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## 1. Key Themes (to be explored)

### **Can restorative processes be applied to any type of criminal offence?**

- Not surprisingly, the public tends to be more receptive when the situation involves, non-violent, first-time or non-repeat offenders and less-serious crime.
- However, to what extent is it necessary to do so.
  - The criminal justice system presently does not ‘process’ this type of offender – particularly if a first-time offender?
  - There was a perception that the majority of less serious, non-violent offenses that are presently charged and prosecuted involve repeat offenders.

### **Although one goal of many alternative measures programs is to reduce incarceration rates, they have not yet had a measurable impact because they tend to focus on less serious offences.**

- Alternative measures policies tend to exclude persons who are accused of more serious assaults, administration-of-justice offences, impaired driving, robbery, and theft over \$5000 – but these offences are also the most likely to result in imprisonment.
- Therefore, if one of the goals of these programs is to reduce the rate of incarceration, then they may have to accept more serious and challenging cases.

### **Some community justice committees across several jurisdictions have expanded their caseload to include more serious offences, such as Sexual Assault, Sexual Abuse, Domestic/Family Violence, Violence against Women in relationships, Criminal Harassment – or have desire to do so in the near future.**

- Some jurisdictions have had success with these types of offences.
  - This is not to suggest that restorative justice is a cure-all for violent crimes, or that it can be applied to all types of offences or to all offenders
  - but the emphasis on healing - reducing the level of ongoing emotional/psychological suffering experienced by victims and their families - could make an important contribution in dealing with the harm and damage that has been done.
- However, this has also raised concerns about - re-victimization, intimidation, abuse of power or trust, unequal power of the crime - and about whether the operating justice model in the community is equipped or has the measures in place to guard against this from occurring.

### **If there is a role for restorative justice in more serious cases, it needs to be defined – with appropriate funds, resources, training and guidelines in place to educate, guide and monitor its application.**

- In reviewing the available material and opinions surrounding restorative justice and cases of domestic and sexual violence, it is abundantly clear that legitimate concerns exist that must be addressed before current and future programs can be considered effective and safe. In order to address these concerns, and in order to develop future programs that are appropriate, both government and the designers of initiatives must enter into extensive consultation and cooperation with victims and women's advocacy groups. Concurrently, women's groups must continue to openly dialogue on these issues with each other, as it is apparent that, although these concerns are shared by many, there is no homogeneous "women's" voice on restorative justice. All the voices should be heard and respected.

## 2. Research Questions

### 2.1. Types of Offences

What are the crimes by type of offence in the community?

### 2.2. Screening

What types of offences does the community justice project receive?

What kinds of criteria are used in determining whether to accept the offence or not?

- · Universal eligibility ?
- · Age of the offender? (what age group?)
- · Offence type? (what type of offence )
- · Seriousness of offence? (please describe what you propose)
- · Cases with direct victims?
- · Community Capacity? E.g. resources, training/education
- · Some other criteria? (please state details)
- · A combination of criteria? (please state details)

How were these criteria developed? – in consultation with other stakeholders, in particular with women/victims, women's/ victim's groups?

If the screening is done by the project, what type of training do its members receive?

What percentage of the community justice project's time is spent on screening?

What types of offences does the community justice project accept?

### 3. Relevant Documents, Studies and Practices – Yukon

#### 3.1. Statistics Canada - Crimes By Type of Offence - 2000 <sup>1</sup>

	2000					
	Canada	Alberta	British Columbia	Yukon	Northwest Territories	Nunavut
offences						
All offences	2,476,520	274,838	485,641	<b>7,521</b>	11,942	6,130
Criminal Code	2,353,926	264,423	457,302	<b>7,218</b>	11,526	5,868
Violent crimes	301,875	31,830	50,819	<b>1,020</b>	1,987	1,682
Murder	484	49	77	<b>2</b>	1	3
Attempted murder	766	35	90	<b>0</b>	1	0
Manslaughter	53	9	8	<b>0</b>	0	0
Robbery	27,012	2,532	4,877	<b>13</b>	18	12
Other violent crimes	273,560	29,205	45,767	<b>1,005</b>	1,967	1,667
Sexual assault	24,049	2,497	3,727	<b>86</b>	181	221
Assault	233,517	25,071	40,616	<b>842</b>	1,648	1,321
Other violent crimes	15,994	1,637	1,424	<b>77</b>	138	125
Property crimes	1,251,667	133,447	258,410	<b>2,502</b>	2,394	1,376
Breaking and entering	293,416	26,781	51,839	<b>774</b>	817	604
Theft of motor vehicles	160,268	14,893	29,266	<b>245</b>	211	199
Theft	683,997	75,663	160,802	<b>1,291</b>	1,207	496
Possession of stolen goods	28,317	4,306	4,794	<b>55</b>	37	6
Frauds	85,669	11,804	11,709	<b>137</b>	122	71
Other crimes	800,384	99,146	148,073	<b>3,696</b>	7,145	2,810
Prostitution	5,036	782	973	<b>0</b>	1	0
Gaming and betting	242	19	53	<b>1</b>	0	2
Offensive weapons	15,306	1,622	3,261	<b>78</b>	56	39
Other Criminal Code offences	779,800	96,723	143,786	<b>3,617</b>	7,088	2,769
Other federal statutes	122,594	10,415	28,339	<b>303</b>	416	262
– nil or zero						
Source: Statistics Canada, CANSIM II, table 252-0001 and Catalogue no 85-205-XIE.						
Last modified: March 8, 2002.						

#### 3.2. Aboriginal Justice Strategy (AJS) Trends – 2000 <sup>2</sup>

##### 3.2.1. Reported Referral Rates: Offences

Total # of Reported Types of Offences Referred by Province/Territory: 1996-99<sup>3</sup>

<sup>1</sup> Statistics Canada, <http://www.statcan.ca/english/Pgdb/State/Justice/legal04c.htm>

<sup>2</sup> Department of Justice Canada, The Aboriginal Justice Strategy: Trends in Program Organization and Activity 1996-1997, 1997-1998 and 1998/1999, Prepared for the Aboriginal Justice Directorate, Department of Justice Canada by Naomi Giff, March 10, 2000 -

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Prov/ Territory	Offence Types and # of Times Referred							
	-A- Property	-B- Assault	-C- Mischief	-D- Domestic Violence	-E- Sexual Assault	-F- Drug Offences	-G- Prostitution	-H- Other
Yukon	20	27	20	0	0	0	0	10

### 3.3. Spousal Assault And Mandatory Charging In The Yukon-1996<sup>4</sup>

#### Executive Summary

##### Background to Mandatory Charge Policy

In December 1983, the Minister of Justice and the Solicitor General issued a public statement on the investigation and prosecution of spousal violence. The basic thrust of the statement and related directives was to remove from victims the responsibility for initiating criminal charges and to ensure that police investigators and Crown Counsel would give priority to cases involving spousal violence. These directives were subsequently reinforced by National RCMP and divisional RCMP policies.

##### Federal Research Initiatives

Since the introduction of the policy directives, the federal Ministry of the Solicitor General and the Department of Justice Canada have co-funded and managed research studies that address a variety of issues related to police and court intervention in spousal assault, but prior to the current study, none had comprehensively examined the extent of implementation of the charging directives, their impact and/or their effectiveness. A study in the Yukon was considered an opportune way to address this lack for several reasons:

- the Territory has a relatively small population which, from a research perspective, made a territory-wide study of key players feasible;
- the RCMP have policy jurisdiction throughout the Territory;
- there is a significant First Nations population;
- there was a willingness on the part of the Territorial government and First Nations to participate in the study.

##### Approach to This Study

The study was directed by Focus Consultants of Victoria, B.C., between December 1994 and December 1995. It explored the effectiveness and impact of criminal justice intervention in spousal assault cases, and the potential limitation of mandatory charge/pro-arrest policies, and attempted to identify alternative models of criminal justice intervention in spousal assault cases.

The study involved:

- interviews with criminal justice, social service and First Nations respondents in Whitehorse and 11 other Yukon communities (respondents in these interviews are called community respondents in this summary);
- interviews with victims of spousal assault in these same communities (these respondents are called victim respondents);
- group interviews involving 42 individuals, most of whom were First Nations respondents, in 10 communities outside of Whitehorse;
- interviews with offenders in spousal assault cases, most of whom were from Whitehorse.

All except two interviews were done face-to-face.

It was important to the funders, the advisory committee and the consultant that the study reflect a strong community base, through the voices both of victims and of workers active in First Nations, the criminal justice system and social services agencies. The study is therefore not based on a quantitative analysis of all spousal assault cases over an extended period of time, nor on a tracking methodology, but rather on the subjective and experience-based responses of groups and individuals that have been involved with the issues of spousal assault in the Yukon.

<sup>3</sup> Department of Justice Canada, *The Aboriginal Justice Strategy: Trends in Program Organization and Activity 1996-1997, 1997-1998 and 1998/1999*, Prepared for the Aboriginal Justice Directorate, Department of Justice Canada by Naomi Giff, March 10, 2000 -

<sup>4</sup> Focus Consultants, Tim Roberts in partnership with Council of Yukon First Nations – Spousal Assault and Mandatory Charging in the Yukon: Experiences, Perspectives and Alternatives, 1994-1996 <http://canada.justice.gc.ca/en/ps/rs/rep/wd96-3a-e.html>

This approach was reinforced by the use of First Nations interviewers under the coordination of the Director of Justice Programs of the Council for Yukon Indians. These interviewers were used for all interviews in the smaller communities outside Whitehorse, and with all First Nations respondents.

### **The Yukon**

For non-Yukon readers, a brief overview of the social demography of the Yukon provides a context for the study.

- the overall population of the Yukon in 1995 was approximately 30,000, of whom 23,000 reside in the capital, Whitehorse. Of the 13 smaller communities in the Territory, 11 were included in this study. One community has a population under 100, three between 100 and 399, five between 400 and 999, and two between 1000 and 2000;
- the aboriginal community comprises slightly over 20 percent of the overall population of the Yukon. Four of the communities are majority aboriginal, five are fairly balanced and 3 are minority aboriginal;
- the First Nations include 7 distinct linguistic/cultural systems;
- the communities are highly isolated, in most cases a minimum of an hour to the next closest centre. Old Crow, a small community in the far north, is accessible only by air.

Prior to 1985, there were virtually no resources except a single transition house in Whitehorse, and little support for victims of spousal assault. The period 1985 to 1992 saw a number of developments relevant to spousal assault, including the 1985 Report of the Task Force on Family Violence, the establishment in 1988 of the Family Violence Prevention Unit, a shelter in Dawson City and an Interdepartmental Working Group on Family Violence.

From 1993 to 1995, there were numerous initiatives undertaken in the Yukon to improve coordination among agencies, including the Report of the Committee to Assess Responsiveness of Yukon Justice to Family Violence, major Integration conferences in 1993 and 1995, the Coordinating Committee on Family Violence, and the Whitehorse-based RCMP Domestic Violence Investigation Team.

### **Respondents**

The 112 community respondents were:

- 62 percent female, 38 percent male
- 54 percent from smaller communities; 46 percent from Whitehorse
- 42 percent from First Nations; 58 percent non-First Nations.

Of the 42 individuals in the 12 group interviews:

- all were First Nations respondents from smaller communities

Of the 57 victim respondents:

- all were female except for one male
- 40 were from First Nations; 17 non-First Nations
- 10 offences occurred prior to 1992, 24 in 1992-93, and 23 in 1994 or 1995.

Of the 11 offenders:

- nine were First Nations; two were non-First Nations
- none were related to the victim respondents (i.e., the samples were mutually exclusive).

### **The Spousal Assault Incident**

The four most frequently mentioned factors perceived by community respondents to contribute to spousal assault (as opposed to causing it) were 1) alcoholism/substance abuse, 2) unemployment/poverty/boredom/lack of education, 3) family dysfunction, and 4) learned behaviour. Factors perceived by victims and offenders to be immediately associated with the assault incident were the spouse's jealousy, alcohol abuse by the spouse, and financial issues.

Of the 57 assault incidents involving victim interviews in this study:

- 46 of victims received cuts and bruises in the assault;
- 32 incurred threats;
- 17 of cases involved weapons;
- 14 involved further more serious injuries;
- 23 required medical care;
- 43 involved alcohol.



### **Victim History of Previous Assault**

- 91 percent of victim respondents had been previously assaulted by their spouses. 71 percent had been assaulted in previous relationships;
- 84 percent of victims reported growing up in a family where there was abuse or violence.

### **Reporting Violence**

- 93 percent of community respondents, when presented with RCMP data on reports of spousal assault in their community, felt the incidence of actual spousal assault was much higher. The median estimate was three times higher than the RCMP report.
- of victim respondents who were previously assaulted by their spouse, 63 percent had not reported these incidents;
- reasons given for not reporting previous assaults included:
  - fear of the offender or of not being protected;
  - ambivalence about the impact reporting will have on their relationship with their spouse;
  - concern that the criminal justice system may not serve the victim's own interests or those of her family;
  - logistical concerns (e.g., lack of telephone, transportation, community support).

Victims said that they reported the most recent assault because of :

- the seriousness and violent nature of the assault;
- changes in the victim's attitude towards violence;
- concern about the impact of the violence on her children.

Conclusions drawn in this study about the reporting of spousal violence are as follows:

- women typically do not report violence until a point is reached where it is perceived to be intolerable. The public education message that any degree of violence is intolerable and should be reported is either not being adequately conveyed to women, or is not meaningful (because of personal or familial perceptions), or is rejected because of problems which are seen to arise as a result of contact with the criminal justice system;
- for a variety of reasons, community service agencies are not highly influential in convincing women to report assault. Instead, support and encouragement come primarily from friends and family members. This suggests that the focus of agencies, the media, conferences and community networking should be to assist community members to identify spousal assault among their circle of friends and relatives, and to offer practical forms of support that could create a zone of safety for the victim. Feeling this zone of safety, the victim may feel more secure about reporting, or simply about drawing firmer lines around acceptable spousal behaviour;
- almost 50 percent of the respondents stated that it was concern about the impact of violence on their children that led to their reporting. Increased dissemination of educational material describing the short- and long-term (inter-generational) impact of violence on children could be a useful educational focus for community-based organizations.

### **RCMP Response and Mandatory Charge**

The key findings in this study concerning the effectiveness and appropriateness of mandatory charge are:

- victims' reactions to how RCMP have handled their cases were fairly positive, and were more favourable concerning cases in more recent years;
- the principal expressed needs of victims are for protection and for RCMP to show concern, interest and support to them. In both respects, their rating of the RCMP response in these areas was significantly higher in cases from more recent years;
- a significant minority of victims (30 percent) did not want their spouse charged. The proportion was slightly higher among First Nations victims;
- First Nations community respondents view healing as a key element of any spousal assault policy, to a greater degree than non-First Nations respondents;
- although there is a strong measure of support for the existing policy, especially among victim respondents, there is also a perception among approximately half of the community respondents that more consideration of victim's preferences should be given in the decision to charge. This need is most strongly expressed in the First Nations community.

Overall, this combined feedback indicates that there is strong support for mandatory charge in its basic message that spousal assault is unacceptable, and that victims must be protected and supported. There is evidence that the RCMP are

becoming increasingly responsive to and empathetic of victims' circumstances in assaultive situations. At the same time, there is a significant degree of dissension from the current policy among respondents who favour increased flexibility and consideration of victims' preferences. Much of the body of opinion resides in the First Nations community. While favouring mandatory charge, many First Nations respondents aspire to the social goals of family healing, and feel that the traditional criminal justice responses have little to offer after the basic needs for protection, safety and support have been met.

### **The Wider Response to Spousal Assault**

Community respondents were asked to identify the most urgent needs in creating an effective response to spousal assault in their community.

- The most frequently mentioned need among overall respondents centred on improved victim support. This is consistent with the needs reported by victims and the purposes of a spousal assault policy identified by community respondents. The next most frequently mentioned need is community/public education and involvement, which is not perceived as being well handled at present. Closely following this need is the need for training and coordination within the system which, to a degree, goes hand in hand with community education and involvement.
- First Nations respondents identify a healing approach as a need in significantly higher percentages than non-First Nations. It is the fourth most frequently stated need among First Nations respondents, compared to a weak sixth for non-First Nations respondents. Among respondents in the group interviews, who were also predominantly persons from First Nations, improved victim support was identified by far the most frequently, but a healing approach and training and coordination were tied for second.
- Respondents did not place a heavy emphasis on offender punishment as a required response. Improved victim support was mentioned far more frequently, along with prevention and coordination measures. Treatment and support resources for offenders were also identified more frequently than punitive orientations.

### **Victim Experiences in the Post-Charge Period**

Key patterns which emerge from victim feedback about the post-charge period include:

- 78 percent of the victims either did not want to testify or to go to court at all. These feelings were particularly strongly felt among First Nations victims, and victims from the smaller communities;
- only six out of forty-five victims said they received no support in their cases, all of these from pre-1992 cases. The primary agent of support was the victim's family, especially among First Nations respondents;
- in 40 percent of cases, the victim attempted to get legal protection from her spouse. Successfully enforced orders were rare;
- 50 percent of victims said they received pressure not to cooperate with the justice system although, over time, the percentage of cases in which this occurred has declined over time;
- only eight of forty-three victims reported having had contact with Crown Counsel prior to the accused's plea. However, the percentage of cases in which at least one pre-court contact has been made has increased in cases from more recent years;
- approximately 55 percent of respondents whose case went through mainstream court were dissatisfied with their contacts with Crown Counsel; similarly 50 percent were dissatisfied with the sentence their spouse received. Dissatisfaction was equally divided between those who wanted longer or shorter sentences and those who wanted treatment for their spouse (most frequently First Nations victims who want alcohol abuse treatment for their spouse) rather than a jail sentence;
- only eight of the victim respondents had cases that were sentenced in a circle process. Of these, five of seven (one did not respond) said their views on sentencing were adequately considered by the circle; two of eight were dissatisfied with the sentence; and none said they would be less likely to report a future assault based on their experience with the circle;
- 12 of the 17 victims who had experience with probation officers in their case were dissatisfied with the enforcement and follow-up.

### **Post-Charge Perspectives of Community Respondents: First Nations Issues and Overall Model**

Only 12 of the 44 First Nations community respondents felt that their First Nation accorded spousal assault a high priority. Self-government was the most frequently cited main priority, which for many respondents was seen as a prior condition for being able to deal with family violence effectively.

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Consideration of initiatives around resources that are currently being taken by First Nations suggests that future funding emphasis be placed on supporting:

- **training initiatives requested by communities for community volunteer and paid workers in fields related to spousal assault;**

Such training should take place within the communities and should be reinforced at defined intervals. An example of objectives for training would be to increase the participants':

- knowledge of the dynamics of spousal assault, its cognitive underpinnings, and its relation to power, control, anger, guilt and self-esteem;
- understanding of the interplay between individual and group accountability, and family and community healing;
- ability to co-facilitate groups for offenders and victims;
- ability to relate knowledge of spousal assault to decision-making, support, counselling and accountability in his/her own work or activity (e.g., drug/alcohol counselling; community health; social work; support group member; friend, family member or neighbour).

We feel that the FVPU should be a key, but not the only player in such training. Many First Nations respondents viewed FVPU as being insensitive to a healing perspective that holds out the possibility of family reconciliation. Training, if it is to be responsive to community-identified needs, will have to be seen to be bridging the perceived gap between the cognitive approach of FVPU and the healing perspective of First Nations programs.

- **positions in existing or planned community-based resources that have a capacity to offer immediate support and counselling/ treatment to both victim and offender.**

Immediate in the criminal justice context means pre-charge or immediate post-charge in a case reported to the RCMP. This suggestion is based on feedback from victim and community respondents that the period between offence and court appearance is one of maximal stress on the victim, and one in which, if the offender is not engaged in more positive self-examination, he tends to scapegoat the victim.

- **networking activities between First Nations that allow them to co-sponsor speakers or training, plan joint initiatives, and share knowledge about their projects, approaches, difficulties and solutions concerning family violence and spousal assault.**

This support could take several forms, including:

- a clearing-house type of newsletter (which could, for example, include samples of screening forms and policies for circle sentencing, announcements of training sessions that could be piggy-backed, job descriptions of service positions, lists of contacts within each First Nation);
- fax machines to facilitate information exchange;
- funds for planning meetings.

The overall objective would be to facilitate community-based approaches to dealing with family violence.

Responses from community respondents as to a preferred post-charge model for dealing with spousal assaults revealed a strong desire for flexibility in terms of how a case should be dealt with after charge: only nine percent (8 of 92) of all respondents advocated the use of mainstream courts throughout a case as the best model for handling spousal assaults. Thirty-two percent of respondents said that the appropriate model depends on the case; 23 percent (all from smaller communities) advocated a model involving mainstream court to first appearance, followed by a stay pending treatment and, if treatment was not followed, the case would be reactivated.

Flexibility after charge is ultimately best addressed by the development of criteria for Crown counsel which would allow for flexibility in a spousal assault case. Based on the feedback from respondents in this study, the following criteria are suggested if this option is entertained:

- the seriousness of the offence;
- history of the accused in terms of previous charges and in terms of non-reported family violence (based on victim or other witness accounts);
- victim preferences re whether prosecution is desired, whether victim is willing to testify, and what conditions re future contact she desires;
- availability of support for victim;
- acknowledgment of the offence by offender, and willingness to participate in a treatment program;
- availability of treatment resources in accordance with the plan.

## Conclusions

Five themes emerged strongly from this report. They are:

- **Support for Mandatory Charge, but Flexibility After Charge**

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The collective response from all respondents would indicate that there is basic support for the concept of mandatory charge. This response is primarily based on the notions that spousal assault is a serious matter, that there should be a clear societal message that it is unacceptable, and that victims or potential victims need protection from assaultive spouses.

However, there is not a consensus, and in fact there is considerable division over whether mandatory charge should lead to mandatory prosecution. As discussed in the next theme, victims do not necessarily engage the criminal justice system because they want to punish their spouse: almost all want to feel safe, and many would like to get help to establish a non-violent relationship. A more flexible approach after charge, depending on a range of factors, would be considered appropriate by approximately half of the respondents.

- **What Victims Want and Appreciate When They Engage the Criminal Justice System**

Closely related to the previous theme, is that the priority needs of victims of spousal assault are to be treated with concern and interest, and to be protected. They want the system to validate their perceptions, reduce their isolation, and hear their needs. Although, as we have reported, there is strong support among most respondents for mandatory charge, among many victims especially First Nations even charging is not necessarily a primary goal. And prosecution of their spouse may for many victims run counter to their own need to be treated with concern, interest and respect.

- **Lack of Evidence that Mandatory Charge Encourages Reporting of Spousal Assault**

There is little in the feedback from respondents to suggest that the mandatory charge policy has encouraged reporting of spousal assault. The policy has been in place in the Yukon for over a decade. Roughly 70 percent of community respondents feel that the policy has been consistently applied, although there is certainly evidence that discretion and inconsistency still exist. Nonetheless, there is a strong consensus that the actual incidence of spousal assault remains considerably higher than the incidence of reports, and two-thirds of victims did not report earlier assaults. Furthermore, a small percentage of victims in this study were less likely to report future assaults on the basis of how their case was handled by the RCMP, Crown, courts or probation.

If one relates these patterns to the primary needs expressed by victims discussed under the previous theme, and if a policy objective is to encourage reporting, it may in fact be counterproductive for the mandatory charge policy to be presented or implemented as one in which the system takes over. Rather, the objective should be to create, within the community, a feeling among victims that it is safe and helpful to discuss her problem among family, friends, service providers and RCMP, and that she will be heard with understanding. This message would endeavour to help the victim feel she can create a zone of safety around herself within which she can consider various relevant options, one of which may involve a decision to report.

- **Differences Between First Nations and non-First Nations Respondents**

Throughout the report differences in responses between First Nations and non-First Nations respondents are noted, within both the victim and community interviews. These differences are summarized in the conclusions section of the main report. The persistence of a pattern of differences suggests strongly that a uniform, inflexible policy is not likely to serve the needs of First Nations and non-First Nations with equal effectiveness. This view is also reinforced by the fact that the experience of First Nations victims with circle sentencing processes albeit based on a very small sample is certainly no worse, and appears to be marginally better than in mainstream courts.

- **Resource Access in Smaller Communities**

The clearest weaknesses in the response to spousal assault reported by respondents are in the speed of court processing, in the enforcement of orders by probation, and in the availability of resources for the treatment of the offender and victim. In all these instances, the lack is felt more severely in the smaller communities than in Whitehorse. In the previous section a three-pronged approach to the issue of resource support in these communities is suggested. These recommendations should also be seen in relation to the clear preference expressed by a large percentage of community respondents for options for processing of cases other than through mainstream court.

**Main conclusions:**

- There is support for the concept of mandatory charge:
  - People interviewed in the study felt that spousal assault is a serious matter and there should be a clear message that it is unacceptable and that victims need protection from assaultive spouses.
  - Although the majority of victims interviewed wanted mandatory charge, they did not necessarily want mandatory prosecution.
  - A more flexible approach after charge would be considered appropriate by approximately half of all victims.

### **3.4. Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon – 1992**<sup>5</sup>

- There are also ideological differences within and outside communities about the most appropriate response to certain offenses.
  - For example, family violence and sexual assault have generated considerable controversy over the validity of certain treatment approaches.
  - First Nation communities will have to ascertain their own directions without losing sight of the needs of communities, and of individual offenders and victims.

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<sup>5</sup> Laprairie, Carol, Report to Department, Yukon Territorial Government, First Nations, Yukon Territory, Justice Canada, Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon. September 1992.

## 4. Relevant Documents, Studies and Practices—Other Northern Territories

### 4.1. Nunavut (Northern) Justice Issues -2000 <sup>6</sup>

#### Domestic violence

- Throughout the literature it is clear that domestic violence is an issue that must play an integral role in any justice strategy adopted, especially in the North.
- The **re-victimization** of victims of spousal assault must not occur.
  - The literature speaks to the fact that victims of domestic violence are re-victimized in a number of ways by the justice system – both community-based and mainstream.
  - The cycle of violence is a real problem, one that requires an effective strategy to end it, not one that builds the re-victimization into the system.
  - The literature points out that the dynamics at the community level have the potential to incorporate this re-victimization in two ways.
    - First, through negative views about women held by powerful community members.
    - Second, through the inability of the community-based initiatives to adequately support or protect the victim by preventing the offender from abusing.
    - These are issues that must be incorporated into the development and implementation of community-based justice initiatives.

### 4.2. Inuit Women/Nunavut Justice System – 2000 <sup>7</sup>

**Offences:** The report does not clarify what it considers to fall within or outside of the category of serious offences.

- However, there is specific reference made to the justice committees dealing with “domestic violence”.
- The specific role of the committee in dealing with these cases (for example: at what stage of the process) is not clarified.
- The report suggests that the committee could assist the JP and higher courts in proposing and implementing sentences in cases involving these offences.<sup>8</sup>

### 4.3. Preventing Family Violence in Northern Communities -2000 <sup>9</sup>

#### *Family Violence in the North:*

- Domestic violence is intimately linked to crime rates and a cycle of criminal activity in Northern communities.
- Not only must it be eradicated so that there will be less criminal activity both engaged in and perpetuated in the community, the lives of female victims and children need protection. It is a multi-faceted problem that requires multi-faceted strategies.
- This article, part of a workshop compendium, does not attempt to articulate a specific plan of action to end the cycle of violence, it simply asserts that it is those within the community who know what needs to be done.
- At the same time it recognizes that the community is not always a safe place for women.
- Communities are unique – so must be responses to crime, especially domestic violence.
- Issues of power dynamics at the community level and the Northern environment are addressed.

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<sup>6</sup> Department of Justice Canada, Research and Statistics Division, by Naomi Giff, Nunavut Justice Issues: An Annotated Bibliography, March 31, 2000, <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-7a-e.pdf>

<sup>7</sup> Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf>

<sup>8</sup> NSDC, Report of the NSDC Justice Retreat and Conference, November 1998, p. 11. cited in Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf>

<sup>9</sup> Bryce, Sandy, Debra Dungey and Lynn Hirshman. “Preventing Family Violence in Northern Communities”, in Self-Sufficiency in Northern Justice Issues Burnaby: Northern Justice Society, Simon Fraser University, 1992 cited in Department of Justice Canada, Research and Statistics Division, by Naomi Giff, Nunavut Justice Issues: An Annotated Bibliography, March 31, 2000, <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-7a-e.pdf>

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- This workshop addressed some of the many issues facing the cyclical nature of family violence in the North. The participants discussed prevention strategies and some of the particular challenges such strategies will face.
- ***Underlying Themes from the Dialogue***
  - Like all Aboriginal communities that are suffering from an epidemic of domestic violence, Northern communities have a specific context that family violence takes place in.
    - Such a context has to be fully understood before real change can occur.
    - Social problems are the core of all the issues that need to be addressed.
      - Any justice initiative that intends to effectively address anti-social or violent behaviour must recognize that these are simply symptoms of more serious underlying issues.
      - It is these core issues that require the most attention and resources (financial and human) if the cycle of abuse is going to be broken.
- ***Findings***
  - ***Northern specific issues:*** The unique nature of the Northern environment and the communities that reside there must be understood and incorporated into any initiative.
    - Small, isolated communities face particular situations and challenges that communities that are not so isolated may not.
    - These particular challenges affect a woman's ability to leave an abusive relationship.
    - The participants drew attention to the role of community support for the victim and the effect that a lack of such support has on her ability to leave an abusive environment.
    - If an abused woman wants to leave a violent relationship and the other community members do not support her, it is possible that she may stay in that abusive relationship, being further victimized.
    - Similarly, the lack of agencies in small, isolated communities, agencies that may provide protection, such as police, may also affect a woman's decision to stay in an abusive relationship.
    - Finally, the participants concluded that if the services and programs adopted are imported from the Southern bureaucratic process, they will not meet the unique needs of the victim.
    - The Northern landscape and needs that arise from it are fundamentally different from the needs of the South.
    - As a result, such Southern-based proposals, if forced upon the community, will more than likely fail to protect the victim.
  - ***Role of the community:*** The participants held that the community must take ownership of family violence.
    - They must take responsibility for ending it and preventing it.
    - This requires looking at a host of other areas: alcohol and substance abuse, a return to many traditional lifestyles, and the renewal of respect for Elders.
    - In many cases government bureaucracy will make this difficult, through the application of mechanistic, rigid, and bureaucratic rules.
    - In such a situation, the participants suggest that a creative process be utilized.
    - The message the participants gave was to not bother waiting for government to make any real steps, either in dismantling the offensive regulations or funding programs.
    - As one participant stated, it's easier to get forgiveness [from the federal government] than permission.
  - ***Power dynamics and politics within the community:*** The politics of the legalistic system that forms the basis for the development and implementation of programs must be addressed along with the politics of the community.
    - In other words, the ideas that may reinforce the cycle of abuse and the marginalization of women in Inuit communities must be brought out into the open and challenged.
    - They must not be incorporated into any new justice initiative.
  - ***Role of prevention:*** Prevention plays an important role in ending domestic violence.
    - Prevention strategies must incorporate working with children in the community, building their self-esteem and their conflict resolution techniques.

- Often low self-esteem and feelings of powerlessness underlie violence and the goal is to address how these feelings are developed and then attempt to prevent them.

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#### **4.4. Aboriginal Justice Strategy (AJS) Trends - 2000<sup>10</sup>**

##### **4.4.1. Reported Referral Rates: Offences**

- Nunavut and the Northwest Territories: northern projects share some of the same concerns about the types of offences being committed in their communities.
- Some the programs speak of reconciliation, even in family violence cases, as the favoured course of action rather than punishment.

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#### **4.5. A Framework for Community Justice in the Western Arctic – 1999<sup>11</sup>**

##### **Offences Excluded from Diversion**

- Community justice committees across several jurisdictions have already expanded their caseloads to include more serious offences, such as sexual abuse and family violence, or have a desire to do so in the near future.
  - With growing awareness of the experience in other parts of the country, this has raised concerns about revictimization and intimidation (some of which has been expressed above) and about whether the operating justice model in the community is equipped, or has measures in place to guard against this occurring.
  - Individuals interviewed for the review of the GNWT Community Justice Initiative indicated that many committees are reluctant to deal with these kinds of offences for the same reasons.
- The 1996 study of Spousal Assault and Mandatory Charging in the Yukon noted that policies to address some of the concerns about the use of circle sentencing in spousal assault cases are necessary and cited the example of Kwanlin Dun where policies have evolved since 1992.
- Study respondents favoured flexibility after charging and concluded that this was best addressed by the development of criteria for Crown counsel which would allow for flexibility in a spousal assault case.
- Suggested criteria are:
  - the seriousness of the offence;
  - history of the accused in terms of previous charges and in terms of non-reported family violence (based on victim or other witness accounts);
  - victim preferences re prosecution of her spouse, testifying and future contact conditions;
  - availability of support for victim;
  - acknowledgement of the offence by offender and willingness to participate in a treatment program;
  - availability of treatment resources in accordance with the plan. \* (Roberts, 1996, pp.1 08-1 09)

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#### **4.6. The New Justice: Some Implications for Aboriginal Communities - 1997<sup>12</sup>**

<sup>10</sup> Department of Justice Canada, The Aboriginal Justice Strategy: Trends in Program Organization and Activity 1996-1997, 1997-1998 and 1998/1999, Prepared for the Aboriginal Justice Directorate, Department of Justice Canada by Naomi Giff, March 10, 2000 -

<sup>11</sup> Campbell Research Associates, Kelly & Associates, Smith & Associates, prepared for Government of Northwest Territories, Department of Justice, A Framework for Community Justice in the Western Arctic – June 1999

<sup>12</sup> LaPrairie, Carol. The New Justice: Some Implications for Aboriginal Communities.

Ottawa: Department of Justice, 1997. Cited in Department of Justice Canada, Research and Statistics Division, by Naomi Giff, Nunavut Justice Issues: An Annotated Bibliography, March 31, 2000, <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-7a-e.pdf>



## Conclusions

- The establishment of an effective and appropriate determination of **case selection** (which offences or offenders the community has the capacity to deal with and those as opposed to those cases which should remain in the mainstream system) is necessary.
  - This requires a clear **assessment of the capacity of the community** to effectively respond to the problem (through ensuring community education, support for, and involvement in justice projects).

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### 4.7. Preventing and Responding to Northern Crime- 1994 <sup>13</sup>

#### **Preliminary findings - The role of the formal criminal justice system**

- The researchers held that an offence threshold should exist in community-based justice systems as they develop and operate in the North.
  - In other words, serious crimes should be dealt with and handled by the formal mainstream justice system.
- When a violent crime occurs, a community-based initiative may not be able to adequately protect the victim and the community from the offender.
- If the community-based cannot adequately protect the community and the victim, the offender will re-victimize and terrorize the community.
- As a result, the formal criminal justice system deals with offenders and offences that the community cannot adequately address.

### 4.8. The Effects of Formal-Legal and Traditional Interventions on Woman Abuse in a First Nations Community - 1993 <sup>14</sup>

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### 4.9. A Community Development Approach to Mental Health Services -1991<sup>15</sup>

This article provides a first-hand analysis of community control over the development, form, and administration of a shelter for battered women in Spence Bay. The residents, initially led by the women in the community and then including concerned men, developed a response to domestic violence. This response reflected the needs and concerns of the Inuit women in the community as both victims of violence attempting to end the violence, and as Inuit women, attempting to address the violence in an Inuit way. A mental health specialist assisted the women. Her role as outside professional was one of initial guidance, continuing assistance and a constant resource. This overview of the experience addresses lessons learned, the Northern environment, and community mobilization and power dynamics.

#### **General Overview**

This article chronicles the community-based development and administration of a shelter for battered women in Spence Bay, NWT. Inuit women in the community decided that they wanted to address, in a culturally and geographically appropriate way the violence being suffered by Inuit women at the hands of their male partners. Geographically and culturally isolated from Southern solutions and institutions, the women and men realized that any real solution had to

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<sup>13</sup> Winther, Neil, Corporal Paul Currie, Ken Bighetty (Resource Persons). "Northern Fly-In Sports Camps: A Self-Responsibility Model for Delinquency Prone Youth", in *Preventing and Responding to Northern Crime*, Burnaby: Northern Justice Society, Simon Fraser University, 1990 *cited in* Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf>.

<sup>14</sup> Ellis, D. and D. Beaver. *The Effects of Formal-Legal and Traditional Interventions on Woman Abuse in a First Nations Community*. A Report Prepared for Health and Welfare Canada. Toronto: The LaMarsh Research Programme, York University, 1993. cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, *Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature*, March 1998 <http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm>

<sup>15</sup> Kamin, Andrea and Romeo Beatch. "A Community Development Approach to Mental Health Services", in *Northern Review* 7, 1991 Summer. cited in Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf>.

flow from the community. This article highlights the cooperative approach taken between the larger social services available to the community and the community residents. This relationship was characterized by a sharing of information and educational resources in order to empower the community to take that knowledge, combine it with their community's needs and begin the process of effectively addressing domestic violence. This article also illustrates the primary role of community members, as paraprofessionals, in dealing with mental and social problems in the community.

This article is based on the experiences of the authors in assisting the community residents of Spence Bay to develop and implement a shelter for battered women. Kamin is the Mental Health Specialist for the Kitikmeot Region and Beach was the Director of the NWT Family Counselling Service. Their role as professionals and resources guided the project and workshops. They visited the community at least three times over a period of two years and have maintained on-going contact.

### **Underlying Themes**

The inherent difficulties of providing social services in the scattered Arctic communities of the Northwest Territories can be overcome with a community development approach, an approach that empowers the community to determine the agenda and plan of action with the assistance of professionals in the field.

The Northern environment requires strategies that are specific to the context of the North, not ones based on Southern models and experiences. □□ There is a shortage of mental health practitioners in Northern communities. The authors point out that this shortage can be dealt with in three ways: by preventing problems from arising, by increasing the number of professionals available, or by training lay counsellors to provide direct service. The authors consider this last option, where community members are trained to become 'paraprofessionals', as the most effective route, especially in remote Northern communities.

### **Findings**

*The relationship between engaging in traditional activities and the decline in domestic violence:*

The researchers note that during the summer months, when Inuit in Spence Bay are participating in traditional activities, less family violence occurs. While the families are leading a traditional lifestyle (on the land, hunting and fishing for a number of months at a time, residing in tents, surrounded by other extended families in their own tents) conflict is not as common.

*The experience of Spence Bay:* An Inuit women's group in Spence Bay, responding to the high levels of domestic violence and the inappropriate options available to abused Inuit women, organized themselves to address the issue. The options available to an abused woman included either going South to a shelter, where they would be without the support of family and friends and face a form of culture shock, or remaining in the abusive situation. The women wanted first, to deal with the family violence on a community level, second, to learn the skills needed to operate a woman's shelter in their community, and third, to learn counselling skills to address the needs of the victim at a shelter.

*A community development model of addressing mental health services (spousal assault in this case):* This model is community-centred, not problem-centred. This means that it is the environment and the needs of the community members that determine what the problem is, how it will be addressed and what the intended results are. First, the community defines the needs and the problem. Then, they are assisted by outside agencies to develop a plan that can facilitate the meeting of their needs. During this time, the community members are trained as paraprofessionals in order to develop and administer a program at the community level, by the community members, in a fashion that represents the needs of the community.

*Paraprofessionals:* Paraprofessionals are defined as people within a community who lack formal psychological training but who are involved within their society as community-type workers.

*Advantages of paraprofessionals to address mental health issues in Inuit communities:* The authors hold that a number of benefits flow from training community members to develop, implement, and respond to the social and mental needs of the community. Specifically, they point out that trained paraprofessionals perform as well or better than professionals, that paraprofessionals (through learning and helping others) often experience personal growth, and that using paraprofessionals increases the number of people attended to. Further, paraprofessionals tend to be more open to innovative strategies, they lack the formality that many professionals have (a formality that results in barriers between the client and the professional), and they have better knowledge of the

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community - its residents, its history and its needs. As a result, traditional values are incorporated and the positive values that guide the community determine the route.

*Role of the professional/ specialist in a community development model:* This individual is present to assist the community in defining, for themselves, what issues they want to confront and how those issues might be resolved. They are information givers and background facilitators. They help with problem identification and act as a resource for background information and consultation. In this example, the professionals organized three workshops for the community.

These workshops, spread out over two years, dealt with sharing general information on spousal assault, provided specific training to men and women, and provided a forum for addressing issues that have come up. They were operated in such a way that encouraged trust-building and community empowerment since knowledge was shared, Inuit values were incorporated, and the information was given (through workshops and other resources) in both English and Inuktitut.

The mental health professional also arranged for **financial support** from the Department of Social Services, and got the support of the YWCA's Allison MacTeer House, the women's shelter in Yellowknife, to assist the women in Spence Bay in organizing and operating a women's shelter.

### **Conclusions**

*Role of Preparation:* The authors note that this approach - empowering community members through training and assistance to become paraprofessionals - was successful as a result of many things. Consistent, organized preparation was an important factor. This involved a review of what has been tried and did not work, or only partially worked in the community and required the development of links with other organizations and resources.

*Importance of grounding the training within the community:* The authors note that the workshops and training took place in their own community of Spence Bay and the information was presented in Inuktitut. This provided a familiar context and contributed to the development of community resourcefulness and confidence.

*Importance of on-going support:* The professionals had consistent contact with the community. Their communication and contact was not limited to the workshops only, but they were available to the trained paraprofessionals in the community for telephone consultations. This on-going support instills a sense of confidence and continuance to the project and plays an important role in empowering the community. The authors note that it is important that this contact be maintained to provide continued support if and when necessary to the community. Continued contact will also assist in expanding and perpetuating community resources throughout the community.

*Success in Spence Bay:* The authors hold that the community development model in Spence Bay was successful. This conclusion is based on the fact that the women of Spence Bay, at the time of writing this article, were organizing a regional conference of Inuit women from all Kitikmeot communities. This conference will include discussion on the progress of family violence groups in the communities and Spence Bay women will be sharing information with other women on their approach to addressing family violence in their community. This is a sign that the community is more empowered than it initially was.

## 5. Relevant Documents, Studies and Practices – Other Canadian

### 5.1. Charging/Prosecution Policies in Cases of Spousal Assault -2001<sup>16</sup>

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### 5.2. Restorative Justice - A Program for Nova Scotia - 2001<sup>17</sup>

Included and Excluded Offences<sup>18</sup>

Restorative justice will not be made available for all offences at all of the four entry points. A debate about whether restorative justice is appropriate for spousal/partner violence offences and sexual offences is ongoing in many parts of Canada. The main concern of those who oppose the inclusion of these offences relates to a possible power imbalance between the victim and offender in a restorative forum. Until the Province takes a formal position regarding the possible benefit of restorative justice in spousal/partner violence situations, offences of this nature will only be considered at the court (post-conviction/pre-sentence) and corrections (post-sentence) entry points.

#### LEVEL 1 OFFENCES

These are the only offences for which a formal caution is an option.

- Provincial Statute offences
- Minor property offences
- Disorderly conduct offences (i.e. loitering, vagrancy)
- Assaults not resulting in bodily harm
- Mischief

#### LEVEL 2 OFFENCES

These offences can be referred at all four entry points.

- This is the largest group of offences. They constitute all *Criminal Code* offences that are not Level 3 or Level 4 offences.

#### LEVEL 3 OFFENCES

These offences can be referred only at the court (post-conviction/pre-sentence) and corrections (post-sentence) entry points.

