

LEGAL RESPONSES TO VIOLENCE IN THE HOME IN NEW ZEALAND

MARK HENAGHAN* AND RUTH BALLANTYNE**

I THE SAD REALITIES

New Zealand appears to be an idyllic country, but the reality is very different for those New Zealanders who are subjected to violence in their homes. It is nearly impossible to quantify the level of family violence in New Zealand. Such violence often occurs behind closed doors and is frequently not reported to the police. Indeed, the New Zealand Police estimate that only 18 per cent of all family violence in the home is actually reported to the police.¹ What we do know is damning; family violence in New Zealand is ‘an epidemic’.² In the 2008 calendar year, the New Zealand Police responded to 82 692 incidents and offences involving some form of domestic violence.³ Those figures are all the more disturbing as they only represent the tip of the iceberg: the family violence that is actually reported to the police. The total amount of family violence in New Zealand is likely to be much higher. Nearly half of the homicides in New Zealand happen in a domestic setting,⁴ and more than a quarter of the total culpable deaths in New Zealand are ‘couple-related homicides’.⁵ Victims of ‘couple-related homicides’ are overwhelmingly women who have been killed by male partners or ex-partners.⁶ In 2009, three quarters of female victims of

* Dean and Professor in Law, University of Otago, Dunedin, New Zealand.

** Dean’s Research Assistant, University of Otago, Dunedin, New Zealand. The authors acknowledge the assistance of Michael Holland and Daniel Eyre.

1 New Zealand Family Violence Clearinghouse, *Family Violence Statistics Fact Sheet* (December 2009) <<http://www.nzfvc.org.nz/StatisticsFactSheet.aspx>>.

2 Jennifer Hand et al, *Free from Abuse: What Women Say and What Can Be Done* (Auckland District Health Board Public Health Promotion, 2002) 1.

3 Judith Collins, ‘New Laws Will Tackle Evil of Family Violence’ (Press Release, 1 October 2009) <<http://www.beehive.govt.nz/release/new+laws+will+tackle+evil+family+violence>>.

4 In the five years from 2002 to 2006, there were 291 homicide deaths investigated by the police. Of these deaths, 141 were perpetrated by a family member of the victim: Jennifer Martin and Rhonda Pritchard, ‘Learning from Tragedy: Homicide within Families in New Zealand 2002–2006’ (Working Paper, Centre for Social Research and Evaluation, New Zealand Ministry of Social Development, April 2010) 7.

5 Of the 291 homicides in New Zealand between 2002 and 2006, 74 of them were ‘couple-related homicides’: *ibid* 8.

6 Of the 74 ‘couple-related homicide events’, male perpetrators killed 60 female victims: *ibid* 28.

culpable deaths were killed by their own family members or partners.⁷ It is shocking that women in New Zealand have more to fear from family members than from strangers. A recent study found that inter-partner violence (ranging from minor psychological abuse to severe assault) has been found to occur in 70 per cent of relationships.⁸ Men and women in the study exhibited similar rates of inter-partner victimisation and perpetration.⁹ The study concluded that 'while males and females appear to be equally predisposed to domestic violence, because of greater male strength and capacity for aggression, males predominate in the more extreme cases'.¹⁰

New Zealand's child abuse record is similarly deplorable. During the 1990s, New Zealand had the third highest child death from maltreatment rate of Organisation for Economic Co-operation and Development countries.¹¹ New Zealand's sad record of child abuse continues into the 21st century, evinced by the killing of 38 children under the age of 15 by family members between 2002 and 2006.¹² The costs of family violence are not just physical and emotional, but economic as well. It is estimated that violence in the home costs New Zealand at least \$1.2 billion per year.¹³

Numerous taskforces, committees and government reports on what should be done to improve New Zealand's abysmal family violence record have been

7 New Zealand Police, *Police Statistics on Culpable Deaths in New Zealand: A Summary of Statistics about Victims of Murder, Manslaughter and Infanticide* (1 April 2010), 10 <<http://www.police.govt.nz/statistics/2009/calendar/index.html>>.

8 This is based on a study that examined a birth cohort of 828 young New Zealanders who had been extensively interviewed throughout their lives and were aged 25 at the time this study was conducted: David M Fergusson, Joseph M Boden and L John Horwood, 'Developmental Antecedents of Interpartner Violence in a New Zealand Birth Cohort' (2008) 23 *Journal of Family Violence* 737, 737.

9 Ibid 748.

10 Ibid.

11 United Nations Children's Fund Innocenti Research Centre, *Innocenti Report Card No 5: A League Table of Child Maltreatment Deaths in Rich Nations* (2003) 4 <<http://www.unicef-irc.org/cgi-bin/unicef/Lunga.sql?ProductID=353>>.

12 Martin and Pritchard, above n 4, 46.

13 Suzanne Snively, 'The New Zealand Economic Cost of Family Violence' (1995) 4 *Social Policy Journal of New Zealand* 98, 98.

commissioned.¹⁴ New Zealand's legislation has at its core the overriding principle of protection of adults and children from violence.¹⁵ The legal definition of violence is wide, including all forms of physical, sexual and psychological abuse.¹⁶ There only needs to be evidence that a child is being or is likely to be harmed (whether physically, emotionally or sexually), ill-treated, abused or seriously deprived for the state to intervene under New Zealand child protection law.¹⁷ When making protection orders, judges must examine the nature and seriousness of the respondent's violent behaviour from the point of view of the applicant or a child of the applicant's family, and the effect of the behaviour on them, rather than from some objective external viewpoint.¹⁸ There are strict penalties for breaches of protection orders.¹⁹ Violence that occurs in the family is criminally prosecuted like any other form of violence.²⁰ Specialist child protection agencies protect children in New Zealand, though there have been problems with underfunding of both the social work profession²¹ and the police²²

-
- 14 See generally Ruth Busch, Neville Robertson and Hilary Lapsley, *Protection from Family Violence: A Study of Protection Orders under the Domestic Protection Act 1982 (Abridged)* (New Zealand Victims Task Force, 1992); Leitner Center for International Law and Justice, *'It's Not OK': New Zealand's Efforts to Eliminate Violence against Women* (2008) <<http://www.leitnerlaw.com/programs/2008new/>>; Neville Robertson et al, *Living at the Cutting Edge: Women's Experiences of Protection Orders* (New Zealand Ministry of Women's Affairs, 2007); Ken McMaster, Gabrielle Maxwell and Tracy Anderson, *Evaluation of Community Based Stopping Violence Prevention Programmes* (Institute of Criminology, Victoria University of Wellington, 2000); Fleur McLaren, *Attitudes, Values and Beliefs about Violence within Families: 2008 Survey Findings* (March 2010) New Zealand Ministry of Social Development <<http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/campaign-action-violence-research/index.html>>; New Zealand Families Commission, *Campaign for Action on Family Violence: Formative Research*, Family Violence: It's Not OK <http://www.areyouok.org.nz/research_evaluation_and_statistics.php>; Centre for Social Research and Evaluation, *Preventing Physical and Psychological Maltreatment of Children in Families: Review of Research for Campaign for Action on Family Violence* (March 2008) Family Violence: It's Not OK <http://www.areyouok.org.nz/research_evaluation_and_statistics.php>; New Zealand Families Commission, *Family Violence Statistics Report* (2009); Denise Lievore and Pat Mayhew, *The Scale and Nature of Family Violence in New Zealand: A Review and Evaluation of Knowledge* (Centre for Social Research and Evaluation, New Zealand Ministry of Social Development, 2007); Trish Knaggs, Felicity Leahy and Nataliya Soboleva, *The Manukau Family Violence Court: An Evaluation of the Family Violence Court Process* (New Zealand Ministry of Justice, 2008).
- 15 *Domestic Violence Act 1995* (NZ) ss 5, 14.
- 16 *Domestic Violence Act 1995* (NZ) s 3.
- 17 *Children, Young Persons, and Their Families Act 1989* (NZ) s 14(1)(a).
- 18 *Domestic Violence Act 1995* (NZ) s 13(2).
- 19 The maximum penalty is imprisonment for a term not exceeding two years: *Domestic Violence Act 1995* (NZ) s 49.
- 20 Historically, violence between couples was seen as a private matter. When police were called, such incidents were dismissed as mere 'domestics'. This changed with the enactment of the *Domestic Protection Act 1982* (NZ). This Act ultimately resulted in changes to police policy in 1987 and 1993, after which family violence was treated seriously as an offence: Mark Henaghan and Bill Atkin (eds), *Family Law Policy in New Zealand* (LexisNexis, 3rd ed, 2007) 87.
- 21 See generally Michael J A Brown, *Care and Protection Is about Adult Behaviour: The Ministerial Review of the Department of Child, Youth and Family Services* (December 2000) New Zealand Ministry of Social Development <<http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/publications-index-2000-2002.html>>.

who deal with violence within families. Programmes for victims and perpetrators of violence, designed to reduce violence and to keep victims safe, are prescribed in New Zealand's legislation.²³ Yet despite all of these actions, there has not been any change in the degree and the severity of family violence in New Zealand communities.

