that violent men will readily be shamed into accepting that their violent acts are wrong.<sup>98</sup> As well, the

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<sup>92</sup> Maxwell and Morris *supra* n. 55, at 87.

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

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

<sup>95</sup> Stubbs, *supra* n.93, at 17.

<sup>96</sup> *Idem.*

<sup>97</sup> *Supra* n. 38.

<sup>98</sup> Stubbs, *supra* n. 93, at 17.

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

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

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

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

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

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

<sup>101</sup> Maxwell and Morris, *supra* n. 55, at 75.

<sup>102</sup> *Ibid.*, 119.

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

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

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

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

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

<sup>105</sup> *Idem.*

<sup>106</sup> *Idem.*

<sup>107</sup> Personal interview between Ruth Busch and care and protection panel facilitator, February 1996.

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

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

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

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

#### *6. The Burford and Pennell Conferencing Model*

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

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<sup>108</sup> Personal interview between Ruth Busch and social worker, June 1996.

<sup>109</sup> Burford and Pennell, *supra* n. 90.

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

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

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

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

<sup>111</sup> *Idem*.

<sup>112</sup> *Idem*.

<sup>113</sup> *Ibid.*, 206.

<sup>114</sup> Burford and Pennell, *supra* n. 90, at 14.

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

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

<sup>117</sup> *Ibid.*, 14.

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

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

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

The Burford and Pennell report does record one instance which causes some concern. The family involved in that conference ended up denying that any violence had occurred. In this case, it appears that the views of the mother and the children were not adequately represented<sup>123</sup> and the husband/father was able to intimidate the family into refusing to acknowledge the abuse. In commenting on this case, Burford and Pennell noted: “That experience confirmed a potential worst fear about how families might subordinate the abuse to other concerns”.<sup>124</sup> They also commented that this was not the only conference where this dynamic surfaced. In other conferences, however, the family and the professionals were able to ensure that things did not get “turned around”.<sup>125</sup>

### *7. The conferencing process suggested by Carbonatto*

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

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<sup>119</sup> Burford and Pennell, *supra* n. 90, at 27.

<sup>120</sup> *Ibid.*, 9. What the term “responsibly” meant was not explained.

<sup>121</sup> *Ibid.*, 24.

<sup>122</sup> *Ibid.*, 25.

<sup>123</sup> *Ibid.*, 28.

<sup>124</sup> *Idem.*

<sup>125</sup> *Idem.*

<sup>126</sup> Carbonatto, *supra* n. 7, at 4.

prepared to assume responsibility for them.<sup>127</sup> If the situation was potentially explosive the mediations could be conducted on a "shuttle approach". Referrals would come from statutory and community agencies such as the police, women's refuge and men's groups.

The object of the conference is to end domestic violence by addressing the causes of the offending, providing support for the victim, and imposing a sanction on the offender which is decided upon "by a 'community' of people who have an interest in the lives of both the offender and the victim".<sup>128</sup> The role of the conference participants is to propose sanctions which will "adequately resolve family abuse".<sup>129</sup> Plans would be arrived at through consensus decision-making with no express provision for the victim to veto proposed sanctions. If the group's sanctions did not prevent further violence, police could become involved.

Carbonatto provides examples of the types of sanctions which might be imposed. For instance, the conference group might implement a plan for checking on the victim at "risk times", such as Friday and Saturday nights "when many incidents occur".<sup>130</sup> Alternatively, the plan might require members to provide the perpetrator with a bed to ensure that he stays away from home if he goes out drinking. Where perpetrators are financially secure, the plan could entail putting the family's bank accounts into the victim's name to allow her to walk out of the relationship and be financially independent if more violence occurs.

#### *8. Problems with the Carbonatto Approach*

This model is clearly only in a developmental phase, however it does cause a great deal of concern. It is a process which can be initiated without referral to the police or the judiciary. It operates under a mantle of confidentiality and there is virtually no external accountability unless further violence occurs. The process creates a situation where the sanction becomes something to be established by the conference participants alone, without reference to the wider community's interest in addressing the consequences of offending. Conferencing under this model may fail to confront the problems inherent in consensus decision-making within a family or community context.