- Fraud and theft-related offences over \$20,000
- Robbery
- Sexual Offences proceeded with as a summary offence)

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<sup>16</sup> Justice Canada, Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses <http://canada.justice.gc.ca/en/ps/rs/rep/rr01-5a-e.pdf> December 2001

<sup>17</sup> Restorative Justice - A program for Nova Scotia, Update 2001, <http://www.gov.ns.ca/just/rj/rj-update.htm>

<sup>18</sup> <http://www.gov.ns.ca/just/rj/rj-framework.htm>

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- Aggravated assault
- Kidnapping, abduction and confinement
- Criminal negligence/dangerous driving causing death
- Manslaughter
- Spousal/Partner violence offences
- Impaired driving and related offences

LEVEL 4 OFFENCES

These offences can be referred only at the corrections (post-sentence) entry point.

- Sexual offences (indictment)
- Murder

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**5.3. FPT Meeting Of Ministers Responsible For Justice – Meeting - September 2000 <sup>19</sup>**

- Federal-Provincial-Territorial Ministers continued to support measures to strengthen the criminal justice system's response to domestic violence. Ministers approved the establishment of an FPT working group that will review the implementation and status of mandatory charging and prosecutorial policies and report back on the results in one year.
- Ministers requested that officials review legislative proposals made by several jurisdictions, including penalties for breach of restraining orders, and reforms to bail provisions and reverse-onus in bail hearings, and report back in November to Deputy Ministers.
- Ministers also supported a proposal to hold a second Federal-Provincial-Territorial forum on domestic violence to enable police, prosecutors, victims services, policy and other criminal justice officials with direct experience in spousal abuse cases to exchange and update best practices.

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**5.4. Restorative Justice in Cases of Domestic/Sexual Violence: Healing Justice? -2000<sup>20</sup>**

**INTRODUCTION**

A woman is raped and beat by her common-law husband of two years, after escalating verbal and emotional abuse. He is charged and sentenced to three years. Prior to the completion of his sentence, they meet together with a victim-offender mediator. She feels the need to face him to come to terms with the past and determine what relationship they will have in the future, particularly in light of the fact that they have a son and will share custody. The husband is also anxious to meet as he has taken a program called "Healthy Relationships" during day parole in Moncton and this has changed his life. The two meet and she questions him at length about why he did what he did and what had changed to make him different now. He takes full responsibility for what happened and reassures her that she had done nothing to bring the

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<sup>19</sup> Federal-Provincial-Territorial Meeting Of Ministers Responsible For Justice – Meeting - September 2000 Department of Justice Canada, News and Events, [http://canada.justice.gc.ca/en/news/nr/2000/doc\\_25613.html](http://canada.justice.gc.ca/en/news/nr/2000/doc_25613.html)

<sup>20</sup> Stephanie Coward Directed Interdisciplinary Studies, Carleton University December, 2000 Restorative Justice in Cases of Domestic and Sexual Violence: Healing Justice? [http://www.hotpeachpages.org/paths/rj\\_domestic\\_violence.html#IV](http://www.hotpeachpages.org/paths/rj_domestic_violence.html#IV)

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assault on. They agree on how to parent their child and, in the end, she shares that she forgives him for what he's done. The relationship remains healthy and both report that the mediation was the best thing that could have happened between them. <sup>1</sup>

Another victim of domestic violence, participating in family mediation in Dartmouth, Nova Scotia, is being constantly harassed by her ex-husband who is calling everyday and writing letters throughout the mediation. She informs the mediator and is told, "Yes, but we have to go on." <sup>2</sup>

Yet another women, an Inuit, is seated in a sentencing circle. She is the victim of terrible acts of domestic violence and the circle is meeting to decide what steps should be taken in the criminal case against her husband. She does not speak unless the judge calls upon her to do so, an indication of the measure of control held over her by her husband, who also sits in the circle. Of the many participants in the circle, only three have any supportive relationship to the victim: her sister, the family violence worker and a trusted friend who also happens to be the sister-in-law of the accused. The sentence that is created requires that the victim and accused attend counselling together, a proposal put forward by the accused. Demonstrating a misunderstanding of the life circumstances of this victim of violence, the judge strongly suggests to the victim that this would be a positive step, assuming the victim would speak out should the abuse continue. She hears the suggestion as an order and feels compelled to comply, though it is unlikely that she will speak out about further abuse. She has been silenced not only by fear of her husband but by a process that should have given her voice. <sup>3</sup>

These are just three examples of the many stories that involve alternative criminal justice initiatives - initiatives that attempt to deal with the effects of crime in a setting outside the confines of the regular adversarial criminal justice system. They can be used in conjunction with the regular system (as in the last story) or in place of the system (as in the case of the sentencing circle and, often, in the case of mediation) and are often lumped into categories such as "restorative justice" or "alternate dispute resolution". These initiatives have applied to the entire range of crimes, from property crimes <sup>4</sup> all the way to murder <sup>5</sup>.

However, for many reasons, there is great controversy over their application to cases involving domestic or sexual violence. Many opinions exist on the efficacy of such initiatives when they are used in cases involving domestic or sexual violence. Indeed, the first two stories illustrate that these approaches can actually be revictimizing to women. However, there are also examples of women who have expressed satisfaction with the process. The question this paper will examine is whether or not these initiatives - particularly restorative justice initiatives - are effective, or even appropriate, in cases of domestic or sexual violence and, if so, what steps might be taken in order to ensure that women are not revictimized in the process.

### **The Research**

This research was born of professional need. From May 1999 to July 2000, I worked with The Church Council on Justice and Corrections as a community educator. As an organization representing eleven Christian denominations across Canada, the Church Council is known for its work on restorative justice issues. Throughout my year there, the issue of restorative justice and women's needs kept resurfacing, either through inhouse discussions on restorative justice in general or, often, following government-initiated round table discussions with other colleagues in the field - particularly those colleagues who were involved in the women's movement. On the one hand, we were hearing that women's advocacy groups did not support restorative justice initiatives for various reasons. On the other hand, we were also hearing from initiatives that reported satisfaction on the part of women who had been through the process. It became clear that answers were needed.

Unfortunately, answers were not readily available. An extensive literature search quickly made it apparent that, although there had been considerable academic investigation into family mediation as it applied in domestic and sexual violence cases, very little had been documented regarding actual restorative justice initiatives (of which family mediation is generally not considered). It then became my intention to conduct primary source interviews with practitioners and women who had been through these processes in order to ascertain the benefits and disadvantages. This quickly became unwieldy due to financial constraints (there is no funding available for undergraduate research) and I could not continue. Therefore, this research is limited to interviews with various practitioners and professionals in the women's movement throughout Canada and the smaller body of literature (including some literature which focuses on mediation) that examines this issue. This paper does not, at all, purport to be an authoritative voice on what truly needs to happen in order to make restorative justice effective for domestic and sexual violence cases (far more extensive research is required

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for that). It merely seeks to broadly examine the issue with the hope that it might point to the need for continuing research in the field.

In short, this paper will briefly examine the background to this issue including the historical struggle for women's rights, particularly in the criminal justice context, as well as the current criminal justice system and its efficacy for meeting women's needs. It will then turn to the issue of restorative justice, its definition, and general opinions regarding its use in cases of domestic and sexual violence. Part three will examine, in more detail, the more significant concerns held by women's groups, and will look at recommendations put forward by various people in the field. Finally, part four will consider a way forward and will conclude that funding must be found for extensive, impartial research to be undertaken in this field.

**Part I: Women's Fight for Justice in the Current System** see chapter on **“Gender”**

**Part II: Restorative Justice: What are we talking about?!** See chapter on **“Definitions”**

**Part III: Issues Pertaining to the Use of Restorative Justice Initiatives in Cases Involving Domestic and Sexual Violence**

A number of concerns regarding current restorative justice initiatives were identified by various people throughout this study.

Some of these included: the fear that initiatives would not effectively deal with issues of safety and risk; 53 the concern that some initiatives (particularly mediation, which we are not considering to be a restorative initiative) would treat the situation as that of a "problem couple" and focus, therefore, on the relationship and not the harm done; 54 the fear that participating in restorative justice while still entangled in an abusive relationship can foster an inappropriate feeling of responsibility for "changing" her partner and contributing to his healing; 55 a concern regarding lack of legal support, particularly when the initiative involves a binding agreement; 56 the fear that appropriately trained and culturally appropriate support persons may not be available to women participating in these programs; 57 and, a concern that restorative justice initiatives focus primarily on offenders and not victims. 58 These concerns were identified by only one or two people. Therefore, although important, I will only list them here and hope that others will examine them in detail at a later date.

Other concerns, however, were commonly identified by many and arose time and again throughout the course of this study. They included:

- 1) a concern over a lack of consultation with women's and victim's groups;
- 2) a fear that restorative justice initiatives would not work to sufficiently denounce domestic and sexual violence and would, ultimately, undo the advances made by women's groups to have these crimes taken seriously by the criminal justice system;
- 3) a concern that women victims be given an informed choice regarding whether or not they participate;
- 4) a concern over issues of power dynamics and imbalance;
- 5) a concern that programs are being transferred to the community without the requisite resources (financial and human) also being made available; and,
- 6) a concern with a lack of training and evaluation standards.

I will consider each concern in turn.

**1) Consultation:**

One of the issues that emerged in various interviews, journal articles, the PATHS conference and other reports was that of consultation. Many groups feel that government has not sufficiently consulted with women's and victim's groups when developing policy in the area of restorative justice. As well, there is a general feeling that non-governmental organizations (often the developers of restorative justice programs) have not obtained enough input on the part of women victims and their advocates into the actual development of the programs that fall under the justice policies directed by the government. Some examples follow.

Irene Smith, in discussing the government-initiated restorative justice program in Nova Scotia, reported that there had been no consultation with women victims in order to assess their feelings on being involved in restorative justice

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processes. She then linked this lack of consultation with an approach that "displaces the survivor to a position in the peripheral, not central to the process" and identified the issue as a significant concern. 59

Bonnie Diamond, Executive Director of the National Association of Women and the Law, noted that she would not be opposed to restorative initiatives if equality principles are considered to be central and if women - particularly women victims - are involved in the development of these initiatives. 60 She does not feel that this has been the case, so far.

The Provincial Association Against Family Violence also noted, in its report Making it Safe, that in order for restorative justice initiatives to be victim-centred, "...the views and experiences of victims must be evident in the design, implementation and evaluation of programs." 61 The Association further asserts that consultation must take place at the program planning stage in order to identify how best to serve victims in these processes. 62

In an example pertaining to the Inuit community, Pauktuutit, in its report, Setting Standards First, commented on the fact that efforts to reform the justice system in the North have, so far, "been initiated by reform-minded people working within the justice system and are not part of the Inuit community." 63 Although the group concedes that not everything must be "an original creation by the community in order to be useful or successful," it does state its belief that the most successful programs will stem from the community itself and will reflect the input of all segments of the community, in particular, the women and children who are the victims of abuse. 64 Mary Crnkovich, while addressing a conference of the Canadian Institute for the Administration of Justice agreed, citing that all segments of the Inuit community must be allowed to fully participate in redesigning an "appropriate, responsible and respectful system" and that "Sentencing circles stop far short of this possibility." 65

Others feel that consultation is undertaken and then ignored. In Michelle McLean's article on circle sentencing in the Fall 1998 issue of *Jurifemme*, Viola Thomas, President of the United Native Nations, states that she feels the government has let down Aboriginal groups in their ignoring the voice of women on the issue of the circles. She states, "There were four years of input by women's groups and Aboriginal women's groups on this issue and they chose to ignore that input." 66

Government officials often contend that such consultation has been undertaken and included in the resulting policies. For instance, at the PATHS conference in April, a question was asked regarding what consultation had taken place in the forming of a ministerial directive in Saskatchewan that would not allow domestic and sexual violence to be included in alternative measures. The speaker who answered the question (who was unidentified in the transcript, but I'm assuming was a government representative), stated that the government undertook 18 months of consultation with various different groups about what should comprise that policy and that it was being considered a starting point in developing a consensus document. 67 It would seem that consultation has taken place in at least one case.

It was beyond the scope of this research to undertake a follow-up to the many allegations of inadequate consultation and ascertain whether or not government and non-governmental organizations who implement these programs agree. It may very well be that the developers of policy and programs feel they have done sufficient consultation. However, the fact that this concern has been and continues to be raised consistently, points to the fact that there is either a misperception that less consultation is taking place than is the case or that it truly has not been undertaken to an acceptable degree. In either case, a remedy is required before restorative initiatives will be acceptable to a large portion of the women's movement.

## **2) Denunciation**

In light of the fact that it took many years and a hard-fought struggle to have domestic and sexual violence taken seriously within the criminal justice system, it is understandable that women do not wish to support restorative justice initiatives that appear to reverse such advances in denunciation. Presser and Gaarder, despite their support for community circles, still conclude that caution is in order for this reason. They assert that, "There are clear risks in applying restorative justice approaches to battering. Chief among them is the risk of framing such violence as not important enough to warrant serious attention, lest the gains of feminists be lost." 68 Some argue that, even though the current system is flawed, turning to restorative justice would actually be worse. Judy White (alias, a survivor of domestic violence and a participant in the PATHS conference, commented during those proceedings: "During the judicial process, abusers do not receive the message that their behaviour is unacceptable much less criminal. Restorative justice strategies seem to me to leave the door wide open for even less onerous consequences for the abuser." 69 Still others are concerned about the decriminalization of sexual and domestic violence through the use of restorative initiatives. 70



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On the other hand, some people in the field consider the denunciatory impact of restorative justice to be quite significant. Judge Bria Huculak commented on this issue earlier this year:

Communities denouncing violent conduct has a very powerful effect, and I have never seen a process where the community hasn't made it very clear that this is not acceptable. It's illegal, and it's not acceptable to have violent conduct in their community. What that does is it clarifies to those present and the participants and the community at large that this conduct is not acceptable and it has to change. <sup>71</sup>

Many look to the presence of family, friends and other influential persons in the process as a positive factor in increasing denunciation. One PATHS conference participant, quoting Australian professor, John Braithwaite, noted that "...the people who are in the best position to communicate the shamefulness of what we had done is those we love, family we love, friends we respect, those individuals who have the most influence on us." <sup>72</sup> Leonard Bush, the officer in charge of Aboriginal police, crime prevention and victim services for the RCMP headquarters in Ottawa, agreed when he summed up the value of restorative justice in the following illustration:

When you have a guy who's beating his wife and you put him in court, he doesn't have to say anything. His lawyer speaks for him. He never has to admit that he ever did anything, but if he wants to participate in a circle, he has to be prepared to be accountable for what he did and to articulate in detail what he did, and he's not doing it in front of a judge that he may never see again. He's going to be in a circle where perhaps his buddies from work are going to be there, his minister is going to be there, his parents are going to be there, his children are going to be there, his siblings are going to be there, and then he has to say in front of him what he's doing and this is a hidden crime, nobody knows what's going on. When he does this, the chance of these people condemning that behaviour, people that he cares about and wants respect from condemning his behaviour, certainly has a lot more potential of changing that pattern of behaviour than say a judge saying, well, six months probation or two months in jail. <sup>73</sup>

Voices can be heard on both sides of the issue.

In listening to and reading the arguments that support or negate the denunciatory effect of restorative justice, I couldn't help but wonder if part of the answer doesn't lay in obtaining a clearer understanding of restorative justice. Issues around the definition and around the practice of restorative initiatives seem to have an impact on women's views about these processes. How women understand restorative justice provides the basis for their opinion in this matter. For instance, during one interview, the executive director of a national women's organization wondered at the wisdom of applying restorative justice initiatives, which carry a primary goal of saving money (another misconception that should not be applied to truly restorative processes), first to violent domestic crimes and not property crimes. She commented that, unfortunately, often people look first at alternatives for areas that are clearly criminal and where there are very real dangers, particularly for women. When I explained that restorative justice initiatives had actually begun with property crimes, back in 1974, and it is in fact only in the recent past that they have been applied to domestic and sexual violence, and only sparingly, she admitted that she didn't really know much about the development of restorative justice. She merely knew that when she encountered information about restorative initiatives it always seemed to be within the area of domestic and sexual violence. She was not aware if initiatives were taking place apart from that. In light of this understanding, her concerns about a "new" form of justice solely being used in cases of domestic and sexual abuse would be justified. However, her understanding failed to recognize that restorative justice has evolved in Canada over the past twenty-five years, beginning with much less serious crimes and moving toward an application to crimes that involve violence.

Another example of a misunderstanding of restorative justice can be found in PAAFV's report, *Making it Safe*. The writers clearly state that "In criminal law, women's fears about restorative justice in part stem from recent sentence reform, particularly the use of conditional sentences for a wide range of offences including sexual offences, harassment, stalking and hate crimes...Conditional sentences mean offenders avoid jail by serving time at home under court imposed conditions - usually seen as easy punishment or no punishment at all." <sup>74</sup> Although the report goes on to let readers know that conditional sentences are not based on restorative principles (they would certainly not meet the five criteria in the definition above), it would appear that many beliefs about the denunciatory effect of restorative justice stem from women's reactions to other processes within the criminal justice system, such as this one, which are not restorative in nature. That is not to say that a restorative process would necessarily result in a sentence that would be considered more harsh. However, in a restorative process the sentence is but one part of the denunciatory effect of an overall process that has sought healing for all parties. Denunciation takes place throughout the entire proceeding and is not merely contained

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in the sentence. This must be taken into account when considering whether or not restorative justice is effective at denouncing crime.

The other aspect of this discussion stems from the application of the word "informal" to restorative justice initiatives, a distinction which emerged on various occasions throughout this research. We talk about offenders being "diverted" away from the "formal" court system to alternative processes, thereby equating these processes with less serious measures. However, I think that such a distinction is false. The philosophy of restorative justice requires not merely an add-on program to the regular criminal justice system, but a complete shift in the way we approach crime. This approach seeks some of the same goals as the current system such as denunciation and appropriate consequences (though the two approaches would differ on what those might be), but moves beyond it in a bid to deal with the deeper issues of healing. I would argue that one form is not more formal or informal than the other, merely different. In the end, it comes down to a philosophical statement on one's outlook on criminal justice responses. If one is seeking retribution in a criminal justice system, then no restorative justice initiative will ever meet the required level of denunciation. It is retribution that restorative justice seeks to supplant. On the other hand, if one is searching for a means to move toward healing and appropriate consequences that rebuild community and work to prevent crime, then restorative justice programs that seek to meet those concerns expressed in this paper, seem better equipped to meet those needs. Denunciation may be better expressed there. Unfortunately, as long as restorative justice remains a "new" and little-used approach that is given few resources by government (more on that later), the general public will continue to view these "alternative" programs as "informal" and lenient, thus limiting their denunciation potential.

As in so much about restorative justice, there are no clear answers regarding this issue. As Judge Huculak points out, there has been little research looking at the effect of denunciation within restorative justice initiatives. <sup>75</sup> This investigation needs to take place so that sufficient data is available upon which we can base our conclusions. As well, in current and future initiatives, measures need to be taken to ensure that restorative processes include an appropriate denunciatory message, both to the accused and to the community, so that these measures are not seen to decriminalize such harmful crimes.

### 3) Choice

Another concern that surfaced repeatedly identified the fear that women are not being given a true choice in whether or not to participate in restorative justice initiatives. The empowerment of women victims emerged as key. Tracy Porteous relayed this message at the PATHS conference when she noted that "The whole issue about violence in relationships and sexual assault is about disempowerment. We believe that in order for the system to be working effectively we need to be building in at every step of the way processes that work towards her empowerment, so giving her the opportunity to have some control we think is key." <sup>76</sup> That empowerment obviously begins with having the right to choose. Unfortunately, most references to this issue within the research revolved around mediation and not restorative justice measures. It is clear that additional research is needed in this area. For the purposes of this discussion, however, I will use many of the examples from mediation as their lessons are applicable to restorative approaches.

The concern that women may not have a real choice in mediation or restorative initiatives is grounded in the experience of many. The Transition House Association of Nova Scotia (THANS) noted many examples of women who were coerced into accepting a mediation process rather than court. They recount numerous situations like the one experienced by Linda T., who had mediation urged on her three times in two years by courts and lawyers, despite a history of severe emotional and sexual abuse. She says, "The judge was tired, my ex was not agreeable to anything, but the judge still suggested mediation. My lawyer urged me to agree so that I wouldn't look uncooperative. I ended up agreeing since I didn't want to look bad." <sup>77</sup> Dorothy Barg Neufeld, Staff Coordinator and a mediator with Mediation Services in Winnipeg, noted the same pressures when she observed during a recent interview that the victim has to make the decision to participate or not. She further noted that if they decide not to, they're often considered the "bad" person. <sup>78</sup> Unfortunately, too many experiences support this premise.

Irene Smith, in referring to the new Nova Scotia policy on restorative justice, noted that under these new measures the case can be referred to a restorative process regardless of the victim's wishes. The victim is not permitted to veto the process. <sup>79</sup> In this case, the victim will obviously not be forced to meet with the offender. However, in a process that seeks to empower victims, it would seem that the victim's needs are dismissed.

Others assert that real choice in the case of domestic violence is impossible. Some submit that a woman cannot truly choose due to the power dynamics that are inherent in these situations. They contend that it is difficult for a woman to

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choose not to enter into mediation without suffering consequences from her partner. <sup>80</sup> Some, such as Kelly Rowe and Barbara Hart, identify a period of healing and empowerment which takes place after a woman separates from an abusive spouse and which can last for several years. They contend that until this period is complete, women cannot enter into processes such as mediation or restorative justice voluntarily or participate freely - a situation often described as "learned helplessness". <sup>81</sup> Therefore, they claim that crimes involving domestic abuse should be excluded from these processes. <sup>82</sup> Others, however, assert that true choice is possible and should not be undermined by a blanket exclusion of all domestic and sexual crimes.

A 1998 study undertaken by Erez and Belknap found that the majority of battered women did not believe that the criminal justice system "could effectively solve their problems with abuse." In these cases, the women wished to retain their freedom to choose and asked to be treated as individuals in seeking to find ways to end the abuse. <sup>83</sup> Presser and Gaarder, in quoting another study, noted that "some victims of abuse are angered at being excluded (from mediation) and others are upset at being required to mediate." In short, victims are demanding choice and control." <sup>84</sup> They further assert that "prohibiting mediation in cases of battering also 'implies that we know better what (victimized) persons' needs are than they do.'" <sup>85</sup>

Victims' voices have also been clear in this. Inspector Leonard Bush shared with the PATHS conference that his office receives calls from victims saying that they would like to report an abuser, but they want assurances first that the situation will be dealt with in a family group conference. <sup>86</sup> Of course, the RCMP must say no to those requests. However, it is indicative that some victims are choosing another form of justice. Indeed, Dave Gustafson, with the Fraser Region Community Justice Initiatives Association, recounts the story of an incest survivor in her early 30s, who wished to enter into a victim-offender process with her abuser:

I responded that, while I believed in victim-offender reconciliation, it was contraindicated in cases of sexual violence without strong public sanctions and a number of other interventions...Colleen graciously reminded me that victims are capable of straight thinking and that helping professionals might do well to take seriously the clients' sense of their own needs before suggesting what those needs ought to be and how they ought to be addressed. <sup>87</sup>

It would appear that flexibility and precaution is in order.

Women should be able to make informed, supported choices when deciding whether or not to enter into mediation or a restorative process. According to the Transition House Association of Nova Scotia, in referring to mediation, an informed choice would include a provision of information on:

- confidentiality
- advantages and disadvantages of all options
- details regarding the importance of and right to legal advice at specific stages
- the availability of appropriate advocacy and support
- access to mediators' credentials. <sup>88</sup>

The same information should be made available to those making choices around restorative processes. As well, it has been suggested that the initial approach to women victims should be made by someone who has extensive experience in the nature and dynamics of abuse and the psychological socialization that accompanies it and that time should be taken, perhaps over a number of sessions, to provide the victim with an opportunity to fully look at the impact of the abuse and make an informed choice about a way forward. <sup>89</sup>

Furthermore, restorative processes should allow enough flexibility to meet the differing needs of the people they serve. C.A. Bethel and L.R. Singer argue that, "By being able to take into account and adapt to the specific aspects of the relationships between the victim and the offender, mediation [read also restorative justice] can tailor a solution, in this case a sentence, that is reflective of the individuals' interests." <sup>90</sup> Programs should be available in cases where victims have made an informed choice to proceed in this manner. To deprive victims of this choice based on a blanket exclusion of certain crimes, I feel, is just as disempowering as forcing victims to participate without their full consent.

Such flexibility might also include recourse for those victims who choose not to enter into a restorative initiative but where the offender is still interested, or in cases where the restorative process has not been satisfactory to the victim (or the accused, for that matter). In referring to mediation, Van Ness suggests a "two track system" which would include mediation as one track and the formal court setting as the other. He proposes that throughout the restorative process, either party could have recourse to the court at any time. <sup>91</sup> For instance, in a case where the victim is not interested in pursuing a restorative model but the accused would like access to a process that might be more supportive than court, the case might proceed in court with the understanding that a healing circle (in which the victim is represented by someone else) would take place at a future time. As well, if a victim enters into a restorative process and is not satisfied, there could be recourse to the court system.

There are those, including myself, who have reservations about such a two-track system. Some of these involve the meshing together of two systems that have very different philosophical bases (e.g. is it truly possible to meet the goals of a restorative process if recourse to the adversarial method is constantly waiting in the wings?) However, the reality of the situation is such that at the present time, a two-track system may be the only effective means of ensuring that flexible choice is presented to those who are affected most.

#### **4) Power Dynamics Within Restorative Justice Initiatives**

Another concern that continually resurfaces revolves around power imbalances that arise in cases of domestic and sexual violence. These issues are particularly important within the context of restorative justice initiatives as these programs are meant to facilitate solutions that meet the needs of all the parties involved, and particularly those of the victim. With power imbalances present, it may be very difficult to reach an equitable level of victim input into these solutions. <sup>92</sup> As well, it is important to note that these power imbalances may not be overt to the facilitator or mediator as often, in violent and abusive relationships, manipulation and intimidation are extremely subtle. <sup>93</sup> Often, the consequence is the revictimization of women rather than her empowerment.

For instance, the THANS report noted that mediators infrequently "offered or accepted power-balancing techniques for use when women were negotiating with abusive ex-partners" <sup>94</sup> and went on to quote various women who had been involved in the mediation process and who felt revictimized:

I had a very hard time saying "no" to him. I agreed to things I regret. I was too scared to stand up for myself. (Dartmouth, NS) <sup>95</sup>

No one knows like I do what he's capable of. And I had never crossed him before. He banged his fingers on the table. That brought back too much...I broke down. (Digby, NS) <sup>96</sup>

In another example, Irene Smith recounted to me the well-known story of a woman who was involved in a mediation situation. She felt completely revictimized when her husband began to play with his watch during the mediation - something he would do prior to beating her. <sup>97</sup> Here, then, is an example of the extreme subtlety of power being played out in what is supposed to be a safe environment. Indeed, some feel that these dynamics between victim and offender can never be overcome, arguing that it is not possible for even the most skilled mediators to offset these power imbalances. <sup>98</sup> Author Barbara Hart considers that the "co-operation needed to reach a mediated resolution, is an oxymoron in the context of domestic assault." <sup>99</sup>

Negative power dynamics can also be found within the structure of the program itself. <sup>100</sup> For instance, Mary Crnkovich identified the case of a sentencing circle in which specific members of the community were ordered by the judge to identify those community members who would participate. <sup>101</sup> She argues that if critical program decisions such as who participates, how the role of the accused and victim are defined, and how the circle is conducted, are left up to certain members of the community, then power imbalances, differences and conflicts within that community may all be transferred into the circle as well. <sup>102</sup> Communities are not homogeneous and inequalities that exist in community can easily become a part of a program that is meant to give equal voice.

To be sure, community pressure in a restorative initiative can be powerful. Katharine Kelly and Susan Haslip, in their look at mediation, identify a community conference case in which a young woman was pressured by other members of the conference to let the young man who assaulted her visit her home in order to apologize, despite her fear that once he knew where she lived he would hurt her again. <sup>103</sup> Here, power dynamics displayed by the rest of the community, and not necessarily the offender, forced a woman to agree to a resolution she did not necessarily support.

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These are obviously serious concerns which cannot be dismissed. However, there are those who believe that steps can be taken to deal effectively with these dynamics. Judge Huculak, in her address to the PATHS conference, stated that the issue of power dynamics was one that definitely needed addressing. [104](#) She identified the fact that facilitators needed to be "very well informed and educated about the dynamics of violence and what the issues are around domination and power." [105](#) She also articulated the need to ensure that the processes allowed the victims to feel safe enough to speak and suggested that support people such as family and others are an essential component in order to allow this to happen. [106](#) Others agree, asserting that once a power imbalance is recognized, the mediators' "skills combined with balancing tools can help balance the unequal power between the parties." [107](#) These techniques can include the constant presence of legal counsel and support persons during the process, attention to the seating arrangement, the provision of counselling services, the use of caucuses (when mediators/facilitators meet separately with the parties), as well as ensuring that parties maintain the right to terminate the process at any time. [108](#)

Others identified extensive case development, preparation, assessment and screening as all needing to be present in order to deal with power dynamics. [109](#) Dorothy Barg Neufeld noted that they do extensive background work before the mediation ever takes place, ensuring that in cases that warrant it there is a safety plan for the victim and also ensuring that the offender is taking the requisite degree of responsibility and is willing to change his behaviour. They also examine such areas as:

- how to begin a session (e.g. when people show up; who goes into the room first);
- how to close off the session (e.g. who leaves first; does there need to be heightened awareness of safety issues; is there a safe time between the meeting and getting the victim home);
- allowing the participants to control the process (e.g. allowing them to progress at their own pace; allowing breaks when needed, etc.);
- identifying power imbalances as they arise throughout the process and being willing to call participants on inappropriate behaviour during the process. [110](#)

These are only a few suggestions in how mediators/facilitators might deal with power dynamics within a restorative initiative or, in these cases, mediation. However, it is clear that more work needs to take place before these initiatives will provide the requisite environment of safety and equality necessary for the program to meet its healing goals.

### **5) Training/Standards:**

The previous section looked at power dynamics and mediators/facilitators' responses to those dynamics. Some argue, like Bonnie Diamond, that facilitators will never receive enough training to be able to deal with these dynamics. [111](#) Others disagree. To be sure, however, the lack of training and program standards is certainly one area that has been identified as a major concern.

Presser and Gaarder assert that, "To help achieve reconciliation...facilitators should be carefully trained and monitored and...must be sensitive to - and capable of interrupting - abusive dynamics that characterize the relationship and that get acted out, however, subtly, in the conference." [112](#) Others, like Kirstin Lund, Barbara Landau and Niki Landau, concur. They identified training as key to making restorative justice approaches more effective in meeting women's needs and suggested that such training include: training for restorative justice practitioners on issues pertaining to woman abuse, including physical and psychological abuse and its effect on family members [113](#) ; training regarding screening for abuse; [114](#) training for practitioners on how to ensure that processes don't revictimize, including the implementation of safety measures and safe termination; [115](#) sensitivity to cultural and racial and ethnic differences which may be applicable to situations of domestic violence; [116](#) and, even training for referral agencies, including government and community agencies, on abuse and how to ensure the safety of the victim throughout the process. [117](#)

Unfortunately, I was unable to track down any information pertaining to training for practitioners of restorative justice, and very little in regards to mediation. I would not consider this research to be complete or extensive. Certainly, more needs to be done. However, the findings still point to an area that requires more consideration before these initiatives will be considered safe and effective for women as, within the information acquired, there seemed to be a lack of specific training for mediators regarding domestic and sexual violence.

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The Transition House Association of Nova Scotia noted that some mediators working on these cases did not even have mediation training and that "even conciliators and mediators with mediation training often did not appear to understand the dynamics and cycle of abuse, and seemed unfamiliar with the different forms of abuse (physical, emotional, sexual, financial and psychological). Many mediators minimized the impact of forms of non-physical abuse." <sup>118</sup> In various interviews, it was noted that mediators have been hired by programs having been trained elsewhere and having practiced, often, in another field not related to family law or criminal justice (e.g. workplace mediation; medical mediation, etc.), although some do come from family mediation backgrounds that may have included training in abuse issues. <sup>119</sup> Within these programs, training is subsequently offered that is specific to the program and that may cover abuse issues if the program deals with that type of situation. <sup>120</sup> However, it was noted that training in that area is not extensive.

There is no government regulatory structure, including certification guidelines, in place in Canada which regulates the practice of mediators throughout the country. <sup>121</sup> As the Provincial Association Against Family Violence in Newfoundland states, "In this unregulated climate, someone with one day of training can set themselves up as a mediator or facilitator." <sup>122</sup> Family Mediation Canada (FMC), however, has developed a set of national practice, certification and training standards, in consultation with provincial, territorial and international mediation associations, under which family mediators must complete a certain level of training and practice before they receive certification. <sup>123</sup> Unfortunately, these standards are not compulsory. In their section on training standards, FMC makes it clear that a formal degree is not a prerequisite to training as a mediator, though it is highly recommended, and that "The FMC certification process will not prevent anyone from practicing family mediation but merely prevent family mediators who are not certified by FMC from claiming FMC certification or accreditation." These standards do, however, form the basis for higher professional standing within the field. Perhaps they could also serve in the development of national governmental regulatory standards in the future.

Abuse issues are identified throughout the FMC practice, certification and training standards. Mediators are expected to: assess families with histories of abuse for the appropriateness of mediation and refer them to other services if necessary; <sup>124</sup> ensure that power imbalances or differing levels of negotiating abilities are managed in order to allow full and equitable participation; <sup>125</sup> maintain a safe environment and terminate the mediation if safety cannot be assured; <sup>126</sup> and, allow partisan support for participants who are at a disadvantage due to power imbalances, <sup>127</sup> among others. In order to attain FMC certification, mediators must also demonstrate a knowledge of the literature, research, skills and techniques related to issues of domestic violence. These include areas of family dynamics, the "dynamics and effects of abuse, coercion and control in families," as well as "the implications of gender in mediation, particularly in terms of power imbalances and family dynamics, participant negotiating styles and mediator-participant interaction." <sup>128</sup>

Within their training standards, a minimum of twenty-one hours of training (out of a total of 180 or 12%) must focus on "abuse and control issues including instruction on power imbalances, the dynamics and effects of abuse on family members, indicators of danger in abuse cases, child protection matters associated with family abuse and violence, safety issues in mediation, the use of tools and techniques to detect and assess family abuse before and during mediation, the use and application of assessment tools to screen inappropriate family abuse cases from mediation, referral techniques, and information about sources of help for abused family members in communities..." <sup>129</sup> Again, however, these training standards are not compulsory in order for mediators to practice in this field.

Within the Transition House Association of Nova Scotia report, the recommendation is made that "Legally regulated professional standards should replace voluntary standards for the training and certification of mediators...Work should begin immediately to develop and implement legally regulated standards for training and certification." <sup>130</sup> I would suggest that the same should apply to facilitators working in restorative justice initiatives. THANS further advocates measures that could also be applicable to restorative process facilitators:

- Mediators should have ongoing training regarding abuse issues even after certification, to deepen their understanding, and to assimilate new research and professional practices.
- Mediators should be subject to periodic qualitative practice evaluations.
- Mediators' training should emphasize the safety of women and children, and an understanding of systemic gender discrimination and power imbalance.
- Front line workers serving abuse victims should be directly involved in mediator training.

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- Presently planned training hours for conciliators and mediators on abuse issues should be increased.
- There should be legal mechanisms put in place to assure mediator accountability, including an accessible grievance process, and a discipline process with consequences. Work, should begin immediately to develop and implement these mechanisms.

Clearly, training standards such as these need to be set in place in order to ensure that women are not revictimized when they participate in restorative initiatives.

Beyond the issue of training, women's groups are also calling for accountability structures for the actual programs being implemented, including better evaluation. PAAFV question, in their report Keeping an Open Mind, whether or not adequate assessment of alternate dispute cases takes place in order to ensure that the standards or the program are met.<sup>132</sup> Having undertaken further research on this question, they assert, in Making it Safe, that some people fear that restorative justice programs "present even greater possibilities for injustice and harm to vulnerable groups because they are less open to the public and have fewer accountability structures." <sup>133</sup> Throughout the PATHS conference in Saskatchewan, the issue of evaluation was raised on several occasions, citing concern that little evaluation of restorative programs seemed to be taking place. <sup>134</sup> Indeed, my experience undertaking this research pointed to a lack of evaluative reports within the field, with some programs (particularly mediation) informally evaluating their services through feedback from participants. <sup>135</sup>

Others note the lack of standards and guidelines on how restorative processes should operate, including determining which cases are eligible and who can or should participate. <sup>136</sup> Pauktuutit, in referring to programs that take place within the Inuit community, call for careful scrutiny of any new initiatives before they are accepted and state that, "Unless community-based services adhere to a clear set of guidelines and standards that reflect the needs and interest of all members of the community, potential exists for victims to suffer all over again. Without strict adherence to such principles, alternatives could end up being even more dangerous than their predecessors, especially to victims who are disproportionately women." <sup>137</sup> They further assert that, "The pace of transfers must slow down to allow for the development of adequate standards and guidelines." <sup>138</sup>

Although Pauktuutit is referring to programs taking place within a certain cultural environment, many of their concerns can also apply to programs delivered throughout the rest of Canada. They call for discussions which focus on: who can participate in the delivery of these services; what conduct guidelines should apply to those who are administering and facilitating these programs; the relationship between community politics and the delivery of such community services; and, the restrictions that must be put in place in order to guarantee that these initiatives do not perpetuate the inequality of Inuit women [or any women]. <sup>139</sup>

Significant research needs to take place regarding the evaluation of current restorative initiatives in order to ascertain the present effectiveness of programs. This information needs to be gathered and made available, preferably at a national level and at the least, provincially and territorially. It does seem clear, however, that there is a considerable need for legal standards and guidelines, both for training and for the overall implementation of programs, in order to ensure safety for those involved in the process.

## **6) Resources**

The final concern that this paper will turn to revolves around a lack of financial and resource support for restorative justice processes. In an interview with Lisa Addario, the Executive Director of National Associations Active in Criminal Justice (NAACJ), she commented that the apparent motivation for these programs at the political level - to decarcerate and ultimately save money - does not lead to effective restorative justice initiatives. <sup>140</sup> Rather, she contends, there should be little or no cost-saving, as money diverted from the prison system should be transferred into the community in order to provide sufficient program support for restorative initiatives. <sup>141</sup> Currently, however, that is not the case. On top of this, there is little indication of successful decarceration. <sup>142</sup> Irene Smith also pointed out this concern when she stated, in Saskatchewan:

I think it's important to say that given the history of [Nova Scotia] when it comes to allocating resources to the community to respond to the various public policies and programs that they've implemented, it's very unrealistic that sufficient resources will be allocated for groups like Avalon Centre to provide the kind of support and counselling that

women need. We've not seen and we certainly do not believe that sufficient resources will be allocated to ensure that there's money there to assist the offender in reintegrating into the community. [143](#)

Pauktuutit also identified this as a concern, claiming that a lack of technical and financial resources has the potential to undermine the efficacy of any community-based service; that while the intent behind alternative sentencing reforms may be positive, "...they can nonetheless do a disservice to communities that don't have the resources to implement them successfully." [144](#) For instance, Pauktuutit questions how an alcoholic abuser might access counselling, not merely for his substance abuse, but for his abuse against his partner, if there is no one in the community trained to deliver such a service or if there are no resources to train interested persons. As well, they inquire as to how a victim can participate in restorative initiatives without the availability of advocacy support and counselling. [145](#) In short, Pauktuutit asserts that "These kinds of attempts at restorative justice run a high risk of failure unless the proper resources are provided to support them. They can also leave women and children in a position of continuing danger." [146](#) They further advance that communities should not take on such initiatives unless government is committed to providing the ongoing resources necessary to develop, implement and maintain these programs. [147](#) Others, such as Viola Thomas, concur citing that the professional therapeutic counselling services required to facilitate the healing process of victims or sexual offenders is just not available in most Aboriginal communities. [148](#) Such concerns should be taken seriously in all communities. For instance, it is likely that a non-Aboriginal small, rural community would not have access to the resources available in Toronto or Montreal. Even in metropolitan areas, it should not be taken for granted, in implementing any initiative, that the community is sufficiently resourced to support that program.

Community resources should consist of the necessary means to provide continual support to both the victim and the offender, prior, during and following any process. To Judge Bria Huculak, this means, among other things, addressing the need for counselling services, including individual and family. [149](#) Mary Crnkovitch cites the following as necessary to support alternative initiatives: "...the development and operation of adequate public legal education on alternatives; paid administration to operate the alternative approach; support and advocacy workers for women and children who are victims of violence; male batterer counselling programs; in addition to the social worker and addictions counsellors that may already be located in the communities." [150](#) I am sure that there are needed resources missing from this list. Once again, the proper steps must be taken to research this issue and ensure that these measures are in place prior to engaging in restorative processes.

Within this discussion of resources, there was some debate over the appropriateness of utilizing the services of volunteers for restorative initiatives. For instance, Irene Smith, among others, shared her concern that volunteers might not possess the appropriate background and training in order to facilitate these processes. [151](#) She also noted that the use of volunteers, and not paid professionals, removes the responsibility of resourcing these processes from the government and moves it into the community. [152](#) PAAFFV grants that using volunteers in alternative processes can benefit by bringing down the very high costs of our current legal system. However, it also echoes Irene Smith's concern when it points out that governments could very easily take advantage of the generosity of those who donate their time and then expect volunteer programs to provide services that should be funded publicly. [153](#)

The onus to provide sufficient financial and human resources to support these programs adequately must remain with government and should not be devolved to the community. However, that doesn't necessarily mean that volunteers should never be used. Many volunteers may already come to the program with extensive training in these issues. For those who do not, funds must be made available to undertake sufficient training, in keeping with the standards and guidelines that will hopefully be developed in the future. As well, though it is true that these programs must maintain a certain standard and must include professional support, restorative initiatives are meant to take place within community. Therefore, as Bev Petras pointed out at the Saskatchewan conference, it is important to not underestimate the resources available in one's own community, [154](#) both paid and volunteer.

#### **Part IV: A Way Forward?**

In reviewing the available material and opinions surrounding restorative justice and cases of domestic and sexual violence, it is abundantly clear that legitimate concerns exist that must be addressed before current and future programs can be considered effective and safe. In order to address these concerns, and in order to develop future programs that are appropriate, both government and the designers of initiatives must enter into extensive consultation and cooperation with victims and women's advocacy groups. Concurrently, women's groups must continue to openly dialogue on these



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issues with each other, as it is apparent that, although these concerns are shared by many, there is no homogeneous "women's" voice on restorative justice. All the voices should be heard and respected.

Other measures must also be taken. The development of restorative initiatives must ensure that denunciation plays a significant role in the process. This is not to say that the result must include harsh punishment. Rather, the process must convey a clear message to the offender and to the community that the action was harmful and will not be tolerated. As well, flexibility must be a key part of these initiatives. Restorative justice programs must always empower the victim to make carefully informed, supported choices about whether or not to participate and this choice must be respected. In cases where victims do decide to participate, process structure and training must ensure that negative power dynamics are appropriately handled so that revictimization does not occur.

Finally, despite the fact that restorative justice initiatives take place within and seek to involve the community in finding positive solutions to situations caused by harmful actions, they are still a response to crime. Therefore, the government cannot abrogate its responsibility to provide sufficient funding and other resources for the effective implementation of these programs. As well, the government bears a responsibility to ensure that effective standards and guidelines exist for both program development and training. Until this is so, it is likely that, despite the benefits of restorative programs, some women will continue to be revictimized.