Violence that occurs in the home does not illustrate abnormal and abhorrent behaviour, but rather represents an extreme expression of the underlying values of a society. The late Jan Wallace, a founding member of Dunedin Women's Refuge, said prophetically in the 1980s, 'the physical abuse of women is not so much a violation of society's norms, as an extreme expression of them'.²⁴ Until a society changes its attitude from the notion that might is right, to the idea that everyone is entitled to equal respect, then legislation and law will always be subject to the underlying values of those who execute and apply the law. As Michael Freeman states:

[V]iolence by men against women in the home should not be seen as a breakdown in the social order, as orthodox interpretations have perceived it, but as an affirmation of a particular sort of social order. Looked at in this way domestic violence is not dysfunctional; quite the reverse, it appears functional. And, of course, the law has played a part, perhaps a major part, not just in reproducing this social order, but in actually constituting and defining that order.²⁵

New Zealand has contrasting philosophies regarding how best to deal with violence in the home. In the private law sphere, where victims initiate action, the direction is for quick and robust intervention by the state once an application is made. In the public law sphere, which largely applies to child protection, the direction is for slow intervention and letting the family decide.

II CONTRASTING PHILOSOPHIES

A Private Law Responses

Historically, the law allowed men to physically punish their wives. As Freeman states, 'the law not only permitted a husband corporally to chastise his wife, but expected him to do so'.²⁶ Generally, violence that occurred between adults in the home was seen as no one's business. Such thinking was common until the 1970s when Erin Pizzey brought the issue of domestic violence to the public fore in her book, *Scream Quietly or the Neighbours Will Hear*.²⁷ From this time on, there was increasing recognition that something should be done about domestic violence. Feminist scholars like Regina Graycar, Jenny Morgan and

22 See generally Independent Police Conduct Authority, *Inquiry into Police Conduct, Practices, Policies and Procedures Relating to the Investigation of Child Abuse: Part 1* (18 May 2010) <<http://www.ipca.govt.nz/Site/publications/Reports-on-investigations/2010/default.aspx>>.

23 *Domestic Violence (Programmes) Regulations 1996* (NZ) ss 28, 32.

24 Interview with Jan Wallace, Founding Member, Dunedin Women's Refuge (Dunedin, 22 June 1983).

25 Michael Freeman, *Understanding Family Law* (Sweet & Maxwell, 2007) 62.

26 *Ibid* 63.

27 Erin Pizzey, *Scream Quietly or the Neighbours Will Hear* (Enslow Publishers, 1974).

Ruth Busch were also influential in changing dismissive attitudes toward domestic violence and made it known that women and children should not have to tolerate violence in their homes.²⁸

New Zealand enacted the *Domestic Protection Act 1982* (NZ) as a response to domestic violence. However, as the 1992 University of Waikato report illustrated, this Act was still undermined by societal attitudes expressed in judicial decisions that suggested that violence between partners was a private matter and no business of state officials.²⁹ In the case of *Newlands v Police*,³⁰ the appellant was convicted for breach of a non-molestation order. The appellant had previous convictions for breaching the order, thus the lower court had imposed a sentence of three months of periodic detention. The appeal judge described the breach as one ‘of an unusual kind’.³¹ The appellant’s ex-partner had come into the Royal Timaru Hotel with her friends and sat at a table near the appellant, as this was the only table available. The High Court judge described the ex-partner’s actions as ‘provocative’.³² When she left the hotel she was physically grabbed on the arm by the appellant and verbally abused. It was accepted that this was clearly an assault, but the High Court judge felt the appellant’s penalty was ‘inappropriate and manifestly excessive’³³ because the female ex-partner was ‘substantially the author of her own misfortune’.³⁴ The sentence of periodic detention was removed and replaced by a fine of \$200 without court costs.³⁵ Although all she did was go into a public bar and sit at a table with her friends – something that every citizen should be free to do – the female ex-partner was told that she would be wise to refrain from any action that could be seen as ‘provocative’.³⁶ This decision effectively blames the ex-partner, rather than telling the appellant that his violent behaviour was of his own making and wrong. It exemplifies the fact that no matter what law is on the books, judges’ own values and perspectives can undermine the entire purpose of having law to protect people from violence. Further evidence of the underlying attitudes of the time is that rape within marriage was not a criminal offence until 1985.³⁷

28 See generally Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1st ed, 1990) 277–307; Ruth Busch and Neville Robertson, ‘The Gap Goes On: An Analysis of Issues Under the Domestic Violence Act’ (1997) 17 *New Zealand Universities Law Review* 337.

29 Busch, Robertson and Lapsley, above n 14, 8.

30 [1992] NZFLR 74.

31 *Ibid* 77.

32 *Ibid*.

33 *Ibid* 78.

34 *Ibid*.

35 *Ibid*.

36 *Ibid*.

37 The *Crimes Amendment Act (No 3) 1985* (NZ) repealed s 128(3) of the *Crimes Act 1961* (NZ), which specifically excluded prosecution of a husband for raping his wife unless the couple had divorced or there was a separation order in place: Neville Robertson and Heather Oulton, *Sexual Violence: Raising the Conversations: A Literature Review* (26 September 2008) University of Waikato Research Commons <<http://researchcommons.waikato.ac.nz/handle/10289/995>>.

1 *The Domestic Violence Act 1995 (NZ)*

New Zealand's current legislation, the *Domestic Violence Act 1995* (NZ), strongly denounces all forms of family violence. The primary purpose of the *Domestic Violence Act 1995* (NZ) is to provide victims with legal protection from domestic violence.³⁸ Firm emphasis is on quick and decisive granting of protection orders, strong sanctions if protection orders are breached,³⁹ and attendance at programmes to prevent further violence.⁴⁰ The Act applies to people who are in a domestic relationship with each other. This includes spouses and partners of the same or opposite sex, family members, those who ordinarily share a household and those in close personal relationships.⁴¹ It does not include strangers who watch, loiter, follow, stop or accost other people or harass them on the telephone or by other means.⁴² In enacting this legislation, the state sent a strong message that domestic violence is indeed a matter for external intervention.⁴³ However, the *Domestic Violence Act 1995* (NZ) is still a private law response because the person responsible for initiating proceedings under the Act is the victim (or suitable representative), rather than the state.⁴⁴

2 *Safety of Children*

It took New Zealand some time to recognise the adverse consequences that violence between adults may have for children. Such risks were highlighted in 1997 by Clyde Feldman, who asserted that 'childhood exposure to violence in one's family of origin is one of the most consistent correlates of later adult domestic violence'.⁴⁵ Likewise, in 1999 Lenore Walker commented that, 'the highest risk marker for a man to use violence against his wife and child is early exposure to violence in his childhood home'.⁴⁶ In New Zealand a longitudinal study of a birth cohort of over 1000 young adults (interviewed at multiple assessment points from birth to the age of 25) carried out an examination of the

38 *Domestic Violence Act 1995* (NZ) s 5(1)(b).

39 *Domestic Violence Act 1995* (NZ) s 49(3).

40 *Domestic Violence Act 1995* (NZ) s 32.

41 *Domestic Violence Act 1995* (NZ) s 4(1).

42 *Harassment Act 1997* (NZ) s 4. The *Harassment Act 1997* (NZ) is specifically designed to deal with harassing behaviour by strangers. Section 6(1)(a) of the Act recognises that behaviour that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context. The Act allows victims of harassment, not covered by domestic violence legislation, to make applications for restraining orders that have the same effect as protection orders. Section 8 of the *Harassment Act 1997* (NZ) makes harassment that causes a victim to fear for their own, or their family's safety, a criminal offence with a maximum penalty of two years' imprisonment.

43 Though the legislative intent of the *Domestic Violence Act 1995* (NZ) is laudable, some aspects of the Act's implementation still fall short of the mark. This will be discussed in greater depth in Parts III and IV of this paper.

44 There is one exception: s 12 of the *Domestic Violence Act 1995* (NZ) allows a protection order application to be made on behalf of a victim of domestic violence if the victim is too afraid to make an application themselves. The implications of this are further discussed in Part III of this paper.

45 Clyde M Feldman, 'Childhood Precursors of Adult Interpartner Violence' (1997) 4 *Clinical Psychology: Science and Practice* 307, 307.