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<sup>127</sup> *Idem.*

<sup>128</sup> *Ibid.*, 3.

<sup>129</sup> *Idem.*

<sup>130</sup> *Ibid.*, 4.



In the Carbonatto model, the suggested sanctions fail to address the underlying causes of domestic violence and provide superficial responses to issues of victim safety and autonomy. Carbonatto's proposed sanctions perpetuate many of the now discredited myths of domestic violence and do not acknowledge the variety of tactics used by perpetrators to maintain power and control over their partners and children. For instance, few researchers now believe that domestic violence is caused by alcohol consumption or that it occurs only on weekends. As well, while the Carbonatto model recognises that "[the victim] may not even have a meaningful community in [her] geographical area,"<sup>131</sup> the common use of isolation as a tactic of power and control is not discussed. Instead, Carbonatto places the onus on the conference facilitators to manufacture a "community" for one or both of the parties so that a conference can be convened. As Carbonatto states:

The onus is on the facilitators to find such a community. Thus the need for facilitators to be inventive in mobilising key network members. This may, for example, take the form of approaching a neighbour whom the victim has only casually met (obviously with her consent).<sup>132</sup>

The most significant drawback in the Carbonatto model is that it does not require the perpetrator to take responsibility for his violent behaviour. By asking family and friends to supervise his actions to prevent further violent incidents during "risk periods", the focus shifts from the abuser's accountability for his violence to the adequacy of the restraints put in place by the community. In the face of future violence, the issue may well revolve around whether or not a certain support person failed to carry out the terms of the sanction rather than focus on the abuser's violence and its consequences for the victim. The agreed plan itself may provide the abuser with an excuse or justification for his violence ("If only you had checked up on things on Saturday night like you were supposed to, this would never have happened.")

As opposed to criminal justice interventions which prioritise victim's safety over reconciliation and/or conciliation concerns, the assumptions underlying the Carbonatto model tend to characterise domestic violence as a relationship issue. The sanctions suggested reflect Carbonatto's view that: "The reality is that many women return to their abusive partners and, therefore, it is necessary to develop ways to help both partners achieve

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<sup>131</sup> *Ibid.*, 3.

<sup>132</sup> *Ibid.*, 3-4.

relationships based on trust and non-violence”.<sup>133</sup> In fact, it is often the victim’s very inability to obtain adequate legal protection or financial autonomy for herself and her children which leads her to reluctantly reconcile with her abuser. This is especially true in cases of recent separation, when statistics in New Zealand<sup>134</sup> and overseas<sup>135</sup> indicate that the risks of serious injury and homicide are heightened.

There is no provision in the Carbonatto model for monitoring the perpetrator’s compliance with the terms and conditions of the agreed plan. Neither is there any follow-up process outlined by which the victim’s concerns and experiences can be compiled and used to further refine or amend the sanctions already in place. In addition, the Carbonatto model relies on the use of “shuttle” mediation for what she characterises as “potentially explosive situations”.<sup>136</sup> Her definition of this phrase highlights many of the problematic aspects of her model. In an implicitly victim-blaming statement she comments: “[A potentially explosive situation is] one in which the victim does not want reconciliation with the offender but is more intent on securing her protection”. Surely the object of all interventions in the domestic violence area - including mediations and other restorative justice initiatives - must prioritise the safety of the victim.<sup>137</sup> Moreover, as already discussed, shuttle mediation is the least effective of the mediation processes in terms of its vulnerability to abuse and influence.