As noted in the introduction, this research is not complete. Indeed, I feel I have only touched on the proverbial "tip of the iceberg". Funding must be found in order to allow academics and practitioners to conduct extensive, impartial research at the national and provincial/territorial levels into these issues. It is my hope that government will provide such funding as part of its responsibility to respond to crime in an appropriate and effective manner. For, although restorative justice may be shadowed by legitimate concern, such cooperation and research could contribute definitive answers to these questions and thereby discover a way forward that truly meets the needs of those affected by crime.

See Footnotes online

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### **5.5. Restorative Justice: Is it justice for battered women? - 2000<sup>21</sup>**

Should the Saskatchewan government allow / institute the use of Restorative Justice strategies for family violence cases throughout the province / in only certain communities / only under certain circumstances / with certain safeguards?

#### **Executive Summary**

(It is essential to keep in mind while reading this document that participants at this conference who expressed opposition to or concern over restorative justice initiatives were expressing their opposition or concern with respect to the use of these initiatives in cases of violence against women only, and were not expressing a general opposition to or concern with restorative justice as it is utilized in other types of cases.)

The basis of this examination is the proceedings of a conference/forum organized by the Provincial Association of Transition Houses of Saskatchewan (PATHS), and held on April 14 and 15, 2000, at the Centennial Auditorium in Saskatoon, Saskatchewan, Canada. A cross section of views ranging from highly supportive of using restorative justice strategies for family violence cases to strongly opposed were represented by conference participants (invited panel members and registrants) who drew on their expertise and experience with the justice system, with alternative or restorative justice, with women's advocacy, and with, and as, victims and offenders. Additional information was provided by two surveys: one completed by participants at conference check-in, the other, at check-out.

This report attempts to highlight key themes and responses to specific issues that emerged during the conference. It is not intended to be a chronological or full record of the proceedings, but rather, it condenses and organizes the perspectives and discussions out of an extremely rich dialogue. In an attempt to preserve the exceptional flavour and

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<sup>21</sup> Restorative Justice: Is it justice for battered women? Report on PATHS' April 2000 Conference  
<http://www.hotpeachpages.org/paths/rjConfdoc.html>

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texture of the conference, heavy reliance is placed on excerpts taken directly from the discussion—on the articulate voices of people who cared ardently about the issues.

It is hoped this document accurately conveys the forum proceedings, and reflects, at least to some extent, the level of commitment, energy, and intensity that ran through and bridged the participants' diverse opinions and positions, and their common passion and struggle:

“To look at the use of restorative resolutions in cases of violence against women is to engage in a controversy. It is a difficult continuum we are all trying to find our place on, in terms of how we proceed. I don't think there are any easy answers. And though it may appear at times that we are at opposite ends of the continuum concerning this issue, we are all close in terms of what we are looking for, and that is, for the violence to stop.” **Tracy Porteous, Coordinating Consultant, BC Association of Specialized Victim Assistance & Counseling Programs**

“I had a whole paper—this is why it would work, this is why not, and last night I thought, no, that's not what I want to say. I guess all I can say is restorative justice could be a good process if it was taken very seriously and over a long period of time. There's benefits to it, and seeing the [failures of the] justice system, I'm torn. I don't know if it should be used or it shouldn't be, but I see the pros and cons to it, and that's all I can say.” **Wanda Gamble, Alternative Measures Worker, Aboriginal Women's Council of Saskatchewan**

This account of the conference:

- a) provides background and context, including information on the invited panel members, the makeup of registrants, and the forum agenda;
- b) struggles with the definition of restorative justice;
- c) critiques the current criminal justice system vis-à-vis violence against women;
- d) highlights a number of concerns while examining the discussion and debate surrounding the use of restorative justice in cases of violence against women; and
- e) summarizes the final discussion of how next to proceed in Saskatchewan.

**Concerns and some agreement:**

**1. Need for consultation**

If restorative justice is, as it claims to be, victim-centered, then the views and experiences of victims and women must be evident in the design, implementation and evaluation of programs. It is imperative that there be broad consultation with women's advocates, Aboriginal women, women of color, disabled women, sex workers, the gay and lesbian community—groups that are not in the 'halls of power' and are more vulnerable to sexual assault, relationship violence, criminal harassment, hate crimes, and the like. To date, it seems this has neither been achieved by, nor on the agenda of, many of the policy-makers, although the Saskatchewan government was applauded for apparently bucking that trend in its willingness to aid and abet consultation and to invite and seek out dissenting voices before moving ahead on this issue.

**2. Safety and risk**

Safety of the victim—physical, emotional, and mental—was of paramount importance for participants on both ends of the spectrum. Victim safety is a complex issue in crimes of battering and sexual assault, hence safety concerns run like a thread through all others. Controversy centered around whether restorative justice does, or even could, put women's safety first. Those who opposed restorative justice processes for reasons of safety did so because they did not accept that the safety of the process could be assured for victims who already live in very fearful and dangerous situations. Restorative justice strategies were seen by some as keeping women in high-risk situations, rather than encouraging them to seek safer options.

**3. Informed choice, unencumbered participation**

There was consensus among participants that women must have informed choice—there should be a process in place whereby women are advised of their rights and entitlements, and of the advantages and disadvantages of restorative justice before making a decision to participate. The necessary time must also be taken in order to provide the victim

with an opportunity to fully look at the impact of the abuse and to make an informed decision on how to go forward. But whether a battered woman can ever freely choose and/or participate remained in issue.

**4. Power: dynamics, imbalances, relations**

Possibly the most intense focus of opposition and words of caution regarding the use of restorative justice measures in cases of battering and sexual assault against women centered on the issue of power. Violence against women is embedded in unequal power relations manifested on the societal level and in its institutions, within different groups and communities, within families, between men and women, and between offender and victim. It is the myriad inequalities in power relations that create and sustain conditions of disadvantage for women.

Women need input into the system to ensure that their abusers will not be their judges, but how can we guarantee them the selection of a meaningful community of people equally supportive of the victim and offender? How can we ensure power imbalances are not brought into the restorative justice process? How can we know for sure family and/or other dynamics are not working to protect the offender at the expense of the victim? We know that restorative justice practices will take place within sexist, patriarchal, classist and racist milieus, among others. How can we be assured that this reality will not influence or distort the restorative justice process away from the goal of relations of equality?

**5. Denunciation/deterrence**

To date there has been little research on the denunciatory aspect of restorative measures. Such an investigation, along with research on other claims of restorative justice, needs to take place so there is empirical data on which to base conclusions. In the end, participants agreed that restorative justice initiatives need to ensure that the process includes an appropriate denunciatory message, both to the accused and the community, so these measures will not be seen as going lightly on serious crimes. Nor can these programs offer offenders refuge from culpability and criminal sanctions. Disagreement centered on how this is best effected, and if it is actually possible within a restorative justice framework.

**6. Offender focus vs. victim focus**

The focus on the healing or rehabilitation of the offender was, for those in favour of restorative justice, a key benefit. They see offenders as victims themselves—victims of socialization, abuse, circumstances—who require therapy, not punishment. Other participants were worried that this viewpoint would risk further victimizing the victim, and expressed apprehension that the offender's victimization could take precedence over the wrong done to, and the needs of, the victim. It is support for those exposed to violence that counts, support to take those measures that effect change—to expose violence whenever it happens, to create the conditions where women and children can safely reveal abuse, to take court action, to do whatever is needed to make the change.

**7. Definition of 'community'**

Restorative justice relies heavily on the notion of 'community'—it imposes more responsibility for the causes and the effects of crime on the community, as a means to affirm and strengthen the power of community and to reclaim the community's involvement. Restorative justice proponents in cases of violence against women see this as positive, those against are not so sure. What is 'community', what is the nature of community involvement, do cohesive/appropriate communities actually exist?—these are the concerns of the latter group.

**8. Community resources and volunteers**

All participants agreed that a lack of technical, human and financial resources has the potential to undermine the efficacy of any community-based service. Under such circumstances, restorative justice initiatives—notwithstanding the positive intent behind them—run a very high risk of failure. Even supporters of restorative measures insisted communities must have the necessary means to provide continual support both for the victim and the offender, prior to, during, and following any process. Debate centred around whether and how this could be accomplished.

**9. Guidelines, standards, training, monitoring and evaluation**

There was strong agreement that clear, coherent, equality-promoting guidelines, principles and standards must define all restorative programs, and that the policy, the guidelines, the screening, and the training must be in place before moving toward these kinds of solutions for cases of violence against women. There must be tracking processes for offenders from province to province, and within provinces. There must be transparency, accountability and a monitoring and evaluation process in place.

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Clearly, the concerns listed above must be addressed before current or future restorative justice programs should be considered appropriate, effective, or safe for cases of domestic and sexual violence against women. And if the process of addressing those concerns goes forward:

“We need to do it in a really thoughtful, really careful way and we need to listen to a lot of different voices and it is not going to happen overnight.” **Jan Turner, Director of Community Services Branch, Saskatchewan Justice**

“And we need to do it collectively, working in a partnership forum,” **Pauline Busch, ED, Regina Alternative Measures Program, SK**

with extensive consultation involving all stakeholders in the community, extending to Aboriginal women and all other women. And government must back the promise and the process of consultation financially.

### **Background to the Forum**

In the mid-1990s, the Canadian Federal Government introduced the National Strategy on Community Safety and Crime Prevention: “Safer Communities, Everybody’s Responsible.” (Phase I, which began in 1994 and continued to 1997, ‘provided a framework for efforts to support community safety and crime prevention. This policy framework was created in consultation with 25 individual child development experts, community advocates, academics, social workers, lawyers, police officers, doctors and business people who volunteered their time to develop a plan to deal with the underlying causes of crime’ (Canada 2000). In Phase II, which began in 1998 and is to continue to 2003, the aim of the National Strategy is to reduce crime and victimization by addressing their root causes through a social development approach. It is a long-term proactive approach directed at removing those ‘personal, social and economic factors that lead some individuals to engage in criminal acts or to become victims of crime’ (Canada 2000).) It was felt that traditional retributive responses to crime—apprehension, sentencing, incarceration and rehabilitation—were not adequate:

This approach, while important, is not sufficient to prevent crime. The National Strategy is aimed at reducing crime and victimization by addressing their root causes through a social development approach.  
Canada 2000

In line with this federal policy evolution, Saskatchewan Justice unveiled its commitment in April 1997 to implement a ‘new’ paradigm throughout the province—a strategy with a restorative rather than a retributive emphasis. This strategy was promoted as a multi-year approach that would better address both the causes as well as the consequences of crime. Elements of the strategy included a province-wide initiative for alternative measures that would see support for community justice committees, family group conferences, victim/offender mediation, and Aboriginal community justice development. The new strategy also included the cultivation of new partnerships in the community, by the community, and for the community. This approach was reiterated by the Honourable Chris Axworthy, Minister of Justice, Saskatchewan, in his opening remarks to begin the second day of the forum:

“It is critical that government, communities, and organizations and people like you continue to work together to find solutions to the problems of relationship violence. Violence has no place in our community, and certainly no place in a safe community, and without question, safe communities are our top priorities. We are committed to keeping our communities safe, and we believe safe communities begin with safe homes and safe families.

There is no single formula to ensuring the success of community justice initiatives. It must be based on each community’s aspiration to become a healthy and safe place, and it cannot be just another government program. It must be a commitment and process adopted by people who see the norms expressed in our criminal laws as valuable to their own health and well-being, and who then take measures to ensure their communities respond.”

In a number of Canadian provinces, Justice Departments have moved toward the use of restorative justice strategies in cases involving domestic violence and/or sexual assault. Although in Saskatchewan these types of cases are excluded from consideration for referral to alternative measures (see first attachment), Saskatchewan Justice was motivated to

revisit this position as a result of ongoing dialogue with certain quarters in the province, both government and community. It was this 're-visitation' that impelled PATHS to become involved in the debate and to plan a conference for April 14 and 15, 2001, at the Centennial Auditorium, Saskatoon, Saskatchewan, Canada, called **Restorative Justice: Is it justice for battered women?**

PATHS' position was that policy development with respect to the use of restorative justice measures in family violence cases must be informed by those who will be affected most. It was hoped the conference would:

- a) facilitate education by way of dialogue with a diverse range of people working in the field, and
- b) provide an opportunity for a cross-sector investigation of the issue by victims and victims' advocates, thereby involving them in the consultation and public policy process.

The intention was that the conference would model a specific restorative justice strategy, the community forum, to help accomplish these goals. It was also to be a working conference—all registrants are asked to commit to attending all sessions on both days, to arriving promptly for each session, to completing the Check-in and Check-out surveys (see second attachment), and to contributing to the discussion.

#### ***Invited Panel Members and Registrants***

Conference brochures with registration forms were sent out to all Saskatchewan women's shelters, crisis centres and sexual assault centres, all Saskatchewan men's intervention groups, all 150 members of Saskatchewan Towards Offering Partnership Solutions to Violence, all Saskatchewan Victim Services and Community Based Justice Programs, the Saskatchewan Battered Women's Advocacy Network, the Saskatchewan Action Committee on the Status of Women, Sexual Assault Services of Saskatchewan, all Saskatchewan Tribal Councils, and Immigrant Women of Saskatchewan. The registration fee was \$35, as a token of commitment to attend. Registration information was also posted on PATHS web site, along with a call for papers, and was advertised on PAR-L, a Canadian feminist virtual mailing list.

Eighty-five of the 102 expected registrants/attendees picked up their conference packages, including the moderator, the two guest speakers, and nine of the twelve confirmed invited panel members. (Virginia Fisher, PATHS Coordinator and conference organizer, had made the final decisions with respect to whom to invite as panel members, moderator, and guest speakers.) All panel members had worked with or were interested in issues of violence against women, and four of them were from outside Saskatchewan, representing perspectives from other parts of Canada. Biographies of all confirmed invited panel members, of the host of the forum, and of the moderator and one speaker can be found as the third attachment. Missing are biographies for the Honourable Chris Axworthy, Minister of Justice, Saskatchewan, and for Jan Turner, a late addition from Saskatchewan Justice. Virginia Fisher read Judy White's brief (Judy had an unexpected last-minute job-related commitment), and Bruce Slusar and Bevann Fox, both confirmed as panelists, failed to appear.

80 people (94% of the 85 participants) completed the Check-in survey. The following demographic information is based on data supplied by those 80 respondents: (Further details on the demographics can be found in the technical report (the fourth attachment).

- 75 (94%) were female and 64 (85%) of those were from Saskatchewan
- 42 (53%) respondents reported being of non-Aboriginal ancestry
- 31 (39%) reported being First Nations and Metis (in Saskatchewan, just under 10% of the population is First Nations and Metis)
- 7 (9%) respondents did not answer the question on ancestry
- 33 (41%) respondents represented a community-based organization
- 19 (24%) reported representing a government department or agency
- 8 (10%) represented multiple organizations (community and/or government)
- 60 (75%) reported working with clients, 55 (92%) of those with victims of violence
- 23 (29%) reported knowing a lot about restorative justice
- 44 (55%) reporting having some knowledge of restorative justice

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- 6 men, all from Saskatchewan, registered for the conference, and 2 others (Wally Roth and Bruce Slusar) were invited to be panelists; 5 of those 8 participated (and completed the Check-in Survey) and the Honourable Chris Axworthy was a guest speaker
- no representatives of immigrant women's groups attended

### **The Agenda**

(The first three plenary sessions on April 15 were scheduled for 90 minutes each: 60 minutes divided amongst three to four panelists, then 30 minutes for discussion/questions from the floor. The fourth and final plenary incorporated all ten panel members plus Jan Turner, to provide concluding remarks of 2 to 3 minutes each, followed by discussion and questions. The entire proceedings of both days were video- and audio-taped, with three microphones at the panelists' table and two floor mikes for registrants. Registrants were asked to give their name and affiliation before speaking, but not all remembered to do so.)

### **Methodology**

This is primarily a qualitative investigation of content, based on data taken from transcripts and videos of the forum, which included panel members' presentations and registrants' questions and responses. Other information was available from two surveys distributed to all panel members and registrants, one to be completed at the beginning of the conference (the Check-in Survey), the other at the end (the Check-out Survey). The transcripts and videos were reviewed for passages to reveal the spectrum in perspectives and opinions, and for recurrent themes and concerns. The report attempts to reflect panelists' and registrants' views, comments, and concerns in their own words, and to give a balanced presentation of the perspectives offered during the forum. The document relies heavily on quotations to preserve the voices of those at the conference, to minimize interpretational bias, and to allow for further interpretation of the data.

### ***What Do We Mean by Restorative Justice?***

Her Honour Judge Bria Huculak, Saskatchewan Provincial Court Judge, made the opening address on the first evening of the conference. Her presentation and the responses to it introduced many of the pivotal points for further debate and discussion on justice and violence against women. Judge Huculak began with the broader societal context of crime, including violence against women, and introduced the notion of 'responsibility', asserting that preventing violence is a fundamental issue for which we all have responsibility:

“I'm not talking simply about offender responsibility. I'm also talking about community and societal responsibilities. When we talk about violence we have to look at what are the social, political and economic conditions that lead to a culture of violence, and we must be prepared, as a society, to address those conditions.”

Then, in laying the groundwork for informed discussion, Judge Huculak introduced the concept of restorative justice—its evolution, underlying assumptions, and key principles:

“Restorative justice is a way of thinking, a way of behaving, and a way of measuring. It is a vision of how to do justice, but it's not just the one thing, it's not just restitution, it's not just reconciliation, it's not just community. It's a combination of all, of many factors.”

Drawing on the work of author Howard Zehr, Judge Huculak spoke of the rationale and benefits of the restorative justice approach:

“Victims in a community have been harmed and are in need of restoration. Victims, offenders, and affected communities are the key stakeholders. Violations create obligation and liabilities. Offenders' obligations are to make things as right as possible. The community's obligations are to victims and

offenders and to the general welfare of its members. Restorative justice seeks to heal and to put right the wrongs. The needs of the victims for information, validation, vindication, restitution, testimony, safety, and support are the starting points of restorative justice. The process of restorative justice maximizes opportunities for exchange of information, participation, dialogue and mutual consent between victim and offender. Restorative justice is meant to be a harm-centered approach, with the victim being central, however, the offender's needs and incompetencies are also addressed, which means there have to be resources for rehabilitation, as well as for victims' needs." Judge Bria Huculak

Restorative justice can be seen as a philosophy or set of principles that guides agencies and practitioners, rather than a specific practice. Many different programs and models fall within this framework, including family group conferencing, victim/offender mediation, sentencing and healing circles, and community forums, any one of which can be used in conjunction with the court system or in its place, and can be instigated at various stages of the criminal justice process. Restorative justice offers an alternative way to think about crime, emphasizing the harm crime does to the victim and community, and how the community, rather than the state, can respond to crime. Instead of focusing only on the guilt and punishment of the offender, restorative justice places emphasis on all those involved—victim, offender, community—and seeks to reconcile, restore and repair lives and relationships.

Naturally, other participants also spoke to the definition of restorative justice and its strategies:

"Restorative justice recognizes and repairs harm to victims in communities, distinguishes between offending action and offender, heals and integrates the offender. Concerns of the victim and community are given equal status. Victims are actively involved, and the process meets the emotional needs of the victims. It requires an admission of the guilt of the offender more so than in the traditional justice system. The offender is held accountable, and is made to acknowledge responsibility for their actions, and also to have a full look at the consequences of their actions." Pauline Busch, ED, Regina Alternative Measures Program, SK

"Each community is unique, and each community decides what a sentencing circle is to them. So when you say sentencing circle in one community, it doesn't mean the same thing as in another community. If you go to Onion Lake right now in Saskatchewan, and you say sentencing circle, they're all pre-charge. There's no post-charge, they're not a part of the court. If you go down to Standing Buffalo, they're all court-driven and the judge determines with a threshold test if this is a case that can go to a sentencing circle. There, a sentencing circle is just a recommendation circle—they recommend to the judge what the sentence should be. They decide what resources they have in the community and what kind of plan they can have for that individual, and then the judge decides. They could recommend two years in jail, ten years in jail. It depends on the community and the strengths in the community." Bev Poitras, Director, Restorative Justice Unit, File Hills/Qu'Appelle Tribal Council, SK

Agreement on exactly what does and does not constitute restorative justice and its practice remained somewhat elusive, and some challenged the validity of the definitions and claims offered above. One of the major sources of diversity regarding the use of restorative justice for the resolution of crimes of domestic and sexual violence could, in fact, be attributed to the variety of definitions the participants held and their different experiences with the development and application of restorative initiatives in various parts of the country. As Jan Turner, Director of Community Services Branch, Saskatchewan Justice, pointed out, and conference participants confirmed, the policy backdrop, the context, and the implementation of restorative justice, especially pertaining to cases of violence against women, all vary greatly across Canada. Forum debate clearly demonstrated that restorative justice means different things to different people, and participants repeatedly made statements and cautions to that effect:

"There needs to be a lot more understanding of what restorative justice stands for before we continue this dialogue because clearly it's something that's not understood within the room." Pauline Busch

"It becomes more and more clear to me that what restorative justice means in one community is quite different from what it means in another community. We need to be really mindful about the language

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being used when we are speaking to each other. We think we are talking about the same thing but indeed we are not.

We find the definition of restorative justice [in the Nova Scotia policy] to be elusive. To define it is to limit. If the definition of a program eludes us, so too do the limits of the program. As such, restorative justice is potentially elusive and slippery, with no gatekeepers. Clear, specific guidelines about sexual assault and domestic violence cases need to be identified, and they need to be done in consultation with women's groups and women who have experienced sexual violence." Irene Smith, ED of the Avalon Sexual Assault Center in Halifax, Nova Scotia

However, notwithstanding the elusiveness of definition, the following assumptions/rationale underlying restorative justice were noted:

- crime derives in part from social conditions/relations in communities
- the current justice system alone cannot offer an effective solution
- the community can significantly contribute to sentencing the offender, assisting the victim and preventing similar crime in the future, therefore a partnership between community organizations, citizens and justice agencies is an essential component for dealing with crime
- solutions to crime are not simple but must be uniquely tailored to the needs of the victim, and the offender, and the community
- punishing retributively is not sufficient to prevent crime
- exclusive reliance on jail does not serve community interests in healing its members, or in creating safe homes or neighborhoods. If anything, the milieu of the jail environment teaches citizens to repress their personal problems rather than deal with them publicly,

and the principle benefits of restorative justice were seen to be that it:

- provides for the emotional, material and financial needs of victims and those affected by crime
- tries to prevent re-offending through re-integrating offenders into their community
- encourages offenders to take active responsibility for their actions
- develops the capacity of the community to deal with the effects of crime as well as its prevention.

Often in the background of conference discourse, but never really examined directly, was the question of what it is that restorative justice would be utilized to restore in cases of violence against women:

"There are a whole lot of issues that need to be reconciled. The dialectic of restorative justice is evolving, and there are many issues yet to be addressed in that discussion. One of the primary issues: what are we trying to restore when we talk about restorative justice, and particularly, what are we trying to restore if we are talking about an abusive relationship?" Helen Smith-McIntyre, Saskatoon Community Mediation Services

Some of those in opposition to using restorative justice in these cases spoke as if they understood the intent to be to restore the offender/victim to some fictitious past intimate harmony. This gave them cause for concern. Proponents of restorative justice in cases of violence against women neither directly or effectively challenged this notion during the conference (although it is likely their cautions about misunderstandings were attempts to do so):

"Our elders tell us that crime is a broken relationship. That's the same with domestic violence. Crime is a broken relationship. Whether that relationship resumes in very close relationship or a relationship where they see each other over the kids or a relationship where they never see each other again, it's a broken relationship, and we have to repair that relationship. If we cannot repair that relationship, it's only going to add on to more violence and more disruption." Bev Poitras

A clearer statement of the matter could easily have been something like:



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“Restorative justice is fundamentally concerned with restoring social relationships, with establishing or re-establishing social equality in relationships. That is, relationships in which each person’s rights to equal dignity, concern and respect are satisfied. Restoring relationships does not then necessarily mean restoring personal or intimate relationships. For example, a restorative process dealing with spousal violence would not entail the reconstruction of an intimate relationship between the individuals but would entail their co-existence with security and equal respect within the same community.” Restorative Justice: A conceptual framework, Llewellyn, Jennifer J., B.A. M.A. and Howse, Robert, Associate Professor of Law, University of Toronto and Visiting Professor, University of Michigan Law School, for the Law Commission of Canada, 1998, see link at <http://www.hotpeachpages.org/paths/legal.html#Restorative>

***The Criminal Justice System and Violence Against Women***

Participants, both those for and against the use of alternative resolution in cases of violence against women, had a lot to say about the failings of the justice system vis-à-vis these types of cases. Although women have worked hard to have sexual and domestic violence recognized as serious offences by the criminal justice system, with the requisite public attention and punishment, and although advances have been made, these advances do not ensure that the needs of women victims are always addressed seriously and competently. In fact, the present criminal justice system is held to be largely impotent to reduce these crimes and to effectively attend to the needs of the victim, the offender, the community. There was significant agreement that:

- the criminal justice system is too adversarial. The main purpose of proceedings is to establish guilt and to hand down a sentence. The victim’s needs are overlooked and often the sentence has little to do with the actual harm done, and does not speak to accountability
- the system does not look at the community context of the crime nor at the deep-rooted issues of the offender, and thus fails to take initiatives that might prevent crime in the future
- the current system tends to keep offenders in the system rather than discourage them from re-offending
- most men are still not held accountable for their violent actions against women—only a minority of cases are reported to the police, and what too often follows from there are evidentiary lapses, police indifference, lenient sentences, low rates of prosecution, and high rates of plea-bargaining, acquittals, and stayed charges
- contact between female victims of violence and the criminal justice system is a source of re-victimization, frustration, and disappointment rather than a supportive experience. Victims often feel they are the ones on trial. They find the system confusing, demeaning and overwhelming.

“The one thing I think we can all agree on here is that the conventional court system has not served the needs of victims very well. I think everybody recognizes that, and so we’re looking for other options, ways that we can better deal with different types of anti-social behaviour and violence and things like that. We certainly are not purporting to see restorative justice being the only route that can or should be taken when dealing with domestic violence. I would never want to see a time come when a victim is given a subpoena to attend a family group conference. I don’t think anybody is in favour of that sort of thing. Right now victims are being given subpoenas to attend court and to testify and to be made out as liars by one side of the adversarial system, and I know, from being a police officer for 23 years, that sometimes a court process is more traumatic on a victim than the actual abuse was.”  
Lennard Busch, Officer in Charge, Aboriginal Police and Crime Prevention and Victim Services, RCMP Headquarters, Ottawa

Judy White, a survivor of domestic violence motivated to contribute to the forum because she felt it was important for survivors to be heard, reviewed many of the inadequacies of the current system in her brief:

“My experience with the justice system, and the experiences of other survivors I have spoken with, sent strong messages to both the victim—me—and the offender, my partner. The message the offender received was, “You can continue to assault your wife, and you are not going to get into much trouble. The police don’t want to be bothered by your wife and may actually help you in order to make her stop complaining. The legal system works strongly in your favor.” The message I, the victim, received was, “The justice system is not here to help victims of domestic violence. Calling the police places you and your

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children in further danger. There is nothing you can do to help yourself without risking your own safety and the safety of your children. Even if it does end up in trial, a guilty verdict is difficult to get, and the punishment will be light.” Judy White

Lack of faith in the current justice system was also strongly expressed by Aboriginal participants. The criminal justice system has not served their communities well and is not effectively addressing the myriad problems in any attempt to reduce or prevent crime. Aboriginal men, and more especially Aboriginal women, are under-represented in the ‘halls of power’ and are over-represented as victims, as those seeking help, and as those being incarcerated. The following comments gave voice to the pressing need of First Nations and Metis for changes and for alternatives to the present system:

“The present justice system is alien to many First Nations people. The judge and lawyers usually fly together into a remote northern community. The people in the community don't know the judge, and they probably don't respect the judge. Therefore, when a judge sits in judgement and says, “You are sentenced to this or that, or you have to act this way,” I don't think they're going to listen. But with sentencing circles, the communities are part of it, the families are, anybody who has an involvement appears and sits there. They are all sitting there, the offender is sitting there, and his peers, people he cares about, sit there in judgment of him. That has more of an impact.” Norma Green, Special Projects, Correctional Services of Canada

“In this report [*Profile of Aboriginal Women in Saskatchewan* (Published by Saskatchewan Women's Secretariat, November 1999)] it talks about violence and that 8 out of 10 Aboriginal women are abused, so this is our problem. From the *Hollow Water [Manitoba]* study, they said 95% were sexually abused. Aboriginal women are five times more likely to use a shelter than non-Aboriginal women. And a *Report from the Indian and Inuit Nurses of Canada* makes the argument that widespread abuse often continues until the entire community decides to confront and eradicate the problem from within. It is we who have to do it. Regardless of what process you use, the change has to come from within the community.” Bev Poitras

“In one community we work with, 80% of the cases are domestic violence. Within the last two years there's been two murders related to domestic violence. The judge came to us in the community and asked, “What can we do?” So it's not only us as First Nations people saying the courts aren't working, the courts are asking us what can we do, because they're not working. This is giving us the opportunity now to ask, what can we do? We have to start dealing with the deep-rooted issues, not just the one, the slap on the face. We have to start dealing with why is he doing that? What is the issue he's dealing with? The present justice system has caused more problems in some cases. Its track record speaks for itself. We've heard of many cases today where the courts are not fair to victims. One statistic last night was 11% of the cases go to court. What happens to the other 89% sitting in our communities? The state or the court becomes the voice of the victim, and this is not always the most effective or efficient way to deal with family conflict.” Bev Poitras

“It really hit home to me when I saw a four year old boy. His mother had brought him and his sister to the [Children's] haven, and said there had been an incident of violence at home, and she needed time to get her stuff together. She left, and the little boy was very upset. He was very angry, and I was trying to calm him down a little bit, and I just said, “Your mom just needs a little break. She needs some time, she's not feeling well, and needs some time.” And these were his exact words to me, and I'm not trying to be vulgar or anything. “She doesn't need a fuckin' break, she needs a fuckin' slap.” And he's five [sic] years old, and in my mind I was saying, if something doesn't happen for this child, we're going to be seeing him in the papers, or something's going to happen in the future for him that's going to be traumatic. I mean, obviously this kid has seen things, and it's going to continue the cycle. The little girl never said a word. She just sat there with her head down like this all the time.” Wanda Gamble, Alternative Measures Worker, Aboriginal Women's Council of Saskatchewan

“I'm not saying let's go full speed ahead. It's a question we have to look at, but in my opinion, it is by far the best thing I've ever seen. It's not a perfect thing, but I've seen how our conventional system has failed victims. I'm a facilitator in family group counseling and I've done 60, many of which have been due to

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violence, not domestic violence but fights and assaults in schoolyards and things like that. And the healing I've seen happen is certainly encouraging to me because I've never seen healing happen in a courtroom, even when the victim's side of an adversarial process wins. I often see the victim going away realizing there's no healing, their fears are not being relieved, living day to day in apprehension of when the offender's going to be back out on the street, and they don't have the support they need to carry on.”  
Lennard Busch

“If you asked me 20 years ago about restorative justice, I would have said, throw the bugger in jail, but since then I've gained more experience in life and have done other things, and so my feeling is I do believe in restorative justice. In all cases, the community is a part of the solution, and they also accept responsibility, and they are accountable for the resolution of the offence. It seems that in those cases when breaches of the justice system are brought to families and communities, there is a better chance of resolution happening in a positive manner that has long term effects in the communities. What I see is we often put the focus on the offender, not on the problem. We don't know what the problem is with this individual. What is the root of the problem? Have we looked at the background of the offender?” Norma Green

Though many forum participants seemed convinced the current criminal judicial system is irreparably flawed, others, believing it can be redeemed, wondered why the problems in the current justice system simply aren't addressed, rather than moving to establish a new process:

“On behalf of survivors of domestic violence and their children, I ask that the members of this conference err on the side of caution with regard to supporting restorative justice in cases of domestic violence. Why don't you just insist that the current system give all offenders, without exception, a very strong message that their abuse is unacceptable, that it is criminal, that it will not be tolerated, that it will be severely punished? Why don't you just insist that the current system give every victim the message that the justice system is there to help, that calling the police will always mean increased safety, that you will not be left all on your own at trial without even the arresting officer showing up? Why not just make the current system work the way it's supposed to? If a victim can't feel protected and supported now, with supposedly the full force of the law and its formality behind her, how will she possibly be able to feel protected and supported without it?” Judy White

### **Restorative Justice and Violence Against Women**

There were those who felt restorative justice should never be used in these types of cases, those who thought benefits are possible, and those who believed very strongly that restorative justice programs would be very effective in meeting the needs of female victims of battering and sexual assault. Most participants, however, voiced serious concerns and cautions about the conditions prerequisite for the implementation of restorative justice initiatives in cases of violence against women. The underlying question was whether the non-negotiable environment of safety and equality for the victim could be assured within restorative justice processes, and if so, how:

“Removing cases of crime and violence against women out of the traditional court system into a more conciliatory process that seeks an alternative resolution might sound good, and women, especially women in abusive relationships, have been saying they are interested in some alternative processes. But current restorative literature is missing an analysis of the dynamics of gendered violence, an analysis of violence in relationships and sexual assault, as well as an analysis of how the impact of women's socialization is connected to these issues and how this makes women more susceptible to violence and repeated violence.” Tracy Porteous, Coordinating Consultant, BC Association of Specialized Victim Assistance & Counseling Programs

Crimes of intimate violence extend into the areas of psychology, sociology, economics, and politics in ways other offences do not, thereby introducing particular and significant dynamics into a restorative justice process, dynamics that must be anticipated and factored into the process. Issues and concerns raised during the forum that participants wanted taken into account can be grouped into the following broad themes:

1. need for consultation
2. safety and risk
3. informed choice, unencumbered participation

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4. power: dynamics, imbalances, relations
5. denunciation/deterrence
6. offender focus vs. victim focus
7. definition of ‘community’
8. community resources and volunteers
9. guidelines, standards, training, monitoring and evaluation

## **1. Consultation**

In discussing the government-initiated restorative justice program in Nova Scotia, Irene Smith reported that although the program claims that the victim is central, no consultation took place with victims’ or women’s groups:

“This results in displacing the survivor to a position peripheral, not central, to the process.”

In commenting on the process in B.C., Tracy Porteous said one of the most important issues in discussion with women’s groups was the lack of informed input into the development of policy by First Nations women, and by victim-serving and women-serving equality-seeking organizations:

“To facilitate such input, it is necessary to make the funds available to these groups so they can develop their own analysis of these policies. All too often I see women’s groups struggling to articulate our issues at a table that is uneven to start with.”

Fay Blaney, Vice President of the National Action Committee on the Status of Women and a member of the Aboriginal Women’s Action Network (BC), attested first hand to the difficulty their group had in being heard and in bringing a gender analysis to the discussion of the planning and development of the Vancouver Aboriginal Restorative Justice Project, thereby raising the issue of the under-representation of Aboriginal women in decision making capacities not only within government and policy-making groups, but also within groups of anti-violence agencies. Fay felt strongly that restorative justice is being implemented without appropriate consultation with Aboriginal women, and she framed this as being part of a sexist, racist society in which Aboriginal women have no voice.

So who is providing leadership in developing restorative justice programs, if women working on violence issues have not felt involved in the process and also believe that women who have experienced the violence have been left out? Participants underlined the need to be extremely mindful of exactly who is setting the direction for change:

“I am fairly sceptical when it comes to restorative justice, certainly in my own province and for good reason. We need to be very cautious of this. The very people who designed the [restorative justice] programs are within the same systems where they are taking indictable offences, reducing them to summary conviction, and sending them off to adult diversion. This has happened in my province.”  
Michelle Landry, Project Officer, Victim Services, Correctional Service of Canada, Ontario

If restorative justice is, as it claims to be, victim-centered, then the views and experiences of victims and women must be evident in the design, implementation and evaluation of programs. It is imperative that there be broad consultation with women’s advocates, Aboriginal women, women of color, disabled women, sex workers, the gay and lesbian community—groups that are not in the ‘halls of power’ and are more vulnerable to sexual assault, relationship violence, criminal harassment, hate crimes, and the like. To date, it seems this has neither been achieved by, nor on the agenda of, many of the policy-makers, although the Saskatchewan government was applauded for apparently bucking that trend in its willingness to aid and abet consultation and to invite and seek out dissenting voices before moving ahead on this issue.

## **2. Safety, risk and re-victimization**

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“Restorative justice recognizes that victims need an opportunity to speak about their feelings and to have the power restored to them that has been taken away by the experience of the offence, and that they need recognition of the pain and the suffering they have endured. Sexual assault survivors need to talk about their feelings. They need to reclaim their power, and they need to have their pain and their suffering validated absolutely. The terror, the humiliation, the stigma that results from sexual assault makes it a long and difficult and painful process. Usually this type of healing only occurs within the context of a safe and trusting relationship. In my opinion, it is unrealistic to think a survivor will discuss what justice has casually called ‘concerns and feelings’ with the perpetrator of sexual assault. It’s unrealistic and dangerous to think healing will take place as a result of such a meeting between the perpetrator and the survivor.” Irene Smith

Safety of the victim—physical, emotional, and mental—was of paramount importance for participants on both ends of the spectrum. Victim safety is a complex issue in crimes of battering and sexual assault, hence safety concerns run like a thread through all others. Controversy centered around whether restorative justice does, or even could, put women’s safety first. Those who opposed restorative justice processes for reasons of safety did so because they did not accept that the safety of the process could be assured for victims who already live in very fearful and dangerous situations. Restorative justice strategies were seen by some to keep women in high-risk situations, rather than encouraging them to seek safer options:

“I felt safe because he was in jail. I knew I wouldn’t be getting a licking for a while and I could walk on the street without getting scared. It felt good to know he wasn’t lurking around looking for me. I felt that with him going to jail I had inner peace in myself, I didn’t have to be afraid anymore.” Survivor of domestic violence, Black Eyes All of the Time (one of 26 women of First Nations descent interviewed for **the** study)

“I find the whole concept of restorative justice in family violence situations very scary. I work with a caseload entirely of domestic violence cases and I can just see so many really scary things that might happen.” Liz McQuarrie, Saskatchewan Social Services, Regina

“I’d put the bugger in jail, is my thought. I’m trying to be open-minded here and listen to all opinions, but we talk about the conditioning process, that this woman has become isolated, her family has been pushed away from her. These men, their mindset is that they con. You’re going to get to the sentencing circle, and this guy will say anything because he’s done it before. That’s what he does. He did it with her, he does it with his family, with the police, and he does it with the judges. He comes off so great because that is what he has conditioned himself to do through the whole process. How are you going to know whether or not this guy’s just going along with the program and in the end, his woman is going to get it for making him go through this program?” Holly Pelletier, Support Worker, Shelwin House, Yorkton, SK

“Reintegration of the offender into the community, in our experience, with woman who have experienced crimes of sexual assault, creates a great deal of fear and as a matter of fact, re-victimization, not healing, for the survivor. A survivor’s sense of safety is so deeply compromised after a sexual assault, they often feel too fearful to go outside even when the perpetrator’s been incarcerated. Knowledge that the perpetrator is at large is usually frightening and actually a very re-victimizing experience for women.” Irene Smith

“There would have to be good supervision where the victim didn’t have to worry about being stalked or maybe killed.” Anne McGillivray, Professor, Faculty of Law, University of Manitoba, Winnipeg, Manitoba

“Can restorative justice work in cases of domestic violence? As a survivor of life threatening domestic violence, my reaction is to say a resounding NO, but to be fair I’m willing to look at both sides. There is some value in allowing the woman to speak to the offender and express to him how he has victimized her. As well, there is a tremendous value in having the appropriate authority around the woman reinforcing that she has been the victim of a crime.

There would need to be, at a minimum, the following in place for the situation to have a positive effect for the victim: a time period away from the spouse for the woman and her children before the restorative justice meeting; counseling for the woman and her children; an understanding that the woman and children may be in danger following the meeting and will not leave with the offender, that the woman will

be escorted home or to a safe shelter; the understanding that this exercise is being done for the benefit of the victim, not for the benefit of the abuser. But the case can certainly be made that the risks of using restorative justice strategies in cases of domestic violence far outweigh any benefit.” Judy White

### **3. Informed choice, unencumbered participation**

There was also concern about whether women can actually have a real, informed choice when it comes to participating in restorative processes. Here the empowerment of women, or lack thereof, emerged as a key concern:

“The whole issue about violence in relationships and sexual assault is about dis-empowerment. We believe, in order for the system to be working effectively, we need to be building at every step of the way processes that work towards her empowerment. Giving her the opportunity to have some control, we think, is key.” Tracy Porteous

Of course, empowerment begins with the right to choose freely. Does the woman feel pressured by her partner or community, or even by the process? Irene Smith reported that under the current measures of the new Nova Scotia policy, a case could be referred to restorative justice regardless of the victim’s wishes. (And see *R v. Taylor* [1995] 3 C.N.L.R. 167 (Sask. Q. B.) where the trial judge reasoned that “a circle may be held even if the victim is opposed to it.”) “That flies in the face of the very premise of restorative justice.”

Others maintained that real choice in the case of domestic violence is not possible. A battered woman can not truly choose, due to the power dynamics inherent in the situation. Healing and empowerment work can take several years after a victim leaves the abusive relationship. Until this period is over, participants contended, the woman simply cannot enter into processes such as mediation or restorative justice voluntarily, or participate freely:

“Participation in restorative justice while still entangled in an abusive relationship can encourage the mistaken belief by the victim that she can somehow help to change the abuser. And when is she finally not entangled?” Judy White

“It may not be possible for a victim of domestic violence to act with concern for herself during the restorative justice process. Victims have been conditioned to consider only the abuser. This strategy is deeply ingrained—the survival of the victim, her children and family depend on it.” Judy White

On the other hand, the point was made that some women want and do choose alternative processes:

“She said, ‘Even now I would like that opportunity to tell him exactly what he did to me and how it felt. I don’t know if it’s going to repair anything, I don’t know that, but as a victim, just being able to let [him] know how it impacted me, and if he chooses not to hear it, [at least] I know I’ve said it to him. It’s a start to the healing process.’” Wanda Gamble, quoting a survivor

Lennard Busch’s office receives calls from victims saying they would like to report an abuser, but they want to be assured first that the situation will be dealt with in a family group conference. These wishes must be acknowledged and respected. In the end, victims should have choice and control. Every case of spousal abusive must be looked at and assessed individually—each situation is different. But information and proper support must be made available to those making choices:

“We believe we should not be approving a referral to an alternative measure unless the woman is fully consenting. And the nature and dynamics of violence against women are such that initial solicitation should take place with somebody who has some experience and some background in the area of women’s psychological socialization and the nature and dynamics of abuse. Rather than have that piece processed by a corrections person (somebody who has experience and expertise working with offenders), we think that that referral and work should be done by a women’s service or a First Nations women’s service. So that somebody can really spend some time with her over a course of perhaps a number of sessions to provide her with an opportunity to really look at the full impact of the abuse. So that she can come to a fully informed place of consent, if that’s the route she goes.” Tracy Porteous

There was consensus among participants that women must have informed choice—there should be a process in place whereby women are advised of their rights and entitlements, and of the advantages and disadvantages of restorative justice before making a decision to participate. The necessary time must also be taken in order to provide the victim with an opportunity to fully look at the impact of the abuse and to make an informed decision on how to go forward. But whether a battered women can ever freely choose and/or participate remained in issue. Norma Green insisted that “real restorative justice process cannot occur without consent—nothing happens without the survivor or the victim’s permission”, but pressure to enter mediation or other alternative processes can come from multiple sites—not only from the spouse but from the family, the community, and/or the justice system itself.