46 Lenore E Walker, 'Psychology and Domestic Violence around the World' (1999) 54 *American Psychologist* 21, 24.

intergenerational transmission of violence.⁴⁷ This study found that it was the accumulation of risk factors such as socio-economic disadvantage, parental difficulties, child abuse and related factors that had the most impact on long term development, rather than specific factors in isolation.⁴⁸

The *Bristol* case⁴⁹ was the catalyst for major changes as to how violence between adult partners should impact on the placement of children. It is a striking and extremely sad example of the potentially lethal danger that children can face when they are cared for by a parent with violent tendencies. In *Bristol*, the father was able to obtain interim custody (now called day-to-day care) of his three daughters, despite allegations that he had previously been violent to his ex-wife (who was the mother of the children). The general belief at the time was that allegations of violence against an adult partner were 'unlikely to impact on questions of the children's day to day care'.⁵⁰ Ultimately, mere months after obtaining the interim custody order, the father killed himself and his three daughters by placing them in the family vehicle and connecting the car's exhaust to the interior of the vehicle. This led to a public enquiry, which recommended that there should be a presumption that if a parent has been found to be violent, they are prima facie unsafe to have unsupervised contact with their children, unless they can satisfy the court that the children would be safe in their care.⁵¹ This presumption became an amendment to the *Guardianship Act 1968* (NZ) and is now enshrined in sections 58–62 of the *Care of Children Act 2004* (NZ). This legislative change sent a strong message that the safety of children comes first.⁵²

The distressing reality is that in the first case to be decided in the Family Court on the new child safety provisions,⁵³ the outcome did not conform with the legislative prescriptions. In *De Leeuw v Edgecumbe*,⁵⁴ the father had been convicted of seriously assaulting the child's mother and had pushed the young child over during a contact visit. However, the father retained care of the child because the mother had begun to exhibit 'unstable needy and stressed behaviour'.⁵⁵ The behaviour by the mother included leaving a series of abusive phone messages for the father saying things like, '[s]he's your child, you bloody

47 David M Fergusson, Joseph M Boden and L John Horwood, 'Examining the Intergenerational Transmission of Violence in a New Zealand Birth Cohort' (2006) 30 *Child Abuse & Neglect* 89, 89.

48 Ibid 104. This finding will be discussed in Part V of this paper as a theme for future responses to family violence.

49 See generally Sir Ronald Davison, *Report of Inquiry into Family Court Proceedings Involving Christine Madeline Marion Bristol and Alan Robert Bristol* (New Zealand Office of the Minister of Justice, 1994).

50 Rosemary Riddell, 'Protecting Children from Family Violence' (Paper presented at the International Conference on Child Labour and Child Exploitation, Cairns, 3–5 August 2008) 2 <<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/protecting-children-from-family-violence>>.

51 Davison, above n 49.

52 Even if there is no finding of physical or sexual abuse, if there is evidence of a real risk of such behaviour the judge can put safety measures in place to protect children: *Care of Children Act 2004* (NZ) s 60(6).

53 Previously contained in the *Guardianship Act 1968* (NZ) and now contained in ss 58–62 of the *Care of Children Act 2004* (NZ).

54 [1996] NZFLR 801.

55 Ibid 802.

well have her'.⁵⁶ The mother had been seriously assaulted by the child's father and had herself grown up in a violent home. The Court decided that the mother may not be safe to look after the child. The mother was given supervised contact and the father had a custody order made in his favour.⁵⁷ What the mother really needed was support and care for the violence she had suffered to enable her to fulfil her potential as a mother. The mother was effectively punished twice, first by the violence inflicted upon her, and secondly by only being allowed supervised contact with her child.⁵⁸

Predicting whether a violent parent will be safe with their children is a very difficult exercise. The legislation provides factors to take into account when considering the future safety of children, including the degree and seriousness of the violence, its frequency, how recent it was, any views expressed by the child and any steps taken by the violent party to prevent future violence.⁵⁹ Analysis of these factors alone is not likely to be enough to eliminate future risk, so the court has the discretion to award supervised contact if they are unsure of a child's safety.⁶⁰ However, an award of supervised contact is only an interim solution because of its artificial nature. An award of supervised contact can be problematic in a practical sense, as there are not well funded supervised contact centres in all parts of the country.⁶¹ The ideal situation is a wide network of contact centres and well-developed programmes to reduce violent behaviour. This would eliminate the risks that violent parents pose to their children. In discussing the difficulty of predicting future risk, Ian Freckleton⁶² cites Alan Bedford's formula of risk prediction: 'predisposing hazards + situational hazards – strengths = degree of risk'.⁶³ Predisposing hazards, such as a parent's own history of abuse, can be addressed by the introduction of more holistic and targeted programmes. Situational hazards can be reduced by a more thorough understanding of the socio-economic conditions that contextualise family violence in New Zealand.⁶⁴ The safety provisions in the *Care of Children Act 2004* (NZ) are only invoked where parents apply to the Family Court for parenting orders and in that sense they are a private law response. However, the chief executive of the department responsible for the administration of the *Children, Young Persons, and Their Families Act 1989* (NZ) is eligible to apply

56 Ibid 803.

57 Ibid 810–11.

58 The same problem is recurring. In *JTP v BTT* (Unreported, Invercargill Family Court, Judge Boshier, 28 January 2010), a mother had suffered violence for 12 years and left the family home without the children. The father alienated the children against the mother so they 'loathed' her. The mother ultimately had to give up on contact.

59 *Care of Children Act 2004* (NZ) s 61.

60 *Care of Children Act 2004* (NZ) s 60(5).

61 Riddell, above n 50, 9.

62 Ian Freckleton, 'Custody and Access Disputation and the Prediction of Children's Safety: A Dangerous Initiative' (1995) 2 *Psychiatry, Psychology and Law* 139, 145.

63 Alan Bedford, *Child Abuse and Risk* (NSPCC, 1987).

64 These ideas are discussed more fully in Part V of this paper.

to the Family Court's wardship jurisdiction to remove decision-making powers from the parents and have the Court appointed as guardian of the child.⁶⁵

B Public Law Responses

By way of contrast, historically, when it came to child protection, the state took a heavy hand, particularly with families in lower socio-economic circumstances. Children were often removed and placed with other families. In 1987, as a reaction to extensive child removal with a strong bias toward Maori, John Rangihau prepared the *Puao-Te-Ata-Tu (Day Break)* report.⁶⁶ This report indicated the importance of Maori children being brought up within a Maori context. This is because Maori see children thus:

The child is not the child of the birth parents, but of the family, and the family was not a nuclear unit in space, but an integral part of a tribal whole, bound by reciprocal obligations to all whose future was prescribed by the past fact of common descent ... There is no property in children. Maori children know many homes, but still, one whanau ... children had not so much rights, as duties to their elders and community. The community in turn had duties to train and control its children. It was a community responsibility.⁶⁷

It was this social environment that led to the introduction of the *Children, Young Persons, and Their Families Act 1989* (NZ). The inclusion of the word families in the title and substance of the Act is significant because the previous Act did not mention families at all.

1 *The Children, Young Persons, and Their Families Act 1989* (NZ)

The *Children, Young Persons, and Their Families Act 1989* (NZ) was an attempt to increase families' involvement in the upbringing of their children, and to empower families through family group conferences, whereby families had the first chance to decide what should happen to children who were at risk of family

65 *Care of Children Act 2004* (NZ) s 31(2)(f).

66 Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare, *Puao-Te-Ata-Tu (Day Break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (New Zealand Department of Social Welfare, 1988).