### *9. The Community Group Conference*

The process being trialed in Hamilton is a hybrid one based primarily on the victim-offender mediation approach but incorporating elements of the Family Group Conference model. In the Hamilton scheme, the District Court refers offenders to the project during the period between conviction and sentencing. Before individual meetings with any of the parties, referrals are reviewed by a Pilot Review Committee comprising representatives from community and statutory agencies and the legal profession. Presently, the Committee includes appointees from the police, community corrections, victim’s support, the Hamilton Abuse Intervention Pilot

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<sup>133</sup> *Ibid.*, 4.

<sup>134</sup> Busch, “Safeguarding the Welfare of Children” (1995) 4 *Butterworths Mental Health & the Law Bulletin* 46, 48.

<sup>135</sup> *Idem.*

<sup>136</sup> Carbonatto, *supra* n. 7, at 4.

<sup>137</sup> *Guidelines for Family Mediation*, *supra* n. 50, at 55.

Programme, Matua Whangai, the Hamilton District Court, church groups, legal academics and criminal barristers. There is special consideration given to the gender balance of this group. The Review Panel may either reject the referral or impose conditions on its acceptance, such as the offender's and/or victim's participation in prior counselling or educational programmes.

After an intake procedure, the parties each meet separately with the mediators and then separate Community Group Conferences are held. The purpose of each separate conference is to address the effects of the offending on the parties and their respective family and friends, and to enlist future support to stop the offending. For the victim, the separate conference allows an exploration of the ways in which her reaction to the offender and the offending have strained her relationships with family and friends. For the offender, it allows conference facilitators to address his specific rehabilitation needs without the victim feeling that her issues are being ignored. One risk of dealing with rehabilitation in the joint session is that the victim will interpret this as indicating that the "real victim" is the offender.

Mutual issues are addressed in a joint session after the separate community group conferences are held. The joint session may involve family and other support people, if requested by the parties. In the Hamilton process, the victim and offender structure the restoration plan; however, they are strongly encouraged to have support people present before, during, and after the joint session. The role of these support people is usually to assist and encourage the parties to generate suitable responses to the offending and to provide an additional level of protection for the victim. In addition, follow-up sessions are built into all restoration plans in order to monitor compliance with the terms of any agreements. Plans are amended where proposals have proven to be unsatisfactory.

*10. The process used by the Hamilton project in circumstances involving domestic violence*

In the protocols adopted by the Hamilton scheme, mediation is generally deemed to be unsuitable for cases of domestic violence.<sup>138</sup> Referrals are excluded where there is evidence of domestic violence in all but the most exceptional of circumstances. Such exceptions might include instances where the violence involved an isolated incident, occurred within the

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<sup>138</sup> National Committee on Violence Against Women, *supra* n. 40, at 35.

context of family trauma or highly unusual circumstances, and the risk of further violence was remote. The mediators would have to satisfy themselves that there has been no previous history of physical, sexual, or psychological violence against an offender's (ex) spouse, children, or others with whom either party has a domestic relationship.<sup>139</sup> Threatening or intimidatory behaviour as well as destruction of property and harassment each constitute "psychological violence" and it is highly unlikely that cases involving such facts would be deemed suitable for the programme. Referrals are also rejected where the offender has made suicide threats, has a psychiatric or substance abuse history, or has abducted or threatened to abduct children.<sup>140</sup>

In those rare instances where such referrals are accepted, they are subject to specific process protocols which have been adopted to deal with the power and control dynamics inherent in most battering relationships. The protocols are designed to ensure that the victim is fully informed of her legal rights and the other options available to her before making a decision about whether to proceed with mediation. At our first meeting, the victim is encouraged to formulate a safety plan, is briefed about her legal remedies and advised to get independent legal advice about protection orders. Finally, she is informed about the array of community and government agencies which she might need to contact for further protection (eg the Hamilton Abuse Intervention Project, the local women's refuges).