#### **4. Power dynamics and multiple sites of power**

Possibly the most intense focus of opposition and words of caution regarding the use of restorative justice measures in cases of battering and sexual assault against women centered on the issue of power. Violence against women is embedded in unequal power relations manifested on the societal level and in its institutions—within different groups and communities, within families, between men and women, between offender and victim. It is the myriad inequalities in power relations that create and sustain conditions of disadvantage for women:

“Is restorative justice single-incident oriented or, conversely, how does restorative justice fit in terms of systemic violence against women? We live in a context of violence, in a racist, sexist, classist, ageist, etc., society. So what do we do with our context when we talk about restorative justice?” Helen Smith-McIntyre

Issues of power are especially pertinent in restorative justice processes because these processes are meant to facilitate solutions that meet the needs of all parties involved. As Anne McGillivray pointed out, the challenge of restorative justice should be to restore relations of equality. Given the inherent power imbalances, however, it may be next-to-impossible to have an equal level of victim focus and input into these processes—and the consequences can very easily be further victimization. Some of the participants see these inequalities as so pervasive that restorative justice processes cannot escape them or be immune to them:

“I wanted to be clear that I agree with restorative justice in the sense that it should apply to youth, and it should apply to property crimes. Although I think the justice system has failed us terribly, when it comes to situations of violence against women, whether it’s violence in relationships or sexual assault, I do not think restorative justice is appropriate. We recognize what the socialization process is for women in the patriarchal society we live in. We know women are socialized to be passive, to not play an active role in their communities. Or even in their personal lives.” Fay Blaney

“Justice wants to make things easier for women to be heard after they’ve been hurt, but it’s not possible to have equal justice when the system on which the laws are built is biased in favour of one group—in this case, white upper-class privileged males. It dawned on me that we are doing essentially what women have been doing all these generations—trying to find a unique way, or another way, of getting men to stop their violence. Maybe if we did it this way, they’d stop their violence. Maybe if we talked about that, it would stop their violence. My fear is, we’re doing the same thing with the justice system. Maybe if we do restorative justice, it will stop men’s violence, maybe if we do mediation, it will stop men’s violence. We’re not challenging the system.” Wally Roth, ED, Alternatives for Men who are Abusive to their Partners (Saskatoon)

“Both genders get criticized and punished in various ways if they don’t follow their expected gender role training. For instance, any woman who acts too male-like is called names like ‘butch’. A man who shows his feelings is called a fag and teased for not being tough enough. Men are told they have to be in charge, the head of the house, to wear the pants in the family. All this training leads to a belief system that supports men to dominate women at home and at work. Because there’s so much support for men to be

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superior to women, men are expected to use controlling behaviours including physical violence to keep women in their place. Just look at how the media portrays women in comparison to men.

Men would probably welcome the chance to work things out with their partners in order to get the relationship back to where they wanted it. I'm also thinking that many women as well would be happy to go along with this new procedure because they would be hoping this might finally show their husbands they were wrong and needed to stop hurting them. Even if we could set up a process that would take these biases into account, how could we be sure these same laws wouldn't just end up benefiting men more than women? The intent of restorative justice is to restore broken relationships. Why would we want to encourage restoring relationships to one where men are expected to be dominant over women?" Wally Roth

The point was made that the justice system is inextricably linked to the larger structures and power relations governing even the most trivial of our everyday activities. People repeatedly spoke to the fear that issues around racism and sexism and classicism and homophobia, clearly documented and identified within the current justice system, would perpetuate through restorative justice measures into a community apparatus where there is even less ability to control it:

"There is absolutely without a doubt systemic discrimination happening within the current justice system. What guarantee do we have these same people who will be given the discretionary power of referring something to a restorative justice model are not going to operate on the same myths currently within these forces?" Irene Smith

Power relations are certainly critical for all women because it is primarily men who establish and maintain the ruling structures and institutions, and who overlook the needs and concerns of women. For Aboriginal women, these multiple sites of power are further complicated by the interaction of colonization, racism, culture, class and gender. This was brought out in many ways during the forum. Fay Blaney in particular presented a damning critique (though one disputed by some of the Saskatchewan Aboriginal women present). Fay touched on many of these levels as they affect Aboriginal women and on how they might jeopardize female victims of violence in restorative justice resolution:

"It's really important to talk about some of the systemic and institutionalized discrimination we face as Aboriginal women. I'm intending to do this so we can make our case that we do have patriarchy and we have colonization within our Aboriginal communities, not only historically, but today. It sounds wonderful on the surface that Aboriginal people are getting the right to self-government, but underneath that is the very hard reality that Aboriginal women don't have a voice in that process. We have patriarchy in our Aboriginal communities. We have matrimonial property rights the men are wholeheartedly supporting because it benefits them. Matrimonial property rights on reserve, for those of you who don't know, mean Aboriginal women on reserve do not have equal division of assets in matrimonial breakdown. (There is no legal protection for women on reserves whose marriages end in divorce. Houses are usually band-owned and it's often up to the band councilors and chiefs—mostly men—to decide which spouse can stay in the matrimonial home.)

Someone this morning said women are violent too. That is true, but the fact remains, the overwhelming number of victims are women, the overwhelming number of offenders are men. It's men who batter women. We have language that's been sanitized. We talk about gender equality instead of talking about which gender is equal and which is oppressive, and we also talk about domestic violence as if it's violence in the household with one partner against the other. It's not. It's the husband beating the wife, generally speaking. Women are the victims of violence and it permeates all our laws across this country whether it's in Aboriginal communities or not. Aboriginal men are benefiting from those privileges, and they exercise those privileges, and they continue to enforce them. If you look at the structure of who are the chiefs in this country, it's abundantly clear who is in control. I know that those of us who are going to post secondary and getting three degrees like you were saying, it's Aboriginal women who are doing that, but who sits in positions of power and authority? It's men. Overwhelmingly the chiefs across this country and the presidents of the boards of directors and the executive directors, those are men. There's something terribly wrong with our system if we have women in places where we're highly powerless to decide our own futures." Fay Blaney



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The discussion of power in formal and informal relationships went on to look at how the pressures of family and community can be very potent in a restorative context. Participants spoke about the lived environment, the psychological foundation set up for women who are abused—the basic and inherent inequality of power that exists between the battered woman and the batterer:

“My partner’s family desperately wanted me to stay in the abusive relationship. They often tried to make it better by treating the children and me very well, but the reality was they were afraid of losing a relationship with their grandchildren if their son was found guilty of assault. My family, on the other hand, had different motives for not addressing our abusive situation until it was almost too late. With a deeply religious background, leaving a marriage went against all values my family held dear. Also, as the abuse progressed, my family learned to fear my partner too and had concerns for their own safety. And they witnessed first hand how working through the justice system had ended in inaction and apathy. They felt as helpless as I did to protect me and my children.

What would have happened to me if I had been offered the choice of restorative justice [in the first few years] after I left? When I was still living with so many pressing reasons to go back, not the least of which was that he was stalking me, terrifying me, to the point I thought it would be safer to go back? How could I have stood up for myself then? What would I have been able to say?” Judy White

And as for the utter dis-empowerment of a rape victim by a rapist:

“I heard Pauline [Busch] say in the last session that she doesn’t see the day her program will ever be ready to handle cases of sexual assault.” Virginia Fisher, PATHS Coordinator and conference organizer and host

“I guess I start by clarifying what I said about [sexual assault cases], that we’ll never see the day [when we do them]. When I speak about that, I’m thinking in terms of rape.” Pauline Busch

Shawna Lekowsky, volunteer with the Prince Albert Police Victim Services Unit, wondered about the composition of sentencing circles and community justice groups. Her concern came out of her experience with a victim who had agreed to a circle, but after going through all the preparations, found that the sentencing circle was the abuser’s family,

“his entire family. It was all his cousins and relatives. I think that would be very intimidating as a victim to see none of my peers, but all of the abuser’s family. You can say the hardest person to be judged by is your own family, but [on the other hand] no family wants to see something bad happen to their own.”

Victims of domestic abuse, even those open to considering restorative justice as a possibility, identify these family and community pressures as a major concern. Those in [Black Eyes All of the Time](#) wanted to make absolutely sure the process is free of bias, and free of manipulation by the accused and his supporters. Many victims and their supporters have experienced just the opposite:

“where the accused (or where their abuser, let’s just say, because often it didn’t even make it to the level of accused) was rallying all sorts of powerful strengths around themselves to prevent that person from complaining.” Anne McGillivray

“I see men as manipulating that system, as an easy way out. In the majority of communities it is usually relatives who sit on the sentencing committee anyway.” Survivor, [Black Eyes All of the Time](#)

“I have recently spent time with a woman from a small community in Ontario whose husband is a prominent businessman. She told us her experience in trying to get help for her family. She has four children. Nobody, the schools, the hospitals, the courts, the police, nobody really wants to deal with this situation. There is tremendous collusion going on.” Michelle Landry

“We have a track record in many Aboriginal communities where the communities rally together, particularly the leadership, they rally together to support and defend offenders and they don’t come to the aid of victims. I just see [restorative justice] as an extension of a system that already exists in which Aboriginal women are silenced. We have been colonized so badly. It’s a patriarchal society and it is steeped in the Indian Act, and we are steeped with it in the non-native society as well.” Fay Blaney

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“That [manipulation] is what we are talking about. This is exactly the thing that shouldn’t happen and does, and we already know it does. We don’t want to just keep adding to the list of horror stories.” Virginia Fisher

Women need input into the system to ensure that their abusers will not be their judges, but how can we guarantee them the selection of a meaningful community of people equally supportive of the victim and offender? How can we ensure power imbalances are not brought into the restorative justice process? How can we know for sure family and/or other dynamics are not working to protect the offender at the expense of the victim? We know that restorative justice practices will take place within sexist, patriarchal, classist and racist milieus, among others. How can we be assured that this reality will not influence or distort the restorative justice process away from the goal of relations of equality?

“The questions that always need asking are who has the power, and who benefits? Please let’s not fail women again.” Helen Smith-McIntyre

### 5. Denunciation and deterrence

Debate took place around the denunciatory impact of restorative justice and to what extent restorative justice acts as a deterrent to crimes of violence against women. There is, apparently, little in restorative justice literature addressing the importance of creating or maintaining deterrence in cases of violence against women. Flawed though the current system may be when it comes to these cases, turning to restorative justice could be even worse. Many participants feared that implementing restorative processes for battering and sexual assault would be interpreted as a move toward the decriminalization of sexual and domestic violence, or its re-privatization, thereby reversing hard-won advances:

“It is unlikely restorative justice would be used as stronger justice than [the current system] in the eyes of either the victim or the offender. Current justice methods leading up to a court appearance already lean heavily in favour of the offender. During the judicial process, abusers do not receive the message their behaviour is unacceptable, much less criminal. Restorative strategies seem to me to leave the door wide open for even less onerous consequences for the abuser.” Judy White

“My guess is, if restorative justice was a real threat to men, there would be lots of them here opposing it.” Wally Roth

Lisa Addario, Executive Director, National Associations Active in Criminal Justice, Ontario, challenged Judge Huculak’s firm endorsement of the denunciatory impact of restorative justice. The writings of Inuit women Lisa had read and her own experience of sentencing circles in Ottawa suggested otherwise. And according to Irene Smith, the intent of restorative justice works against delivering a sufficient denunciation of the crime and, in fact, jeopardizes the victim’s well being:

“Restorative justice encourages forgiveness and I want to say very clearly, we are not in the business of forgiving sexual assault and domestic violence. We are in the business of stopping it, zero tolerance. Forgiveness is not essential to the survivor in her healing process. If the survivor is pressured or guilted into forgiving a perpetrator prematurely, it can actually sabotage her healing process.” Irene Smith

Anne McGillivray’s study documented in *Black Eyes All of the Time* supports the idea that victims want vindication—they want a clear and forceful denunciatory message, backed up by a sufficiently strong sentence:

“The survivors who were interviewed had a lot to say about the wrist-tap sentences their offender got. But they also felt that the threat of a prison sentence was much more of a deterrence than the possibility of attending a meeting to engage in a dialogue or an apology.” Anne McGillivray

“Yes, he was sentenced, but not to jail. He was just given 100 hours of community service work. He didn’t learn anything from it.

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I think they should send them to jail instead of going through all that. Behind bars for what they did to people, for what they did to partners because if they send them to something like that, camps or something, they're going to think I can do it again because he's not behind bars for what he did.

It's too easy, it's too easy for them because most abusers don't realize what kind of pain they put their partners and kids through. Restitution, or going to counselling, community service work? Too easy.”  
Survivors, Black Eyes All of the Time

Yet even in that study, there were survivors who were open to and agreed with what they saw as certain advantages of restorative justice (“Nineteen out of the 26 women thought it [alternative measures] was worth a try. They expressed a number of concerns. Some had experienced a little form of it. Some had not experienced it at all. They wanted close supervision of the process, they wanted safety for women and children, they wanted recognition that some offences cannot be diverted and should not be diverted, either because of the type of offence or because of the seriousness and severity of the offence. It depends on how severe or to what extent the violence or abuse is. It depends on the type of abuse, whether sexual or what.” Anne McGillivray), such as a rehabilitative capacity they did not see the criminal justice system fulfilling:

“I think trying to help them would be a lot better than trying to get revenge on them or trying to do something worse to them. I don't think they're going to learn anything if nobody is there to help them.

Some of them have just about killed their partners. Those are the ones who should go in court and the public can see what's going on out there. But those who are not doing bad, like not really hurting their partners should go and ask for help. Maybe those are the ones who would get better soon.

It would probably work better than the justice system. It wouldn't spit [them out as] hard-core criminals. Someone goes in for petty crime and comes out hard-core because you know, that's the way jail is.”  
Survivors, Black Eyes All of the Time

A common opinion underlying the view of those concerned with the non-denunciatory impact of restorative justice was that crimes such as domestic violence and sexual assault have a public/social element that precludes a 'private' solution approach. Gender violence is a crime, a serious crime. It is not a dispute. It is an anti-social act at a basic level that the justice system must judge and prohibit with according severity. Deterrence requires a conviction and a sentence that sends the message to others that such behaviour will not be tolerated. Society requires a strong statement in keeping with the seriousness of the offence—and incarceration may be the only way to deliver that message. Thus the importance of consistent arrest and prosecution along with adequate sentences in deterring and denouncing abuse.

Another viewpoint, though, is that arrest is not necessarily the best way to protect the woman, or to denounce and deter further abuse, or to serve the interests of the victim, the family, the community. The offender can be arrested only to be released a few hours later, coming away more angry and more violent than before. Or the offender may lose his job if sentenced and this ultimately leaves the victim and the family deprived. And prison does not generally make individuals less violent:

“Housing people in institutions, and I speak from the experience of a people who have been housed in institutions from infancy to death ... if you see the number of people in Saskatchewan currently housed in corrections, it certainly has not served as a deterrence for our communities.” Pauline Busch

“My husband works at Saskatchewan Penitentiary as a guard, and he says, ‘From what I see, all they learn when they're in there is how to be a better criminal.’” Wanda Gamble

“As for corrections [contractors], that process Tracy was talking about, ( [positions funded in B.C. to spend no more than 4 hours interviewing the woman and everyone else in the case to determine whether or not this is an appropriate referral for an alternative measure]) we'd give anything to have something like that in our communities. As it is, we just send the guys to jail and then they come back and beat up their old lady again.” Jackie Ballantyne,

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Chairperson, Victim Services, La Ronge, SK, and Mental Health Social Worker, Mamawetan Churchill River Health District

People arguing this viewpoint saw the involvement of community and family in the process as a positive factor in stressing denunciation. Having your peers, your family, elders and so on sit in judgment and denounce actions was held to be more effective, with more impact, than the court or a judge:

“When we do something wrong, the people who are in the best position to communicate the shamefulness of what we had done is those we love, family we love, friends we respect, those individuals who have the most influence on us.” Norma Green, quoting John Braithwaite, Professor in the Law Program, Research School of Social Sciences, at the Australian National University

“When you have a guy who’s beating his wife and you put him in court, he doesn’t have to say anything. His lawyer speaks for him. He never has to admit he ever did anything. But if he wants to participate in a circle, he has to be prepared to be accountable for what he did and to articulate in detail what he did, and he’s not doing it in front of a judge he may never see again. He’s going to be in a circle where perhaps his buddies from work are there, his minister is there, his parents, his children, his siblings, and he has to say in front of them what he’s been doing. This has been a hidden crime, nobody knows what’s been going on. When he [finally has to tell], the chance of these people condemning his behaviour, people he cares about and wants respect from, condemning his behaviour, certainly has a lot more potential of changing that pattern of behaviour than a judge saying, well, six months probation or two months in jail.” Lennard Busch

“In the responses from the 2,000-plus men we’ve seen in our program so far, the majority of the men would rather be punished than be held accountable. The men would sooner go to jail, get it over with, and then say to everyone, “I’ve done my time, leave me alone,” than be held accountable for their behaviour. That’s been a very shocking surprise we received from the men. It shocked me when I first realised that’s what men really wanted.” Wally Roth

It seems, then, that arriving at true accountability on the part of the offender, not just a jail term, is key to affecting change in attitudes and behaviour:

“Under the current justice system, these men get such short sentences that violent men don’t mind serving time. They know the sentences are not measuring up to what the crime is.” Wally Roth

Though confident of the power of communities to denounce violence, Judge Huculak did admit that to date there has been little research on the denunciatory aspect of restorative measures. Such an investigation, along with research on other claims of restorative justice, needs to take place so there are empirical data on which to base conclusions. In the end, participants agreed that restorative justice initiatives need to ensure that the process includes an appropriate denunciatory message, both to the accused and the community, so these measures will not be seen as going lightly on serious crimes. Nor can these programs offer offenders refuge from culpability and criminal sanctions. Disagreement centered on how this is best effected, and if it is actually possible within a restorative justice framework.

## **6. Offender focus vs. victim focus**

Another point of debate was the focus of restorative justice measures. As Judge Bria Huculak defined it, restorative justice is supposed to meet the needs of the victim, the offender and the community. But Virginia Fisher challenged this: “Last night, you heard [Judge Huculak] say it is a myth that restorative justice is for the offender. However, I think a lot of people were wondering why she thought it was a myth, because a lot of us, I think, see it as a reality.” Many other participants agreed that too much emphasis is focused on the offender, while the needs of the victim and others impacted by the crime are overlooked. In referring to the development of restorative justice, Michelle Landry remarked that certainly initially, the focus was on the offender, and restorative justice had little use for the victim:

“Yes, I think you are right. Traditionally, restorative justice—in the way it has evolved—has not really attended to the victim’s needs and rights. The focus has largely been, and it is an important focus, to stop the offending behaviour. Victims talk about why they are really not interested in restorative justice, and [proponents] of restorative justice have had to acknowledge that people involved in instituting so called

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restorative justice programs have really not done a good job in giving victims prominence. The people who've instituted these programs have largely been people who've worked with offenders, so there's been a real imbalance which we need to address. For example, the John Howard Society has done wonderful work but they are, as far as I'm concerned, identified as working with offenders, right, and allied with offenders, so how comfortable are victims really, going to the John Howard to have them do an assessment? There's no sense there of neutrality." Michelle Landry

The focus on the healing or rehabilitation of the offender was, for those in favour of restorative justice, a key benefit. While other participants were worried this would be at the risk of further victimizing the victim, those arguing for restorative justice see offenders as victims themselves—victims of socialization, abuse, circumstances—who require therapy, not punishment:

"We have to get to the core. Why does a person offend? I think everybody knows we all like to be in control of our lives, and I think, how do we empower people to know they can take control of their lives? I'm thinking of the men as well. Especially the men and what has happened to them as children. I mean, were they abused, did they grow up in a household where there was all types of abuse happening? And it is common and what usually happens is two unhappy people, unwell people, find each other. They'll find *somebody who is willing to be abused and manipulated*, so there is a *co-dependency* role here too (Italics added. The words in italics were included here to show how even those who know better can say things that could be construed as victim-blaming. This underlines the concerns about the amount of training and understanding of the dynamics of these crimes required of those who will be the gatekeepers, administrators, and workers in restorative justice programs)." Norma Green

"Our elders tell us that hurt people hurt people. This means that a program for the abuser and the abused must be available for a restorative approach to domestic violence." Bev Poitras

But the negative side to this approach diminishes the abuser's responsibility. It removes agency from men's violent behaviour and trivializes abuse against women:

"I am dismayed by how many times I've heard about us needing to consider the complex background of the offender. I am telling you, survivors also have complex backgrounds. Violence is a choice." Kathi Cridland, Saskatoon Sexual Assault & Information Centre

Other participants expressed apprehension that the offender's victimization could take precedence over the wrong done to, and the needs of, the victim. It is support for those exposed to violence that counts, support to take those measures that effect change—to expose violence whenever it happens, to create the conditions where women and children can safely reveal abuse, to take court action, to do whatever is needed to make the change.

Closely connected with the misgivings over offender focus was the suspicion of developing an approach that would make a victim part of an aggressor's treatment or would reduce the offense of domestic abuse to a 'couple's' problem:

"To involve sexual assault survivors in a process intent on preserving the offender's integrity and reintegrating him into the community places a tremendous responsibility on the survivor to support the perpetrator's healing. We all need to be significantly concerned by that. Allocating even the minimum responsibility to the survivor for the offender's healing can all too easily support the common myth that women survivors of violence are somehow responsible for the crimes committed against them. I think that's a real danger of the restorative justice program when they talk about restoring the relationship to where it was previously." Irene Smith

And the use of a mediation approach in the context that spousal abuse or sexual assault is merely a disagreement can be extremely dangerous. The violence and abuse itself has created such a power imbalance that to ensure that the process is actually restoring victim equality would be very difficult. From the victim's perspective, would alternative processes to criminal justice indeed be more effective than simply having adequate victim support services within the existing system?

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“Victim input, victim safety, vindication, and victim satisfaction are what [survivors in the study] wanted. These are promises the justice system has made that it has not yet kept. I think this is what diversion would have to actually keep as a promise if it were going to work for women.” Anne McGillivray

### 7. Definition of ‘community’

Restorative justice relies heavily on the notion of ‘community’—it imposes more responsibility for the causes and the effects of crime on the community than does the current criminal justice system, as a means to affirm and strengthen the power of community and to reclaim the community’s involvement. Restorative justice proponents in cases of violence against women see this as positive, those against are not so sure. What is ‘community’, what is the nature of community involvement, do cohesive/appropriate communities actually exist?—these are the concerns of the latter group. Division on this issue amongst participants fell along cultural lines—Aboriginal/non-Aboriginal—although there were important voices of dissent within each group. This division is understandable when the dynamics of community-making and identity are considered. The ‘community’ conceived of during the conference, implicitly and explicitly, looked to be closely-knit with relational ties not only between the disputants, but between everyone involved in the resolution process. Any solutions reached by the process would be enforced by social pressure from a collective body involved in most aspects of the lives of the offender and the victim. There was also the notion that members of a ‘community’ share some prevailing idea of mores and a common notion of what constitutes justice. Critics, though, doubted that many of today’s fragmented centres of population, urban or otherwise, bear much resemblance to this notion of community (if any ever did), situated as they are in a highly mobile society where people may or may not know each other, may or may not share the same set of values, may or may not have any social cohesion, may or may not even be just:

“I have a question about appropriating other people’s culture. When I look at my own culture there are some problems we have. When I turn on the television and we’re more concerned about the NASDAQ than we are about what is happening with children starving in other parts of the world, I think we have a very long way to go before we can do restorative justice. We can’t even restore our communities. I think of things like living in urban areas in this province and in Canada where we don’t even learn who our neighbours are. It is very hard for me to trust that we could take a process like this and make it work.”  
Ken Crawford, STOPS to Violence, SK

“The comment about appropriating people’s cultures I think is a very important one. Certainly in Nova Scotia they’re saying we’re going to do this community kind of response in terms of restorative justice, but I don’t know who my community is. I think that is a fair question. Can we indeed take a model such as you’re suggesting and plunk it down in my community?” Irene Smith

“I don’t wholly agree that shaming can be an effective tool today in the society we live in. In traditional society, if there was shaming, you were in a closed community in which it was effective, but in today’s society, you can go anywhere and everywhere. And I don’t think we are at a place where we think violence is an abnormal thing. Aboriginal communities have rates of violence of 80% and higher. [This is what is normal.] Violence is an everyday thing in our lives and so we are not ashamed of it anymore and neither are our elders. Our elders are also the perpetrators of that violence. I don’t have confidence in that community, to ask that community to be the one to talk about shaming. Why would we call in a community that’s been socialized in that way to tell what is acceptable and what is shameful?” Fay Blaney

It was also pointed out that community is intimately linked with, and a product of, power relations. Communities are not homogenous. Power inequities within the community can easily corrupt and misuse a program:

“My concern is around the question of community. First of all, Aboriginal communities don’t look anything like the traditional communities that existed a long time ago. Second of all, I think we’ve misinterpreted what those communities used to do around issues of justice and we’re basing those things on romantic notions. Emma LaRocque (in *Re-examining Culturally Appropriate Models in Criminal Justice Applications, Aboriginal Treaty Right in Canada: Essays on Law, Equality and Respect for Difference*, edited by Michael Asch, UBC Press, 1997) talks about the ways Aboriginal peoples dealt with issues of violence [traditionally] and it was certainly not always restorative justice. So I have a big problem with the notion of using communities in that way. We have examples in B.C. of the Access to Justice Program where they were going to put a sexual assault offender through an Aboriginal spiritual system and the elders said that was highly inappropriate, that is

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not what our spiritual ceremonies are for. Yet there is political interference in the process. That particular offender happened to have male relatives in positions of power who insisted restorative justice be used.”  
**Fay Blaney**

Proponents of restorative justice argued that a ‘community’ is not necessarily a geographical entity or a grouping of close relations, but can be a locus of ‘care’ capable of developing anywhere:

“We have to look at how we define community as well. Community of care as opposed to the town of such-and-such.” Lennard Busch

“Community—a community can be developed anywhere. I don’t think a community should be isolated to just a certain group of people. Community can be developed anywhere. In our First Nation communities, we’re just starting to build that community networking and the supports in it, and I think that can happen anywhere. The other thing that elders say about restoring community and sharing values of other people, they say, you take the best of every culture that you know about or that you study, or that you hear about, and you leave the bad. They say that about our own community, our own culture, and our own traditions. Take the good and leave the bad.” Bev Poitras

### **8. Community resources and volunteers**

All participants agreed that a lack of resources—technical, human and financial—has the potential to undermine the efficacy of any community-based service. Under such circumstances, restorative justice initiatives—notwithstanding the positive intent behind them—run a very high risk of failure. Even supporters of restorative measures insisted communities must have the necessary means to provide continual support both for the victim and the offender, prior to, during, and following any process. Debate centred around how and whether this could be accomplished.

The possibility was raised that the justice system was actually using restorative justice as a means of diverting cases of family violence and sexual assault away from the justice system as a cost saving measure and because family violence was not taken seriously by the criminal justice system. Lisa Addario doubted that such motivation at the political level for these programs—to decarcerate and ultimately save money—will lead to effective restorative justice initiatives:

“Ultimately there should be little or no cost saving. Money diverted from the justice system should be transferred into the community in order to provide sufficient program support for restorative processes.”

But will this transfer happen?

“Given the history of Nova Scotia when it comes to allocating resources to the community to respond to the various public policies and programs they have implemented, it is very unrealistic [to trust] that sufficient resources will be allocated for groups like Avalon Centre to provide the kind of support and counselling women need. We have not seen and we certainly do not believe sufficient resources will be allocated to ensure there is money to assist the offender in reintegrating into the community.” Irene Smith

And in Saskatchewan:

“We’ve had 1,400 people [a year] come through mental health since we went into the health district. And just about as many through addictions. We have referrals from prosecutions, victim services, and probation officers. [Mostly] it has to do with domestic violence and sexual abuse cases, either primary perpetrators or secondary victims. Basically we have victim services and we have four mental health counsellors for an area a quarter of Saskatchewan that begins just outside P.A., and extends north [from there almost] to the NWT and east to the Manitoba border. We don’t have enough to do what we need to do back home.” Jackie Ballantyne

Within this discussion of resources, concern arose over the appropriateness of utilizing and depending on the services of volunteers for restorative initiatives. Many were concerned volunteers might not possess the necessary background and training to facilitate these processes. As well, the use of volunteers and unpaid professionals downloads the responsibility of resourcing these functions from government to community:

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“Within the restorative justice model in Nova Scotia, they’re proposing it be volunteers who engage in a facilitated meeting with the perpetrator and the woman who has survived sexual violence or domestic violence. I have serious concerns about volunteers facilitating that kind of a meeting, and again, if government are suggesting they are not downloading to the community, isn’t asking volunteers to do pro-bono work exactly that? It takes a great deal of training and understanding about the dynamics of sexual violence and domestic violence to be able to facilitate those kinds of meetings.” Irene Smith

Are volunteers resources? How are resources to be measured and by whom?

“Communities need the resources for the circle of support in order to provide the follow-up and the after-care. Communities know what they can deal with. Many of the communities we go into when we start our restorative justice initiatives to speak to them about what restorative justice is, they have to determine what resources they have. Many of the resources they do have, they say, well we don’t have any money for them. I’m saying, don’t look at it as money. What kind of resources do you have in your community that are not financial? What kind of elders do you have in your community, what kind of men do you have in your community who were abusers, who are free and are coming out now to speak about it? What kind of resources do you have in your churches? What kind of resources do you have in your First Nations? And they talk about their family support system, their alcohol programs, their parent aids, and their foster-care people in their community. These are all resources. We should never stop a program of healing just because we don’t have any money. There are processes in our community that are very effective, but you’ve got to search them out and find them, and not be stopped by saying we have no money.

Community justice forums and alternative healing treatments are excellent forms for providing a network of support for the women, and making sure the offender knows their behaviour is visible and now widely known. Awareness that someone is watching sometimes can change behaviour. Now I’m not saying that it does in all [cases], but sometimes it can. People can change with proper techniques, support, and skill development. There’s developing skilled counsel in our communities in First Nations traditional values of love, respect, honesty, trust, and family, traditional roles and the restoration of our spiritual teachings.”  
Bev Poitras

## **9. Guidelines, standards, training, monitoring and evaluation**

“There needs to be funding. There needs to be screening, really clear screening and training and guidelines, and standards, and monitoring, and a tracking system in place. And all of these things in place before going down the road.” Tracy Porteous

There was strong agreement that clear, coherent, equality-promoting guidelines, principles and standards must define all restorative programs, and that the policy, the guidelines, the screening, and the training must be in place before moving toward these kinds of solutions for cases of violence against women. There must be tracking processes for offenders from province to province, and within provinces. (Without such a tracking system, if, once an offender successfully completes an alternative measure, he has no criminal record, an individual could commit a crime of sexual violence in one jurisdiction, be provided with an alternative measure, then travel to another jurisdiction and commit the same crime there and it will look like a first offence. Studies underline the high rates of recidivism involving cases of violence against women—any alternative program must have standards in place to ensure provinces can track offender behaviour from place to place.) There must be transparency, accountability and a monitoring and evaluation process in place.

Bev Poitras, who ultimately supports the use of restorative justice strategies for family violence, qualifies her support by saying:

“Under certain circumstances. Each case is unique and should be evaluated by the Crown as to the appropriateness of the case for alternative measures. There must be certain safeguards in place, a process of including contemporary and traditional assessment of the situation, the support for the victim and the offender, and acknowledgement of improper balances in the relationship, the seriousness of the assault, and the length of time this has been happening.”



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The reality is though, that even in Saskatchewan where offences of domestic violence supposedly fall outside the realm of restorative resolutions, some cases are being dealt with in the ‘gray area’. Who is making the decisions about these cases, and on what basis, under what criteria, and on what information? According to whose standards is it to be determined that an adequate and appropriate safety and support system and other necessary resources are in place? Should these standards and processes vary from community to community? In the sense that restorative resolutions are seen to be community-owned and community-driven, province-wide standards for cases like these may be very difficult, and contentious, to arrive at, to implement, and to monitor.

### **Concluding Session**

For the final session of the conference, all invited speakers were asked to make a short summation, and to speak to the question of how to proceed—to give concrete recommendations on how to move forward with Saskatchewan Justice on this issue. Discussion and questions followed.

During the opening session of the conference, Judge Huculak acknowledged that:

“restorative justice is not a panacea for violence [against women]. It is not an answer to criminal conduct. It can be part of a solution, but only part of a bigger solution.”

Even so, to a large extent discourse during the conference, as in most debate, was driven and shaped by dichotomies. During the concluding session, there was an important call towards bridging these dichotomies in a constructive manner. Many participants voiced the need to move beyond a mindset of ‘either/or’. The futility of approaching this issue as an ‘either/or’ or a ‘for-or-against’ proposition was stressed in various ways.

First, the reality that a restorative justice ‘system’ will not soon supplant the current criminal justice system was recognized even by those firmly in favour of introducing restorative process in cases of violence against women. The requisite supports are not yet in place and restorative resolutions are not suitable or successful for all cases. There was wide agreement, therefore, that we must remain vigilant about the current justice system. It must be held accountable and its flaws not forgotten. Many participants advocated pressure for improvements and innovation in the administration of criminal justice in the province, with a focus on the woman as victim/witness and on the child as victim/witness, and on the responsibility of Saskatchewan Justice to treat these cases appropriately:

“The current justice system is not going to go away. It has to be made to work in a more subtle, more sophisticated, more careful, more victim-centered way. Part of that means getting victims’ voices into the justice process in a far clearer, far better way than is now being done. We have to hold our justice system accountable for its failure to pay attention to women as women and children as children. We know a lot about what could be done to start making those things work much better.” Anne McGillivray

“The either/or dichotomy is a set-up, and we, whichever community, cannot allow ourselves to be forced to choose between a ‘more’ or a ‘less’ inadequate approach.” Wally Roth

Second, most attendees, both those emphatically in favour of restorative solutions and those with a very cautious stance, spoke about the use of restorative justice in conjunction with the criminal system. During the conference there was a wide range of suggestions about how and at what stage the two could and should be combined and under what conditions either one should be used:

“For example, the horrendous story we heard from Judy that was read into the record today talked about how over a period of time it got worse and worse and worse, and it seemed nothing could be done. Maybe that type of case certainly would not be appropriate at the later stages to deal with in a circle. By that time, it’s far gone and that guy should be locked up and never be near anybody ever again as far as I’m concerned. But at some point there was a time when perhaps he could have been brought into a circle. They could have asked, “Why are you doing this and what are your needs, why do you feel you have to dominate somebody, why do you think violence is an answer to your own pain, your own suffering?” And I think at that point, there really might have been a chance to turn things around. Now there’s no

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guarantee that any system we use is going to work 100% of the time. There are always going to be people saying, look at that, that didn't work, so let's ditch the whole process. But I don't think that's the answer.” Leonard Busch

“My comment is not either/or, but together, if they were to do the jail time with some of the restorative justice processes taking place in the jails. They [already] have abuse programs currently available. Then after [coming back] into the community, the reintegration circles and the healing circles could take place.” Unnamed female participant

“It's scary to sit here and listen to you people. I know you guys are great, that you're all going toward the same direction. But you're trying to say, well this other direction, I don't think it will work. But that other direction may work. And that other direction has angles that come back to you people. It just doesn't go one way all the time. A sentencing circle is a very sacred thing. When you get to that one point, into the sentencing circle, you have to deserve it, earn it, get it. It doesn't just appear because you're Indian and want one. So even when you're at that sentencing circle, the people within that circle can say this guy is not ready, this guy is 'BSing' us, back to the courts. Then it'll go back to where you guys want to deal with it and that's where it should go, because when you get there, you have to deserve it. Please keep your options open because all we are is an option out of incarceration. Because when a guy gets out he's coming back and we have to deal with him at home.” Hector Gaudry, Director, Restorative Justice Program, One Arrow First Nation, SK

Third, transcending the discourse of 'either/or' is the victims right to choose and the unconditional need to respect this from both sides:

“Coming from Europe and from the war, I learned how to value choices. I think it's very dangerous to close doors, and that we are not in power to make decisions for somebody else, and we have to be very careful when we make some kind of decisions that we, we can't decide for everybody. For this process, I'm seeing court system, I see justice and community working together in solving this, but I also see lots of other support systems [like] what I am seeing now in place.” Mila Vanovic, Saskatoon Community Mediation Services, ex-Yugoslavian lawyer

“I think we have to be careful about not getting into the mindset of either/or. Like restorative justice versus the criminal justice system. Restorative justice is new, and there certainly is a will to make the criminal justice system more sensitive to the needs of victims and everyone who it engages. I envision that at some point we will have a system that will better meet the needs of all people who are affected by behaviour. You know, victims, offenders, and their family groups or the community. There has to be something in it because otherwise there wouldn't be so many people excited about it. Right now, what we're doing here is exploring. Where can we go with this? Where should we go? What should the timelines be? What has to be put in place? One size does not fit all. We're not trying to make everything fit everybody the same. It's a process that has to be community owned and driven, but it has to be government supported, and there has to be that sober second thought [around] government guidelines such as you in Saskatchewan provide as we move forward.” Lennard Bush

Another sentiment expressed throughout the conference, and reaffirmed during the closing comments, was that neither model addresses key changes needed to stop violence against women. The broader context, the systemic and structural factors behind women's disadvantageous status must be attended to if government and society truly intend to solve this problem. There is a need for preventative action—for wide-spread parenting skills training and relationship skills information, for a sustained focus on children and on anti-violence programs. Both sides acknowledged that childhood and children have to be a number-one priority in all our communities:

“Had someone successfully helped these women in childhood their lives would have been very, very different.” Anne McGillivray, speaking of the 26 First Nations women in her study documented in [Black Eyes All of the Time](#)

The prevalence of violence and discrimination against women in our society—a society with violent, racist, sexist, ageist, classist, and homophobic facets—must be acknowledged. Action must be taken by each of us and on every level.

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Without a fundamental shift, change will not occur. In this context, Anne McGillivray raised the issue of human rights. She stressed that the subject of rights was a resounding issue for women survivors in her study and that this notion must be central to any initiative within restorative justice and within the existing criminal system:

“Until I learned I had rights as a human being and as a woman, I just accepted whatever my partners gave to me.” Survivor, Black Eyes All of the Time

Lisa Addario voiced another caution against polarizing, dichotomous positions. She addressed the important misconception that if one doesn't support restorative justice, then one must necessarily support a law-and-order agenda. She made the point that the women's movement in Canada has consistently rejected restorative justice measures in cases of violence against women and sexual assault, but that at the same time, it has also rejected harsher penalties and stiffer sentences:

“Rejecting restorative justice does not mean you want to lock an offender up for ever and ever. We all need to be supportive of a progressive analysis because there is a climate out there willing to swing back the pendulum. We must continue to be vigilant about the other alternative—a judicial system that has been sexist and racist and held a lot of myths when it comes to women.”

Jan Turner affirmed this need for a unified progressive stance. “How do you even talk about restorative justice in this particular climate where people want everything tougher, tougher, tougher?”

Firm agreement existed about the need for continuing dialogue in forums like this conference and among different groups:

“The most crucial thing I would like to see come from this conference is that we keep the lines of communication open, that we don't close the doors amongst ourselves. If we are going to offer a balanced approach to future issues, we need to do it collectively, working together in a partnership forum.” Pauline Busch

Consultation was considered the keystone for any further steps by the government along this road—extensive consultation involving all stakeholders in the community, extending to Aboriginal women and all other women. There is an obvious need for capacity building especially within the Aboriginal women's movement, which would entail the space for dialogue and familiarization with the issues, and the means to carry out their own analysis before arriving at the consultation table. Supporting Aboriginal women and other groups of women in this way means providing core funding. In short, the government must back the promise and the process of consultation financially:

“This would be a much more respectful place to begin in terms of respecting women and respecting others so you do not end up making mistakes and having to backtrack.” Tracy Porteous

“I want to add my voice to those that have already been raised with regard to continuing the dialogue. We need to keep talking, and my hope is that Saskatchewan Justice will continue talking with us, and will listen, and will in as many ways possible, enable and empower all the voices to be heard.” Helen Smith-McIntyre

So, where do we want to go?

“When we talk about restorative justice as a vision, let's challenge ourselves to have a vision of a system where it is so safe, so honest and so productive in terms of results for the victim that we will now see 90% of women instead of 11% of women coming forward and asking for help and pressing for justice.” Alice Jack, Lloydminster Interval House, SK/AB

And how do we get there?

Jan Turner's comments on the position of Saskatchewan Justice, and on its proposed process, contained many of the elements that must be considered, along with a significant pledge around process:

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“There are questions that are raised. There are questions that are raised in communities, in many of the isolated communities about why these matters can’t go in, and as one of the gatekeepers, I want to take this conversation very seriously, and I don’t want it to just happen somewhere and we turn a blind eye. I don’t want it driven by a policy no one’s ever talked about. I want it driven if it’s going to change, and I’m not saying it is going to change, but if it’s going to change, we need to do it in a really thoughtful, really careful way, and we need to listen to a lot of different voices, and it’s not going to happen overnight. We need to keep having sessions like this, lots of discussions. All of us in the room do. We all go back to our communities, where we live, where we work in programs, many of us, not me, but many of the people in the room talk to clients who come in every day with views on this as well.” Jan Turner

Several participants underlined the need for more awareness and education regarding restorative justice. Some felt there had been an unbalanced view presented of restorative justice processes as they occur in Saskatchewan or that participants simply did not know what occurs in a sentencing circle:

“So, to the people here who are talking about circles, I say, learn about a circle first and what can happen. Yes, in some circumstances, circles cannot be used, but through talking to elders in the community, and people that work in the community, you’ll know if it’s appropriate or not.” Jackie Ballantyne

Both sides, those in favour of and those critical of the use of restorative justice in cases of violence against women, recognized the need for education around restorative justice processes.

It must also be acknowledged by those in favour of restorative justice processes in violence cases that the caution and scepticism expressed by others is legitimate. Much of this originates from actual experience. The logistics of having a foolproof process in place is a sobering challenge. Bev Poitras made the case for a pilot demonstration as a possible way to move forward, especially in the current situation where adequate services and supports are already lacking in many parts of the province. Another potential strategy would be to research what competencies currently exist for restorative justice processes in communities and to seek ways to cultivate and enhance those competencies. Those with certain competencies could act as mentors for other individuals and/or communities:

“Should the government allow or institute the use of restorative justice strategies for family violence throughout the province./ in only certain communities? If the trained mediators and resources are available, with the support for the family, then why not try something different? Communities that recognize this is a major problem have to be prepared. They have to have strong resources willing to participate, and they have to have started on their own healing journey. These communities would be ideal as pilot projects or areas where we can start something in restorative justice.” Bev Poitras

But it also had to be acknowledged that by no means are any communities ready today to assume the responsibility of adopting restorative resolutions for these offences. Many of those cautious of, or opposed to, the use of restorative justice with these types of offences are so because standard processes do not exist. Before going down the restorative route in cases of violence against women, there must be very clear policy, guidelines, screening processes, standards and training in place, along with a monitoring and evaluation procedure.

All of the above—continuing dialogue, full consultation, the establishment of competencies, policy, guidelines, training, action and demonstration—all require resources. The government cannot download responsibilities to communities without the adequate support services in place. The ideal may be that restorative justice is community owned and driven, but it must be supported by the provincial level of government to the full extent required. There must also be continued and increased funding for programs dealing with violence against women and for women’s services. Resources for restorative justice should not compete with, nor take away from, women’s programs.

And, if it is actually possible, how soon could we be ready?

“At this time I don’t feel our programs are ready to handle cases of domestic abuse. There is still much work to do in order for our programs to even consider taking domestic cases. Is it a process that can be open to all areas of the province? Again, I must say no. I grew up in an isolated community with very limited resources to this day. We don’t even have running water in our community, let alone professionals specifically trained to handle cases of abuse.