67 Ibid 74–5. In this context whanau means 'extended family, family group, a familiar term of address to a number of people – in the modern context the term is sometimes used to include friends who may not have any kinship ties to other members': John Moorfield, *Te Aka Māori-English, English-Māori Dictionary* (2010) <<http://www.maoridictionary.co.nz/index.cfm?dictionaryKeywords=whanau&search.x=47&search.y=13&search=search&n=1&idiom=&phrase=&proverb=&loan=>>>. For more information on tikanga Maori, see generally Hirini Moko Mead, *Tikanga Maori: Living by Maori Values* (Huia Publishers, 2003); Joan Metge and Jacinta Ruru, 'Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law Policy' in Henaghan and Atkin (eds), above n 20, 47–80.

violence.⁶⁸ The Act provides for family services to be given to the family and for support to be given to the child.⁶⁹ The Minister responsible for the Act, the Hon Michael Cullen, said that the legislation ‘places greater emphasis on the interest and authority of families. It reduces the power of the state, of professionals to make decisions for children and young persons irrespective of their families’.⁷⁰ However, the overriding principles of the legislation are that children and young persons must be protected from harm, their rights upheld, and their welfare promoted.⁷¹ The welfare and interests of the child or young person are the first and paramount consideration in any decision.⁷² As the Mason⁷³ and Brown⁷⁴ Reports (which evaluated the implementation of the legislation) have shown, the emphasis on family empowerment has meant that the state has withdrawn its resources and protective mechanisms from children. Ian Hassall, the first Commissioner for Children, and Gabrielle Maxwell have illustrated this, stating:

[T]he reality of family empowerment depends on resources and support services. Many families are living in very poor circumstances: without adequate incomes, in poor quality housing and without the support of others in caring for their children and acquiring skills in managing their families. The rhetoric of family responsibility can readily lead to the reduction of the support of the state sector which is essential to the wellbeing of many families.⁷⁵

Adequate funding for child protection agencies has always been a significant issue. Robin Wilson (the first General Manager of the Children and Young Persons Service) illustrates a controversial example of serious funding problems:

I’ll say this, and I don’t know that anyone will actually believe it, but I swear to you it’s true: that the Treasury actually suggested to us, because we couldn’t manage with our budget, that we should actually do fewer child abuse investigations ... that’s just unbelievable!⁷⁶

Nothing has changed in the interim. Funding of social service agencies is still a significant problem in New Zealand today. The police have similarly

68 Section 22 of the *Children, Young Persons, and Their Families Act 1989* (NZ) sets out who is entitled to attend a family group conference. It includes parents, and members of the child’s family, wider family group and whanau, as well as a care and protection coordinator, and an involved social worker or police constable. The conference is given legislative authority under s 29(1) of the Act to make such decisions and recommendations and formulate such plans as it considers necessary or desirable in relation to the care and protection of the child or young person. Under s 30(1) of the Act, the plan needs to be agreed to by the social worker or police officer involved.

69 *Children, Young Persons, and Their Families Act 1989* (NZ) s 86. The services are to be provided by the chief executive of the department responsible for the administration of the Act. Other organisations can also be named in the order. Section 91 of the Act provides that support orders can be made to provide support for the child, such as counselling.

70 Henaghan and Atkin, above n 20, 86.

71 *Children, Young Persons, and Their Families Act 1989* (NZ) s 13(a).

72 *Children, Young Persons, and Their Families Act 1989* (NZ) s 6.

73 Ministerial Review Team to the Minister of Social Welfare, *Review of the Children, Young Persons and Their Families Act 1989: Report of the Ministerial Review Team to the Minister of Social Welfare* (New Zealand Department of Social Welfare, 1992).

74 Brown, above n 21.

75 Office of the Commissioner for Children, *A Briefing Paper: An Appraisal of the First Year of Operation of the Children Young Persons and Their Families Act 1989* (1991) 12.

76 Brown, above n 21, 23.

withdrawn resources in the area, as it has been shown that they have chosen not to investigate child abuse complaints. In November 2008, a backlog of over 100 active files involving allegations of child abuse was found in the Wairarapa area within the Wellington Police district.⁷⁷ There had been little or no progress in relation to the initial complaints received by police staff. The report found that there was a lack of independent treatment given to the investigation of child abuse in police policy documents.⁷⁸ The report found that the failure to investigate child abuse was not representative of all police investigations, but rather was a sign that child abuse, even though it involves a serious crime, was being given a low priority so that more high volume crimes such as traffic offences could be pursued.⁷⁹ All the good intentions of involving, listening to and supporting families have been totally undermined by the state's decision to withdraw the resources and effort required to make the legislation work.

2 *Re-victimisation by the State*

Recipients of domestic purposes benefits have long been the target of politicians and state agencies in New Zealand. In *Ruka v Department of Social Welfare*,⁸⁰ Miss Ruka had been receiving a benefit for a number of years. However, when the state found out that she had been living in a highly violent and totally non-supportive relationship with Mr T, for 18 years they charged her with benefit fraud. She was technically ineligible for a domestic purposes benefit because she had been living in a relationship in the nature of marriage.⁸¹ Both the District Court and the High Court judges held that despite the existence of violence, a de facto relationship existed between Miss Ruka and Mr T and thus Miss Ruka was convicted of benefit fraud.⁸² However, the majority of the Court of Appeal displayed empathetic understanding for Miss Ruka's plight. The Court accepted that Miss Ruka was suffering from battered women syndrome.⁸³ She had survived an 18 year relationship with Mr T in which she was routinely beaten, raped and abused.⁸⁴ Miss Ruka bore Mr T a child early in the relationship, but he played no role in caring for the child. All domestic tasks and duties fell on Miss Ruka, while Mr T came and went as he pleased without explanation and had a number of relationships with other women.⁸⁵ Miss Ruka never received any financial support from Mr T because any money he earned he spent on himself and he declined to make any contribution to household expenses. The majority in the Court of Appeal quashed Miss Ruka's convictions and held that there was no relationship in the nature of marriage because Mr T

77 Independent Police Conduct Authority, above n 22, 4.

78 Ibid 6.

79 Ibid 51–2.

80 [1997] 1 NZLR 154.

81 *Social Security Act 1964* (NZ) s 63.

82 *Ruka v Department of Social Welfare* [1995] 3 NZLR 635.

83 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154, 156.

84 Ibid 174–5.

85 Ibid 175.

did not support Miss Ruka or their child, and there was no continuing emotional commitment.⁸⁶

3 Compensation for Victims

New Zealand provides compensation for victims of violence in the home under the Accident Compensation Corporation scheme. This scheme pays for medical expenses, counselling and vocational rehabilitation, as well as 80 per cent of the victim's salary while they are recovering.⁸⁷ The purpose of the *Accident Compensation Act 2001* (NZ) is to provide for a fair and sustainable scheme to manage personal injury.⁸⁸ A personal injury includes physical injury suffered by a person, as well as mental injuries suffered by a person due to physical injury.⁸⁹ Mental injury is also covered if it is caused by certain criminal acts performed by another person.⁹⁰

There is the possibility of a victim bringing private action against a domestic violence perpetrator in court for exemplary damages designed to punish the perpetrator and make an example of them. In the case of *G v G*,⁹¹ a wife claimed that her husband, a doctor, had been very violent towards her during their marriage. He had picked her up and dangled her over the second floor balcony of their flat and threatened to drop her on the road eight feet below. The husband then carried her back inside, dropped her to the floor, and wearing his shoes, kicked her hard in the kidney and upper thigh areas. In another incident, he kicked her off the bed so that she fell onto a drinking glass on the floor that broke and lacerated her lower back. To stop her yelling her husband put his hand around her neck and threatened to kill her. The wife described having a near death experience. The husband would not allow her to use the telephone to seek help for her injuries from medical professionals. Cartwright J concluded:

[A]s part of an ongoing desire to control his wife, particularly when it came to sexual relations and her body shape, the defendant consistently threatened, assaulted, and abused her. His treatment of her was brutal and degrading and resulted in her having a reduced ability to escape from a relationship in which she felt trapped.⁹²

In awarding exemplary damages of \$85 000, Cartwright J was influenced by 'the persistence and severity of the violence and the fact that the defendant is a

86 Ibid 185.

87 In the past, victims of historic sexual abuse within their families were able to recover a lump sum payment to help them with rehabilitation. Currently, people who suffer personal injuries may be eligible for treatment costs, home help, weekly compensation, education support, travel and accommodation for treatment, rehabilitation plans, home modifications and funeral grants: Accident Compensation Corporation, *What Support Can I Get?* (20 June 2008) <<http://www.acc.co.nz/making-a-claim/what-support-can-i-get/index.htm>>.

88 *Accident Compensation Act 2001* (NZ) s 3.

89 *Accident Compensation Act 2001* (NZ) s 26.

90 *Accident Compensation Act 2001* (NZ) s 21.

91 [1997] NZFLR 49.

92 Ibid 55.

member of a profession entrusted to care for the physical and mental health of the community'.⁹³

4 *New Public Law Responses*

(a) *Police Safety Orders*

The most recent public law philosophy is for the state to come down very hard on perpetrators of family violence through police safety orders.⁹⁴ A qualified constable⁹⁵ can issue an on-the-spot order, which prevents the recipient of an order from having any contact with the alleged victim, their children and any other family members for up to five days.⁹⁶ Breaching a police safety order will result in automatic arrest.⁹⁷ The difference between a police safety order and a protection order is that the issuance of the police safety order immediately suspends any parenting or contact order that the parent who it is issued against may have.⁹⁸ When a protection order is granted, a respondent can still have contact with their children. Whether this contact is supervised or unsupervised depends on the safety of the children. This crucial difference makes police safety orders more restrictive than protection orders.