Identification of domestic violence factors is of utmost concern. Where violence forms the basis for a charge against the offender, there is less opportunity for domestic violence issues to be hidden. Charges involving breaches of protection orders and assault are, therefore, readily identifiable. In some cases, however, it is possible that the type of charge may mask the existence of such violence. For instance, if the offender has been charged with theft or damage to the property of a former partner or assault against her present spouse, it may not be apparent that domestic violence issues are involved. In order to deal with this contingency, parties are always asked whether they know the offender. Where it is revealed that the victim and the offender do know each other, the victim is asked to detail the nature of their relationship and specific questions are asked to ascertain whether there have been any previous violent incidents.

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<sup>139</sup> See definition of "domestic violence" in section 3 of the Domestic Violence Act 1995.

<sup>140</sup> This approach coincides with the definition of "serious violence" found in Magana, and Taylor, "Child Custody Mediation and Spouse Abuse: A Descriptive Study of a Protocol (1993) 31 Family and Conciliation Courts Review 50, at 55.

In those few domestic violence situations where mediation is considered appropriate, a “narrative mediation” process is adopted as opposed to the strictly problem solving approach used in the traditional victim-offender mediation model. One of the advantages of this technique over other forms of mediation and conferencing is that it examines the social discourses which have allowed the offender to avoid responsibility for his violence. Narrative mediation facilitates a deconstruction of the perpetrator’s belief system about gender roles and violence, and allows him to explore the ways that these beliefs are socially constructed and legitimised. For example, the offender in his initial separate session is asked such questions as:<sup>141</sup>

- If a man wanted to control and dominate another person, what sort of strategies and techniques would he put into place to make this possible?
- If a man desired to dominate another person what sort of attitudes would be necessary to justify this?

These questions allow the offender to consider the implications of violence generally, before examining whether, and how, he has engaged in the use of power and control tactics in his domestic relationships.

A decision to proceed further with the mediation process is conditional on the offender understanding the impact of his actions on the victim and her children and family. He also needs to accept responsibility for his actions, not blame his victim for his use of violence, and agree that it is her decision solely to determine her future involvement (if any) in their relationship. For example, the offender needs to agree to cease all unwanted contact with the victim by not telephoning or writing to her or coming to her home or workplace. In general, the offender needs to stop all behaviours which the victim might consider coercive, controlling or dominating in order to empower her to make her own decisions about her future.

Issues arising during the victim’s separate session mirror the ones addressed with the offender. She is encouraged to discuss the ways in which she has accepted responsibility for his violence and how such acceptance reflects prevailing societal assumptions about gender relations and domestic violence. The session also focuses on issues of self blame, her feelings of despair and worthlessness in being unable to stop the violence, and in general women’s role vis-a-vis their male partners. A primary aim of this separate session is to encourage the victim to place responsibility for the violence squarely on the offender.

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<sup>141</sup> White M. “Deconstruction and Therapy” in Gilligan, S and Price, R (eds), *Therapeutic Conversations* (1993) 22, 30.

Through the use of community group conferences, the communities of victims and offenders can be mobilised to provide support for dealing with the consequences of violence. The conference also allows participants to more openly address the issue of secrecy which can surround violence in families. Only when mediators and conference participants are satisfied that it is safe and appropriate to meet will the parties meet in a joint session. This protocol has the advantage of prioritising victim safety and offender accountability over all other issues in the mediation process.

### III. CONCLUSION

The restorative justice process opens up new opportunities for victims and offenders to actively participate in the criminal justice system. However, the desire for change should not be allowed to blind us to the limitations of the process. These limitations arise from the dynamics of mediation and conferencing and are clearly exemplified in cases of domestic violence. In this early trial period of restorative justice initiatives in New Zealand, great care and thought should be given to whether domestic violence cases should be referred to these programmes. In our view this decision should not be taken lightly. The process should only be attempted in rare cases and then only after special protocols are followed to ensure a victim's free and informed consent and safety. It must be remembered that in most cases, an abuse victim turns to the criminal justice system for protection from on-going violence. She should not be asked to participate in any process which may compromise her safety and risk exposing her to further violence. At the very least, the system which a victim turns to for protection should not be complicit in her further victimisation.