What needs to be done before we feel we are ready to take domestic cases is a lot of work. If we work very intensively preparing for the next two years ... We need to have the people built within our programs, not ones we borrow from elsewhere. We need to have those family therapists on site, we need to have people who have the background. We, ourselves, we're mediators, we're facilitators, we're not counselors, and we're very cautious about crossing that line we set for ourselves, not to go and pretend that as a facilitator I can see beyond the issue in front of me here and begin to dig into very deep-rooted issues. We're very cautious about that. These are some of the things that need to be explored, and they need to be explored by professionals built into the programs.

I know from a personal point of view where I've began to work on my own childhood sexual abuse since 1986, I'm nowhere near finished. I still have a very long journey, and for me to think I can look at other women and say, "We're going to fix you up and send you on your way, girl, no more problems." I'm not prepared to do that. I'm not prepared to be that callous.

I also believe very strongly that restorative justice does have the ability to address many of those [issues] given the right resources, given the right people being part of that process. In fact, I would put the restorative justice process before the court system. I have seen nothing that gives me confidence in our present court system. I have seen plenty that gives me confidence in restorative justice. When I think back to the case of my sister, I think the safety of a community justice forum would have served her much better." Pauline Busch

Finally, Sandi LeBoeuf, Director, Family Centre, Saskatoon Tribal Council, and the conference moderator, closed the forum with a succinct and inclusive summation of the overarching perspectives presented throughout the conference and the closing session:

"One of the things I learned a long, long time ago is that God has three answers for us. 'Yes', 'No', and 'Wait'. Sometimes it is the 'waiting' that is the most difficult. There are many things we agree on as a group and there are many things we disagree on. There have been emphatic 'no's' and emphatic 'yes's'. Regarding the key question the forum was to address, I realized the people emphatically saying 'no' were saying, "No, there must be services in place. There must be other things happening." The people saying 'yes' were saying, "Yes, but with conditions that the services and supports are in place." So, from this perspective, we are working on this together. Everyone I listened to today basically agreed the justice system has failed the woman living in a violent situation. We need to take a good strong look at that situation. I recognized a split in people's views on how to deal with the issue. All people said, continue the dialogue, include government and justice. We may not be ready yet, but if we go that route, Aboriginal women and all women need to be consulted about the process. We cannot close doors. We need to keep doors and the lines of communication open. Finally, we need to take action. We cannot sit back and simply allow things to happen. We need demonstration of what the possible process could be. We have diverse backgrounds in this room. As a community we need to work together. We all came together with the same purpose, the same thought in mind. We may have differences in opinion as to how best to deal with that, but we all have the same concerns. The justice system is not working. What are our alternatives?"

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## **5.6. Aboriginal Justice Strategy (AJS) Evaluation -2000 <sup>22</sup>**

### **5.6.1. Adequate Training/Services**

- Concern was expressed by several people interviewed for case studies, that specific programs deal with family violence and sexual assault without having adequate training and services in place to do such work.
- In this context, it was thought by respondents that projects have to be prepared to address victims' needs when they participate in circles with the offenders, which includes specialized training and services.

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<sup>22</sup> Department of Justice Canada, Evaluation Division, Final Evaluation Aboriginal Justice Strategy, Technical Report, October 2000

## 5.7. Aboriginal Justice Strategy (AJS) Trends-2000<sup>23</sup>

### 5.7.1. Reported Types of Offences

Total # of Reported Types of Offences Referred by Province/Territory: 1996-99 <sup>24</sup>								
Province /Territory	Offence Types and # of Times Referred							
	-A- Property	-B- Assault	-C- Mischief	-D- Domestic Violence	-E- Sexual Assault	-F- Drug Offences	-G- Prostitution	-H- Other
British Columbia	54	16	0	36	34	0	0	28
Saskatchewan	2004	626	424	0	0	10	112	185
Manitoba	186	626	424	0	0	10	112	185
Ontario	302	335	92	1	2	49	33	593
Quebec	0	0	0	0	0	0	0	0
Nova Scotia	25	9	13	0	0	0	0	49
Newfoundland	0	0	0	0	0	0	0	0
Nunavut	52	14	3	4	0	0	0	6
Northwest Territories	3	6	0	0	0	0	0	3
Yukon	<b>20</b>	<b>27</b>	<b>20</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>10</b>

**A: Property** refers to such offences as theft, break and enter, possession of stolen property and vandalism.

**B: Assault** refers to any form of assault that is non-sexual and non-domestic.

**C: Mischief** refers, generally, to a situation where an individual willfully destroys or damages property, obstructs or interferes with another's use of property, or where an individual willfully destroys or alters data, or obstructs or interferes with another's use of that data, as defined in the *Criminal Code* of related offences.

**D: E:** Sexual assault cases and domestic violence cases are referred to and accepted by some projects.

- Very few projects report accepting referrals of this offence type: only 3% of 1998-99.
- Both Manitoba and British Columbia have projects that accept both sexual assault and domestic violence cases.

♦ **F: Drug Offences** refers to possession of drugs, trafficking, and all drug related offences.

♦ **G: Prostitution** refers to the act of soliciting and not to the act of making a proposition.

♦ **H: Other** is a category that is often used in the project files, so many details are left unexplained. It also used here to capture offences that are not captured in the previous columns. Some of the other offences that have been reported on include municipal, provincial and federal offences such as: arson, suicide threats, indecent exhibition, liquor-by-laws, fraud, breach of probation, failure to appear, obstructing justice/police, threats, weapons, failure to stop, willful damage, impaired driving, non-criminal disputes.

### 5.7.2. Sources for Client Referrals

- This section highlights where and from who programs get client referrals from.
  - o This was not always determined (in isolation) by the program.
  - o It is dependent upon the attitudes, policies, and philosophies of the surrounding justice and social services agencies as well as the relationship the program has with agencies.
  - o In fact, programs may want to expand their referral sources, but are unable to.
- By 1998-99, 87% of the projects reported on their sources for referrals.
  - o While most projects report one of or both the Crown/Court and the Police/RCMP as a referral source, a large number also report 'other'.

<sup>23</sup> Department of Justice Canada, The Aboriginal Justice Strategy: Trends in Program Organization and Activity 1996-1997, 1997-1998 and 1998/1999, Prepared for the Aboriginal Justice Directorate, Department of Justice Canada by Naomi Giff, March 10, 2000 -

<sup>24</sup> Department of Justice Canada, The Aboriginal Justice Strategy: Trends in Program Organization and Activity 1996-1997, 1997-1998 and 1998/1999, Prepared for the Aboriginal Justice Directorate, Department of Justice Canada by Naomi Giff, March 10, 2000 -

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- Other sources include a referral base of agencies and institutions at the local level, both justice related and non-justice related. Such referral sources, as indicated in the project activity reports, include, but limited to:
  - o probation,
  - o self,
  - o community members,
  - o local agencies,
  - o courtworkers,
  - o high schools,
  - o band councils,
  - o tribal councils,
  - o friendship centres,
  - o the John Howard Society,
  - o tribal police,
  - o legal aid,
  - o victims,
  - o victim services and
  - o social services.
    - Very few projects use only criminal justice agents as referral source.
    - There is a wide referral base to draw upon that includes community residents, schools, local agencies, self and band council.
    - These ‘other’ referral sources can highlight some important links that the project can develop with the community.

Source of Referral	# Programs		
	1996-97	1997-98	1998-99
Police	8	21	49
Crown	8	16	35
Other	6	18	34
<b>TOTAL</b>	<b>22</b>	<b>55</b>	<b>118</b>

- Clearly the most common reported referral source, especially in the last two years, was Police.

**5.7.3. Reported Referrals Rates: Offences**

- Offers the number of times assault, property offences, mischief, domestic violence, sexual assault, drug offences, prostitution and others were referred to the projects funded by AJS.
- It is important to remember that these figures are as reported on in mid and final activity reports by the projects.
  - o Many projects did not engage in quantifiable activities, did not accept criminal diversions, or did not adequately report on their referral rates.
  - o If this latter group had reported more thoroughly these numbers would be significantly higher.
- The most common offences referred were property related, followed by assault.
  - o Offences in the ‘other’ category were also prominent.
  - o The offence categories represent the most common cited offence types.

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**5.8. Restorative Justice in Canada - 2000<sup>25</sup>**

- Can restorative processes be applied to any type of criminal offence?
  - o Not surprisingly, the public tends to be more receptive when the situation involves non-violent, non-repeat offenders and less-serious crime.

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<sup>25</sup> Federal-Provincial-Territorial Working Group on Restorative Justice - Restorative Justice in Canada: A Consultation Paper (May 2000) available from the Department of Justice Canada, <http://canada.justice.gc.ca/en/ps/voc/rijpap.html>.

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- However, programs such as Community Justice Initiatives in Langley, British Columbia, have had some success in working with sentenced offenders in cases of serious personal and sexual violence.
    - In a 1995 study of this program, victims said they felt they had finally been heard, that they were less fearful and that they weren't preoccupied with the offender any more, and that they felt at peace<sup>26</sup>.
  - This is not to suggest that restorative justice is a cure-all for violent crimes, or that it can be applied to all types of offences or to all offenders; but the emphasis on healing could make an important contribution in dealing with the harm and damage that has been done.
  - Two types of initiatives that deal specifically with criminal matters are alternative measures programs and policies, programs, and legislation that attempt to increase the use of alternatives to incarceration.
    - Community-based alternatives to incarceration include options such as conditional sentences where offenders serve their sentence in the community, or diverting offenders to specialized programs for addictions, anger management, and other issues.
    - As has already been discussed, alternative measures programs offer offenders a way to take responsibility for their behavior and to address the harm that they have committed.
    - Although one goal of many alternative measures programs is to reduce incarceration rates, they have not yet had a measurable impact because they tend to focus on less serious offences.
    - Alternative measures policies tend to exclude persons who are accused of more serious assaults, administration-of-justice offences, impaired driving, robbery, and theft over \$5000 – but these offences are also the most likely to result in imprisonment.
    - Therefore, if one of the goals of these programs is to reduce the rate of incarceration, then they may have to accept more serious and challenging cases.
  - However, if there is a role for restorative justice in more serious cases, it needs to be defined carefully.
    - The idea of restoration may be suspect in situations where the offender holds power or influence over the victim because the victim is specially vulnerable through age, economic dependency, mental or emotional capacity, or because of the nature of the offence (such as spousal assault or sexual offences).
    - Similarly, the public expects the justice system to clearly denounce serious and violent crimes, and the use of restorative processes might be seen as compromising that message.
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## **5.9. Formal Response of the Avalon Sexual Assault Centre Re: The Restorative Justice Program - 1999<sup>27</sup>**

### **Background**

In June 1998, the Nova Scotia Department of Justice introduced a new program for Nova Scotia, Restorative justice. According to the guide, crimes of sexual and domestic violence will only be referred to Restorative Justice at the post-conviction, pre-sentence entry point. In December, 1996, the Correctional Services introduced the Alternative Measures - Adult Diversion Program, post-charge, pre-trial option to criminal justice system. According to their eligibility criteria serious sexual assaults are not eligible. However, we are aware of at least one serious assault that was referred and accepted into the Adult Diversion Program.

The Avalon Sexual Assault Centre has many questions and concerns regarding the utilization of the Restorative Justice process in cases of sexual assault/abuse and domestic violence. We offer a rationale, based on our expertise in systemic violence and victim/abuser dynamics, for our belief that sexual assault crimes are incompatible with the restorative justice model in its current form. We also pose some questions and make recommendations regarding community ownership, volunteerism, informal cautions and warnings, project timing, and research/analysis.

Note: Because 95% of domestic violence is perpetrated by men against women, the term 'she' will identify survivors of male violence and the term 'he' will identify perpetrators/offenders throughout this document. Restorative justice refers to victims; in this presentation, women who have encountered male violence will be identified by the term 'survivor'.

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<sup>26</sup> Roberts, Tim. (March, 1995). Evaluation of the Victim Offender Mediation Project, Langley, B.C. Final Report for Solicitor General of Canada, page 104. Victoria, B.C.: Focus Consultants.

<sup>27</sup> Formal Response of the Avalon Sexual Assault Centre to the N.S Department of Justice Re: The Restorative Justice Program Submitted to the N.S. Department of Justice, Restorative Justice Program September, 1999 <http://www.hotpeachpages.org/paths/rjIrene.html#XIII>



The goals for the N.S. restorative justice model to "repair the harm caused by the offense, and achieve a sense of healing for the victim and the community" are laudable. For sexual assault crimes, however, restorative justice is at cross purposes with its end. In its current form, this program has the potential to seriously harm survivors who participate in the process. I will cite various principles and goals from the Nova Scotia Restorative Justice document and responded to them in a context that gives the power/abuse dynamics that characterize sexual assault/abuse and domestic violence cases their due.

### **1. Restorative justice encourages repentance and forgiveness**

We are NOT in the business of forgiving sexual assault/abuse or domestic violence. We are in the business of STOPPING it. Seeking an apology for this type of violence is NOT an appropriate societal goal. Adopting zero tolerance for sexual assault/abuse domestic violence is. Furthermore, forgiveness is NOT essential in a survivor's healing process and, if a survivor is pressured or guilted into forgiving a perpetrator prematurely, it can sabotage her healing process.

### **2. The victim is central to the process of defining the harm and how it might be repaired**

Restorative justice claims to be victim-centered. Yet, to our knowledge, input from survivors of sexual or domestic violence was not solicited and considered in the design of these new measures. Under these new measures, if a survivor does not want her case to go to restorative justice, this may happen anyway. The survivor does not have a veto as to whether her case will proceed to a restorative justice program. In our view, the lack of consultation and current policy displaces the survivor to a position peripheral, not central, to the process of defining harm and how it might be repaired. In our view, restorative justice appears to focus on the perpetrator, not the victim. He repents for his crime and justice is restored. How can justice be restored for a survivor of sexual assault who has chosen not to participate in the restorative process?

### **3. Restorative justice recognizes that victims ... need an opportunity to speak about their feelings and to have the power restored to them that has been taken away by the experience of the offense...[and] they need recognition of the pain and suffering they have endured ....**

Sexual assault survivors need to talk about their feelings, need to reclaim their power, and need to have their pain and suffering validated. The terror, humiliation and stigma that result from sexual assault, make this a long, difficult and painful process. Usually, this type of healing only occurs within the context of a safe, trusting relationship. It is unrealistic to think that a survivor will discuss what justice has casually identified as "concerns and feelings" with a perpetrator of sexual assault. It is unrealistic and dangerous to think healing will take place as a result of a such a meeting between a perpetrator and the survivor. Survivor/perpetrator interactions that have successful therapeutic outcomes usually result only when there has been intensive, long-term preparation and a bastion of support for the survivor. Given the limited resources of our communities and the department of justice, this preparation and support is not likely to be available. The N. S. provincial government has a long history of introducing public policies and new initiatives without community consultation and in turn, without the resources required to support these initiatives.

### **4. [Offender] recognition of pain and suffering [inflicted on the victim]**

If a sexual assault survivor becomes emotionally and psychologically tied to a perpetrator's recognition of the pain and suffering they caused or, an apology or repentance for the act, her capacity to heal becomes incumbent on the perpetrators decision to apologize or repent, and the quality of this apology. This emotional entanglement gives power back to the perpetrator, not the survivor. Therapists work with sexual assault survivors to free them from any need for offender repentance or apology so they may reclaim their sense of empowerment independent of anything the perpetrator says or does. If, however, a survivor agrees to listen to an offender's account of his understanding of the harm inflicted on her, what happens if she is not satisfied with the account? Who evaluates this? What happens then?

### **5. Reintegration of the offender into the community**

a) In our experience with women who have experienced crimes of sexual violence, the reintegration of sexual assault offenders into the community creates fear of re-victimization, not healing, for the survivor. A survivor's sense of safety

is so deeply compromised after sexual assault they often feel too fearful to go outside, take buses, or walk alone during the day, or at night, even when the perpetrator has been incarcerated. Knowledge that the perpetrator is at large is usually a frightening, re-victimizing experience.

b) To involve a sexual assault survivor in a process intent on preserving the offender's integrity, and reintegrating him into the community, places responsibility on the survivor to support the perpetrator's healing. Allocating even minimal responsibility to the survivor for offender healing can all too easily become fodder for the current myth that women survivors of violence are somehow responsible for the crimes committed against them. (The remarks about "bonnet and crinolines" made by Justice John McClung in the recent Ewanchuk case speak to the fact that, even among our courtroom judges, the myth that women survivors of violence are somehow responsible for the crimes committed against them abound. As such, policies that may potentially reinforce this mythology must be avoided.)

c) Finally, given recidivism rates for youth and adult crime, it seems clear that community reintegration is usually successful only if there is sustained support and intervention for offenders. We have not seen an allocation of resources to this end. How much money will be made available, and to whom?

## **6. Community ownership**

a) The N. S. Restorative Justice document states that "community ownership is essential to a successful restorative justice program. This does not mean a downloading of Government responsibilities onto communities without resources." The Avalon Sexual Assault Centre is the only sexual assault centre in Metro Halifax that provides counselling, support and advocacy for victims aged 16 years and over who have been impacted by crimes of sexual violence. Surely our expertise will be a necessary resource in sexual violence cases. Currently, our staff and programs are stretched to the limit. How will the Department Justice support Avalon Centre, and other community agencies who provide advocacy and support to survivors in the restorative justice program? Community police, crown attorneys, correctional workers will most certainly require education and training around systemic violence and equity issues The Halifax Regional Police are currently struggling to fund sexual assault/abuse training. How will the police, crown and correctional workers be supported to adequately train their personnel in the areas of sexual abuse and assault. Who will deliver this training? How much money has been allocated for this training?

b) "Community ownership" might be problematic in small communities where professional and personal relationships regularly cross. Survivors of domestic violence, sexual assault, and childhood sexual abuse from small communities often explain to us that the tightly-knit nature of their communities make privacy after disclosure virtually impossible. Also, disbelieving and sometimes hostile responses to domestic/sexual assault/abuse disclosure from the police, or justice system, might mean forfeiture of a survivor's safe membership in her home community. Given that a survivor does not have a choice as to whether her case is directed to restorative justice, how will her privacy and safety be protected? According to the N. S. Restorative Justice document, in some geographic areas other community agencies may be utilized in the restorative justice process? What agencies will be involved? Who will monitor these agencies? To whom will they be accountable? What is the extent of their authority in terms of referring cases back to the conventional system? Community based programs must have clear, consistent parameters to ensure safety and equitable treatment of all parties in this process. Have these parameters been set? If so, what are they? If not, when will they be designed?

## **7. Volunteerism**

Volunteers will apparently facilitate meetings between sexual assault/abuse survivors and perpetrators in the restorative forum. This type of work with survivors requires extensive, specialized training and experience. The Avalon Centre does not support this forum (volunteer-facilitated or otherwise) in its current form. If this forum goes forward, how will volunteers be trained? How will they gain experience? Who will monitor volunteers to determine their work is satisfactory, who will supervise and support them? Have funds been allocated for this? Is asking volunteers to provide professional expertise and service, pro bono, not an example of downloading on the community: something the Department of Justice claims restorative justice will not do?

## **8. Underlying causes of criminal behaviour**

It is hoped that redressing the underlying causes of crime will be one secondary impact of the restorative approach. How will restorative justice redress the issues underlying violence against women: historical, systemic oppression of women, rape myths, objectification of women in the media, sex role stereotyping, views of women as sex objects?

#### **9. Moratorium on information disclosed in the restorative forum**

"No admission, confession or statement by the offender made in the course of restorative justice discussion will be admissible in evidence against that person in later proceedings." What are the implications of this in cases where similar fact evidence is at issue? Once again, restorative justice appears to focus on the interests of the perpetrator, not the protection of the survivor.

#### **10. Timing and research/analysis issues**

Where is the research to substantiate your claims that this process will increase the satisfaction, specifically, of women survivors of male violence? Why has this project been implemented without this research being completed? What system will be put into place to continue to monitor survivor satisfaction with this process as it grows and changes? What if the outcome of this research determines that victims are not satisfied with the restorative justice process? What will happen then? When does justice intend to make this process available to all offenders? Does the swiftness with which this program is being implemented, despite the number of unresolved issues, reflect that it is being driven by budgetary concerns and a need to placate a public increasingly dissatisfied with the current criminal justice system? How can you reassure us this is not the case?

#### **Concluding Remarks**

We find the definition of restorative justice, as you describe it, to be elusive. To define is to limit. If the definition of a program eludes us, so too, do the limits of that program. As such, restorative justice is, potentially, an elusive, slippery slope with non-existent or, at best, precarious stop-gates for its process. Clear, specific guidelines about how sexual assault/abuse and domestic violence cases will be handled in this forum do not currently exist. We were seriously alarmed when, in response to a question regarding how sexual assault cases were going to be mediated in Phase I of this Initiative, representatives for the Department of Justice responded, "we did not anticipate them." Does this mean they will not be mediated in Phase 1? Important details specific to sexual assault have either not been anticipated or, having been anticipated, have not yet been worked out. The Department of Justice, without fail, must anticipate crimes of sexual assault/abuse and recognize the societal, systemic violence of which they are a part. The Department of Justice, without fail, must recognize that sexual assault/abuse and domestic violence crimes have power, control and safety issues that are specific to them. Justice must take measures that are informed and practical, not philosophical, to protect the woman and children who are the primary victims of male violence.

#### **Recommendations:**

- 1) Recognize the incompatibility of sexual assault/abuse domestic violence crimes with restorative justice in its current form and eliminate access to this forum by offenders of same.
- 2) Slow the implementation of restorative justice until stakeholders are able to thoroughly review this process.
- 3) Conduct the necessary research (consult with survivors and community based agencies whose mandates address women and sexual/domestic violence issues) to determine if survivors of sexual and domestic violence will be satisfied with this process in its current form.
- 4) Place a hold on restorative justice for sexual assault/abuse domestic violence cases until research has been completed that supports your statements that victim satisfaction will increase as a result of this process.
- 5) Create clear, specific guidelines and an infrastructure to monitor the expanded discretionary powers of the police, crown, and corrections. Commit financially to this sustained monitoring.
- 6) Recognize the need for and commit to the education and training of all parties (police, crown, corrections, community agencies) around sexual assault/abuse domestic violence issues. Commit financially to this education and

training.

7) Create access to due process for victim, community agency, offender complaints.

### **Final Statement**

We look forward to further discussion of these issues and will offer our expertise to find constructive solutions to the issues. We appreciate that the Department of Justice recognize the need to address the decline in public confidence in the current justice system. These are complex problems with no easy solutions. However, we must state emphatically that the model of restorative justice proposed is not conducive to restoring justice for survivors who have experienced crimes of sexual violence.

### **5.10. Restorative/Criminal Justice—Identifying Some Preliminary Questions, Issues & Concerns - 1998<sup>28</sup>**

#### **More Appropriate Way of Dealing with Offenders on Less Serious, Non-Violent Offenses**

- There is some support for diversion/alternative measures and restorative programs if they are strictly restricted to first-time offenders who have committed relatively minor, non-violent offenses.
    - While generally supportive reforms which would implement a restorative focus within these particular confines, these same individuals questioned the extent to which it was necessary to do so.
    - Basically a number of interviewees observed that the criminal justice system presently does not ‘process’ this type of offender – particularly if a first-time offender.
    - There was a perception that the majority of less serious, non-violent offenses that are presently charged and prosecuted involve repeat offenders.
  - A further observation was that the category of ‘violent’ offenses includes a wide-range of behaviours.
    - For some of those behaviours we may not want to preclude the possibility of diversion/alternative measures – for example, a bar brawl.
    - This observation, however, is premised on the assumption that sophisticated gender/diversity/equality rights analyses.
  - This limited use of restorative justice programs was often suggested as a possibility only after it was made clear that there was no room for the consideration of diversion/alternative measures or restorative programs in sexual assault cases, child sexual abuse cases, violence against women in relationships, criminal harassment or any other offence where the dynamic was one of abuse of power or trust or characterized by unequal power of the crime was motivated by hate.
    - The existence of the ‘exceptional circumstances’ provision in relation to many of these types of offences is what is considered as the ‘weak link’ in the policy reform.
  - Other questions and issues raised included:
    - Who is going to determine the seriousness or level of violence inherent in a particular offense?
    - Is that determination made in consultation with the victim? With police-based victim services? With specialized victim services?
    - Are sufficient and additional resources being made available to cover increased workloads and costs which are likely to accrue to police and victim service providers?
    - What mechanisms are in place to monitor diversions from police, crown counsel and corrections? How are breaches of diversions being monitored so that charges can be laid?
  - The consensus of victim services providers, particularly specialized victim services providers, is that the exceptional circumstances provisions should be eliminated in relation to cases of sexual assault cases, violence against women in relationships, child sexual abuse, criminal harassment and hate crimes.
    - In short, there should be no exceptional circumstances provision in the policy until such time as there are appropriate funds, resources, training and provincial guidelines in place to educate, guide and monitor its application.
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<sup>28</sup> Goundry, Sandra A., Legal Consulting and Research Services, Restorative Justice and Criminal Justice, Reform in British Columbia – Identifying Some Preliminary Questions, Issues and Concerns, Prepared for: BC Association of Specialized Victim Assistance & Counseling Programs, 30 April, 1998

### 5.11. Planning/Evaluating Community Projects - 1998 <sup>29</sup>

#### **Serious Offense Mediation**

Before proceeding with your planning, you must decide upon types of offenses your program will handle. One of the most difficult and controversial issues is that of whether alternative dispute resolution methods should be used for serious crimes. A basic principle of restorative justice is that the outcomes must be meaningful both to victims and offenders. This may be difficult to achieve with serious offenders who may find community sanctions much less severe than the prison term they might otherwise have faced. Serious offenders are often repeaters and care must be taken that they cannot simply use restorative justice programs to manipulate the system.

Your decision concerning the type of offenses and offenders your program will handle must be based on your own community's needs, concerns, and resources. Planners must recognize that their communities may have limits in the degree of seriousness of offenses they wish to deal with through restorative justice programs. Many communities prefer to restrict restorative programs to less serious offenses, at least until they become comfortable dealing with offenders this way. However, there is some evidence that restorative justice methods can be used with serious offenses.

For example, the Hollow Water program has used a number of different treatment approaches including individual counselling, traditional healing methods, and community living. The traditional component is based on sharing circles involving victims, offenders, and support people from the community. Sweat lodge ceremonies, sacred fires, fasts, and feasts are used for healing and to bring the community together. Organizers proceeded with this program very carefully and spent a great deal of time planning the project. Program staff received extensive training and a great deal of effort went into educating the community. Because of the serious nature of the offenses committed, the program is very long and very intensive. The thirteen-step healing process typically stretches over a number of years. Professional clinical help is available for victims and offenders and both parties have the option of going to the formal justice system. This can be necessary if victims are not happy with the community-based process or if offenders continue their harmful behaviour or refuse to follow community-imposed dispositions. We should not assume that offenders will want to participate as it may be easier for them to go through the mainstream justice system where they do not really have to face up to the consequences of their behaviour or try to change themselves.

Another program for serious offenders was carried out in Anchorage, Alaska (Flaten, 1996). Mediations were conducted with juvenile offenders and their victims for offenses as serious as manslaughter and attempted murder. While mediations for minor property offenses typically have the goal of obtaining restitution, the primary goal of serious offense mediation is to help in the healing process. Participation in mediation did not result in more lenient dispositions for the offenders, most of whom were already serving their penalties at the time of the mediation. Most participants reported that mediation was successful in meeting the goals of reconciliation, accountability, and closure. All the victims reported that mediation was very helpful in helping them to bring closure so they could put their victimization behind them. They also reported that being able to ask questions and to talk about their feelings was important to them. Some reported that the mediation helped them reduce their fear of the offender. The offenders reported that the mediation helped them to realize that they were victimizing real people and that their actions had done real harm. They said it was helpful to them to have been able to apologize to the victims. The format of serious offense mediation will vary depending on local circumstances, but some have used the process of group conferencing.

This type of mediation should not be attempted without a great deal of planning. Organizers of the Anchorage project waited at least one year after the offense before entering into mediation. Victims and offenders received extensive preparation prior to the mediation session and participants found this preparation very helpful. Organizers felt that debriefings should also be conducted after the mediation because of the powerful emotions involved. Some of the participants also expressed the desire for follow-up mediation or a way to keep informed about the rehabilitation progress of the offender.

Several projects involving prison-based mediation have been done with adult offenders. As with the young offender

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<sup>29</sup> Solicitor General Canada, Rick Linden University of Manitoba and Don Clairmont, Dalhousie University, Making It Work: Planning And Evaluating Community Corrections & Healing Projects In Aboriginal Communities, 1998  
<http://www.sgc.gc.ca/epub/Abocor/e199805b/e199805b.htm>

program, the goals are somewhat different from those of community-based programs in that they emphasize sharing information and healing rather than restitution. They involve voluntary meetings held between victim and offenders in an institutional setting. Typically, they explicitly exclude offender benefits such as parole release (Immarigeon, 1996). However, this need not always be the case. For example, in March, 1997 Dwayne Archie Johnson, convicted of murdering Helen Betty Osborne in The Pas, Manitoba, was granted day parole. While an earlier day parole had been revoked following the protests of Osborne's family, the family decided not to oppose a subsequent application after Johnson met with them and also made a public statement about the murder.

The Johnson case illustrates the potential value of prison-based mediation. The case had remained unsolved for many years and the Osborne family's search for justice became a very painful one. While the murder took place in 1971 the case did not come to trial until 1987. Four men were present when Osborne was murdered, but Johnson was the only one of the four to be convicted to any crime. Protests by the family and community members about the handling of the murder led to an examination of the case by the Manitoba Aboriginal Justice Inquiry. The family's feelings that just had not been done continued when Johnson was initially granted day parole. It was not until the meeting with Johnson that the family could finally bring some closure to the case and feel comfortable with his release.

While the opportunity for such a reconciliation is relatively rare in our prison system, evaluations of prison-based mediation programs indicate these programs can be quite successful. Immarigeon's (1996) assessment of several prison-based programs found that hundreds of victim-offender reconciliation meetings have been held with a great deal of success and with no negative consequences.

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### **5.12. At The Time Of Disclosure-1998<sup>30</sup>**

This manual is a by-product of the above, more broadly-focused manual prepared by the authors. The objective here is to focus upon the time of disclosure of sexual abuses in the community and to assist the front-line community workers in responding effectively to that situation. The authors reiterate their perspective on traditional Aboriginal societies and sexual abuse (e.g. that there were strongly held and widely shared norms against sexual abuse and little actual abuse) and the shattering of these normative systems and the effective community sanctioning as a result of colonization and its associated strategies and policies. They contend that the terrible state of abuse in Aboriginal communities in the post-World War Two era has begun to be dealt with as a result of the movements (i.e. spirituality, identity, healing) which have been impacting on Aboriginal communities since the 1980s. The authors argue that there is now a clear alternative to the approach followed in mainstream society, one that emphasizes restorative rather than retributive justice, and wellness rather than sickness. At the same time the authors acknowledge that both mainstream and Aboriginal approaches have to accommodate one another, and note that spirituality, healing and restorative justice have strong roots in the mainstream society. Accordingly, their manual draws heavily on both sources of literature for definitions, lessons learned, strategies to follow and so forth. Moreover, the authors, while emphasizing the Aboriginal approach and the achievements attained thus far in local communities, consistently show a sensitivity to the demands and requirements of the larger legal system and to the values of impartiality, professionalism and technical competence when dealing with sexual abuse.

The authors discuss what abuse is, why it is a serious problem, the patterns of abuse, signs of abuse, guidelines for intervention (especially when dealing with children) and the issues and needs of the various parties at the time of disclosure. These are all strikingly similar to what one would describe for mainstream society and indeed the literature cited here is largely non-Aboriginal. They also discuss why and how sexual abuse, and especially the response to sexual abuse, are different in Aboriginal societies. Here they highlight the pervasiveness of the problem, and the special challenges and opportunities presented by Aboriginal community life. The preferred model for response advanced in this reference manual calls for the establishment of a community-based response team and for the development of a community wellness program. The community response team includes representation from the legal and child protection agencies and represents an integrated and coordinated response involving agents and perspective from both the local

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<sup>30</sup> Bopp, Judie and Michael Bopp. *At The Time Of Disclosure: A Manual for Front-Line Community Workers Dealing with Sexual Abuse Disclosures in Aboriginal Communities*. Ottawa: Solicitor General Canada, Aboriginal Peoples Collection -Technical Series, 1998 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, *Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature*, March 1998 <http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm>

community and larger society. Particular attention is paid to the stress and burn-out that front-line caregivers and members of the community-based response team frequently experience. The authors also utilize available Aboriginal materials to highlight examples of community response teams, and prevention and healing programs that appear to have been successfully implemented in Aboriginal communities.

The manual should be seen in appropriate context. While the authors' premise that there is an increasingly pervasive and credible Aboriginal approach or justice movement is valid enough, it is still the case that few communities are actually implementing the extensive alternative systems described in the manual. Fewer still are the quality evaluations which examine the extent to which such intervention strategies as community response teams for sexual assault are equitable (fair to all community members), efficient (justify the considerable costs and community involvement required), and effective (achieve wellness for victims, offenders and the community). It is interesting that the chief source for most of the guidelines, signs of abuse, issues for the various parties and so forth is a non-Aboriginal handbook published in 1982 (i.e. Sgroi). It could be said that the development of a better, more Aboriginaly-relevant system for dealing with sexual abuse is just beginning. This reference manual will certainly assist caregivers and front-line workers in advancing that development.

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### **5.13. Responding To Sexual Abuse-1997<sup>31</sup>**

As the authors note, nowadays almost all Aboriginal communities are struggling with the issue of dealing with sexual abuse. It is an extensive and serious issue in Aboriginal society and one where Aboriginal peoples have been dissatisfied with the response provided by the mainstream justice system and, more importantly, with the approach and conceptualization of the issue in mainstream society. Increasingly, Aboriginal communities and Aboriginal professionals have favoured alternatives rooted more in communitarianism, restorative justice, and healing. New strategies such as community response teams and community wellness programs are also favoured. This manual has been written "to assist Aboriginal community sexual abuse response teams (CRTs) to develop ... strategies for addressing the issues of sexual abuse ... [introducing] the main issues and problems with which CRTs should be prepared to deal". The authors discuss the understanding of sexual abuse in First Nations communities, the community wellness approach, care for the caregivers, response to abuse at the time of disclosure, the development of a community response team, involvement of the community, and legal and administrative concerns. Resource information is provided on most topics and appendices include a basic workshop program geared to enable community teams "to engage the material in the manual", as well as an outline for a two-year sexual abuse worker training program.

The monograph presents a credible account of why sexual abuse became so prevalent in Aboriginal communities in the post-World War Two era. The authors trace the decline of clear traditional boundaries and rules regarding sexual conduct to the impact of colonization and its associated strategies and policies (e.g. residential schools). There is an interesting discussion of traditional values and traditional teachings on healing. The authors contend that over the past twenty years in particular an Aboriginal healing movement has emerged which has spawned the recent effective community-based approaches to the problem of sexual abuse. The movement has been fuelled by a re-awakening of traditional spirituality, cultural identity, and political action.

Among the highlights of this reference manual, perhaps the most important, are the discussions of how to develop community response teams and community wellness programs. The authors also provide a clear and thorough account of dealing with the critical first phases of responding to sexual abuse incidents (see At The Time of Disclosure below). Throughout the monograph the authors are continuously differentiating and integrating Aboriginal and mainstream approaches and experiences in relation to sexual abuse and to justice issues in general. They are cautious in their arguments and in their advice to potential community practitioners. In other words, they appreciate the complexity of the issues and the need to balance the various considerations. They emphasize the importance of establishing protocols with the mainstream justice system and of attention to records and to details in general. A special aspect of the manual is the considerable attention given to caregivers, with tips to recognize and avoid stress and burn-out (a very real threat given the intensity and time-consuming nature of the caregiver role in small, densely-networked communities) and guidelines for their activities.

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<sup>31</sup> Bopp, Judie and Michael Bopp. Responding To Sexual Abuse: Developing A Community-Based Sexual Abuse Response Team In Aboriginal Communities. Ottawa: Solicitor General Canada, Aboriginal Peoples Collection - Technical Series, 1997 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 <http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm>

Overall, this is an excellent reference manual for front-line caregivers. Its historical and explanatory models may be somewhat simplistic but the authors are more interested here in facilitating community development than in advancing scholarship – though a careful reading would reward those who have that orientation. This reference manual is well-written, contains a host of interesting resource materials, good tips and useful procedural information, and succeeds in its objective "to inform anyone interested in working on the challenge of sexual abuse from a community-based platform about what is involved in mounting an effective community response".

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#### **5.14. Family Violence -1996<sup>32</sup>**

Some women report that in healing circles or <<community>> <<justice>> projects, where the focus is on restoring peace and harmony, they feel uneasy about confronting their abusers. They do not wish to appear to be violating traditional norms of peacemaking, and they feel the added pressure of having to consider the consequences of disrupting these initiatives, whose goal is to regain control of important dimensions of community life.

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<sup>32</sup> Final Report of the Royal Commission on Aboriginal Peoples, Volume 3: Gathering Strength, Chapter 2 The Family, Section 3 Family Violence <http://www.indigenous.bc.ca/v3/vol3ch2s2.5tos3.3.asp>



## 6. Relevant Documents, Studies and Practices – USA

### 6.1. Restorative Justice with Respect to Domestic Violence & Sexual Abuse <sup>33</sup>

There are many within our society who are struggling to find the best response to domestic violence and sexual abuse. Some look for societal change, some for individual healing; some look to the criminal justice system to provide protection and motivation for change; yet others long for a restorative justice response involving the victim, perpetrator, and community. How we respond depends on our underlying philosophies regarding the root of abuse, our understanding of justice, and our beliefs regarding how people change.

In recent years our society has begun to realize the importance of an interdisciplinary response to abuse and are learning from each other. One of the areas in which this is being done is looking at how our understandings of restorative justice and family violence theory interact.

While our traditional justice approaches tend to see crime as a violation of the state and seek punishment of the wrongdoer, a restorative justice approach sees crime as a violation of people and relationships and justice as repairing the harm done. Restorative justice attempts to involve the victim, wrongdoer, and community in the search for solutions which promote repair, reconciliation, and reassurance. While in recent history, restorative justice approaches have not been used for family violence situations, we want to look at how the above underlying principles would have a bearing on a healing response.

This integration of restorative justice philosophies and domestic violence/sexual abuse knowledge is not an easy one. Professionals in the social service community and court system have emphasized the complex and unique dynamics of abuse. These dynamics need to be taken into consideration when exploring the application of restorative justice models. Some of the dynamics of domestic violence and sexual abuse include that they:

- involve a power imbalance between the victim and the abuser;
- often require immediate intervention and on-going protection, to ensure safety of the victim;
- usually occur between people who are in intimate relationships (ie. marriage, parent/child, etc.) making it difficult to address safety requirements;
- are a reality that is frequently buried and kept a secret;
- are ongoing crimes that are deeply ingrained in the relationship and the abuser's way of thinking;
- require extensive intervention in order for change and healing to occur; and
- often continue without confrontation by key institutions in society (ie. political, legal, religious).

Voices for Non-Violence would like to develop restorative justice models which take these complex dynamics into account.

A chart highlighting retributive justice, restorative justice, and restorative justice as it applies to family violence situations follows on the next four pages. Although this third category is still in the developmental phase, its development has taken the dynamics of abuse, as mentioned above, into consideration. This comparison is intended to illustrate the uniqueness that is required when

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<sup>33</sup>Restorative Justice with Respect to Domestic Violence & Sexual Abuse An article by Heather Block & Chris Lichti (unpublished)  
<http://www.uua.org/cde/csm/restorative.html>

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responding to abuse from a restorative justice approach.

**Old Paradigm: Retributive Justice (Howard Zehr)**

**New Paradigm: Restorative Justice**

**Restorative Justice with respect to Domestic Violence & Sexual Abuse**

1

Crime defined as violation of the state

Crime defined as violation of one person by another

Crime defined as violation of both one individual by another and relationship

2

Focus on establishing blame, on guilt, on past (did s/he do it?)

Focus on problem-solving, on liabilities and obligations, and on future (what should be done?)

Focus on the past, present, and future, with the abuser taking responsibility for the abuse. It is the responsibility of the abuser along with the support of the larger community to take action toward changing behavior.

3

Adversarial relationships and process normative.

Dialogue and negotiation normal.

Concern for the protection of the victim primary. Accountability of the abuser upheld.

4

Imposition of pain to punish and deter/prevent

Restitution as a means of restoring both parties; reconciliation/ restoration as goal.

Restitution as a means of restoring both parties -- restoration of healthy human beings as the goal.

The development or restoration of an on-going violence-free relationship between victim and abuser may follow but is not necessary.

5

Justice defined by intent and by process: right rules

Justice defined as right relationships; judged by outcome.

Justice (Greek) as "a context in which persons seek to restore right relationship and provide for the needs of the one who has been made a victim by an [abuser], and to prevent the [abuser] from continuing to harm others."

6

Interpersonal conflictual nature of crime obscured, repressed; conflict seen as individual vs. state.

Crime recognized as interpersonal conflict; value of conflict recognized.

Crime recognized as a result of a combination of factors including the presence of oppression and sexism in society, socialization, inability to deal with emotions, and an individual's action against a vulnerable person. Impact of power imbalance on relationship between victim and abuser recognized.

7

One social injury replaced by another.

Focus on repair of social injury.

Focus on education, healing for the victim and abuser, and societal change.

8

Community on sideline, represented abstractly by state.

Community as facilitator, restorative process.

Community as intervenor for the abuser, embracer /upholder for the victim, and ally in the healing/change process for both.

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9

Encouragement ' of competitive, individualistic values.

Encouragement of mutuality.

Encouragement of empowerment of victim and abuser towards lives free of violence.

10

Action directed from state to offender: victim ignored offender passive

Victim's and offender's roles recognized:

- victim rights/needs recognized;
- offender encouraged to take responsibility.

Victim's and abuser's roles recognized; victim given protection and opportunity for healing; abuser encouraged to take responsibility for action and given support to change behavior.

11

Offender accountability defined as taking punishment.

Offender accountability defined as understanding impact of action and helping decide how to make things right.

Abuser accountability defined as understanding impact of action, agreeing to participate in a process to examine values, patterns, and taking action to change values and behaviors. Victim has voice in accountability of abuser. Community takes responsibility for hearing abuser's voice and holding him/her accountable.

12

Offense defined in purely legal terms, devoid of moral, social, economic, political dimensions.

Offense understood in whole context -- moral, social, economic, political.

Offense understood in whole context - historical, moral, social, economic, political.

13

Debt owed to state & society.

Debt/liability to victim recognized.

Debt/liability to victim recognized.

14

Response focused on offender's past behavior.

Response focused on harmful consequences of offender's behavior.

Response focused on harmful consequences of abuser's behavior.

15

Stigma of crime unremovable.

Stigma of crime removable through restorative action.

Stigma of crime removed through change in behavior and restorative action.

16

No encouragement for repentance and forgiveness.

Possibilities for repentance and forgiveness.

Possibilities for taking responsibility for violence and repentance. Forgiveness not an expectation but may follow in the victim's own time.

17

Dependence upon proxy professionals.

Direct involvement by participants.

Direct involvement of victim and abuser, with both given a safe place to speak. Others involved (eg. professional or lay people from the community) must have an awareness of dynamics of domestic violence.

## 6.2. A restorative justice critique of shelters for battered women in the American deep south-2001<sup>34</sup>

- Cook begins her review of shelters for battered women in the American deep south by noting the evaluative framework of “moral pragmatism” advanced by Stan Cohen.
  - With this framework in mind, Cook provides background to the development of such shelters and their selection of clients.
  - While shelters did not arise out of restorative justice theory, Cook applies such theory to determine whether shelters in the American deep south fulfill the criteria of restorative justice and moral pragmatism.
  - Her aim is to improve responses to battered women.