There is no right of appeal against a police safety order: once it is issued, it will run its course. As Bill Atkin rightly points out, this legislation cuts across all the traditional checks and balances in a justice system when state power is exercised against a citizen.⁹⁹ Police safety orders go to the heart of the principles of natural justice, because they do not allow alleged offenders the right to be heard. Even citizens alleged to have committed the most heinous crimes have a right to be heard. Such a right is not similarly afforded victims because a police safety order can be made even when the victim does not consent to one.¹⁰⁰ Where a police safety order is made inappropriately, which, given the foibles of human nature, will happen from time to time, there is no possible redress. Thus, police safety orders are a form of absolute power given to a state official. When the state acts this way in passing such legislation, it is giving a clear message that so long as the state official can justify it, it is permissible to exercise absolute power. It is a form of power and control by the state, and models the very attitude perpetrators of violence display when they believe that might is right. The addition of natural justice safeguards and accountability mechanisms would still

93 Ibid 65.

94 The police safety order provisions came into force on 1 July 2010. The orders were enacted by s 9 of the *Domestic Violence Amendment Act 2009* (NZ) which inserted pt 6A into the *Domestic Violence Act 1995* (NZ). In July 2010, the police issued 290 police safety orders, 25 of which were breached: New Zealand Police, *Monthly Statistical Indicators* <<http://www.police.govt.nz/service/monthly-statistics>>.

95 A qualified constable means a constable who is of or above the position of sergeant: *Domestic Violence Act 1995* (NZ) s 124A.

96 *Domestic Violence Act 1995* (NZ) s 124K.

97 *Domestic Violence Act 1995* (NZ) s 124L.

98 *Domestic Violence Act 1995* (NZ) s 124G.

99 Bill Atkin, 'Domestic Violence Laws – No Overhaul but Radical Changes' (2009) 6 *New Zealand Family Law Journal* 126, 128.

100 *Domestic Violence Act 1995* (NZ) s 124C.

give protection to victims, but would also show a more even-handed approach by the state.

(b) *Proposed New Offence*

In 2006, the death of two young baby twins, Chris and Cru Kahui, led to public outcry in New Zealand. The twins died in hospital of non-accidental head injuries. They lived in a household with a number of adults, but the family exercised their right to silence. Eventually the police charged the father of the twins with murder. The prosecution case was based on circumstantial evidence of the likely time of death and the likely presence of the father in the house with the twins during that time. The jury's not guilty verdict roused public anger that two young children could be killed, and yet no one be held responsible for their deaths.¹⁰¹

The New Zealand Law Commission has recommended a new crime: failure to protect a child (a person under the age of 18 years) or vulnerable adult from risk of serious harm.¹⁰² The offence is modelled on section 5 of the *Domestic Violence, Crimes and Victims Act 2004* (UK) c 28. The English offence applies only when the child or vulnerable person has died.¹⁰³ However, the New Zealand offence will apply when a child or vulnerable adult is seriously injured.¹⁰⁴ A vulnerable adult is defined as a person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw him or herself from the care or charge of another person.¹⁰⁵ The duty will be imposed on members of the same household as the victim.¹⁰⁶ The definition of 'member of a particular household' is wide: it will include people who do not live in the same household as the child or vulnerable person, but who are so closely connected with the household that it is reasonable in the circumstances to regard them as a member of the household.¹⁰⁷ Flatmates and regular visitors to a household, such as a boyfriend who regularly stays overnight, are likely to come within the definition. Schoolteachers are not covered by the proposed provision, even though they have regular contact with children. Child carers may be covered by the definition if

101 It has long been recognised by lawyers, judges and academics that it is difficult to secure a conviction of a child's carer, where the child is cared for by more than one person. As the United Kingdom Law Commission points out, it is usually clear that at least one of the carers has committed a serious criminal offence, but it is often unclear which carer is responsible for the ill-treatment. Thus it is 'difficult, or impossible, to prove even this beyond reasonable doubt': United Kingdom Law Commission, *Children: Their Non-Accidental Death or Serious Injury (Criminal Trials)*, Report No 282 (2003) 1.

102 New Zealand Law Commission, *Review of Part 8 of the Crimes Act 1961: Crimes against the Person*, Report No 111 (2009) 55. The Commission drafted a proposed Crimes (Offences against the Person) Amendment Bill (NZ) and appended it to their review. The government plans to introduce the Commission's recommendations as an official government Bill during 2010: Simon Power, *Govt to Strengthen Crimes Act to Protect Children* (18 December 2009) New Zealand Government <<http://www.beehive.govt.nz/release/govt+strengthen+crimes+act+protect+children>>.

103 *Domestic Violence, Crime and Victims Act 2004* (UK) c 28, s 5.

104 New Zealand Law Commission proposed Crimes (Offences Against the Person) Amendment Bill cl 24

105 New Zealand Law Commission proposed Crimes (Offences Against the Person) Amendment Bill cl 24.

106 New Zealand Law Commission proposed Crimes (Offences Against the Person) Amendment Bill cl 24

107 New Zealand Law Commission proposed Crimes (Offences Against the Person) Amendment Bill cl 24.

they spend regular time in the household. A child carer, who cares for a child in their own household, will come within the provision if the child was in their household at the time of the act or omission giving rise to the risk of death or serious injury. The other people covered by the definition are staff members of any hospital, institution or residence where the victim resides.¹⁰⁸

In order to be caught by the proposed offence, the member of the same household or staff member of any hospital, institution or residence must have frequent contact with the child or vulnerable adult.¹⁰⁹ However, what will amount to frequent contact is not defined. The accused person must also 'know' that the victim is at risk of death, serious injury or sexual assault as the result of an unlawful act or an omission to perform a statutory duty such as failing to feed a child.¹¹⁰ Knowledge in the criminal law includes constructive knowledge. This is when the circumstances are obvious and a blind eye is turned to them; for example, when it is clear that a child is being regularly beaten from the visible bruising and the frightened behaviour of the child, but the household members choose to ignore it. The final element of the offence is a failure to take reasonable steps to protect the victim from the risk.¹¹¹ Persons under the age of 18 at the time of the act or omission, who are members of the household, will be exempt from being charged.¹¹² What constitutes 'reasonable steps' will be a matter for juries. The proposed offence will carry a maximum penalty of 10 years' imprisonment.¹¹³

The objective of the proposed offence is to protect the vulnerable. The proposed legislation is laudable in its attempt to give power to potential victims by obliging household members to do what is necessary to protect those at risk. However, the proposed legislation is too vague as to who may or may not have the obligation, and what degree of risk is necessary before intervention is warranted. This suggests hindsight may be relied on in determining who should have intervened and when. As currently drafted, it would not meet Lon Fuller's test for a proper legal system because, 'the desideratum of clarity represents one of the most essential ingredients of legality'.¹¹⁴ Such uncertainties mean that laws are no longer set rules of conduct, but rather a hierarchy of power where officials use hindsight to decide on the day.

108 New Zealand Law Commission proposed Crimes (Offences Against the Person) Amendment Bill cl 24.

109 New Zealand Law Commission proposed Crimes (Offences Against the Person) Amendment Bill cl 24.

110 New Zealand Law Commission proposed Crimes (Offences Against the Person) Amendment Bill cl 24.

111 New Zealand Law Commission proposed Crimes (Offences Against the Person) Amendment Bill cl 24.

112 New Zealand Law Commission proposed Crimes (Offences Against the Person) Amendment Bill cl 24.

113 New Zealand Law Commission proposed Crimes (Offences Against the Person) Amendment Bill cl 24.

114 Lon Fuller, *The Morality of Law* (Yale University Press, 1964) 63.

III THE STRENGTHS OF NEW ZEALAND'S RESPONSES TO FAMILY VIOLENCE

A Wide Definition of Domestic Violence

The *Domestic Violence Act 1995* (NZ) defines domestic violence broadly, and includes psychological abuse.¹¹⁵ Behaviour may be psychological abuse even though it does not involve actual or threatened physical or sexual abuse.¹¹⁶ A single act may amount to abuse, as well as a number of acts that form part of a pattern of behaviour, even though some or all of these acts when viewed in isolation may appear to be minor or trivial.¹¹⁷ A wide definition recognises that abuse can be systematic, and it is as much about an attitude towards the other person as is it about the physical harm that may eventually be caused. A wide definition enables early intervention before the violence escalates to more serious physical harms.

The wide definition of violence is not used consistently. Currently, the *Care of Children Act 2004* (NZ) states that children must be protected from all forms of violence.¹¹⁸ However, in cases involving allegations of violence made in proceedings relating to parenting orders under the *Care of Children Act 2004* (NZ), violence is limited to physical or sexual abuse.¹¹⁹ The Child and Family Protection Bill 2009 (NZ), which recently passed its second reading, professes to make the definitions of violence in the *Care of Children Act 2004* (NZ) and the *Domestic Violence Act 1995* (NZ) consistent.¹²⁰ The Child and Family Protection Bill 2009 (NZ) will import the wide definition of violence in the *Domestic Violence Act 1995* (NZ) into the principles relevant to the child's welfare and best interests under the *Care of Children Act 2004* (NZ).¹²¹ However, in allegations of violence in parenting order proceedings, violence will still be limited to physical or sexual abuse, and will not address psychological abuse at all unless there is a valid protection order in force (which may be based on

115 *Domestic Violence Act 1995* (NZ) s 3.

116 *Domestic Violence Act 1995* (NZ) s 3(5).

117 *Domestic Violence Act 1995* (NZ) s 3(4).

118 *Care of Children Act 2004* (NZ) s 5(e).

119 *Care of Children Act 2004* (NZ) s 58.

120 Justice and Electoral Committee, Parliament of New Zealand, Child and Family Protection Bill (2010) 1.

121 Child and Family Protection Bill 2009 (NZ) cl 19.

psychological abuse as well as physical and sexual abuse).¹²² Thus, although the Child and Family Protection Bill 2009 (NZ) will import the wide definition of violence from the *Domestic Violence Act 1995* (NZ) into the *Care of Children Act 2004* (NZ), the wide definition will not be used consistently throughout the amended Act.

B Victims' Viewpoint

The *Domestic Violence Act 1995* (NZ) emphasises the viewpoint of the victim.¹²³ Victims of violence are likely to understand the perpetrator's behaviours better than anyone else, and for too long we have not given sufficient weight to their feelings and how they see the likely future. In *Surrey v Surrey*,¹²⁴ the New Zealand Court of Appeal effectively creates a presumption that once an applicant for a protection order has proved the existence of past violence and a reasonable subjective fear of future violence, then a protection order is necessary. A respondent who wants to challenge the order must provide evidence that there is no reasonable basis for the fears.¹²⁵ In *Surrey v Surrey* the husband had raped his ex-wife on three occasions after separation and sent inappropriate text messages with strong sexual references to the couple's 10 year old daughter.¹²⁶ The High Court judge classified the incidents as situational saying that:

[T]he fact there has been domestic violence while a couple's relationship was deteriorating was not by itself sufficient reason to predict that one or other of the parties would resort to some form of domestic violence while participating in access arrangements.¹²⁷

The Court of Appeal placed significant weight on the subjective perceptions of the applicant. In determining the likelihood of future violence, the Court is able to take into account a pattern of behaviour.¹²⁸ The Court interpreted this liberally, 'such that any repetitive conduct (even if it was of a sporadic nature or formed a series of different types of violence) can be seen as forming a pattern of

122 Child and Family Protection Bill 2009 (NZ) cl 22(1). This will be an extension of the current *Care of Children Act 2004* (NZ) provisions because a valid protection order (based on physical, sexual or psychological abuse) could be used to automatically ensure a violent party cannot be given day-to-day care or unsupervised contact of a child unless they can satisfy the court the child will be safe. However, if parent A is psychologically abusive to parent B and their child and there is no protection order in force against parent A, s 60 of the *Care of Children Act 2004* (NZ) would not apply to protect the child. Parent B would have to rely on the proposed s 61A of the Act to prevent parent A from having day-to-day care or unsupervised contact with their child, or get a protection order against parent A before making a parenting application. Section 61A is to be inserted into the Act by cl 24A of the Child and Family Protection Bill 2009 (NZ) and emphasises the court's general power to make any order it thinks fit to ensure the safety of the child. This is not substantially different from s 60(6) of the *Care of Children Act 2004* (NZ) currently in force.

123 *Domestic Violence Act 1995* (NZ) s 13(2).

124 [2010] 2 NZLR 581.

125 *Ibid* 591 [43].

126 *Ibid* 583–4 [2].

127 Bill Atkin, 'Case Note: *Surrey v Surrey*' (2009) 6 *New Zealand Family Law Journal* 219, 219.

128 *Domestic Violence Act 1995* (NZ) s 3(4).

behaviour'.¹²⁹ The Court of Appeal also rightly states that '[t]he single most robust predictor of future violence is a history of multiple prior offences'.¹³⁰ One of the factors that had swayed the High Court judge to take a narrow interpretation was that to put too much weight on the applicant's perspectives 'gives too much power to the mother over the continuance of the domestic relationship of the children with their father'.¹³¹ Given the father's behaviour, it is appropriate that the law place a burden on him to prove his safety before he can have contact with his children.¹³² The connection between parenting orders and protection orders will become stronger in New Zealand. The Child and Family Protection Bill 2009 (NZ) will amend the *Domestic Violence Act 1995* (NZ) to give the Family Court jurisdiction to make interim orders for day-to-day care and contact when a protection order application is made.¹³³

C Ex Parte Protection Orders

In New Zealand protection orders can be made *ex parte* (without notice to the other side) on the papers sent through to the Family Court judge on duty. This makes the accessibility of the orders simpler, more cost effective and less emotionally taxing for the victim. On average over 80 per cent of protection orders are filed *ex parte*.¹³⁴ The downside to *ex parte* applications is that some protection orders may be granted in circumstances where, in reality, the violence is not quite as portrayed on the papers. The High Court became concerned about this because of the principles of natural justice. In *Y v X*,¹³⁵ Heath J accepted Justice Fisher's analysis from *Martin v Ryan*¹³⁶ that *ex parte* orders should normally only be justified where the following requirements are met:

- (i) Clear case on the merits
- (ii) Irreparable injury if application proceeds on notice
- (iii) No delay by applicant
- (iv) Effect of order will be only brief and provisional
- (v) Strong grounds for overriding conventional requirements of natural justice.¹³⁷

Justice Heath has also said that it was preferable for *ex parte* applications to be made in writing, rather than orally, except in extreme circumstances.¹³⁸

129 *Surrey v Surrey* [2010] 2 NZLR 581, 602 [99].

130 *Ibid* 590 [40].

131 *Ibid* 587 [25].

132 Father's groups have lobbied for some time that domestic violence laws have gone too far and that they deprive fathers of contact with their children: see, eg, Masculinist Evolution New Zealand, *MENZ Issues* (8 October 2010) <<http://menz.org.nz/>>.

133 Child and Family Protection Bill 2009 (NZ) cl 7.

134 Peter Boshier, 'The *Domestic Violence Act* Ten Years On' (2006) 5 *New Zealand Family Law Journal* 133, 134.

135 [2003] NZFLR 1126.

136 [1990] 2 NZLR 209.

137 *Ibid* 226–7.

138 *Y v X* [2003] NZFLR 1126, [71].

D Protection Orders Stand Even if a Survivor of Violence Chooses to Resume Living with the Perpetrator

Once a survivor of violence has a protection order, that order still stands, even if the survivor chooses to resume living with their partner.¹³⁹ If the survivor's partner becomes abusive while they are living together, it is still a breach of the protection order, and the survivor is able to ask their partner to leave. Under the previous legislation, once the survivor returned to their violent partner, the order automatically lapsed and the burden was on them to apply again if the partner began behaving in an abusive manner.

E Interim Orders Automatically Become Final Orders Unless Respondent Takes Active Steps to Discharge Order

Ex parte orders are initially of an interim nature, which gives the alleged perpetrator three months in which they can defend the order.¹⁴⁰ If the alleged perpetrator does not take any action, the order automatically becomes a final order. This places the burden on the respondent rather than the applicant.

F Legal Aid

In New Zealand legal aid eligibility is income based.¹⁴¹ Civil legal aid in New Zealand is a loan, which means that it can be claimed back by the state.¹⁴² Applicants for domestic violence orders have been granted an exemption and do not have to repay the loan. The exception only applies to domestic violence protection and does not apply to orders in relation to children or other matters.¹⁴³ It has been found that applicants who do not meet the threshold to receive legal aid are discouraged from applying for protection because of the costs involved.¹⁴⁴

G Protection Orders on Behalf of Others

Section 16 of the *Domestic Violence Act 1995* (NZ) is a somewhat controversial provision that allows for protection order applications to be made on behalf of a victim of violence if they are too afraid to make the application themselves. Although the underlying intent to protect victims is noble, this provision does have the potential to disempower. For example, in *X v Y*,¹⁴⁵ the woman had lived with an extremely violent partner who had numerous convictions for serious assaults against her. She chose to remain in this relationship. However, the police took the view that they should apply for a

139 *Domestic Violence Act 1995* (NZ) s 20.