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## 6.3. Domestic Violence Against Women: Community Justice Issue or Individual Crime<sup>35</sup>

ABSTRACT
This theoretical paper examines the definition of domestic violence as a non-crime, individual private crime, and community justice problem. Historically, in patriarchal society, domestic violence was not a crime. Under some circumstances, men were regulated in how, when, and where they could beat their wives. It was only recently that some societies, including the United States, have criminalized domestic violence. That criminalization, however, has privatized woman battering. Although it is an individual's woman's right to not be beaten, domestic violence continues unabatedly. This paper presents the proposition that domestic violence will continue to flourish until it is considered a community justice issue. Community justice is examined as an alternative to the individual privatization domestic violence that currently exists.

## 6.4. Domestic Violence and Restorative Justice -2001<sup>36</sup>

## 6.5. Protecting Indian Women From Domestic Violence -2001<sup>37</sup>

Eileen Luna, Impact Evaluation of STOP Grant Programs for Reducing Violence Against Women Among Indian Tribes, final report submitted to NIJ, grant number 96-WT-NX-0006 (NCJ 186235).

When Congress made funds available for the development of ways to reduce violence against Indian women, tribal elders faced a challenging task: find ways to cooperate with various tribal and nontribal criminal justice agencies, and navigate the maze of law enforcement authority.

(For more discussion about the complexity of law enforcement in Indian Country, see "Policing on American Indian Reservations" by Wakeling, Jorgensen, and Michaelson, page 2.)

A recently released evaluation found that the tribes rose to the challenge. The grants to stop violence against Indian women have made a significant impact in the 14 Native communities that initially received awards.

### The Congressional Mandate

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<sup>34</sup> Cook, Kim.. (2001). "A restorative justice critique of shelters for battered women in the American deep south.". *Criminology- Aotearoa/New Zealand* September (no. 16): 7-9. <http://www.restorativejustice.org/rj3/Full-text/SheltersforBatteredWomen2.pdf>

<sup>35</sup> Jo-Ann Della-Giustina, John Jay College of Criminal Justice <http://www.asc41.com/www/2000/absgc013.htm>

<sup>36</sup> Sherman, L. (2001) "Domestic Violence and Restorative Justice." *Virginia Journal of Law and Policy*. <http://www.asc41.com/www/2000/absgc013.htm>

<sup>37</sup> Luna, Eileen, "Protecting Indian Women From Domestic Violence", *NIJ Journal*, January 2001, <http://www.ncjrs.org/txtfiles1/jr000246.txt>

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Through Title IV, the Violence Against Women Act of the Violent Crime Control and Law Enforcement Act of 1994 (the Crime Act), Congress mandated that 4 percent of the funds allocated for violence against women grants be made available to Indian tribal governments to empower Native communities to combat violent crimes against women.

In fiscal year 1995, 14 tribal governments received grants from the Department of Justice's Violence Against Women Office to develop ways to stop violence against Indian women. The money was made available through a program called STOP (Service-Training-Officers-Prosecutors).

### **Evaluating the Effects of Violence Against Women Grants**

To assess the effects of the violence against Indian women grants, the Tribal Law and Policy Program at the University of Arizona, with NIJ funding, conducted an evaluation using surveys and site interviews. In particular, researchers sought to learn about the unique cultural and political context within which each STOP program functioned.

**Improved training.** Many tribal grantees used their STOP violence against Indian women funds to train representatives from numerous agencies who came into contact with abused women.

The evaluators found that training improved both the efficiency and the number of responses to domestic violence situations, as well as increased awareness among community, police, prosecution, and judicial officials.

According to the data, increases in protection orders ranged from a 98-percent increase in one tribal community to a 50-percent increase in another. Prosecution rates rose as well; in one location, cases reaching court quadrupled after training.

**Improved coordination.** Other grantees formed working groups to bring together representatives from various community groups to design and review policies regarding the handling of sexual assault and domestic violence cases. These groups often included members from tribal courts, law enforcement, prosecution, victims' services, tribal council, social services, and community members.

The evaluators found that, in general, the working groups successfully developed appropriate, sensitive tribal legislative codes and protocols for responding to violent crimes against Indian women, fostered interagency coordination, and created an atmosphere where issues related to violence against Indian women could be discussed in the community.

**Improved focus on Native culture.** Tribes that received grants were creating programs that kept traditional views intact.

Before the STOP funding was available, Indian women who requested counseling often were referred to off-reservation counseling centers in surrounding towns. Such programs usually stress leaving the abusive situation and becoming self-sufficient--something that usually requires urbanization and is inappropriate for Native populations. Similarly, grantees view off-reservation batterer intervention programs as incompatible with tribal values, customs, and practices. With their STOP grants, tribes are developing on-reservation, culturally appropriate crisis intervention programs for women and their batterers.

### **Improving Enforcement**

Tribal police and courts encounter significant problems getting tribal court orders and tribal legislative codes honored by other jurisdictions. To rectify this problem, grantees are:

- Negotiating full faith and credit agreements with outside jurisdictions.
- Expanding task forces or advisory boards to include nontribal law enforcement agencies to generate a more coordinated response.
- Constructing tribal legislative codes modeled after State codes in the hope that they will be more readily accepted by outside jurisdictions.

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--Negotiating cross-deputization agreements with nontribal law enforcement agencies.

Four tribal grantees added a specialized domestic violence/sexual assault officer through the grant, and eight grantees developed mandatory arrest policies as a result of the STOP Violence Against Indian Women grant.

Most grantees used the discretionary portion of their awards to develop or supplement probation services and to develop or supplement court-mandated batterer intervention groups. Six tribes created a position in which some-one tracks offenders' movements through the criminal justice system.

**Increasing Conviction Rates**

Overall, tribal grantees were prosecuting and sentencing domestic violence crimes more vigorously. Grant managers attributed the increased conviction rates both to initiation of the funding and to the resulting development of tribal legislative codes since the funding became available.

## 6.6. Coordinated Community Responses to Domestic Violence-1996<sup>38</sup>

### INTRODUCTION

The past two decades have seen dramatic changes in the response to domestic violence in states and communities throughout the United States.<sup>1</sup> To date, a great deal of the change has occurred within the criminal and civil justice systems. In many communities the justice systems have experienced a number of important changes in their laws and agency practices related to domestic violence. As a result many justice systems now respond to domestic violence in a way that is more likely than in the past to hold perpetrators accountable and to protect and support battered women. At the same time, social services for battered women have become more widely available with substantial growth in domestic violence hotlines and shelter services, and batterer intervention programs have been developed and made available in many communities. While problems of execution and service availability still remain even in the most progressive jurisdictions, shifts in public knowledge and attitudes have occurred that, at the local level, seem to support better responses to domestic violence in many communities.

There is also a growing awareness that the problem of violence against women is complex and requires comprehensive service responses involving agencies and services beyond the justice systems. A number of coordinated efforts have grown up over the recent past, as some communities have moved beyond changes in individual agencies, usually those in the justice systems, to respond to domestic violence in a more comprehensive and coordinated way. Many of the early efforts focused on coordination among agencies within the criminal justice system, or between these agencies and domestic violence service providers. In recent years, however, a "second generation" of coordinated responses has developed as some communities have expanded their efforts to include a broader array of agencies and stakeholders, including health care providers, child welfare agencies, substance abuse services, clergy, and business.

Some communities have gone a step further and worked to involve the community as a whole in responding to domestic violence through prevention and education efforts aimed at raising community awareness and reshaping attitudes about this issue. Many of these more expansive efforts are quite new; only limited information has been available about them and the broader community and legal contexts in which they have occurred.

This report presents the results of a project to examine coordinated community responses to domestic violence, with a special focus on communities that are trying to incorporate into their response services and stakeholders beyond the justice system. The study was designed to understand the different approaches taken to coordinating a response and how these have developed not only in relation to the needs of battered women but in the context of other policy influences. All of the communities in the study have coordination efforts dating back a number of years that began with the criminal justice system and, in many cases, with domestic violence service providers or advocates. These communities' efforts to expand their response to include other agencies or stakeholders are more recent and much less developed than their criminal justice response. This study describes how the communities coordinate criminal justice responses and examines the issues that they have encountered as they have begun to move beyond the justice systems. Since most of these efforts are in their early stages, the findings do not provide definitive answers about the best approach to broad coordination or the likely outcomes. The study does, however, raise a number of important issues for communities to consider as they seek new and better ways to address this complicated problem.

This report is organized as follows. Chapter 2 describes the study design including site selection and site visit procedures. Chapter 3 provides descriptions of each community's efforts, including the history, features and outcomes of the coordination. Chapters 4, 5 and 6 discuss important cross-cutting issues about how the sites created change, the mechanisms they used, and opportunities for further efforts. The report concludes with a summary of the important issues for communities and various agencies to consider in coordinating a response to include a broad range of organizations and stakeholders. The remainder of this chapter provides a brief discussion of the diversity of the service needs of battered women and batterers and issues involved in developing a coordinated response.

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<sup>38</sup> Sandra J. Clark Martha R. Burt Margaret M. Schulte Karen Maguire Coordinated Community Responses to Domestic Violence in Six Communities: Beyond the Justice System October 1996  
<http://www.urban.org/crime/ccr96b.htm>

### SUMMARY AND CONCLUSIONS

This study describes how six communities have brought about changes in their response to domestic violence, largely within the justice systems. It provides several examples of how these communities have begun to move beyond the justice systems to incorporate a broader number of organizations and stakeholders into their response to domestic violence. The findings illustrate how different approaches have developed based on each community's characteristics. A number of factors, including the history of coordination, resources, and even individual personalities, can all influence a community's effort. There is no single model of a coordinated response that will succeed in every community. In addition, many of the efforts to expand a community's response beyond the justice systems are relatively recent and, in many cases, are still developing. While the findings of this study do not provide definitive answers about the best approach to a coordinated response, they raise a number of important issues for agencies and stakeholders within a community to consider. This chapter highlights important issues for the community and for the individual organizations within the system--criminal justice agencies, domestic violence service providers and advocates, health care and substance abuse service providers, businesses, and other agencies and stakeholders.

#### Issues for Criminal Justice Agencies

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|--|
| <p><b>Issues for Criminal Justice Agencies</b></p> <ul style="list-style-type: none"><li>• Formulate a response at each step in the process</li><li>• Make the response standard and predictable</li><li>• Define roles to involve the victim and ensure victim safety</li><li>• Allow staff to specialize in domestic violence, but also improve the response agency-wide</li></ul> |
|--|

#### *Formulate a response at each step in the process*

The overall impact of the criminal justice response is only as strong as its weakest link. For example, a strong police response does little good if prosecutors do not move forward on the cases, judges do not sentence offenders to interventions, and probation does not assure compliance. In order to bring about systemwide changes, a community needs to raise the consciousness of each agency about their role in addressing domestic violence and how this role interacts with and affects the ability of other agencies to respond to this issue. A strong community response to domestic violence requires that each part of the criminal justice system has appropriate policies that are followed in practice. In many of the communities in this study, individual agencies developed their policies through discussions with other justice agencies and domestic violence service providers to ensure that the policy was appropriate and compatible with other agencies' procedures. Establishing this rapport may be difficult in communities where relationships among justice agencies or between justice agencies and domestic violence service providers are not well-developed or even, at times, antagonistic. However, the interaction among these agencies in the study communities was an important part of the process of developing a coordinated response.

#### *Make the response standard and predictable*

Consistency in handling domestic violence cases is important to ensure that victims are protected, batterers are punished and that no one falls through the cracks. Improvements that rely on behavior and attitude changes on the part of a few people working within the criminal justice system are unlikely to improve the response systemwide and may not be sustained over time. Agencies must adopt policies and procedures that ensure that everyone responds appropriately in every case, and reinforce these changes through ongoing training. Across the sites, many people stressed the importance of this predictability in making battered women feel safer and making batterers more aware of the likely consequences of their actions.

#### *Define roles to involve the victim and ensure victim safety*

Criminal justice agencies' primary focus traditionally has been on the perpetrator of domestic violence. It is possible that actions within this focus can *increase* the risk of harm to the woman. Domestic violence is characterized by an ongoing pattern of abuse and criminal justice agencies can change to include a concern for assuring the victim's safety in addition to addressing the perpetrator's actions in a particular incident. These agencies can play a role in assisting the *victims*, and increasingly they do so. However, this shift often requires persons working within these agencies to rethink their roles and responsibilities in responding to domestic violence cases, and may be helped along by training on domestic violence issues. Some communities have adopted policies that include attention to the victim as a standard part of their response. For example, it has become standard practice in some jurisdictions for police departments to provide information to the victim about her rights and available resources. In some communities, police and probation also follow up with a victim, giving her a source of support, serving as a resource for her, and, through these actions, improving their ability to carry out their law enforcement roles.

#### *Allow staff to specialize in domestic violence, but also improve the response agency-wide*



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Working in the area of domestic violence is not for everyone. Many people become frustrated trying to hold the batterer accountable through the criminal justice process when the victim is unwilling to cooperate or remains in the abusive relationship. It is important to have people dealing with these cases who are aware of and sensitive to these issues, and do not turn their frustrations back on the victims.

While specialization can improve the ultimate response to domestic violence, it is often not sufficient by itself. Even with specialized staff for domestic violence, others in the agency still come into contact with domestic violence victims and issues. Training and policies should support an effective response by *everyone* in the agency.

**Issues for Domestic Violence Service Providers and Advocates**

**Issues for Domestic Violence Service Providers and Advocates**

- Stay active and involved
- Be inclusive
- Keep thinking about the best ways to help

*Stay active and involved*

Any community interested in expanding its ability to meet the needs of battered women needs to draw on the extensive knowledge and experience of traditional domestic violence service providers and advocates. However, in some communities relationships between traditional providers and other agencies in the community are strained and distrustful. Since traditional domestic violence providers have, in many communities, struggled with limited resources for many years, they may view with suspicion the interest of other public and private agencies in getting involved in domestic violence services. They may fear that funding will shift to these more mainstream agencies once they receive a little training, or that the traditional providers will be expected to compromise their principles in some unacceptable ways if they work with these agencies. Many turf issues may arise.

However, the experience of traditional providers and more mainstream agencies in the communities we visited suggests that both have a great deal to benefit from true collaborative work that includes discussion of and agreement on shared goals, appreciation of the roles that each can play in reaching those goals, and an understanding that it will take all of the agencies working together to reach the whole population of women experiencing battering. If they do not already do so, traditional battered women's service providers need to build relationships with providers of other services or representatives of other community sectors. In the process, domestic violence service providers can learn to appreciate the goals and constraints of other agencies and how their talents and skills can complement and augment other service providers. Traditional domestic violence service providers can develop ways to work with other agencies to translate their knowledge from extensive experience into policies and procedures that other providers can understand and follow. Traditional domestic violence service providers can also benefit from this interaction by learning from other agencies about their clients, their legal and policy constraints, why they do what they do, and how you can both help women in different ways. It is important for traditional domestic violence service providers to stay in the discussions, and not to withdraw. It is possible that traditional domestic violence service providers and other agencies can work out some co-location or other cooperative service arrangements that keep all of their agencies growing, or a system of cross-referrals that takes advantage of all of their strengths.

*Be inclusive*

If they do not already do so, traditional battered women's service providers should recognize that their agencies do not serve every woman who experiences battering in their community, and that others might have something to contribute toward making services and supports more available to all women who need them. It is important to try to think of ways to involve ever more sectors in the work of ending domestic violence, and to work with them to define and reach mutual goals.

*Keep thinking about the best ways to help*

The anti-violence against women movement, including activism to stop both sexual assault and domestic violence and to aid their victims, grew out of the activist feminism of the early 1970s (see, for example, Koss and Harvey, 1991, [Chapter 4](#) with regard to anti-rape activism). The feminist roots of the movement account for its examination of cultural assumptions that support battering and its analysis of ways in which social institutions, including the criminal justice system, incorporate and support those damaging assumptions (see Dobash and Dobash, 1979; Greenblatt, 1985; Saunders et al., 1987; and Yllo, 1983).

During the early years of the anti-violence movement, every day's contact on hotlines and in shelters with women experiencing battering brought new ideas and new challenges to try to understand what was happening to these women and how to help them. These ideas led anti-violence activists to challenge the traditional behaviors of societal institutions. They tried (and still try) to bring about change to make the institutions protect battered women rather than ignoring their needs or even denying the appropriateness of their requests for help. The ongoing need for this is apparent when we note that even today, in some jurisdictions, police departments continue treat a domestic violence

incident as a private interpersonal dispute to be settled rather than as a crime for which evidence needs to be collected and charges made. In a number of domestic violence incidents, arrests are not made, cases are not taken through prosecution, charges against the same man are reduced, and penalties in the cases that reach conviction are often minimal. These difficulties still arise even in some of the model communities we visited.

However, while the role of advocate for battered women toward the official systems through which they must pass is still relevant, in many communities traditional domestic violence providers and advocates have learned how to work with representatives of the key public systems to improve the treatment of battered women. As they have done this, they have had to keep thinking in order to develop effective ways to get their message across and to get its implications accepted by justice and other agencies. They have had to learn about the constraints and requirements of these agencies, to appreciate the jobs that these agencies are mandated to do, and to help the agencies modify their behavior to be more supportive of victims in ways that complement the agencies' completion of their own primary tasks. Doing so has taken some creative thinking; the need for such thinking is just as great as new agencies are brought into the network of services that seek to help battered women.

The challenge for traditional domestic violence providers and advocates is to use their background, knowledge, and motivation to extend current understandings to an even deeper level as they encounter women in circumstances where they are not yet ready to seek help from the network of traditional domestic violence services. These new understandings must then be applied to helping the agencies serving these women (e.g., health care, child protection, or substance abuse agencies) to incorporate a concern for domestic violence issues into their standard practice in ways that support the women and further their safety and well-being. Possibly the women need to move some in their attitudes and motivations toward a commitment to live violence-free. But equally likely, today's providers also need to move some in thinking about how they can serve and support this part of the battered woman population. The best results will probably come from creating new services informed by a blend of the best elements of professional orientation (from the new agencies) and social critique (from the domestic violence advocates).

#### **Issues for Health Care Providers**

##### **Issues for Health Care Providers**

- Be aware that women may not be ready to address the domestic violence in their lives
- Provide services and resources to back up screening and reporting policies

*Be aware that women may not be ready to address the domestic violence in their lives*

Medical providers reach some battered women who do not come into contact with other service systems (i.e., criminal justice and domestic violence). However, many battered women come into contact with the health care system because they *require* medical attention for their injuries, not because they have sought help for the domestic violence. Battered women seen by health care providers may not be open to an intervention for the domestic violence at that time. However, support and referral information provided in health care settings may be a first step in helping battered women move toward addressing the violence in their lives.

*Provide services and resources to back up screening and reporting policies*

Screening and reporting policies by themselves are unlikely to accomplish a better response for battered women if they are not part of a larger effort to serve the victim. Providing resources and services for battered women identified through these efforts offers an incentive for providers to be more aggressive in their screening efforts. In setting up these services, health care agencies face the decision of whether to provide services to battered women "in-house" or to refer their patients to outside agencies. The sites in this study provide examples of both approaches.

#### **Issues for Other Agencies and Stakeholders**

##### **Issues for Other Agencies and Stakeholders**

- Understand the extent of domestic violence among your own clients
- Determine which agencies can do which services best
- Determine which agencies can serve which women best
- Commit your agency to using the expertise of traditional domestic violence providers, both initially and on an ongoing basis

*Understand the extent of domestic violence among your own clients*

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To begin to address domestic violence among its client population, an agency must first develop screening protocols to identify women who experience battering, and then decide the circumstances under which they will use these protocols. An agency could, for example, decide to use the protocol for every case seeking services of any kind, or any person encountered by the agency (if it is not one where clients come voluntarily). This is the approach of some child protection agencies, and it is the approach that the Joint Commission on the Accreditation of Hospitals requires of all emergency rooms (although this is not always followed in practice). Alternatively, an agency could decide only to screen clients seeking particular services (e.g., those coming to the emergency room of a hospital, but not those coming to a variety of other clinics or seeking other services), or clients exhibiting certain patterns of injury or explaining their injuries in unconvincing ways. The only real way any agency will come to understand the full scope of domestic violence in its clientele is to screen everyone, at least at the beginning. It may become clear as the evidence collects that some degree of targeting would be almost as efficient, but any decision to limit screening would then be based on facts rather than on assumptions.

*Determine which agencies can do which services best*

To formulate a broad coordinated response, a range of agencies in a community must work together to identify agency service strengths and weaknesses, as well as complete gaps in the system of available services. Then, these agencies must work out arrangements whereby agencies agree to provide services that they are best at, and to develop and use an efficient and effective referral system to get clients to the best agency to help them. Agencies must also work together to decide which agencies should assume the task of developing new services to fill identified gaps.

*Determine which agencies can serve which women best*

The previous discussion raised issues about identifying which types of service each of the agencies did best. In addition to thinking about these types of skills, it is also important to think about where women are most comfortable going, and the context in which they will be most likely to accept and benefit from services. This is particularly pertinent for ethnic and language minority women, who may be best served by agencies in their own communities or that serve primarily women from their ethnic or cultural background. The goal should be that any agency to which a woman turns for help, or which identifies a woman as needing help, should be able to help her without having to send her somewhere else where she may feel culturally alien, or where she may not be ready for the types of services available.

*Commit your agency to using the expertise of traditional domestic violence providers, both initially and on an ongoing basis*

It is important for agencies to recognize that there is a lot to know about working with domestic violence victims, and that using the available expertise of domestic violence providers and advocates can result in better services and save them some needless mistakes. It can also help their staff to feel safe, avert burnout, and learn how to apply abstract principles in concrete cases. At the same time, working together can create new allies rather than perpetuating old antagonisms. In many of the situations we learned about on our site visits, agencies that joined forces with the traditional domestic violence providers found that both grew and learned useful things in the process that improved agency practice in both agencies to better meet the needs of clients.

**Issues for the Community**

<p><b>Issues for the Community</b></p> <ul style="list-style-type: none"><li>• Recognize the roles of all community members</li></ul>
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*Recognize the roles of all community members*

A community's response to domestic violence should take into account the fact that not all battered women come into contact with or seek services from any agencies. To address the needs of all battered women requires a response that includes every member of the community. In this way, a community's response may have an impact on even the most isolated battered woman. Raising the community's awareness and reshaping social norms around this issue so that *everyone* plays a role in condemning domestic violence and supporting battered women is the critical basis for widespread and permanent changes. Widespread education and prevention activities were used in some of the study sites to involve the larger community in the response to domestic violence. San Francisco even developed culturally-appropriate messages to mobilize particular ethnic communities to take action against domestic violence. The efforts are an essential part of a coordinated response. The ability to respond to domestic violence is not limited to service agencies and providers; clergy, employers, and neighbors can and should all play a role.

**NOTES**

1. Throughout this report, domestic violence is generally used to refer to abuse (physical, verbal or emotional) of a woman by an intimate male partner (husband, ex-husband, current or former boyfriend). While women can also perpetrate violence in intimate relationships, this occurs less frequently than violence directed at women (Council on

Scientific Affairs, American Medical Association, 1992). Domestic violence also occurs between intimate partners of the same sex.

2. Some of the points made here are taken from the Aron and Olson study, which was a companion study to the present one.

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### 6.7. Resolving Disputes Locally: Alternatives for Rural Alaska - 1992<sup>39</sup>

- **Case Screening.** Decision-makers/conciliators select the cases they will take and reject those that do not meet criteria they set.
  - o PACT formally expresses these criteria in writing.
  - o The Sitka Tribal Court judge screens cases based on past experience, and the Minto Tribal Court relies on discussions among its members about which cases to accept or reject.
  - o As a practical matter (given the unsettled legal status of tribal courts in Alaska), the Minto and Sitka tribal courts attempt to avoid cases that might directly challenge their authority or jurisdiction.
  - o PACT's case screening focuses more on the organization's philosophical beliefs about the types of cases appropriate for conciliation than on concerns about challenges to its jurisdiction.
- **Caseload Characteristics.** The three organizations differ in the types of cases that they hear.
  - o Minto's tribal court attempts to police the community, not so much to punish offenders as to "help" villagers solve problems.
  - o The court also handles some traditional adoptions in addition to the civil regulatory cases that make up the bulk of its work.
  - o The Sitka Tribal Court's cases consist almost entirely of child custody proceedings, some of which are involuntary proceedings under ICWA and some of which are guardianships.
  - o A few have been formally transferred to the tribal court from state or county courts in other states.
  - o PACT handles mostly civil matters such as landlord-tenant matters and small business cases.
  - o PACT, to date, has not handled any criminal or domestic matters.
- **Wide Range of Disputes Resolved.** All three organizations evaluated appeared to have the potential to handle a very wide range of dispute types that are presently filed in state courts, including typical civil matters, family and children's matters (this was less clearly demonstrated in the case of PACT), and quasi-criminal matters.
  - o They also were able to deal with personal disputes that normally would not be handled by the state courts.

### Alaska State Legislature<sup>40</sup>

- Domestic violence cases or arson cases in which a life was threatened may not be considered for a community sentence.

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<sup>39</sup> Alaska Judicial Council, Resolving Disputes Locally: Alternatives for Rural Alaska, August 1992, <http://www.ajc.state.ak.us/Reports/rjrepframe.htm>

<sup>40</sup> Alaska State Legislature, Legislature Promotes Restorative Justice Measure Builds Upon Effectiveness of Traditional Justice Goals <http://www.akrepublicans.org/prdyson104252000.htm>

## 7. Relevant Documents, Studies and Practices - International

### 7.1. Re-visioning Men's Violence Against Female Partners -2000<sup>41</sup>

'Re-vision - the act of looking back, of seeing with fresh eyes...is for women... an act of survival' (Rich, 1979, 35).

#### Introduction

There is still considerable debate about the value of the criminal justice system in affecting men's violence against their female partners. Many of the law reforms introduced in the 1980s and early 1990s - specifically mandatory arrest, prosecution and imprisonment in their various guises - seem to have failed to increase women's safety. A number of writers have suggested that this is because the criminal justice system does not and cannot challenge the patriarchal structures which both underlie and sanction men's violence against their female partners (see, for example, Smart, 1989 and 1995; Snider, 1998 and Morris, 1993). Others writers continue to promote a law enforcement response and suggest that the reasons for its failure lies in practical difficulties and that stricter enforcement, controls on discretion and so on would make a difference (see, for example, Hanmer, 1989, Edwards, 1989 and, most recently, Kelly, 1999).

Intriguingly, feminist writers can be found on both sides of these argument and, further, those feminist writers who continue to argue for increased criminalisation and penalisation are directly at odds with feminist or pro-feminist writers who have argued that feminist values have the potential to transform the criminal justice and penal systems and to provide a more 'caring' vision of justice (see, for example, Heidensohn, 1986; Daly, 1989).[1] In addition, in recent years, some writers have made connections between the ethic of care and the principles and practices of restorative justice as a way of transforming and re-visioning conventional justice processes (Masters and Smith, 1998).[2] However, violence by men against their female partners is often excluded from these debates as being inappropriate for restorative processes and practices. This article tries to come to grips with these conflicts and tensions. It reviews what has been achieved through criminal justice routes for women experiencing violence at the hands of their partners by raising a number of questions and then explores an alternative, or additional, way in which this violence might be addressed.

#### Has law reform reduced men's violence against their female partners?

The difficulty with trying to answer this question is that is impossible to know precisely the 'true' level of men's violence against their female partners. We know that the number of arrests is a poor indication of the extent of this violence and that changes in these may result from changes in reporting and recording practices rather than increases or decreases in offending.[3] Awareness of the inadequacy of these statistics led to the use of other sources of data, particularly victim surveys in trying to obtain a more accurate picture (for example, the British Crime Survey (Mirrlees-Black, 1995)). However, conventional victim surveys do not produce reliable estimates either[4] and increases in prevalence rates over time are usually explained by an increased willingness to report such incidents and to improvements in research methodology.[5] Surveys which have focused generally on the extent of violence against women may also not provide a reliable estimate the extent of men's violence against their partners.[6] Surveys which specifically explore violence by partners, including current partners, are arguably better able to capture the extent of this violence and certainly these surveys produce higher estimates of this violence though the extent to which these are 'real' differences or methodological constructs again remains unclear (Morris, 1998).[7] Overall, then, we have to conclude that there is no evidence to suggest that prevalence rates have declined since the 1980s and 1990s - for the reasons outlined earlier, they are more likely to have increased.[8]

#### Do women want to rely on the criminal justice system?

Research shows that only a few of the women who experience violence at the hands of their male partners rely on the law, police or courts to deal with it, at least in the first instance (see, for example, Gelles and Strauss, 1988; Morris, 1997;

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<sup>41</sup> Allison Morris and Loraine Gelsthorpe Re-visioning Men's Violence Against Female Partners (2000, Howard Journal of Criminal Justice, forthcoming)

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Mirrlees-Black, 1998).[9] Some women may 'accept' this violence and see it as simply part of 'ordinary' life (Bush and Hood-Williams, 1995). Almost all have to overcome a reluctance to take action; their preference seems to be to turn first to friends or family, and then to general practitioners, lawyers and other 'helping' agencies as much as to the police.[10]

When women do call the police, they do so for many reasons which may or may not include wanting their partner arrested. In Hoyle's (1998) sample of 39 victims, for example, only a third wanted their partner arrested and many of these women did not want the police to proceed further: they wanted immediate protection but not necessarily prosecution. Indeed, in Hoyle's view, some victims judged interventions as successful even though they did not result in a prosecution and whether or not their partner was arrested was unrelated to women's level of satisfaction with the police. In the victim's terms, therefore, this decision not to proceed further with a prosecution was a rational choice. It may be 'for the sake of the children', for instance; or it may be because she is still 'in love' with her partner, because she wants the relationship to 'work', because she has nowhere else to go, because she has no money, or because she is afraid of her partner and knows that the violence will continue irrespective of police action. Moreover, even Kelly (1999, 113), whose recent research clearly had at its base a pro-arrest stance, concluded that women who called the police 'wanted some form of action'. There is no clear evidence that what women wanted was arrest and prosecution.[11]

Whatever the reason - and whether we as outsiders agree with it or not - if a woman does not want her partner arrested, prosecuted or imprisoned, it is arguable that she should be listened to. For us, as outsiders, to dictate otherwise in order that we might fulfill some assumed greater goal - for example, the penalisation of all violent men - is to increase the powerlessness of this woman. To do so in the name of 'women's interests' or 'feminism' seems to us even more problematic. After reviewing the now extensive literature on arrest, Buzawa and Buzawa (1996, 161) concluded that it imposed 'unacceptable' costs on victims. Indeed, Hoyle (1998, 229) suggests on the basis of her research findings that pro-arrest and pro-prosecution policies could do more harm than good. In any event, it is unlikely that the criminal justice system will be able to intervene effectively against a woman's express wishes. There is some evidence from the United States that women stopped calling the police when they lost any say about the prosecution of their partner (Buzawa and Buzawa, 1996).[12] Ford (1991) made a point which is also relevant here. He described women's use of the criminal justice system as a resource which they could use to increase their relative power and as a way of managing the violence they experienced. He advocated against, therefore, any policies which might 'inadvertently disempower victims' (1991, 329).

### **Do the police arrest violent men when called?**

Although police policy on violence in relationships in most Western jurisdictions specifies offenders should be arrested except in exceptional circumstances, research suggests that the police do not always follow this policy (see, for example, Edwards, 1989; Stanko, 1989 and 1995; Grace, 1995; Hoyle, 1998; Kelly, 1999). For example, Kelly (1999) quotes arrest figures (for periods between 1993 to 1995) of only 13% for Greater Manchester, of 18% for Northumbria and of 24% for West Yorkshire. In the two Home Office pilot areas (funded from 1992 to 1995) in which Kelly's research was based, the arrest rate was only 19% and 12%. Even where there were visible injuries and the offender was present, the arrest rate was only 45%.[13] And, more recently, Hanmer et al (1999) quote a figure of 27% for one division of West Yorkshire (Killingbeck) for 1997 - a reduction over the 1996 figure.[14]

There are various reasons for this difference between police policy and practice: the policies are permissive; they can be manipulated; they can be followed by the letter but not in spirit; and they can be ignored, resisted or broken (for a discussion, see Hoyle, 1999, 12-13). But importantly in this context, Hoyle (1998, 181) suggests that a key factor for the failure of the police to arrest or for the crown prosecution service to prosecute was the victim's preferences.[15] We dealt with the implications of this earlier.

### **Does penalisation or rehabilitation 'work'?**

Given what we have said in the above two sections, it is apparent, in the main, that men who are violent towards their partners are not held accountable for their actions and that the criminalisation and penalisation of this violence touches only a minority of violent men. Conversely, it can be argued that the penalisation of violent men may brutalise them further and thus may make them behave more violently or oppressively towards women (Carlen, 1992). Research also suggests that arrest in fact increase the level of violence in some men (see, for example, Sherman, 1992). Hudson (1998)

further makes explicit the likelihood that increased criminalisation and penalisation has impacted primarily on the poor and the marginalised and that this penalisation is more likely to reinforce than to change sexist attitudes. Moreover, there is very little evidence to suggest either generally with respect to criminal behaviour or specifically with respect to violence against women that increased penalties deter many offenders (see, for example, von Hirsch et al, 1999 and Sherman, 1992) or that rehabilitative sanctions ‘work’ (see, for example, Gendreau and Andrews, 1990 and Edleson and Syers, 1990). It is true that more recently there has been some evidence that programmes make a difference (Dobash et al, 1996; [16] Scourfield and Dobash, 1999; Davis and Taylor, 1999), but many programmes dealing with men’s violence towards their partners do not take men on court orders and it remains to be seen whether or not men who voluntarily attend such programmes have even higher ‘success’ rates. Certainly, at a general level the evidence suggests that the effectiveness of interventions is increased when offenders become involved voluntarily (McGuire, 1995; McIvor, 1992 and McLaren, 1992).

### **A different direction: towards restorative justice**

The above research findings, taken together, indicate to us the need to fundamentally rethink how better to respond to women who are experiencing violence in relationships, especially when much of this violence is within current relationships (Mirrlees-Black, 1999, Morris, 1997) and given women’s apparent reluctance to invoke criminal justice processes and sanctions. As noted earlier, at least some of these women do not wish to end their relationship for a range of emotional, financial or cultural reasons (Carbonatto, 1998). Hoyle (1998, 221ff) recently suggested an integrated approach incorporating both the civil and criminal law to create ‘family justice’, but there is no reason to suppose that this combination would serve women any better than the individual components. She also refers (at page 222) to specialist courts which exist in some American and Canadian cities and which deal only with family violence cases (Clark et al., 1996). And indeed, the first of these in England has recently been established in Leeds (BBC News Online, 1999). However, there does not seem to have been any systematic evaluations of these and they continue to rely on conventional criminal justice practices.

Our preference is to explore the possibilities of restorative justice. [17] Research in New Zealand has shown that, through restorative processes, offenders can be held accountable for their offending in meaningful ways; that the voices of victims can be heard; that victims can feel better as a result of their participation; and that outcomes which address both victims’ and offenders needs or interests can be reached (Maxwell and Morris, 1993). Maxwell and Morris (1999) and Maxwell et al (1999) have also found that restorative processes can reduce reoffending. Conventional criminal justice processes and practices cannot make these claims.

The principal difference between restorative justice and traditional criminal justice processes is that restorative justice stresses the inclusion of the key parties to the offence - in particular, the victim, the offender and their friends and families - in decision making processes and reaching outcomes and thus envisages them coming together to resolve collectively how to deal with that offence, its consequences and its implications for the future. Thus, within the context of men’s violence against their partners, a meeting would take place between all those with an ‘interest’ in the offence and its aftermath (the victim, the offender, possibly their children, their families, their friends and any significant others the parties wish to be present) aided by a facilitator. The expectation would be that the offender would acknowledge his responsibility for the violence and that all the participants would be involved in a search for a way of ensuring the violence is not repeated. This might involve the man agreeing to live elsewhere for a while or to join a drug or alcohol programme or a programme specifically focused on preventing men’s violence. A safety plan for the woman and her children would usually also be developed - for example, the provision of a personal alarm for the women, agreement to ring the police or some nominated others if the violence seemed likely to recur or agreement to leave the relationship if the violence was repeated. These agreements could be monitored by all members of the meeting or nominated individuals. Some, if not all, of these actions might be possible within the criminal justice system. But there are clear differences in emphasis: the parties want them to happen, they are not coerced; and the support systems commonly relied on by women have been brought into play more forcefully so that the violence is no longer ‘private’ or ‘personal’.

There are a number of claims which have to be addressed in seeking to advocate restorative responses to men’s violence against women. In the next section, we explore some of these and attempt to answer them.

### **Claim 1: Restorative justice perpetuates power imbalances**

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The principal argument against the use of restorative justice in men's violence against women is that the power imbalance in violent relationships is too entrenched for restorative processes to 'work' (see, for example, Martin, 1996; Stubbs, 1997). These relationships are said to be characterised by dominance (by the abuser) and submission (by the abused) and, consequently, it is argued that women are unlikely to be able to assert their needs or wishes.[18]

No-one could deny the power of men's violence against their partners, including the power of threats and emotional abuse. These are controlling behaviours. However, power imbalances can be addressed by ensuring procedural fairness, by supporting the less powerful, and by challenging the powerful. Thus restorative processes could provide a forum in which the victim can make clear to the offender and, importantly, to their friends and families the effects of the violence on her. Friends and families can also provide a supportive basis for that voice to be heard or, if appropriate, may speak for the woman, more powerfully than any prosecutor in a criminal court. A reasonable expectation for facilitators of restorative justice processes is that they should create an environment which ensures that women do participate, by whichever way is necessary. Examples cited by Braithwaite and Daly (1994) include mobilising the support of men who are anti-violence or women with experience in highlighting the effects of violence against women. They also refer to the fact that in some Maori tribes an accused male abuser would have no right to speak and that statements would have to be made on his behalf.

**Claim 2: Restorative justice removes men's responsibility**

Linked to power imbalances is the claim that violent men commonly reject responsibility for their violence and place responsibility for it onto women, minimise the consequences of their violence, blame women for 'provoking' them and so on (see, for example, Leibrich et al, 1995; Dobash and Dobash, 1992). Because of this, it is believed that restorative processes would be powerless to challenge men's attitudes and behaviour. Stubbs (1997, 123), for example, argues that setting up restorative processes 'holds no guarantee that women will feel empowered to speak about their experiences, their fears for the future, and [their] wishes concerning the sanction'.

In restorative processes, however, the abuser is expected to take responsibility for the abuse and men's techniques of neutralisation can be challenged. Violent men may be unable to 'hear' their female partners, but they are likely to find it more difficult not to hear the voices of concern from their friends, their parents, their partner's parents, their siblings and so on. Of course, Stubbs (1997, 123) is right that a single restorative meeting of however many supporters will not be able to effectively challenge 'structural inequality and deeply held misogynist views'. But that is hardly a reason for abandoning the very different principles and practices of restorative justice and passing the matter over to a criminal justice system which itself is deeply embedded in structural inequality and misogynist views (Edwards, 1996; Smart, 1989). And, of course, Stubbs is also right when she points to contrition and apology - key elements in restorative processes - being part of the cycle of violence (Walker, 1979) - the lull before the storm. The difference in restorative processes is the 'public' nature of that contrition and apology and the shared monitoring of subsequent events to ensure that it is 'real'.

**Claim 3: Restorative justice decriminalises men's violence**

Another main argument for rejecting alternative processes is that men's violence against their partners must be recognised for what it is: criminal behaviour. As such, criminal justice responses are required and nothing should be done which might be viewed as minimising the seriousness of this violence. Critics tend to see restorative processes as decriminalising men's violence against their partners and as returning it to the status of a 'private' matter.

The use of restorative processes, however, does not signify the decriminalisation of men's violence against their partners. The criminal law remains as a signifier and denouncer, but the belief within restorative processes is that the abuser's family and friends are by far the more potent agents to achieve this objective of denunciation. Research has found that there is some community support for the belief that it is 'OK' to hit women in some circumstances. Leibrich et al (1995), for example, found that about one in five men held this view in 11 out of 20 scenarios. But this means that four in five did not and restorative processes are a way of mobilising this censure. Of course, we are not anticipating that large social or geographical communities can be mobilised in this way (even if they could be defined with some precision). Our references to 'community' here mean specific members of a woman's small social network, neighbourhood or family with whom she maintains contact - her 'personal community' so to speak. [19]



Arguably, by challenging men's violence in the presence of the abuser's family and friends the message of denunciation is loud and clear for those who matter most to the offender. In this way, restorative processes also have the potential to challenge community norms and values about men's violence against their partners. In Hudson's (1998, 250) words, restorative justice 'can...not only perform the norm-affirming expressive role of adversarial criminal justice; it can perform an additional norm-creating role'. There is also nothing in a restorative justice approach which prevents the police from arresting violent men or which prevents them and other agencies from educating the public that men's violence against their partners is wrong. And, of course, the availability of restorative processes does not prevent women who prefer to use the criminal justice system to do so. In addition, the criminal justice system can be used as part of an escalation of responses (on the lines proposed by Braithwaite and Daly, 1994).

There is one other matter which needs to be dealt with here. Kelly (1999, ix) asserts that 'victims of domestic violence think domestic violence should be responded to as a crime'. There are three points to make. First, this strong statement is made on the basis of a questionnaire with a response rate of 28% and it is clear that few of those who responded were still living with their violent partners. Second, and related to this latter point, in our experience, women still living in violent relationships rarely 'see' that violence as crime (Morris, 1997); this is a common criticism of the ability of victim surveys to uncover the extent of men's violence against their partners. Third, even if Kelly's statement is valid at a general level, it does not lead automatically and exclusively to the promotion of a law enforcement response. Other crimes are now being diverted if the circumstances are appropriate and, in some areas, restorative conferences (such as those organised by the Thames Valley police) are being held for a range of crimes (Young and Goold, 1999).

#### **Claim 4: Restorative justice mediates men's violence**

Critics of restorative justice seem to see it as the same as mediation or conflict resolution and, therefore, as open to the same concerns. They are not. Indeed, there are few examples of offending or victimisation in which it would be appropriate to advocate mediation. For example, if someone takes your umbrella, unless there is a conflict about its ownership, there is no basis for negotiation or bargaining over who owns it and who has stolen it. This lack of bargaining or negotiation is even more explicit in restorative responses to violence against women by their partners. There may be two quite separate views on 'what happened', but in restorative processes the victim's perspective is central and the meeting can only proceed on the basis of the offender's acceptance of responsibility.

Martin (1995) cites as an example of mediation practice an agreement in which the victim agreed to comply with the abuser's rules of behaviour (for example, to have her partner's dinner ready at a particular time) in return for his agreement not to batter her. But this is not in accord with restorative principles: violence is not negotiable and freedom from violence could never be conditional. Martin (1995) also quotes findings from Maxwell and Morris's (1993) research on family group conferencing that about a quarter of the victims felt worse as a result of the conference. But, in the main, this was the result of poor practice and ignores the fact that about 60% of victims felt better as a result of the process.[20] Women with experience of court processes have also often expressed their dissatisfaction with these (Shapland et al., 1985).

#### **Claim 5: Restorative justice encourages women to remain in violent relationships**

An implicit or underlying assumption when parties seek legal remedies is that, where there was a relationship, it has broken down, and contact is not desired. This is not necessarily so when men are violent towards their current partners. A principal argument presented in support of the use of restorative processes with respect to men's violence against their partners is that many women for a range of reasons wish to remain in or return to relationships which others would see as abusive (see, for example, Carbonatto, 1995).[21] What restorative processes envisage is allowing women to make choices about their futures from a range of options.