140 *Domestic Violence Act 1995* (NZ) ss 13(3), (4).

141 New Zealand Legal Services Agency, *Can I Get Legal Aid?* (2006) <<http://www.lsa.govt.nz/legal-aid/can-i-get-legal-aid/index.php>>.

142 *Ibid.*

143 New Zealand Legal Services Agency, *Legal Help for Civil/Family Matters* (2006) <<http://www.lsa.govt.nz/legal-aid/legal-aid-guide/civil-family/domestic-violence.php>>.

144 Leitner Center for International Law and Justice, above n 14, 22; Robertson et al, above n 14, xi.

145 [1997] NZFLR 167.

protection order on her behalf to protect her. When the application went to the Family Court the judge refused the order on the basis that to make an order against her wishes would further disempower her.¹⁴⁶ The *Sentencing Amendment Act (No 2) 2009* (NZ), which came into force on 1 July 2010, allows District Court judges to make protection orders (even if the victim had not sought a protection order) upon sentencing an offender for a domestic violence offence. To do so, the court must be satisfied that the making of the order is necessary for the protection of the victim of the offence.¹⁴⁷ There had been concerns that this would also disempower survivors of domestic violence. However, the Act provides that such an order can only be made if the survivor of the offence does not object to the making of the order.¹⁴⁸

IV THE WEAKNESSES OF NEW ZEALAND'S LEGAL RESPONSES TO FAMILY VIOLENCE

A Enforcement

Whilst the punishment provisions for breaches of protection orders have been considerably stiffened under the *Domestic Violence Act 1995* (NZ),¹⁴⁹ enforcement remains a substantial problem. This was the message of the *Living at the Cutting Edge* report, in which 43 women were interviewed about their experiences of protection orders.¹⁵⁰ The women interviewed generally believed that the legislation was heading in the right direction; however, lack of enforcement was their primary concern. Many women in the study experienced multiple and repetitive breaches of their orders,¹⁵¹ and felt that men were 'seldom ... subject to any meaningful consequences for such breaches'.¹⁵²

146 Ibid.

147 *Sentencing Act 2002* (NZ) s 123B(2)(a), as amended by *Sentencing Amendment Act (No 2) 2009* (NZ) s 4.

148 *Sentencing Act 2002* (NZ) s 123B(2)(b), as amended by *Sentencing Amendment Act (No 2) 2009* (NZ) s 4.

149 The penalty for breaching a protection order is a term of imprisonment not exceeding two years: *Domestic Violence Act 1995* (NZ) s 49(3).

150 Robertson et al, above n 14.

151 *Living at the Cutting Edge* report participants said that electronic means such as telephone calls, text messages and emails were frequently used to harass and intimidate them. These actions are a clear breach of a protection order: *ibid* xiii.

152 *Ibid*. A pilot specialist Family Violence Court was set up in Manukau to address the attitude that perpetrators are not subject to meaningful sentences. It was designed to minimise delays, promote perpetrator accountability, and to enhance the safety of victims. Ultimately, an evaluation into the Court found that a lower conviction rate, more discharges without conviction and more community sentences were being imposed in the Manukau Family Violence Court. Custodial sentences (when they were given) were significantly shorter than if perpetrators had been prosecuted in other courts: Knaggs, Leahy and Soboleva, above n 14, 53–8. It was hoped the Manukau Family Violence Court would have a lower rate of reconviction because perpetrators would be held more accountable for their violence. However, 11 per cent of the offenders from the Court were reconvicted for family violence offences, compared to just 7 per cent before this specialist court was established: at 66. These statistics question whether perpetrators are being held accountable for their actions and whether victim safety is improved by specialist family violence courts.

Inconsistent enforcement by the police can have fatal consequences. The death of 19 year old woman Reipai Dobson is a clear example.¹⁵³ Reipai had a protection order against her ex-partner. However, after he had been arrested for fighting in the street, the police bailed him to Reipai's address at 4am, despite the fact that she had a protection order against him that included the provision that he was not allowed onto the property. The ex-partner stabbed Reipai to death, had a drink of water, and then hanged himself.¹⁵⁴

B Lack of Early Intervention for Children – Not an Integrated Approach

The reports on the deaths of children (whom the state had prior knowledge of) have one common thread: no one asked the crucial question, 'is the child safe now?'¹⁵⁵ That this question was not asked is not the fault of the legislation, which prioritises children's safety,¹⁵⁶ but rather due to a lack of resources, a belief that families will always do the right thing by their children and competition instead of cooperation and information sharing between government agencies. There has also been a focus on incidents rather than the overall wellbeing of the child. As Craig Smith has said:

This kind of battlefield triage, where cases only receive attention when they get severe enough, does not respect the rights of children and does not provide adequate child protection. Each time a child is re-notified there is a real danger that the abuse will be more severe, the problem more entrenched and the long-term damage to the child more profound.¹⁵⁷

The most comprehensive international study on protecting abused children by Michael Wald, J Merrill Carlsmith and P Herbert Leiderman looked at children who had been removed in one county in California and compared outcomes with children who were left at home with family support services in another county.¹⁵⁸ The researchers did not find that either removing children or keeping them at home was better, rather that it depended on the child and their circumstances. The one key ingredient to all the children who did well in the study was having one ongoing, competent, caring adult in their lives.¹⁵⁹

153 Leitner Center for International Law and Justice, above n 14, 32.

154 Ibid.

155 See generally Ian Hassall, *Report to the Minister of Social Welfare on the New Zealand Children and Young Persons Service's Review of Practice in Relation to Craig Manukau and His Family* (Office of the Commissioner for Children, 1993); Office of the Commissioner for Children, *Final Report on the Investigation into the Death of Riri-o-te-Rangi (James) Whakaruru* (2000); Trish Grant, *Report of the Investigation into the Deaths of Saliel Jalessa Aplin and Olympia Marisa Aplin* (Office of the Commissioner for Children, 2003).

156 *Children, Young Persons, and Their Families Act 1989* (NZ) s 13(a).

157 Craig Smith, 'Beyond the Tip of the Iceberg' (1998) 11 *Social Work Now* 33, 36.

158 Michael Wald, J Merrill Carlsmith and P Herbert Leiderman, *Protecting Abused and Neglected Children* (Stanford University Press, 1988).

159 Ibid 179.

The New Zealand government has earmarked \$1.34 million dollars to implement a programme called 'E Tu *Whanau-ora*'.¹⁶⁰ This is an initiative of the indigenous Maori people who are over-represented in family violence statistics as both victims and perpetrators. The new policy will mean that a *whanau-ora* provider will be the main point of contact for families in difficulty, rather than several state agencies dealing with each family. The emphasis of the programme is on prevention, and this will be best achieved by having one person working closely with a family at risk to coordinate all the needs that they may have. This person effectively becomes the 'competent caring adult' identified as crucial by Wald, Carlsmith and Leiderman.¹⁶¹

C Ineffective Stopping Violence Programmes

Attendance at a specified stopping violence programme is mandatory once a protection order has been made, unless there is no appropriate programme available for the respondent, given their character or personal history.¹⁶² Though stopping violence programmes are generally mandatory, the rates of programme non-attendance and non-completion are high. Principal Family Court Judge Peter Boshier points out that a quarter of those referred to stopping violence programmes fail to complete their course.¹⁶³ There are further problems because stopping violence programme attendance is not managed nationally,¹⁶⁴ and even those perpetrators that do attend programmes do not necessarily participate fully.¹⁶⁵ These issues need to be addressed because for 'this sentence to have integrity, we must up our game to ensure that perpetrators of violence do attend and complete their programmes, or are routinely prosecuted if they do not'.¹⁶⁶

Based on a comprehensive evaluation of stopping violence programmes carried out by Ken McMaster, Gabrielle Maxwell and Tracy Anderson, perpetrators who complete programmes are generally less violent. Of the interviewed perpetrators, 98 per cent of them reported that others were 'a lot or fully safe with them' after completing the programme and that they now had a

160 This is a Maori phrase that means 'a sense of wellbeing': New Zealand Family and Community Services, *E Tu Whanau-ora* <<http://www.familyservices.govt.nz/working-with-us/programmes-services/whanau-ora/index.html>>.

161 Wald, Carlsmith and Leiderman, above n 158, 179. The real test of the *Whanau-ora* initiative will be whether it will be adequately funded, so that the best possible providers can be adequately trained and supported in the challenging work they will be required to carry out with at risk families.

162 *Domestic Violence Act 1995* (NZ) s 32(4).

163 Peter Boshier, 'Are Stopping Violence Programmes Worthwhile?' (Speech delivered at the Domestic Violence Hui, Northshore, 16 February 2009) 2. A Ministry of Justice survey of the 20 busiest courts indicated even worse completion rates with only 50 per cent of all respondents having completed their court-directed programme: Peter Boshier, 'Out of the Darkness: Arresting the Spiral of Family Violence' (2010) 6 *New Zealand Family Law Journal* 266, 267.

164 Boshier, 'Are Stopping Violence Programmes Worthwhile?', above n 163, 6.

165 Boshier suggests a system where the Ministry of Justice no longer oversees the operation of stopping violence programmes, and where specialist agencies report back to the court about a perpetrator's programme attendance, participation and how successful the programme was for the particular perpetrator: Boshier, 'Out of the Darkness', above n 163, 267–8.

166 *Ibid* 268.

‘good understanding’ of the effects of violence on their partner or ex-partner.¹⁶⁷ Seventy seven per cent of the perpetrators were ‘very confident’ about staying non-violent in the future.¹⁶⁸ However, this evaluation needs to be treated with a degree of caution given the self-reporting nature of the interview process; that only those perpetrators who completed the programme were interviewed; and that the interviews were conducted shortly after programme completion. It has been found that the longer the follow-up period, the less positive the results.¹⁶⁹

Currently the Ministry of Justice only funds stopping violence programmes when a protection order has been made.¹⁷⁰ This means that people who want to address their violence at an early stage, have to pay to attend a programme. It is recognised that for programmes to work better they need to be more widely available and tailored to meet the particular background of the perpetrator.¹⁷¹ There also needs to be ongoing support after programme completion; otherwise perpetrators are likely to lapse back into old habits.

A major gap in New Zealand’s response to violence in the home is that there are few opportunities for children to attend programmes to help them deal with the violence that they have experienced either directly or indirectly.¹⁷² Ministry of Justice statistics show that in 2005 a total of 6624 children were involved in 4 545 applications for protection orders.¹⁷³ In the same period, women’s refuge provided services for 12 161 children.¹⁷⁴ These figures are a startling reminder that many New Zealand children are affected by violence within their homes.

V WHAT NEEDS TO BE DONE TO ACHIEVE A MORE VIOLENCE-FREE SOCIETY?

The New Zealand Ministry of Social Development is leading the way by seconding comprehensive reports on how we can learn from tragedies such as homicides within families.¹⁷⁵ A working paper released in April 2010 examines

167 Ken McMaster, Gabrielle Maxwell and Tracy Anderson, *Evaluation of Community Based Stopping Violence Prevention Programmes* (Institute of Criminology, Victoria University of Wellington, 2000) 77.

168 Ibid 78.

169 Boshier, ‘Are Stopping Violence Programmes Worthwhile?’, above n 163, 9.

170 Boshier, ‘Out of the Darkness’, above n 163, 268.

171 For example the perpetrator may have been the victim of past violence and abuse themselves, or the perpetrator may have major mental health or major substance abuse problems. These personal circumstances should be taken into account when deciding on the appropriate programme to send the perpetrator to. As Boshier states ‘[a]ll violence is wrong, but the drivers behind that violence differ between perpetrators enormously’: *ibid* 267.

172 Clause 15 of the Domestic Violence Reform Bill 2008 (NZ) was set to address this gap, but the proposed legislation is not proceeding under the current New Zealand National government.

173 New Zealand Ministry of Justice, *Family Court Statistics 2005: Statistics for Individual Case Types* (16 June 2009) <<http://www.justice.govt.nz/publications/global-publications/f/family-court-statistics-2005/2-statistics-for-individual-case-types>>.

174 Shine, *Facts about Domestic Violence* (2009) <<http://www.2shine.org.nz/index.php?section=28>>.

175 Martin and Pritchard, above n 4. See also Family Violence Death Review Committee, *Home* (20 August 2010) <<http://www.fvdr.health.govt.nz/>>.

homicides within families in New Zealand between 2000 and 2006, and concludes that separation is the most dangerous time for women and their children and new partners. Separation is associated with nearly half of the family homicides and with three-quarters of the couple-related homicides.¹⁷⁶ This high risk factor must be recognised by lawyers, judges and service providers to ensure maximum protection is put in place during separation. Another area requiring focused intervention is shaken and assaulted babies: more than one third of the child victims in this study died within their first year of life.¹⁷⁷ Older children are usually killed by assaults that are intended to punish the child.¹⁷⁸ Early intervention and public awareness can reduce these risks. Alcohol and drugs are significant factors in perpetrators' backgrounds.¹⁷⁹ Campaigns to prevent the prevalence of alcohol and drug abuse will assist in reducing family violence in New Zealand. Better support for those suffering from mental illness could also reduce family violence in some cases.¹⁸⁰

While lethal family violence can and does occur in all family circumstances, the number of cases significantly increases at each step of the New Zealand Index of Deprivation scale.¹⁸¹ In New Zealand, more Maori and Pacific peoples live in highly deprived areas, and thus the numbers of deaths attributable to family violence in their communities are much higher than in all other population groups.¹⁸² Such an outcome is the cumulative effect of unequal access to the

176 Martin and Pritchard, above n 4, 76.

177 Ibid. It is shocking to note that the 'child most at risk of fatal violence in New Zealand between 1991 and 2000 was less than one year of age, male and Maori. He was most likely to die from battering, sustaining head and other fatal bodily injuries inflicted by one of his parents': Maori Reference Group for the Taskforce for Action on Violence within Families, *E Tu Whanau-ora: Programme of Action for Addressing Family Violence 2008–2013* (Family and Community Services, New Zealand Ministry of Social Development, 2009) 31.

178 Martin and Pritchard, above n 4, 76. In New Zealand, parents are no longer allowed to use any physical force to 'correct' or punish their children. Section 59 of the *Crimes Act 1961* (NZ) used to allow the application of reasonable force to children for the purpose of discipline. However, this section was substituted on 21 June 2007 by s 5 of the *Crimes (Substituted Section 59) Amendment Act 2007* (NZ). Section 59(2) of the *Crimes Act 1961* (NZ) equivocally states that nothing in any rule of the common law justifies the use of force for the purpose of correction.

179 Martin and Pritchard, above n 4, 11.

180 Ibid 10, 31.

181 Ibid 19. Figure 2 of the report tabulates the rate of family homicide per 100 000 of population alongside the New Zealand Index of Deprivation quintiles (to represent socio-economic status). This data was collected by analysing the address of the victims of family related homicide in New Zealand. The graph shows a shocking increase in the levels of family homicide in areas of increased deprivation.

182 Ibid 20. Figure 3 of the report combines the above family homicide rate and deprivation scale, with information about victims' ethnicity. The highest number of family homicide victims are overwhelmingly Maori people living in the most deprived neighbourhoods in New Zealand. This position is generally supported by the *Whanau Ora* report which states that '[s]ub-standard housing, for example, is correlated with increased rates of household injury, lower standards of personal health, [and] domestic violence'. The report goes on to say that 'whanau members face a disproportionate level of risk for adverse outcomes, as seen in lower standards of health ... and increased rates of offending': Mason Durie et al, *Whanau Ora: Report of the Taskforce on Whanau-Centred Initiatives* (April 2010) 15 <<http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/planning-strategy/whanau-ora/index.html>>.

social and economic determinatives of good health and wellbeing. It reflects the research done by Richard Wilkinson and Kate Pickett,¹⁸³ who suggest that where there are large economic gaps between members of society, the costs in terms of mental health, drug use, education performance and violence grow. Amongst the developed countries studied by Wilkinson and Pickett, New Zealand had the fifth highest income inequality and the fifth highest rate of social and health problems.¹⁸⁴ A more egalitarian society, with less economic difference and more opportunity for an equal start in life is the best long-term solution to reduce family violence in New Zealand.¹⁸⁵ Family violence is not just a gender issue; it is inextricably linked to larger issues of deprivation and class.

183 Richard Wilkinson and Kate Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (Allen Lane, 2009).

184 *Ibid* 20.

185 *Ibid* 232; see generally James Flynn, 'IQ Trends over Time Intelligence, Race and Meritocracy' in Kenneth Arrow, Samuel Bowles and Steven Durlauf (eds), *Meritocracy and Economic Inequality* (Princeton University Press, 2000) 35. Sweden has low levels of family violence and takes a family health approach to supporting vulnerable families. It is a good example of a country where 'children's rights and developmental needs occupy the top level of the political agenda and extensive family support is woven into the fabric of the society'. Joan E Durrant, 'From Mopping Up the Damage to Preventing the Flood: The Role of Social Policy in Preventing Violence Against Children' (2006) 28 *Social Policy Journal of New Zealand* 1, 14.