The diversity of the nature of men's violence against their female partners and of women's responses to it is an indication of the need for a range of responses rather than a primary or sole reliance on criminal justice responses. This speaks to the importance of allowing women to make the choices which best suit them rather than allowing professionals to decide for them.[22] Indeed, one way of addressing the power imbalances referred to earlier is to provide women with these choices. Some critics seem unwilling to accept that women who have experienced violence can effectively make choices for themselves because they have to have been involved in a relationship founded on power

and control. But transferring this power and control to the state (often in reality male professionals) does little to address the women's concerns.

**Claim 6: Restorative justice reduces women's safety**

The first part of this article doubted whether or not the criminal justice system could increase women's safety. In our view, friends and families are far better placed than professionals to prevent the recurrence of violence and to play a role in monitoring the safety plan. Restorative justice processes directly involves them, in contrast to the exclusion intrinsic to criminal justice interventions. This 'opening up' of knowledge and awareness is especially important when one of the possible outcomes of the restorative meeting is the separation or the continued separation of the parties since it is widely recognised that women are more 'at risk' after leaving their violent partners (Morley and Mullender, 1994).[23] Criminal justice interventions can do little to prevent this. Families and friends maybe can because they can arrange networks of support and surveillance where necessary. Knowledge empowers them to act as well as the woman.

**Claim 7: Restorative justice encourages vigilantism**

Restorative justice is sometimes equated with community or popular justice which is, in turn, equated with vigilantism.[24] It is true that community justice can be repressive, retributive, hierarchical and patriarchal. But these values are fundamentally at odds with the defining values of restorative justice and cannot, therefore, be part of it. That is why also we believe that the 'community' involvement in restorative processes needs to be defined quite narrowly and to exclude the attendance of 'representative' members of geographical or social communities. Also, if there were concerns about communities taking over this process for non restorative purposes, checks could be introduced - for example, courts could provide some oversight of restorative justice outcomes for the purposes of ensuring that the outcomes are in accordance with restorative justice values. Finally, of course, vigilantism does not require the introduction of restorative processes to emerge. Abrahams (1998) provides many examples of vigilantism from modern day Britain (and elsewhere) which seem rather to have been reactions against the failings of conventional criminal justice processes and sanctions. The spectre of vigilantism in debates on restorative justice, therefore, is something of a red herring.

**Claim 8: Restorative justice lacks legitimacy**

Tyler (1990) found that citizens treated with respect by the police, listened to by them and so on were likely to see the law as fair; conversely, when they were treated without respect and were not listened to the law as seen as unfair. He distinguished between 'process control' and 'outcome control' and concluded that 'having a say' (that is, process control) was more important than determining the outcome of the decision. Tyler's research, however, was based in a context in which decisions were made by third parties (judges). To this extent, his conclusions may not be relevant for restorative conferencing which is premised on consensual decision making. The same point can be made with respect to the elements subsequently identified by Paternoster et al. (1997) as providing legitimacy. These include: representation (playing a part in decision-making), consistency, impartiality, accuracy (the competency of the legal authority), correctability (the scope for appeal) and ethicality (treating people with respect and dignity).

Restorative justice embodies some of these principles - particularly with regard to respect for victims and offenders. However, it does not meet others since they relate primarily to expectations of the 'legal authority'. To our mind, however, this is not problematic because the notion of legitimacy is derived principally from conventional justice values. Restorative justice involves somewhat different values and its legitimacy must derive from these. Important elements, therefore, in providing the legitimacy of restorative justice are the inclusion of the key parties, increased understanding of the offence, and its consequences and respect.

**Conclusion**

Family violence has a particular set of underlying characteristics: the existence of a prior relationship between the parties; the fact that the parties have lived together and may wish to continue living together; the likelihood of repeat victimisation; the context of emotional abuse and ongoing power imbalances in the relationship; the victim's fear of the offender; the secrecy of the violence; the isolation of the victim; and the offender's minimising of the seriousness of the violence. Although some see these as requiring criminal justice solutions, in our view, they equally justify a restorative justice approach. Moreover, it can be argued that, because many women do not seem to wish to use conventional

criminal justice processes, these processes themselves perpetuate many of these characteristics. Women's unwillingness to call the police, for example, keeps the violence secret and may allow men both to continue to minimise and to repeat their violence.

We are not, of course, saying that the criminal justice system has no place at all in dealing with men's violence towards their female partners. The criminal law and criminal sanctions play an important declaratory and denunciatory role. And there will be many times when women want their partners arrested or where it is necessary to prevent further assaults, as with other offences. But the criminal justice system does not serve women who have experienced violence at the hands of their male partners particularly well. Few violent men are reported to the police by their partners and, despite the existence of pro-arrest policies and the expectation that violent offenders will be arrested and imprisoned except in exceptional circumstances, many men escape both criminalisation and penalisation and, even when they do not, there is little evidence to show that these approaches 'work'. This is hardly a surprising conclusion. The criminal justice system has not been particularly successful in controlling crime and so why should we expect any more with respect to violence against women?

There is some support from women themselves for a different approach. This article has advocated moving in a new direction: towards restorative justice. There is increasing reliance on co-ordinated responses to crime and violence against women is no exception (Kelly, 1999; Clark et al., 1996; Hague and Malos, 1996; Hague et al., 1996). Whilst these may be positive developments in themselves, they could be strengthened by moving outside the criminal justice system. Restorative justice processes increase women's choices, provide women not only with the support of family and friends, but also with a voice, and, through this involvement of friends and families, may increase women's safety.[25] By offering constructive rather than penal solutions, restorative processes may also be opted for at an earlier stage in women's experience of violence. The Women's Aid network is premised on principles of empowerment for women. Restorative justice could be a powerful tool in this.

[1] They discuss differences in the perceptions of justice from a care as opposed to a retributive perspective and portray these as 'female' and 'male' respectively. The female perspective emphasizes needs, motives and relationships; retributive punishment and deterrence are not viewed as consistent with the ethic of care.

[2] For more information on restorative justice, see Braithwaite (1989), Walgrave (1998), Van Ness (1997), Van Ness and Strong (1997), Zehr (1990), Consedine (1995), and Bowen and Consedine (1999).

[3] Criminal statistics in England and Wales do not distinguish violence against women by men. Other jurisdictions do - for example, in New Zealand - there is a specific offence called 'male assaults female'. This, however, includes all such assaults and is not restricted to offences where there is a relationship between the parties. Similarly, some states in the United States record 'domestic violence' offences but these can include child as well as adult victims.

[4] There are a number of reasons for this: for example, these surveys are set within definitions of crime and violence against women within relationships is not necessarily viewed by participants in these terms; participants may be too afraid to disclose incidents to interviewers, especially but not only where the abuser is present in the household at the time; or participants may feel too embarrassed to disclose the offence.

[5] The number of incidents of domestic violence reported in the 1995 British Crime Survey was more than three times higher than in the 1981, but this was probably affected by the change in method of data collection from face to face interview to the participants' private use of laptop computers. Some methodological problems remain, however; see Mirrlees-Black (1999).

[6] By having first explored violent crime by strangers, these surveys may have shaped women's responses to the extent of violence they experienced at the hands of their partners. Examples of this kind of survey are the Australian Bureau of Statistics (1997) and Johnson and Sacco (1995).

[7] Taken together, however, although these (and other) surveys vary considerably in their estimates of prevalence of men's violence against their female partners, we can suggest that probably somewhere between one in three and one in five women have experienced some level of violence at the hands of their current partner at least once during their relationship and that around one in ten have experienced at least one act of physical or sexual abuse in the previous 12 months. See Mirrlees-Black (1999, 89) for a table summarising the findings of six surveys relating to five countries.

[8] Sometimes, the reduction of repeat calls to the police from the same woman has been taken as an indicator of the reduction of violence (Kelly, 1999; Hanmer et al, 1999), but it is not this clear cut: it could equally mean that the woman did not view the previous intervention as meeting her needs or wishes (Hoyle, 1998; Buzawa and Buzawa, 1990). Lloyd et al (1994) specifically mention the likelihood of an increase in the number of calls to the police if police responses are seen as more effective.

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[9] In Morris's (1997) sample, for example, only 11% of the women who disclosed any level of physical violence, said that they had ever asked the police to come to their home to deal with their partner's violence. The comparable figures in Mirrlees-Black (1999) were 9% for 'intermittent' victims (women who reported being assaulted 'once or twice') and 22% for chronic victims (women who reported being assaulted three or more times). Gelles and Straus (1988) estimate that only 14% of American women who experience 'severe' violence ever contact the police.

[10] The ESRC Violence Research Programme (1998) quote three studies on this point. The proportion of women experiencing violence who contacted GPs ranged from 14% to 22%, the proportion contacting lawyers ranged from 12% to 22% and the proportion contacting the police ranged from 15% to 24%.

[11] Kelly's data are difficult to interpret because of definitional elisions. For example, on page 52 it is said that the women wanted the offender 'arrested/ removed'. These are different types of actions. Similarly, on page 53, it is said that women wanted 'assertive action, including arrest', but there is no indication of whether or not assertive action always included arrest.

[12] Women also have recourse to a number of civil remedies through injunctions. There have been numerous criticisms of these, especially around their lack of enforcement (see Morley and Mullender, 1994 and Edwards, 1996 for details). It is hard to make comparisons over the years because of changes in the legislation, but in 1998 there were around 37,500 non-molestation orders and around 20,000 occupation orders. The issue for us here is the extent to which women actually use these orders. Less than half the orders had the power of arrest attached and there were very few applications for warrants of arrest (Lord Chancellor's Department, 1999). Changes in legal aid provision may affect the number of applications for orders. It is estimated that violence is a feature in as many as a third of divorces in England and Wales (Hester et al., (1996).

[13] Arrest does not automatically result in prosecution (though contrast those jurisdictions with 'no plea' (i.e. no plea bargaining) and 'no drop' (i.e. mandatory prosecution) policies with respect to violence against women). In Kelly's (1999) research, only 20 cases were able to be tracked through to prosecution. Only two of these men were given prison sentences. Nine were bound over to keep the peace and five were conditionally discharged. It seems unlikely that these sentences did much to increase women's safety. Provision was introduced in the Police and Criminal Evidence Act 1984 to make wives competent and compellable witnesses against partners where the offence involved an assault on the wife by the accused to encourage (and make easier) prosecution in these cases but the provisions are not widely used for both pragmatic and humanitarian reasons (for more information, see Cretney and Davis, 1997).

[14] A recent American study (Feder, 1999) found a similarly low figure - 20% - in the area investigated and Feder cites this (at page 63) as somewhat higher than was found in other American studies other than one jurisdiction which had a mandatory arrest policy. Even there, the figure quoted is 22%..

[15] Other researchers put a different interpretation on the failure of the police to arrest. Kelly (1999, ix), for example, suggests it is related rather to value judgments about 'victim worthiness', and assessments that the incident is a 'one off' or that the victim is likely to withdraw the complaint. However, Kelly also notes (1999, 29-30) that what victims wanted from the crisis counselors in the Domestic Violence Matters pilot was the space to talk about the abuse and to obtain advice rather than to talk about their partner's arrest or prosecution or about leaving their partner.

[16] For example, men who participated in two men's programmes (CHANGE and the Lothian Domestic Violence Probation Project) as a condition of probation showed reductions in their violence and associated controlling behaviour some 12 months after the programmes compared with men given prison, probation or fines/admonishments. The difficulty with generalising from such findings is that the men were not randomly allocated to the outcomes (those on the programmes were first assessed as suitable for the programmes) nor were the samples adequately matched. The controls were much younger and had much higher levels of unemployment: both factors likely to be effect reoffending rates. The programme men were then compared with the other men, irrespective of their very different sanctions. Samples were small: there were 51 men involved in the two programmes and the 'control' group was 71. The differences in 'reoffending' also appeared only when the men's self report data (obtained through postal questionnaires) were used and not on the basis of police or court data. And the recontact rate at the 12 month point was only 53% for programme men and 49% for the 'control' group men. It is at least possible that involvement in the programmes influenced admission rates and that those who could not be contacted had higher 'reoffending' rates. The programme men's partners also reported lower 'reoffending' rates and had higher recontact rates (60% and 57% respectively), but this has to be read within the context of the above critical points. We are not suggesting here that the programmes did not have a positive effect; the issue is the extent to which one can generalise from the findings.

[17] Examples of 'pure' restorative justice in practice are difficult to find, but family group conferences (Maxwell and Morris, 1993) and community panel adult pre-trial diversion programmes (Maxwell et al., 1999) certainly get close to restorative ideals. We do not include victim-offender mediation programmes as examples of restorative justice. Dignan and Cavadino (1996) distinguish restorative conferencing (an example, in their terms, of a communitarian model of justice) from mediation (an example, in their terms, of a reparation model of justice) on the basis of four characteristics:

the delegation of powers from the state to members of the community; the convening of a meeting to which supporters of victims and offenders are invited as a mechanism for arriving at a negotiated community response; the empowerment of the offender and his or her family through formulating a plan which is acceptable to the other participants; and monitoring of those plans.

[18] As an aside, it is worth noting that the power imbalances associated with childhood and adulthood have not been seen as a problem in the same way in the increasing use of restorative processes and practices for young offenders. One could also, of course, suggest that there is always a power imbalance between offenders and victims as offenders have 'taken' from victims, but restorative justice processes and practices routinely work towards removing this imbalance.

[19] Some women, especially those who are abused may be isolated generally and specifically from their families. In these cases it might be possible to involve lay advocates (such as refuge workers) to support the women through the process. Equally, there may be situations where 'local communities' or families tolerate violence; here too lay advocates could play a useful role.

[20] The other victims felt neutral about the process.

[21] For example, two thirds of the women interviewed by Carbonatto (1998) who had had contact with the police as a result of their partner's violence towards them wanted the relationship with their partner to continue despite the violence. Mirrlees-Black (1999) also reports that more than two thirds of the 'chronic' female victims in the British Crime Survey were living with their partner at the time of the last assault and a quarter of them were still living with their partners at the time of the survey interview. Almost 60% of the chronic victims assaulted in the last year also reported that they were living with their partners at that time; 56% were still living with their partners at the time of the survey interview.

[22] An example of professionals rather than women deciding is reflected in the policy in Ontario, Canada, of mandatory charging. Kelly (1999, 3) describes this as having the 'added advantage' of the police taking pro-active responsibility for law enforcement. She also notes that police are expected to lay the charges, not on the basis of victims' wishes, but on the basis of the behaviour complained about.

[23] Surveys consistently show that higher levels of violence by partners are reported by women no longer living in that relationship (see, for example, Morris, 1997). Separated women may be more willing to report violence by partners and violence may have been a factor in the decision to leave, but it is likely that also that violence escalates around and after separation.

[24] von Hirsch and Ashworth (1998, 303) certainly justify conventional justice practices on the grounds that they displace vigilantism and prevent people from taking the law into their own hands.

[25] The police in some areas already recognise the role which friends, neighbours and family can play in their introduction of 'cocoon watches'. Here the police request the help and support of these various individuals in protecting the victim by calling the police if the violence seems likely to recur.

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## 7.2. An Integrated Restorative Approach to Family Violence-2001<sup>42</sup>

This workshop looks at an interesting family violence project in Goulburn, a small rural city in New South Wales (Australia). What began initially as a review by the Goulburn Family Support Service (GFSS) of its own practices, has developed into a collaborative community project on how to best respond to family violence. Family support workers are now using a restorative approach in all aspects of their practice from engaging individuals, through to facilitating restorative conferences for families.

Their review highlighted some of the difficulties encountered around family violence:

- no single agency involved victims and perpetrators;
- the emphasis was on disrupting the behaviour and ending the relationship;
- there were no perpetrator programs; and,
- There was almost total reliance on the formal criminal justice system to deal with and influence

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<sup>42</sup> Terry O'Connell, (Real Justice, Australia), Restorative and Community Justice: Inspiring the Future An International Conference Winchester, England March 28 – 31, 2001, <http://www.law.soton.ac.uk/bsln/rj/rjsumoc5.htm>

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perpetrator behaviour.

Some fundamental questions were raised on the agency's existing practices:

- What are these practices?
- What is their rationale?
- What would good outcomes look like for all affected by family violence?
- How do these practices meet the needs of those seeking our assistance?
- If it were possible, what would need to change in the agency's practices to better meet those needs?

In its research, the agency found increasing evidence that victims of family violence wanted the violence to stop and the relationship to improve. It also found that criminal justice interventions alone, without appropriate support or other interventions, were most likely to impose upon perpetrators the very same experience they themselves subject victims to, domination and isolation.

The GFSS successfully obtained funding in 2000 from the New South Wales Women's Advisory Council to develop women's safety plans. Initially the GFSS held two community seminars involving other agencies in order to create a shared understanding of family violence and its impact, as well as identifying those practices capable of making a difference. It then began using restorative practices as the most effective way of responding to the key questions mentioned earlier. The focus was on engagement and the importance of allowing those seeking assistance to 'tell their stories'.

Practice involved asking simple and open questions:

- What happened?
- What were you thinking at the time?
- What have you thought about since the incident?
- Who has been effected by what has happened? In what way?
- What has been the hardest thing for you?
- What do you think will make a difference for you or for others?
- What would you like to happen from here?

This experience revealed how the victim had the need to tell the perpetrator how she and her family (in most cases) had been affected by the perpetrator's behaviour. The victim also wanted the behaviour to stop and the relationship to improve, although this did not exclude termination of the relationship through separation or divorce.

What has emerged from this is the development of an integrated family violence model, which has as its central feature, a forum for family dialogue (otherwise known as a restorative conference). There are two parallel pathways, one for men and boys, the other for women and girls. Using a communitarian approach, the model involves the victim and perpetrator, their respective family and significant others, initially in the relevant pathway, and later in a restorative conference following appropriate assessments. Some matters may be deemed not suited to a restorative conference, with interventions limited to working with families within one or both pathways. Others may be involved in more than one restorative conference.

The model requires insight and skills in three key areas:

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1. Working with men and boys.
2. Working with women and girls.
3. Facilitation of restorative conferences.

#### Working with men and boys

A key element is the involvement of male (as well as female) practitioners. A consultant to this project, Dale Hurst, brings a wealth of experience around men's violence. Dale will provide insight on the following issues:

- Global picture regarding working with men and masculinity
- Understanding men, and men that use family violence
- Understanding cultural contextual approaches to men using family violence
- Traditional approaches to men using family violence, results and effects
- Training on Community Development framework for men using family violence
- Community Education as component of framework- targeting men.
- Men's support groups.
- Mentoring programs for men and boys.

#### Working with women and girls

GFSS practitioners are more familiar with this area although attention and training be given to the following:

- Working with girls around family violence.
- Expanding the community net for women and girls affected by family violence.
- Women's support groups.
- Mentoring programs for women and girls.

#### Facilitation of restorative conferences

An initial facilitator training has been provided for GFSS, although there is a need to recruit and train more males (as community volunteers). It is intended that restorative conferences will be co-facilitated by a female and male. Like the Family Group Conference model presently used for child protection issues (most have a strong undercurrent of family violence), the restorative conference would involve largely the same group.

#### How the GFSS model works

Referrals may come from other agencies, self-referrals or from the court. The Goulburn local court magistrate now refers family and community violence matters. Following an initial interview by GFSS staff, a plan is developed with the person seeking assistance. This may then involve making contact with the perpetrator (or in some cases the victim), as well as various family members or significant other.

Using the pathway approach, interviews may take different configurations depending on the nature of the incident and the relationships involved. For example, where there is a male perpetrator an initial assessment is undertaken, interviews may involve his own family (mother, father, brothers and so on). A similar process may

take place for female victims.

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The restorative conference is used only when there has been a thorough assessment process, and sufficient work done with the perpetrator, victim and their respective families to ensure they understand and want to participate. In some situations, there may be a need to hold several conferences depending upon the nature and extent of the violence, and importantly, the amount of change required from (in most cases) the perpetrator.

### **Summary**

This model has the potential to make perpetrators of domestic violence accountable for their actions. It has the capacity to create different and more experiences for those involved and importantly, can begin to break the cycle of family violence around young people.

### **7.3. Restorative Justice & Sexual Crimes-2001** <sup>43</sup>

This symposium examines a sensitive and controversial topic, the use of restorative justice processes for sexual related crimes. The major concern raised about this approach, is the notion of inviting the victim into a forum with his/her perpetrator, given the power related nature of sexual crimes. This symposium offers an interesting and challenging perspective on this issue. Using two case studies to show how restorative conferences have been successfully used for sexual assault and sexual abuse crimes, I will argue these (crimes) are best suited to this type of intervention, because of the deeply personal nature of the (victim's) violation. This presentation does not advocate restorative approaches as an alternate, but as part of the formal justice system.

It will be shown that by providing a safe forum in which victims and their families are able to vent their painful emotions that it is possible for victims to be validated and allow for some, a sense of closure. In beginning to explore, why victims and offenders might want to be involved in a restorative conference, it is important to understand a little of Silvan Tomkins' psychology of affects.

We are at our individual best according to Tomkins, when we are able to: ventilate our painful emotions; minimise negative emotions (those that make us feel awful); and, maximise positive one (good feelings). Anything that inhibits the free expression of emotions reduces our sense of wellbeing, anything that helps this to occur, enhances it (wellbeing). Restorative conferences provide safe forums, which promote the free expression of emotions consistent with Tomkins' blueprint.

By slightly varying the Real Justice scripted model; it is possible to engage conference participants to talk about how their lives have been affected by a crime, both victims and offenders alike. Modeling of the specific questions capable of making this happen in the actual conference, begins when first contact is made with potential (conference) participants.

#### **In the case of the offender:**

- ? What was your part in the crime?
- ? What were you thinking at the time?
- ? What have you thought about since the incident?
- ? Who has been affected by what you have done?
- ? How have others been affected?
- ? What has been the hardest thing for you?

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<sup>43</sup> Terry O'Connell, (Real Justice, Australia), Restorative and Community Justice: Inspiring the Future An International Conference Winchester, England March 28 – 31, 2001, <http://www.law.soton.ac.uk/bsln/rj/rjsumoc4.htm>



**In the case of the victim (or victim's family or support):**

? What did you think when you realised what had happened?

? What impact has this had on you and others?

? What has been the hardest thing for you?

The sequence or order of inviting conference participants to speak is critical. Having the offender speak first is significant for a number of reasons, the most important being that it builds victim perspective, because questions of the offender require reflection, acknowledgement and validation of the victim. (It should be noted that the offender should not participate unless there is unconditional acknowledgement about owning what he/she did). This process begins to minimise the negative affects felt by the victim and his/her support people.

The victim is then invited to speak followed by his/her support people. The questions allow the victim to 'vent' at the source (offender) which itself precipitates an 'affective resonance'. For the victim, this accelerates the process of minimising negative affects and maximising the positive ones, as other participants begin to 'mutualise' (share) all affects. When the offender's family is finally invited to speak, they generally respond by acknowledging and validating the victim's experience, therefore helping to further minimise negative and maximise positive affects.

The offender is then asked "Is there anything you would like to say at this point?" once everyone has spoken. This normally involves further reflection, acknowledgement and apology or some expression of remorse. The victim is then asked, "Why was it important for you to be at this conference today?" (This would apply for post court where sentence determination has been finalised, otherwise the question would be "What did you want to come from today's conference?")

**Kathy's Story**

Kathy was 12 years old when David (35) befriended her. David worked in a shop below Kathy's home. As both Kathy's parents were working, she was required to look after her young brothers and sister. Kathy was attracted by David's friendship, which led to physical and sexual involvement. This lasted nearly twenty years. It was through David's manipulation and deceit that he maintained almost total control over Kathy. As Kathy began to understand what had happened to her she attempted to confront David and his wife. She finally disclosed to the police and David was charged. He pleaded guilty and was sentenced to 3 years imprisonment.

But Kathy felt devastated and isolated. The courts had failed to provide her with an opportunity to be heard. She was having ongoing counseling, but was still completely dissatisfied. Kathy wanted justice and desperately wanted to participate in a conference although she was very fearful.

The conference involved 29 participants. Kathy came with her parents, sister, cousins and other support people including her counselor and psychologist friend. David was accompanied by his wife, three sons (22, 24 and 25) as well as neighbours and friends (as well as correctional official who escorted him). The conference lasted 5 hours and was a very powerful experience. From the short video interview with Kathy it can be seen how significant the conference experience was for her.

**Jane's Story**

Jane was 12 years when her brother-in-law Dennis, sexually abused her on a number of occasions. Dennis lived in a unit below Jane and would periodically 'look after Jane' when her parents were away. When Jane disclosed this abuse to her mother, it was decided to involve police and welfare. However Jane decided (after being interviewed) that she did not want to pursue the complaint. Prior to the abuse both families were close, but with the disclosure, relationships were badly strained particularly as Dennis and Sue (Jane's older sister) had

two children of their own.

The restorative conference lasted around 5 hours and involved Jane, her mother and father as well as sister Sue. Dennis was supported by his mother and father, and his two younger sisters.

The conference was very powerful with all participants expressing great relief at the end. Communication was re-established between the two families, although Jane and her mother were clear that neither would ever forgive Dennis for what he had done.

### **Summary**

Because of the level of ‘collateral’ harm experienced by victim families in these cases, the primary victim/s are often further isolated. The conference process provides the opportunity to gain a shared understanding of how everyone has been affected. Importantly, the involvement of the victim’s family and significant others, together with the offender and his/her family, ‘aggregates’ against the power relationship because of the numbers involved and the public nature of the process.

#### **7.4. Restorative Justice for Serious Crimes - 2001 <sup>44</sup>**

Serious crimes normally involve high levels of trauma for victims and their families. There is an understandable concern that involving victims in forums with their offenders can potentially increase this trauma.

O’Connell argue however, using four case studies (firebombing, road death, home invasion and murder) that restorative conferences have been shown to have significantly reduced the level of ongoing emotional and psychological suffering experienced by victims and their families.

For experienced facilitators, these conferences are easier to facilitate than those for low level crime, because the associated trauma experienced results in high levels of negative emotions, which are easily evoked. Allowing victims to tell their story is of paramount importance.

Understandably, however, the idea of bringing victims of serious crime together with their perpetrators, raises a number of real concerns. In this symposium, the case will be made generally for using restorative conferences for serious crime regardless of whether they were used in the criminal justice system, either as part of the formal or post-judicial process. Whilst the protocols or procedures might vary according to when restorative conferences are used, the fundamentals remain the same.

### **Why?**

- In beginning to explore why victims and offenders might want to be involved in a restorative conference, it is important to understand a little of Silvan Tomkins’ psychology of affects.
  - We are at our individual best according to Tomkins, when we are able to: ventilate our painful emotions;
    - minimise negative emotions (those that make us feel awful); and, maximise positive emotions (good feelings).
    - Anything that inhibits the free expression of emotions reduces our sense of wellbeing, anything that helps this to occur, enhances it (wellbeing).
  - Restorative conferences provide safe forums, which promote the free expression of emotions consistent with Tomkins’ blueprint.

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<sup>44</sup> Terry O’Connell, (Real Justice, Australia), Restorative Justice for Serious Crimes Restorative and Community Justice: Inspiring the Future An International Conference Winchester, England March 28 – 31, 2001, <http://www.law.soton.ac.uk/bsln/rj/rjsumoc1.htm>

**The Process:**

By slightly varying the Real Justice scripted model; it is possible to engage conference participants to talk about how their lives have been affected by a crime, both victims and offenders alike.

**First Contact:**

Modeling of the specific questions capable of making this happen in the actual conference, begins when first contact is made with potential (conference) participants.

**In the case of the offender:**

- ? What was your part in the crime?
- ? What were you thinking at the time?
- ? What have you thought about since the incident?
- ? Who has been affected by what you have done?
- ? How have others been affected?
- ? What has been the hardest thing for you?

**In the case of the victim (or victim's family or support):**

- ? What did you think when you realised what had happened?
- ? What impact has this had on you and others?
- ? What has been the hardest thing for you?

**The Sequence**

- The sequence or order of inviting conference participants to speak is critical.
  - Having the offender speak first is significant for a number of reasons, the most important being that it builds victim perspective, because questions of the offender require reflection, acknowledgement and validation of the victim. (It should be noted that the offender should not participate unless there is unconditional acknowledgement about owning what he/she did).
    - This process begins to minimise the negative affects felt by the victim and his/her support people.
  - The victim is then invited to speak followed by his/her support people.
    - The questions allow the victim to 'vent' at the source (offender) which itself precipitates an 'affective resonance'.
    - For the victim, this accelerates the process of minimising negative affects and maximising the positive ones, as other participants begin to 'mutualise' (share) all affects.
    - When the offender's family is finally invited to speak, they generally respond by acknowledging and validating the victim's experience, therefore helping to further minimise negative and maximise positive affects.
  - The offender is then asked "Is there anything you would like to say at this point?" once everyone has spoken.
    - This normally involves further reflection, acknowledgement and apology or some expression of remorse.
  - The victim is then asked, "Why was it important for you to be at this conference today?" (This would apply for post court where sentence determination has been finalised; otherwise the question would be "What did you want to come from today's conference?")

**Four Case Studies**

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- Even though the four case studies involved very different offences, the basic conference format described above was used.
- Without exception, all victims and offenders responded in similar ways.
- The following is a brief description of each case study:
  - **Firebombing**
    - Two seventeen-year-old males firebombed the home of two brothers who they accused of making racial slurs. The home was totally destroyed and the victim family (four members) was forced to jump from the first floor resulting in the mother breaking her back. The conference was referred by a psychologist following the court hearing and after the offenders had been sentenced to juvenile detention for two years.
    - There were 20 conference participants: the victims; their families and neighbors, the two offenders and their families as well as the police investigator. The conference lasted about 3 hours. The psychologist and psychiatrist present reported that the process had a significant impact on participants.
  - **Road Death**
    - A twenty-year-old male whilst speeding with his motor vehicle, struck and killed an elderly pedestrian. The offender was sentenced to three years 'home detention'. The referral came from Probation and Parole.
    - There were 15 conference participants: the victim family; the offender and his family; and, 3 probation officers. The conference lasted about 2 hours. All participants felt it was a worthwhile experience. An important moment in the conference was when the victim's wife challenged the offender about the need to forgive himself.
  - **Home Invasion**
    - Two nineteen-year-old males forced entry into the residence of an eighty-year-old male pensioner whom they assaulted and robbed. One offender had lived next to the other offender, and was well known to the victim and his wife, who had just died some six months before the incident. She was particularly fond of the offender who was sentenced to two years 'home detention' (although not next door – with his mother who had divorced). The victim was disgusted with the decision not to send the offender to prison and this was given extensive media coverage.
    - There were 16 participants: the victim; his brothers and sisters; his minister; the offender; his family; and, probation officer. All participants reported they were pleased with the conference. An outcome from the conference was that the offender had accepted the victim's invitation to have a meal with him (also the offender's father).
  - **Murder**
    - Four males attempted to robbery a Pizza Hut, which resulted in the murder of a seventeen-year-old delivery boy. The four offenders were all sentenced to long prison terms. The murdered boy's father began a victim support group and became a high profile victim advocate.
    - This conference was filmed as part of a documentary known as "Facing the Demons". This highly acclaimed film is available for purchase from Real Justice – [www.realjustice.org](http://www.realjustice.org) – and shows the journey undertaken by the eleven participants leading up to and including the

conference itself. Follow-up interview immediately following the conference and 18 months later revealed high participant satisfaction.

- **Summary**

- Restorative conferences have much to offer all stakeholders in the aftermath of serious crimes. However, these require experienced facilitators and considered preparation.

### **7.5. Domestic Violence Manual, Establishing A Local Domestic Violence Committee - 1998<sup>45</sup>**

- **Local Domestic Violence Committees** have been formed in many areas.
- Their primary aim is to develop effective liaison between the various groups and workers throughout the community who are involved in domestic violence work, and to enable them to provide each other with support in their work.
- Many committees also undertake community education and promote the development or improvement of services for domestic violence victims.
- The following guidelines for the establishment and running of a local committee are drawn from existing committees' experience, and may be adapted or modified according to local circumstances and priorities.

- **Aims**

1. To develop effective liaison between the various groups within the community who are involved in matters of domestic violence.
2. To promote continuing co-operation and understanding between the Police, Government departments, non-government agencies, and the community, of the problems and dangers associated with domestic violence.
3. To ensure that all matters associated with domestic violence are resolved promptly at a local level wherever possible.
4. To promote recognition of the forms that domestic violence may take, and awareness in the community that it is a crime like any other. Through such ongoing community education, to encourage the whole community to accept responsibility for, and take positive steps to reduce and prevent incidents of domestic violence.
5. To create an awareness within the community of the various agencies set up to assist people affected by domestic violence.
6. To investigate the need for and advocate the establishment of improved services for victims of domestic violence.
7. To monitor the enforcement and effectiveness of the domestic violence legislation, and associated policies (e.g. in the Police, housing and other Government departments) at a local level. To advocate the development of such policies where they do not exist.
8. To consult with and make recommendations to the State Domestic Violence Committee regarding changes to legislation, policies and service provision. Communications with the Committee to occur directly or through the local Committees' representative on the Committee or through the Executive Officer to the Committee.

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<sup>45</sup> Women's Issues and Social Empowerment (W.I.S.E.), Domestic Violence Manual, Establishing A Local Domestic Violence Committee Melbourne ~ Australia, 1998 <http://www.infochange.net.au/wise/DVIM/DVIM9.htm>

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- **Suggested Membership**

- Agencies or individuals appropriate for membership of these committees because of their role, or potential role, in assisting domestic violence victims or developing community education programs are as follows:
    - Police Domestic Violence Liaison Officer
    - Chamber Magistrate
    - Women's Refuge Worker
    - Family Court (and other) counsellor
    - Community Health Centre Worker
    - Ethnic Health Worker
    - Social Worker or other representative of local hospital
    - Women's Health Education Officer (and/or other officer of the Health Department)
    - Housing Department Representative
    - Department of Family and Community Services Representative
    - Local General Practitioner
    - Local Teacher
    - Local Solicitor
    - Social Security Department Representative
    - Other non-government agencies involved in relevant services (e.g. Ethnic Organisations, Aboriginal Services, Family Support Services, Women's Health Centre)
    - *Note: Efforts should also be made to ensure Aboriginal women and women of non-English speaking background are represented on the local committee as appropriate (see also [Domestic Violence: Consultations with Aboriginal Communities](#)). This may be done by contacting the appropriate community organisations, in order to discuss their participation on, or liaison with, local domestic violence committees.*
    - In some areas, Aboriginal domestic violence committees have been formed.
  - **Suggested Activities**
    - **Workshops:** most of the local committees have started off with a workshop on domestic violence, government policies, social issues, local services and strategies. Assistance with the program and speakers can be provided by the Executive Officer as above if required.
    - **Local Resources Directory:** Many local committees now have a list of the agencies in their area which can assist domestic violence victims. This very useful resource should be compiled in areas where it does not exist and widely distributed locally.
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## 7.6. Restorative Justice The Public Submissions-1998<sup>46</sup>

### **Type of Case to be Dealt With Universal eligibility**

Twenty-seven submissions supported universal eligibility for restorative programmes. Some comments included:

Although I don't see Restorative Justice as the total answer to all our "Criminal Woes" I believe that some aspects of it could be applied to anyone who commits a crime especially in terms of a victim's needs being met. (Couch, 11)

I do not believe that there should be discrimination as to what offences should be considered initially. If the system is truly restorative in all aspects then it can apply equally to murder, other crimes of violence and sexual offences. Always there is choice so no one party can force the other to be involved if they don't want to, and it would only apply to those who have accepted responsibility for the offending. (Aitken, 35)

To establish a rigid bureaucratic or legal test for the initiation of Restorative programmes ... is to undermine the objectives and operational integrity of Restorative programmes. The success of Restorative interventions is entirely dependent on the volition and attitude of those immediately involved in the offence under consideration. This requires that decisions to proceed with Restorative programmes be considered on a case by case basis. (Pax Christi Aotearoa-New Zealand, 52)

However, some recognised that universal eligibility might not be practicable initially, and suggested that if some form of targeting was required, this could be on the basis of:

- "Early offenders" (that is, first or second offenders);
- Younger offenders (under 25); or
- Type or seriousness of the offence.

Eight submissions made their support for universal eligibility subject to the agreement of the victim to participate, and the offender's acceptance of responsibility for the offending.

### **Aged-based criteria**

The age of the offender was supported as a possible selection criterion in three submissions, with a further two favouring a strong focus on young offenders in any selection process. The age groups suggested ranged between 17 and 21 years, and the reasons included the importance of early intervention, the belief that youth justice system should be extended and the fact that those aged under 20 years already received some special consideration within the adult system.

### **Offence-type criteria**

There were diverse views about offence-based criteria.

Eight submissions believed that selection should involve cases with direct victims. Three others sought to include cases without direct victims where there was thought to be some likelihood of success in restoration or where the offence was such that it might have resulted in the creation of direct victims, for instance driving with excess blood alcohol. However, two other submissions expressly excluded victimless offences on the basis that their numbers would overwhelm any programmes.

Some submissions approached eligibility for restorative programmes on the perceived seriousness of the offence. How the issue of seriousness should be approached was not necessarily explicit nor commonly shared.

Generally the basis for referral to restorative programmes should be made on the seriousness of the offence.

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<sup>46</sup> Ministry of Justice – New Zealand - Restorative Justice The Public Submissions First published in June 1998, © Crown Copyright [http://www.justice.govt.nz/pubs/reports/1998/restorative\\_justice/ex\\_summary.html](http://www.justice.govt.nz/pubs/reports/1998/restorative_justice/ex_summary.html)

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An obvious way of determining this would be through the current distinction between offences laid summarily and those laid indictably. We believe all offences laid summarily should be referred to restorative justice programmes. Indictable offence could be dealt with in a similar manner if the victim consents. (Dunedin Community Law Centre, 5)

Restorative justice should only be applied for "minor" offences. The definition of "minor" would be easy to define. Examples of offences ineligible for restorative justice would be murder, rape, grievous bodily harm, etc. (Christian Coalition, 46)

The Committee favours eligibility being determined by either offender or offence with the proviso that serious offenders and serious offences need further evaluation before being involved. There is a view that serious violence would rarely be appropriate given that victims of such offending would be less likely to want to meet their attacker face-to-face. (NZ Law Society, 67)

In my submission, convictions for serious offences, not just those of violence, should not be an automatic bar to a restorative justice process/programme. (French, 98)

Whether or not violent and sexual offences, in particular, should be included was the subject of debate:

Rape and or incest victims or domestic violence would solely depend on the victim. They may prefer post sentence. (Ngati Rarua Trust, 64)

We are firmly of the opinion that violent crimes should also be dealt with by restorative processes. It is far too easy and merely avoiding a difficult issue to suggest that they be cut from the process. Surely more than most others, violent offenders need to see the effects of their offences and face the consequences of their actions. Restorative processes offer that opportunity. (Restorative Justice Network, 72)

Any case, except serious offences involving violence could be eligible...(Women's Division Federated Farmers of New Zealand, 81)

A fairly substantial minority thought that some cases should be automatically excluded. Most of these respondents [to the National Council of Women] thought that the Restorative Justice system was not appropriate for violent offenders, especially rapists, for paedophiles or for offenders with psychiatric problems or with incorrigibly bad attitudes. "Why waste time and effort on hopeless cases?" one group asked. On the other hand, several respondents said that all should be eligible because the more serious the crime, the greater the need for healing and reparation. (National Council of Women, 40)

### **Recidivists**

The eligibility of repeat offenders was also addressed:

While it is true that repeat offenders are less likely to be reformed by a restorative system, these are the very people who are not being reformed by the current system. Recidivism within the current system is a strong argument for trying a new approach, not for sticking with structures which have failed in the past. (Auckland Unemployed Workers Rights Centre, 33)

Conversely:

Recidivists, who by definition have demonstrated an inability to change, should be separated from the society and individuals against whom they offend. Recidivists should not be eligible for restorative programmes. (Christian Coalition, 46)

### **The views of victims' organisations**

The five submissions made by victims' organisations all commented on the issue of eligibility for restorative programmes.

The NZ Council of Victim Support Groups advised that it had been unable to reach agreement on whether or not restorative justice should be available in all cases including serious offences like rape, or just for minor offences. The submission of Doctors for Sexual Abuse Care supported the exploration of alternative justice routes for victims and



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perpetrators of sexual assault crimes. Family and Friends of Murder Victims Inc. was emphatically of the view that restorative justice should not be an option for repeat, violent, sexual or drug offences. Rape Crisis chose not to comment on the issue of eligibility because it believed that a thorough exploration of how the concept of restorative justice might work was first required. The submission of the National Collective of Independent Women's Refuges focused on family violence, and this is dealt with further below.

**Family violence**

The issue of whether or not a restorative justice framework should deal with cases of family violence was addressed in 11 submissions. While divergent views were expressed, most of the submissions recognised that the use of restorative processes with this type of offending required particular and careful attention.

Five submissions anticipated the use of restorative justice for family violence cases. The May 1996 Family Violence Advisory Committee took the view that restorative justice processes could expand the options available for dealing with family violence. It concluded that given certain conditions, there was a place for such processes both at a number of points within the current justice system to enhance existing processes, as well as an alternative to the current system. An holistic approach which challenged traditional boundaries around practice was sought. The Committee stressed that any adoption of restorative justice processes should not be viewed as undermining in any way the seriousness with which family violence was viewed.

Another submission had this to say:

The debate is where to draw the line between those offences that should be dealt with in a restorative programme and those that should be dealt with within the Courts' jurisdiction. Māori feel that domestic violence in the whanau can be handled in a Marae process, healing the family rift by using family and iwi to maintain some control over the offender. (Rangihika, 104)

Three submissions believed that the restorative option should be available to victims of family violence within the justice system if they wished to utilise it, while a further submission suggested that any victim considering a restorative option should also have clear and full legal advice.

Six submissions urged care and further consideration before any conclusions were drawn about the appropriateness of applying restorative justice practices to family violence. Factors included concern about victim safety, the fact that family violence had only recently come to be viewed and treated as a serious crime, and a belief that it was still condoned by many.

In this social context, careful consideration needs to be given to suggestions that place additional responsibility on the community to respond to family violence before we are sure that the community in general understands the seriousness of family violence as a crime and are prepared to respond in an appropriate manner. (Department of Social Welfare, 51)  
Another observation was:

A fear has been expressed by some groups that sexual and family violence, having only recently been brought out in to the open, will drift back behind the closed doors of the family/community. It is important that such crimes continue to be brought to the public's awareness. (Te Whare Roimata, 106)

The National Collective of Independent Women's Refuges put the strong view that restorative processes not linked to a criminal justice response to family violence were inappropriate. It was the Collective's belief that the Domestic Violence Act achieved an appropriate balance between restorative processes and criminalisation and that this approach should be subject to a rigorous evaluation before further change was contemplated.

Other concerns raised, and supported in part in other submissions, included:

- Power imbalances in families in which violence occurs make meaningful negotiation impossible;
- A victim's inability to give free consent to participate when unfavourable decisions may impact on safety or child custody and access issues;
- A risk that restorative justice processes might assist in the trivialisation of crimes against women and reinforce misogynist attitudes;

- The inefficacy of mediation because it fails to address family violence as violence, but rather as a symptom of conflict, communication breakdown, co-dependency or female masochism;
- A concern that the needs of children may be placed ahead of the needs of abused women.

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## 7.7. Restorative Justice - 1996 <sup>47</sup>

### Referral of Cases to Mediation

- How should eligible cases be directed to mediation:
  - · All eligible cases automatically referred?
  - · Exercise of discretion to refer cases from eligible group?
- If discretion is to be exercised in referring cases to mediation, who are the appropriate referral sources:
  - · Individual victims and offenders (self referrals)?
  - · The police and other enforcement agencies?
  - · Police and crown prosecutors?
  - · Victims' agencies?
  - · Defence counsel?
  - · Probation officers?
  - · Judges?
  - · The agency providing the mediation?
  - · Some of these sources? (please state which ones)
  - · All of these sources?

### Type of Cases to be Dealt With

- What selection criteria should be applied for cases to be referred to restorative justice programmes:
  - · Universal eligibility?
  - · Age of the offender? (what age group?)
  - · Offence type? (what type of offence?)
  - · Seriousness of offence? (please describe what you propose)
  - · Cases with direct victims?
  - · Some other criteria? (please state details)
  - · A combination of criteria? (please state details)

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<sup>47</sup> New Zealand, Ministry of Justice, Restorative Justice, A Discussion Paper, 1996, <http://www.justice.govt.nz/pubs/reports/1996/restorative/index.html>

## Selection Criteria

- **Universal Eligibility**

- In 1993, there were 60,496 cases resulting in a conviction for offences excluding traffic offences (Spier, 1994). If restorative interventions for adult offenders are to be extended, one way to do so is to apply them universally. Paragraph 5.9.2 describes what constitutes a case and estimated that the cost of one type of a universal scheme (post-conviction/pre-sentence) was likely to amount to more than \$23 million.
- State investment in restorative programmes needs to be justified by demonstrable improvements in the quality of the criminal justice system, achievable at an acceptable price. Eligibility for restorative processes might therefore be approached on the basis of providing the 'most good for the most people'. This suggests the need for some form of targeting.
- Marshall (1995b) points out that for victim-offender mediation to have any prospect of success the victim has to be able to get something significant out of the process: there may be less scope for such achievements in most instances of minor offending.
- If the degree of victimisation or loss is low, then the effort and inconvenience to the victim of attending a victim-offender mediation is unlikely to be compensated through any outcome. This is especially pertinent if the content of the mediation focuses on the rehabilitation and welfare of the offender. Additionally, there might need to be better evidence of reductions in reoffending than has thus far been observed to justify providing restorative justice programmes to minor offenders.
- On the other hand, there do not appear to be strong arguments for excluding serious offenders from restorative programmes. If restorative processes can improve victims' satisfaction with the criminal justice process and outcomes and reduce recidivism, victims and the community may have the most to gain from restorative programmes which target more serious offenders. As noted in paragraph 4.4, although property crimes were selected most frequently as appropriate for restorative justice, the majority of participants in the MRL (1995) focus groups believed that all types of offences and offenders could be dealt with by this process so long as the victim freely wanted this to happen.
- If it is accepted that restorative processes should not be universally available for efficiency and effectiveness reasons, then there needs to be some agreed basis for eligibility. If lines must be drawn, then lines relating to offenders are an obvious option in spite of the fact that victims' needs will exist across the spectrum of offences and thus offenders. Options for determining eligibility include systems based on the age of the offender, or the offence type or the seriousness of the offence, and these are now discussed in turn.

- **Age Of The Offender**

- One option is to restrict eligibility for new restorative schemes to offenders within a certain age range. This idea has been proposed by a number of groups who have tended to focus on young adults.
- Moana Jackson (1988) proposed that mutually mediated *murū* should be incorporated into the range of criminal sanctions. *Murū* is a traditional concept by which redress for wrongdoing is delivered by the offender's whanau to the whanau of the victim. In response, the Courts Consultative Committee (1991) recommended the application of family group conference arrangements (rather than youth justice procedures in general) to persons aged 17-20. The reason for selecting this particular age-range was not explicit, but it may be assumed from their comments that the committee thought the involvement of families and victims was most likely to be beneficial and influential in respect of offenders in young adulthood. While they noted that older age groups were less likely to be influenced by whanau or family, it was suggested that this extension was appropriate given the initial experiences of those involved in the youth court. Part of the long-term value in extending the process to this

group may have been seen as a reduction in recidivism, although such reductions are not necessarily clearly evident (see paragraph 5.6).

- The Crime Prevention Action Group (1992) raised the prospect of increased diversion for casual offenders. In this context, the Crime Prevention Action Group II (1993) proposed further analysis of the appropriateness of raising the age at which young offenders are covered by family group conferences to 18 years.
- The offender target group for community group conferences is not entirely clear since although the paper refers to adult offenders, it also uses "young person" interchangeably and refers to family relationships for 17, 18 and 19 year olds (McElrea, 1994: 12). The response of the Courts Consultative Committee (1994) to this paper indicated that it "tentatively favours extending the family group conference in certain criminal offences to 17 and 18 year olds." Another response expressing a contrary view was that any idea of applying new restorative developments exclusively to young (but not necessarily youth) offenders would be unwise. This was on the grounds that many would represent the failures of the youth justice system, and that conference arrangements in the adult system would be no more likely to be successful (New Zealand Law Society, 1994).
- These proposals have two aspects. The first involves extending the use of family or community group conferences to young adults as part of the court process. The second incorporates the diversionary element of the current youth justice system.
- There are limitations in using chronological age to determine eligibility.
- The cut-off age will always be rather arbitrary and there are different ages of majority in society for different purposes. The United Nations Convention on the Rights of the Child which New Zealand has ratified, regards those up to 18 years as children. Recent Government policy changes (for example, benefit and education study assistance and the school leaving age) have increased the age range of those who may be considered youths or the responsibility of their parents.
- The desirability of extending the diversionary approach of the Children, Young Persons and Their Families Act also needs to be considered. The principles in the Act are based on the interests of young persons, and favour these over those of the victim. Further, the authority to arrest young persons is limited to the need to avoid further offending or tampering with evidence, young persons do not usually receive criminal convictions and there are prohibitions on the publication of details of offenders and cases.
- The justification for extending these arrangements to older offenders would need to be considered, along with whether such changes would be in the interests of justice, or indeed congruent with restorative objectives such as denouncing the offence and holding the offender accountable.
- If family group conferences were to be extended to offenders aged 17-20 years, this would be likely to involve more than 20,000 cases, based on 1994 volumes. Paragraph 5.9.2 describes what constitutes a case. During 1994, there were 30,929 cases prosecuted in this age range and 23,353 cases resulted in a conviction.
- If any scheme was to apply only to 17 and 18 year olds, then the numbers affected would be smaller but still significant. In 1994, 15,120 cases involving offenders aged 17 and 18 were prosecuted, and 11,070 cases resulted in a conviction (Department of Justice, 1995c).
- The coverage achieved by any scheme would be dependent on the stage at which it applied, and issues such as whether conferences were to be discretionary or compulsory and apply to all offences or just those with direct victims. On current volumes, compulsory conferences for 17 and 18 year olds at the post-conviction/pre-sentence stage alone would involve one and a half times more conferences than were held in the entire juvenile justice system in 1994 (Department of Social Welfare, 1994).

- **Offence Type**

- A further way to limit eligibility is to restrict the application of restorative programmes to offenders charged with or convicted of certain types of offences.
- The largest single category of offences for 1993 (and in preceding years) was traffic offences. There were 62,417 convictions involving 45,340 cases. Within this group, the largest number of cases (29,307 in sum) involved driving with excess alcohol and driving while disqualified. These offences do not in themselves involve victims, although related offending may do so. There were 1,095 cases of driving offences causing death or injury (Spier, 1994).
- Categories of all other offences and the conviction volumes for 1993 were as follows:

**Table 6.1 Number of Cases Resulting in a Conviction for All Offences Except Traffic Offences by Type of Offence 1993**

Offence Type	Number of Cases Convicted
Violent	9,303
Other against persons	1,378
Against property	21,458
Involving drugs	7,949
Against justice	5,869
Against good order	4,889
Miscellaneous	9,650
Total	60,496

Drawn from Spier, 1994, Table 2.12 page 38

- Broad category types, such as those above, could be used to determine eligibility. However, some categories of offences, or particular offences within these categories, may not have victims.
- Alternatively, particular offences (for example rape, assault, burglary, theft etc.) might be identified as the eligible group for restorative programmes. Conversely, this method might be used to exclude particular offences from mediation (also see paragraph 5.2.3).
- In various discussions with New Zealand legal, victim support, correctional and police representatives, it was sometimes suggested that offences involving domestic violence, sexual crimes and murder should not be part of restorative programmes. In the case of murder, the victims were regarded in the wider sense to include the immediate family of the deceased. Concerns were that the victims of these offences were unlikely to obtain any advantage from a restorative process, that the risk of revictimisation would be too great, or that no restorative outcome could be accommodated because imprisonment was likely (or in the case of murder mandatory). Others in the same groups however, noted that victims of serious offences often have issues that they wish to resolve with the offender and that the victims' further recovery could be impaired by being denied access to restorative programmes. They observed that for some rape and incest victims the opportunity to confront the offender and experience that offender expressing guilt and responsibility could be an empowering experience. Carbonatto (1995) suggests that mediation in domestic violence cases may be an important tool in meeting the needs of the victim and offender who wish to continue living together or who share ongoing responsibilities through their role as parents. Others have emphasised that the model proposed by Carbonatto is only suitable in particular circumstances, and even then should only be used alongside other strategies such as education programmes for both offenders and victims. It has also been pointed out that mediation processes in cases of family violence have in the past been used to blame victims by defining the issue as a "couple problem" and removing responsibility for it from the offender (Martin, 1995).
- The majority of participants in New Zealand public opinion research (MRI, 1995) thought that all offences should be included as long as the victim wanted to use the process. However, this research

also identified a tension between the expectations of some men who felt uncomfortable with the notion of restorative justice programmes applying to offences such as child abuse, rape and murder and the views of some women who felt that restorative justice should be reserved for serious personal offences such as rape and murder rather than "wasted on more trivial offences such as car theft and burglary". Similarly, Marshall (1995) was concerned that mediation did not get marginalised to petty offences.

- **Seriousness Of Offence**

- Although it is not possible to predict the impact of an offence on a particular victim, it is possible to delineate more serious offences. These are reflected in sentencing principles in section 5 of the Criminal Justice Act 1985 that create a category of violent offences for which imprisonment is the expected penalty, and by the hierarchy of maximum penalties which indicates the relative seriousness of offences.
- Accordingly, eligibility for mediation might be determined by factors such as:
  - whether the offences are imprisonable; whether they carry a maximum penalty of a certain length; whether the judge considers that he or she would have imposed a sentence of imprisonment within a predetermined range (such as between 6 and 24 months); or whether the judge considers the offender might be required to pay more than a certain amount of reparation. Examples of similar eligibility criteria are found in the Criminal Justice Act 1985 for pre-sentence reports (section 15), revocation of deferment orders (section 21), the suspended sentence of imprisonment (section 21A) and reparation reports (section 22 (4)(b)).
  - If eligibility was based on fixed categories such as maximum penalties of a certain level, then no discretion need be required. Other categories such as whether a sentence of imprisonment within a predetermined range would have been imposed would involve the exercise of discretion and this could introduce a possible gate-keeping effect. Any systems involving the use of discretion are likely to result in variation around the country in the nature of cases referred.

### **Referral for Mediation**

Eligibility for a restorative process will be of limited value if it is not associated with a way of advising parties of, or directing them to, that process.

There are two general approaches that could be adopted for referral.

The first is to arrange for the automatic referral of all cases which meet the eligibility criteria whatever they might be. This has the advantage of precluding the introduction of bias in selecting cases. However, where the rules are broad and involve a high volume of cases, there is the risk of swamping the co-ordinating agency with referrals. Arranging and holding mediation meetings is a time-consuming process and considerable time may be lost in following-up cases which may never have been likely to result in mediation for a variety of reasons. There is also the danger of creating delays in the court system.

The alternative approach is to draw from the pool of cases which meet the broad eligibility criteria, those which are considered likely to benefit from restorative processes and those where the victim or offender seek a mediation meeting. If this approach was to be adopted, it would be desirable for the referral sources to be wide to ensure that a broad range of interests and perspectives could influence selection. Those who might be appropriate referral sources for restorative programmes include the following:

- Individual victims and offenders (self referrals);
- The police and other enforcement agencies;
- Police and crown prosecutors;
- Victims' agencies;

- Defence counsel;
- Probation officers;
- Judges.

An alternative view is that meetings could be initiated by the programme co-ordinator once guilt is established by admission or trial, while "A judge should have the power to order a community group conference in any other, appropriate, case". "...The role of the co-ordinator, who sets up the [community group conference] will be pivotal" in assessing whether a conference would be a pointless exercise, whether the cost of a conference is justified and deciding who should attend the community group conference (New Zealand Law Society, 1994: 3).

## **7.8. Domestic Violence and Restorative Justice Initiatives, The Risks of a New Panacea -1996<sup>48</sup>**

### **I. INTRODUCTION**

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

Because of the similarities in philosophical perspectives and process techniques between mediation and the processes used to implement restorative justice, the controversy about the appropriateness of adopting a restorative justice approach for domestic violence cases is embedded in the more general debate about utilising mediation processes to deal with domestic violence situations.[1] Battered women's advocates have long argued that mediation is inherently unfair and potentially unsafe for their clients. They suggest that women are better served by the traditional adversarial process.[2] Mediation proponents, on the other hand, contend that in all but the most serious cases, the mediation process is more empowering and more effective for victims than engaging in court proceedings.[3] A third view posits that the mediation process may be helpful but that a case-by-case determination of appropriateness must be made.[4]

Recent restorative justice initiatives in New Zealand and Australia have extended the parameters of this debate from family mediation to the criminal justice arena. It has been suggested that a restorative justice model offers opportunities for victims[5] and offenders[6] to effectively address domestic violence situations that have come to the notice of police, community groups and/or the criminal courts.[7] We suggest, however, that this conclusion should not be reached lightly. The purpose of this paper is to critically evaluate arguments about the use of a restorative justice model for domestic violence cases and to propose specific protocols which we believe should be implemented in the very limited number of domestic violence situations for which restorative justice may be applicable. Our analysis presumes that the primary goals of any intervention in domestic violence situations -including restorative justice programmes - must entail the prioritisation of the safety and autonomy of victims over any other 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[8] and the Family Group Conference model (renamed by the programme "the Community Group Conference")[9]. While a hybrid process was ultimately developed by Waikato Mediation Services, the attempt to decide which aspects of the two approaches would be utilised in the programme involved examining the perceived advantages and drawbacks of these existing models, especially their implications for cases involving domestic violence.

#### *1. Victim-offender Mediation*

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<sup>48</sup> Stephen Hooper\* and Ruth Busch, Domestic Violence and Restorative Justice Initiatives, The Risks of a New Panacea, 1996 [http://www.waikato.ac.nz/law/wlr/special\\_1996/4\\_hooperbusch.html](http://www.waikato.ac.nz/law/wlr/special_1996/4_hooperbusch.html)

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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, 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 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 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



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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>

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 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 on-going issues, such as the distress arising from "reliving" the experience of victimisation. As well, the mediators were unable to guarantee the on-going 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> 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 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 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> Most importantly, 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 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 Zealand in 1989 as the

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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 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 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

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the family, is then formulated.[77] The plan commonly covers three main elements. First, "putting things right" in the form of an apology.[78] Second, addressing the issue of reparation.[79] For example, the family may suggest that there be regular payments to the victim from part-time earnings or the sale of an asset.[80] The third element of the plan involves a penalty.[81] This may entail the young person engaging in unpaid work either for the benefit of the victim or for an organisation suggested by the victim.

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

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

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

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

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

Waikato Mediation Services has adopted a conferencing model which includes not only families as participants but also people drawn from the victim's and offender's communities. This community conference approach draws on the wide range of knowledge within the parties' social networks to support change.[88] It enables the parties to realise the array of resources available to them within their families and communities. Since, in most cases, funding for conferencing allows the offender and victim access to mediators for only a few hours, it is essential that parties utilise the strengths of their on-going family and community networks to complete their rehabilitation work.

The conferencing process enables participants to find wide-ranging options to address the causes of the offending and its effects.[89] These can include options which were not readily apparent at the time the conference was called. For instance, in the Canadian provinces of Newfoundland and Labrador, the outcomes of community conferences have

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included dealing with a party's or family's needs for firewood 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 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 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.

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Another major concern about adopting the conferencing model for adult offenders arises from research which has found that victims or their representatives have attended only 46% of conferences.[101] For those victims who have been present, statistics indicate that 38% felt worse after attending the conference.[102] Although there have been attempts to explain these disappointing statistics in terms of inadequate preparation of victims and unrealistic expectations of conference outcomes, victim dissatisfaction may in fact reflect the underlying objects of the FGC which focus primarily on the offender and his family. One can only query whether a victim would be more likely to participate if the offender were an intimate who had a (lengthy and on-going) history of violent behaviour toward her rather than a stranger who had committed a non-violent property offence.

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

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

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

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

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

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

Gale Burford and Joan Pennell are currently trialing the use of the conferencing model for child abuse and family violence cases in Newfoundland and Labrador. Their initial report details some of their findings and outlines in detail the process used by them.[109] Two central principles are used to guide the project.[110] The first is that family violence does not stop by itself; there must be mandatory intervention by government authorities such as probation or child

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welfare workers.[111] Second, the best long range solutions are those which give the affected parties the opportunity to come up with solutions that are appropriate for their families, their communities and their culture.[112]

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

These conferences follow a similar process to that used in New Zealand FGCs. As with FGCs, the actual decision is made by the family group participants. The co-ordinator emphasises that the conference belongs to the family (rather than to the statutory agencies involved) and this is reinforced by the use of community facilities for the conference venue, circular seating and voluntary participation.[118] After advising the family about the possible plan outcomes, the conference co-ordinators and other professionals withdraw from the room and leave the family to arrive at its decision.[119]

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

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

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

In her article outlining the appropriateness of a restorative justice approach for domestic violence, Helene Carbonatto develops a conferencing process to be used in New Zealand.[126] The conference would involve a trained facilitator, who would be responsible for bringing the parties and their "key network members" together. Participants in the meeting would include family, friends and others whom the spouses respect and who are prepared to assume responsibility for them.[127] If the situation was potentially explosive the mediations could be conducted on a "shuttle approach". Referrals would come from statutory and community agencies such as the police, women's refuge and men's groups.

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

Carbonatto provides examples of the types of sanctions which might be imposed. For instance, the conference group might implement a plan for checking on the victim at "risk times", such as Friday and Saturday nights "when many incidents occur".[130] Alternatively, the plan might require members to provide the perpetrator with a bed to ensure that he stays away from home if he goes out drinking. Where perpetrators are financially secure, the plan could entail putting

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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.

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 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*



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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 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 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.

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.

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.

See online for footnotes

## 7.9. Mediation: Towards An Aboriginal Conceptualisation - 1996<sup>49</sup>

### **Domestic violence--a mediatable conflict?**

It is with these comments in mind that I want to explore whether that degradation, violation, maiming, demoralisation and murder of women which is described as a 'conflict' is mediatable? Specifically, whether mediation, as a conflict resolution mechanism, is an appropriate process for achieving the goals of protection of women and their children, and the provision of their security and safety.

Adherents of the 'Western' mediation model are unequivocal on the issue of mediating issues of 'domestic violence'. The answer is no, not ever. Keeping in mind that the model is founded on the concept of 'negotiating for oneself', it follows that an abused woman whose sense of self is significantly disintegrated would be incapable of 'negotiating for herself', rendering the process a mockery. Ethically, then, it would be unacceptable to expect a woman to literally 'bargain' for her personal health and safety and that of her children. Given that she has an absolute first need for physical safety, the 'protection' remedy (courts, restraining orders, gaol) would seem infinitely more appropriate. Also, if she lives in a large centre where women's shelters and rape crisis centres may exist, well, she might have access to a temporary hide out.

This argument is a strong one in its own context. It rests on 3 key assumptions however; those concerning 'settlement' and the individual nature of conflicts as discussed above, and that 'protection' remedies in fact effect safety. Given that virtually none of these assumptions hold true in an Aboriginal community, it is no surprise that Aboriginal people commonly identify family fighting and domestic violence as concerns suitable for mediation.

It must be stated unequivocally that Aboriginal women's experience of the white world of 'justice' has been primarily that from which one seeks protection, rather than pursues as a source of protection. As just one example, I have been recently informed of the case of an Aboriginal woman being baton raped by 5 policemen. While this may be an isolated incident, I believe that some variations on a theme are common, if not prevalent. Moreover, as the Royal Commission Into Aboriginal Deaths in Custody report makes clear, involvement with the white legal system is perilous indeed.

In fact, an Aboriginal woman who charges her husband/brother/father with violent acts is responsible for whatever dangers or death may befall him once he passes through to the justice system. Needless to say, the intensity of the social disapprobation she would be made to endure in the context of a small, bonded Aboriginal community would be intolerable. She would be hated by the family. Better the beatings.

Securing a restraining order to control a perpetrator's access to a woman whilst living in the community is equally counter-effective, if not absurd in a small community. His anger is exacerbated, and his family, now forced to take him in, is also angry. She is now in grave danger.

Moreover, seeking 'protection' from a powerful, inexorable formal justice system might well galvanise the white welfare system into action. They take children.

Within the context of 'Western' society, concern with women's protection has underlined the exclusionary policy about mediation and 'domestic violence'. Within the context of an Aboriginal community, it is, by high contrast, the legal remedies which compromise women's safety.

### **Concerns surrounding mediation**

While it may be argued that mediation is safer than the existing alternatives in the Aboriginal context, the question remains as to whether it is a potentially appropriate and effective means for beginning to address the alarming prevalence, frequency and viciousness of violence against women.

'Mediation' as defined in an Aboriginal context, and construed as a healing process seeking to address relationships, may well have an important place in the mosaic of strategies which collectively strengthen the fibre of an Aboriginal community. Mediation, so defined, could theoretically provide a safe, legitimate and supportive environment which

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<sup>49</sup> Madeleine Sauve Mediation: Towards An Aboriginal Conceptualisation, Indigenous Law Bulletin Volume 3, No. 80, May 1996, <http://www.austlii.edu.au/au/special/rsproject/rslibrary/ilb/vol3/no80/2.html>

respects both women and men's primary need for community and family. For women, it may represent the only milieu in which they can give voice to what it is they need and want in a partnership.

Ultimately, however, the degree to which that voice is legitimated and heeded depends on the authority and fair-mindedness of the mediator. The mediator's power is directly related to endorsement from the society at large. As with all 'justice' constructs, what is viewed as appropriate and inappropriate behaviour depends on the society's constructs of right and wrong. Thus a mediator's interventions, particularly where they take on an advice giving or a guidance role, will reflect local perceptions of justice.

My deep-felt worry here has to do with levels of social tolerance. I know, for instance, why it is that in the course of a dinner party no-one urinates on the table. I also know that, outside of some tisking and head shaking, the tolerance level for violence against women is very, very high. That a far, far greater number of Aboriginal women die at the hands of their partners than any deaths in custody, is representative of what I mean in terms of social concern, if this is to be measured by government response.

So, I know it is definitely not okay to urinate on the dining table, and I know it's not okay that Aboriginal men die in prison; but it is apparently only a source of discomfort to society that women are beaten to death and girl children are raped.

Tolerance increases still more when the aggrieved party belongs to the offending group itself. This is the case for women generally, and for Aboriginal women living in communities, significantly more so. The conditions conducive to high levels of tolerance come together simultaneously in communities: intimacy, cultural closeness, homogeneity. Conduct considered outrageous by an outsider is endured by one's familiars.

If, as suggested by Donald Black, conflict management is isomorphic with its social field, then it expresses and dramatises that social field in a pure and concentrated fashion. Like fractals, it resembles the whole of which it is part, and, in effect, recapitulates and intensifies its larger environment. Consider, then, a larger environment in which the level of tolerance for women bashing, child sexual molestation, and violence is high. What does that mean for victims looking to a conflict resolution mechanism which operates predominantly on social controls through the presence of a mediator?

It is certain that white 'justice' offers little remedy for the needs of Aboriginal women living in communities. Mediation, construed as a healing process harmonising with the existing cultural ethos, may well address those needs. However, a significant part of the overall 'healing', which cannot be ignored, has to do with the cultural re-creation of the honouring of women. To achieve any of this, we must, all of us, have access to our inner beings. That alcohol and drugs block and prohibit that access further underscores the quintessential need for a focus on healing processes in all the directions; spiritual, physical, emotional and mental.

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## **7.10. Domestic Violence Strategic Plan -1991<sup>50</sup>**

The New South Wales Domestic Violence Committee has addressed a number of problems relating to the law and the legal process as they affect women as victims of domestic violence.

Over the years, it has monitored the implementation of legislative changes and in 1987 convened the Violence Against Women Law Reform Task Force which developed proposals for law reform to improve the availability of protection for women and children who had been victims of violence and abuse.

During the Commonwealth Government's National Domestic Violence Education Program, research indicated that there were specific issues to be acknowledged and addressed for women in Aboriginal communities. During the period of the program, interstate initiatives were commenced with the establishment of committees, councils or reviews of responses to domestic violence within each State or Territory. The Queensland Domestic Violence Task Force, which

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<sup>50</sup> New South Wales, Domestic Violence Strategic Plan, Women's Co-ordination Unit, Domestic Violence Information Manual, Consultations With Aboriginal Communities, 1991, <http://www.infoxchange.net.au/wise/DVIM/DVATSL.htm>

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reported in October 1988, most recently identified specific problems facing Aboriginal and Torres Strait Islander communities.

In addition, interstate networks, such as the Commonwealth-State Co-ordinating Task Force on Domestic Violence, later replaced by the National Committee on Violence Against Women, have taken account of Aboriginal women's statements on domestic violence. These require governments to take action to prevent violence, but in ways which address the complexities of Aboriginal society, kinship and cultural values, the historical destruction of Aboriginal traditions by white man's colonisation and tyranny, and the extent of alcohol and other substance abuse.

Some Aboriginal women have publicly stated that domestic violence in Aboriginal communities must be addressed holistically by analysing the problem within the context of the disintegration of tribal and kinship ties. Skepticism about the ability of the police and the criminal justice system will appropriately respond to Aboriginal women's needs for protection have also been expressed, given the over-representation of Aboriginal prisoners in custody and the evidence presented to the inquiry into black deaths in custody.

When the NSW Domestic Violence Committee decided to address domestic violence from a broad-based perspective, going beyond the legal responses in order to ensure consistency and uniformity of policy, programs and training, it was clear that Aboriginal communities warranted special attention. Special strategies need to be developed to respond to the issues which are specific and unique to Aboriginal communities.

An Aboriginal Working Party was therefore convened to operate for the duration of the development process of the Domestic Violence Strategic Plan. Other working parties met only for a limited period, over a few weeks, to identify the issues of concern to be included in the Discussion Paper.

The Aboriginal representative on the Domestic Violence Committee contacted a wide range women who would represent community views.. In addition, the Women's Co-ordination Unit provided the services of two Aboriginal project officers to visit Aboriginal communities around the State to discuss with women their ideas and needs and to have them identify effective strategies to combat domestic violence, ones which were working for them now and those which would work in the future. It was seen as essential that Aboriginal women be given an opportunity to communicate their views to women with whom some trust could be established.

## **PROCESS**

As part of the consultation process, meetings were organised with Aboriginal women in the following 12 towns: Bega, Narooma, Nowra, Wagga Wagga, Sydney, Newcastle, Tamworth, Dubbo, Bourke, Morce, Macksville and Lismore.

Because time was limited', it was necessary to select places where strategies or ideas about the issue of domestic violence already existed, and towns which geographically gave a State-wide representation. Many towns missed out on direct consultation. However, as many Discussion Papers as possible were sent out, and women from nearby towns were encouraged to attend the meetings.

Overall, 151 Aboriginal people attended the meetings from the following towns and communities: Bega, Eden, Narooma, Moruya, Wallaga Lake, Nowra, Bomaderry, Wollongong, Wreck Bay, Wagga Wagga, Coolaman, Sydney, Newcastle, Tamworth, Werris Creek, Dubbo, Peak Hill, Broken Hill, Bourke, Coonamble, Lightning Ridge, Brewarrina, Moree, Macksville, Nambucca Heads, Bowraville, Lismore, Casino, Ballina and Cabbage Tree Island. Many more women were contacted individually, several of whom agreed to send in a written response.

Women from each community took responsibility for distributing information and arranging the meetings, which were open to all Aboriginal women, though most of those who attended were women working in the domestic violence field or with Aboriginal welfare issues. Several community women did attend, however, and it is important to note that a number of Aboriginal women elders actively took part in the consultations.

The following is a summary of the major issues raised and the strategies identified.

## **HISTORICAL BACKGROUND**

Violence against women and children was practically unknown in traditional Aboriginal society. Men and women shared the food hunting and gathering roles and thus had equal social and economic importance within society. Acts of

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violence against women received severe punishment and condemnation.

The arrival of white 'settlers' brought levels of violence which were previously unknown; Aboriginal people were massacred driven off the land by means of poisoning, rape and venereal disease.

The white 'settlers' were predominantly male and conflict over women was a dominant theme in black and white relations. Male 'settlers' massacred, raped and abducted Aboriginal women, who were also bartered by Aboriginal men.

But while the courage of the men who went forward to meet the Europeans was clear, it was probably surpassed by that of the young women who were frequently dispatched by their male relatives to appease the sexual appetite of the strange and threatening white man. (Reynolds, H. 1981, *The Other Side of the Frontier*, James Cook University, Townsville.)

Land and people were lost; cultural values and customs were forcefully removed. Aboriginal people were denied access to traditional languages and customs, and forced into missions and onto reserves. Their traditional ways were ridiculed by the white man's system and their way of life was destroyed by racist policies and white religion.

Government policies saw generations of children stolen from their families and forced to adopt completely alien attitudes and environments. The effects of this practice on both the children and their families have been devastating and, in some cases, have led to identity problems, difficulties in forming relationships and dysfunctional parenting skills. Those families, which lost children have not only suffered intense pain and anguish, but have also learned not to trust government authorities, policies and workers.

These factors, along with other discriminatory policies and practices, led to the disintegration of social and family structures, and the disintegration of women's social positions within many NSW Aboriginal communities.

This is not to say that domestic violence amongst the Aboriginal community has been caused by white colonisation, or that Aboriginal people themselves hold no responsibility for acts of violence against women. It supports the idea that sexism and resulting violence were not part of Aboriginal life before 1788. It says that the disintegration of Aboriginal life happened so rapidly and so violently, and was based on such racist philosophies, that Aboriginal communities today have a level of acceptance of domestic violence which may not be tolerated in other communities. They have been denied access to information about, women's rights, as well as access to employment, education and quality of life.

There are so many destructive factors affecting Aboriginal peoples' lives that, to many, domestic violence is accepted as just another one. Violence was, and is, used as a means of both control and survival. Many Aboriginal women consulted expressed concern at the amount of violence present in the communities.

## **COMMUNITY EDUCATION**

Every meeting identified an urgent need for community education. Many community women do not know their rights and that they have a right to help. Aboriginal people have been denied access to information, and communities are isolated in ways which hinder knowledge of rights and responsibilities. This isolation is not only geographical; urban women are also isolated through lack of access to services and information. A large number of women are unaware that they have options and that violent behaviour is unacceptable. Many men are unaware of the serious consequences of their actions.

Most Aboriginal people today have either been directly involved, or have a close relationship with someone who is involved, in domestic violence. A number of older women said that they had not experienced domestic violence in their youth but were only too aware of its presence in the communities now. 'Black-fella's love' is a common term and in itself signifies the level at which domestic violence is accepted in the communities.

During the consultations, we found a general lack of community support for women who speak out about domestic violence. Women feel that the time is long overdue for communities to say that they have had enough and that the violence must stop. They feel it is time to stop ignoring what is happening and to take a stand. Women, and men, must tell batterers and those who treat domestic violence lightly that they do not agree with what they are doing and that their behaviour is unacceptable. Before the community can make a stand, individuals must be aware of their rights,

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obligations and responsibilities.

Participants agreed that for this to happen, communities need support in running a series of awareness programs and information days to inform women and men of their legal and individual rights, of the consequences of their actions and to point them towards resources.

One community is presently applying for funds to run rolling workshops in their town.

Since the consultations, two of the communities visited have established women's groups. These groups consist of voluntary community women who aim to provide information on women's rights. They will produce pamphlets for their own particular community, visit schools and provide support for women. With regards to domestic violence, they will inform the individual woman of her legal rights and of possible avenues of support. They will give her continued support and, if she chooses to involve the police, will accompany her to the police station and to court.

Bourke community makes use of its local radio station to broadcast programs on domestic violence, and on rights and responsibilities.

### **LEGAL ISSUES**

Using the law is not a viable option for many Aboriginal women. Once again, women have little knowledge about legislation, its desired effects and the processes involved.

When women go to hospitals to have injuries treated, or to the police and solicitors, they are often not informed of their legal rights. When police tell women there is nothing they can do for them (and in so doing, fail to perform their job) women have little choice but to return home. It is ironic that Aboriginal organisations receive widespread criticism from the non-Aboriginal community for not performing their functions efficiently, when public services, such as the police and hospitals, knowingly refuse to help Aboriginal women in life and death situations.

As a result of being denied information, women remain unsupported and unaware of their legal rights and the court process, and are reluctant to become involved. There are women, however, who are aware of the legislation but do not use it because they have no faith in government policies and laws, and because they believe (in common with all Aboriginal communities) that solutions are to be found, and should therefore be developed, within each community.

It would be wrong, therefore, to assume that legislation and access to the legal process is the answer for all Aboriginal women and communities. It is also wrong to assume that women are not using the law because they do not want to.

All Aboriginal women need to know their legal rights and the processes involved in using the law. They need to have this option and to be confident that if they choose this path, they will receive all the help and assistance to which they are entitled.

In only two towns were women able to say that their Aboriginal Legal Service (ALS) catered for women within the community. Women complained that the ALS would represent the perpetrator in domestic violence cases, but would not assist the women. This is despite a policy of not representing one Aboriginal person against another. One male ALS worker said he felt sorry for the women because at the Service they could only help the men.

Concern was also expressed over the arguments used in defence of men, i.e. that they are violent because of the difficulties they have experienced themselves as a result of racism, lack of employment, alcoholism, ill-health, etc. Whilst this is all true, it is also true for women, and does not excuse domestic violence.

In general, women feel that the ALS is not responding to their needs. Aboriginal women may not be confident enough to seek other legal assistance. As a result, court cases are dropped.

One community was happy with their ALS, saying it would represent whichever party sought legal assistance first. If the second party applied to the service for legal representation, it would assist that person in finding other legal help within the town.

There is a general lack of knowledge about the court system. Women feel it does not cater to them. It is also

difficult to trust a system which promotes justice but which, in the past, has been used against them. One town described their magistrate as racist, conservative and judgmental. This magistrate allegedly decides whether or not women should pay their court fee on the basis of the colour of their skin - or on how many times they have been to court in similar situations.

### **POLICING**

In all communities consulted, women felt the police were failing to perform their duties in regard to domestic violence. Often they do not respond to calls but, if the call is from the local mission, may respond in three or four cars. Stories were told of cases where, if the woman was Aboriginal and the man non-Aboriginal, police would side with the man. Common complaints about the police included. their failure to respond to calls; their reluctance to go to missions; that they do not offer information on legal rights, suggesting instead that there is nothing they can do; that they treat victims badly and consider domestic violence to be a cultural problem.

In some country towns, police stations are not open 24 hours a day or at weekends. Often the nearest open police station will not respond to calls from other towns, leaving people in those communities with no police protection at certain times of the week.

A number of isolated towns which have a high incidence of domestic violence regularly receive police who are straight out of the Academy. In one town, there is one police officer for every 100 people. The community is adamant that it needs counsellors and crisis workers rather than this many police. It is interesting to note that communities which have a high police presence continue to have high levels of violence.

People are increasingly reluctant to use police who do not perform their duties and who appear to be judgmental and racist.

NSW currently has 33 Aboriginal Police Liaison Officers (APLOs), all of whom are male. APLOs are the link between the community and the police but women at these meetings seemed unclear about what these officers do in relation to domestic violence. One APLO consulted said that, on the instruction of his supervisor, he had no involvement whatsoever with domestic violence issues. Thus, in his town, women did not receive his support when reporting or wishing to report an incident, which appears to be a common situation.

This is not to say that all APLOs have no involvement in domestic violence issues within their community, but it does suggest that officers vary in their responses and responsibilities. Their statement of duties allows supervisors to decide whether or not they will play any role in domestic violence.

Women are not using the police, courts and legislation because of racism. lack of knowledge and lack of support. APLOs are employed, amongst other things, to foster good relations between the police and the community and to inform that community about their legal rights. They should, therefore, be accessible to all Aboriginal people.

### **HOSPITALS**

Hospitals in country towns' lack specialist services. During consultations, women expressed reluctance to use hospitals because of alleged racist behaviour. At one meeting, women said that one major Sydney hospital's casualty section refuses to treat Aboriginal people unless they can prove they do not have Hepatitis B.

Doctors and hospitals are reluctant to give advice to women who are victims of domestic violence and often do not give appropriate treatment. As a result, women are reluctant to attend hospitals and their injuries go untreated.

### **HOUSING**

The need for adequate housing continues to be a major issue in Aboriginal communities. The possibility of private rental is almost non-existent. Real-estate agents are reluctant to rent premises to Aboriginal applicants, and when they do it is on different terms and conditions, such as shorter leases and higher rents. As a result, Aboriginal people are often forced to move from one place to another in order to get a night's sleep.

Whilst some Aboriginal people own their own homes, many live in Department of Housing premises under the Homes for Aboriginals Scheme. However, the number of houses available under this scheme is limited and maintenance by the Department is a major concern, with extremely long waits for repairs. This causes particular difficulties when extended family is visiting and/or there is a domestic violence situation. One town consulted also expressed concern about non-Aboriginal people moving into IUA houses.



When most families move into HFA homes, they put the house in the name of the husband/de facto. Therefore, when women and their children are forced to flee their home because of domestic violence, they have to find other accommodation. This is very difficult, if not impossible, when a woman has no stable income, has low self-esteem and lives in a town where housing is scarce.

### **ABORIGINAL SERVICES**

All those consulted expressed an urgent need for Aboriginal control of Aboriginal services. Problems also exist where mainstream services have no Aboriginal workers. Often, a worker who leaves an identified position within a service such as Social Security or Housing is not replaced with another Aboriginal person, leaving Aboriginal people with no-one in that service to help them. This is particularly important where it is a welfare-type service.

Aboriginal women are reluctant to use mainstream services. Employing Aboriginal workers helps, but women may still not use a service because of its policies and attitudes.

Communities were concerned at the turnover of Aboriginal staff working in refuges. Apart from workplace racism, Aboriginal refuge workers often experience pressure from their family and community who may see them as turning against men. Aboriginal women working in refuges are placed under immense strain and pressure.

At the moment, NSW has three refuges which are run by and for Aboriginal women. There is an urgent need for more. Women need safe houses in their communities, a safe place they can run to in a crisis. In a number of towns visited, the nearest refuge was four to five hours drive away, and there was no daily bus service. Rain on dirt roads can make leaving an impossibility.

### **ALCOHOL**

Alcohol is a serious problem in most communities. It contributes to the destruction of the family unit; affects people's physical and mental health; changes personalities and destroys the environment.

Women consulted felt that alcohol contributed to the regularity of beatings and domestic violence. Because alcohol is a problem in many communities, it is often the focus of attention. However,<sup>1</sup> women stressed that it is neither the cause of, nor an excuse for, domestic violence.

One woman related the situation in her town, where religion has a high profile and alcohol is banned. Domestic violence remains a huge problem, to which the community turns a blind eye. It is interesting to note that the church leaders are men.

### **Young People**

Domestic violence is having disastrous effects on the individual, the family and the community. As it is Aboriginal parents face many problems because of the rapid changes in their lifestyle since 1788. However,<sup>1</sup> women at the meetings felt that to parent properly people have to be able to look after themselves; they have to know their own values and to have their own identity. For many people, men and women, domestic violence makes this impossible. Many are living in severely dysfunctional families. Some Aboriginal youth are homeless because of domestic violence. Young boys are learning to bash in an effort to exert power, and young girls will go into violent relationships.

One woman speaking at a community meeting said that after years of abuse she had left her violent husband. Now she watches her grown sons bash their partners and feels she has failed. Communities see children as their most important asset because they are the future, representing the survival of a unique people. Yet elders are afraid to pass on knowledge to young people because they feel there is no-one they can trust with it. There are children who are too distressed to be children. At the moment, 40-60% of Aboriginal youth are in an institution at any one time.

Communities want their children to be involved in domestic violence and sexual assault (as well as alcohol) awareness programs within their schools. They want their children to learn about their people's culture so that they can develop self-esteem and pride in who they are.

### **Recommendations**

The following are recommendations put forward by all communities visited.

1. That the Department of Family and Community Services and the Aboriginal and Torres Strait Islander Commission develop a series of awareness programs covering issues specific to women's rights, and issues specific to domestic violence. This should be done in consultation with the Aboriginal community and held within communities.

2. That the Police Department provide appropriate training to police officers on domestic violence within 'Aboriginal communities. This training should be developed in consultation with Aboriginal women.
3. That the Police Department provide appropriate training to Aboriginal Police Liaison Officers on women's legal rights and on domestic violence within the communities.
4. That the Police Department conduct a recruitment campaign targeting Aboriginal Police Liaison Officer positions for women, and giving these positions support and training.

The following recommendations were made by individual communities.

- That the Department of Family and Community Services and the Aboriginal and Torres Strait Islander Commission establish more Aboriginal refuges and safe houses in communities.
- That the Department of Education develop courses on Aboriginal culture to enable children to gain self-esteem and identity.
- That the Department of Education develop courses for Aboriginal children which cover issues specific to living in violent households.
- That the Aboriginal and Torres Strait Islander Commission promote its women's issues budget and make funds available for the running of workshops and information days in isolated and remote communities.
- That the Education Department provide teachers with training in Aboriginal culture and on the effects of violent households on children.
- That the Police Department employ Aboriginal women in police stations to give information and advice on women's issues.
- That the Department of health encourage Aboriginal people to sit on hospital board meetings.
- That the Police Department ensure police are accessible 24 hours a day, regardless of the opening hours of the local police station.
- That the Police Department encourage regular meetings between local police and Aboriginal organisations and Aboriginal community women.
- That the Department of Family and Community Services develop an awareness kit on domestic violence which is easily accessible to both Aboriginal organisations and Aboriginal community women.
- That the Attorney General's Department employ Aboriginal women to work within the court system and to make this system more accessible to, and beneficial for, Aboriginal women.
- That the Department of Health recognise the effects of domestic violence on the health of communities and individuals by developing a policy on domestic violence in consultation with various community groups.
- That the Ombudsman's office promote the role of the Ombudsman within Aboriginal communities.

### **Community Strategies**

All communities consulted believe that strategies and solutions will only work if they are formed and carried out by the communities themselves.

The following strategies were suggested by communities:

- Establishing women's groups to give advice and information and to act as a support network;
- Using local media, such as radio and newspapers, to give out information on domestic violence and women's rights;

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- Community members, both individually and as a group, saying they do not support domestic violence;
- Community members making people and organisations, such as the police, the Aboriginal Legal Service, hospitals etc., answerable to the community. This can only be done when individuals know the roles and responsibilities of these groups;
- Applying for funding to run workshops on domestic violence;
- Applying for funding to run courses for perpetrators in drug, alcohol and other related matters;
- Communities organising regular meetings with the police on important issues.

Reference: NSW Domestic Violence Strategic Plan. Report on Consultations with Aboriginal Communities. Women's Co-ordination Unit,