

# Are You Really Okay?

An Easier and More Effective Solution  
for Obtaining Protection Orders.

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## ***Introduction:***

*“The rate of family violence<sup>1</sup> in New Zealand is horrific.*

*Last year alone, more than 100,000 incidents of abuse were reported to Police – that’s around one every 5 minutes. Worse still, nearly half of all homicides and reported violent crimes are family-violence related. We have the highest reported rate of intimate partner violence in the developed world and the fifth highest reported rate of child abuse.*

*Clearly something isn’t working. We can, and must, do better.”<sup>2</sup>*

*- The Honourable Amy Adams, Minister of Justice.*

For a country who was one of the first in the world to specifically legislate solutions for domestic violence, our recent statistics are nothing short of horrific.<sup>3</sup> Protection Orders are often not sought and when they are, they are regularly breached.<sup>4</sup> An estimated 76% of domestic violence in New Zealand is never reported,<sup>5</sup> and it is only reported incidences that make up the 100,000 incidences reported in 2014.<sup>6</sup> Amy Adams is right – “we can, and must, do better.”<sup>7</sup>

This dissertation seeks to examine the role of Protection Orders as the leading and most permanent remedy for domestic violence incidences in New Zealand, aside from criminal charges. Specifically, it endeavours to identify reasons for the 76% of unreported domestic violence. This enquiry is centred on section 12 of the Domestic Violence Act and its role in providing an alternative pathway to seeking a Protection Order.<sup>8</sup> The rationale for focusing on this section is the potential it has to aid victims by providing an easier and more effective method of seeking a Protection Orders. In addition, the lack of use this section has had since 1996, when the Act came into force, is intriguing.

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<sup>1</sup> For the purposes of this dissertation, the phrase ‘domestic violence’ will be used interchangeably with ‘family violence’. To my mind, ‘domestic violence’ is the correct term as the specific Act is entitled “The Domestic Violence Act 1995.” However, more recently, ‘family violence’ has become a popular alternative phrase, thought to highlight the effects violence has on entire families, especially with regards to children. Thus, while there appears to be a shift towards ‘family violence’, for all legislative purposes, ‘domestic violence’ is the defined phrase in the Act.

<sup>2</sup> Ministry of Justice *Strengthening New Zealand’s legislative response to family violence: A public discussion document* (2015), introduction by the Honourable Amy Adams, Minister of Justice.

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

<sup>4</sup> Joanne Carroll “Protection order ‘only a piece of paper’” (11 March 2012) New Zealand Herald <[www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=1-791252](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=1-791252)>.

<sup>5</sup> Are you okay “Family violence statistics” (2016) Family Violence: It’s Not Okay <<http://areyouok.org.nz/family-violence/statistics/>>.

<sup>6</sup> *Strengthening New Zealand’s legislative response to family violence: A public discussion document*, above n 2.

<sup>7</sup> *Ibid.*

<sup>8</sup> Domestic Violence Act 1995, s 12 (full section attached at Appendix 1).

This dissertation comprises four chapters. Chapter I sets out the historical context of domestic violence, the introduction of the Domestic Violence Act and where it falls short in protecting victims. It looks to the Parliamentary rationale for the inclusion of section 12 and compares the intended and actual operation of the section.

Chapter II navigates the contention between autonomy and paternalism in the context of domestic violence law, in light of the controversial result of *X v Y*.<sup>9</sup> It considers societal and socio-economic effects on autonomy and their links with domestic violence before settling on a care-based approach to domestic violence law, which attempts to balance the autonomy and paternalism contentions.

Chapter III undertakes a cross-jurisdictional analysis of the United Kingdom, Canada and Australia. It looks for novel responses and reform introduced in these jurisdictions that aim to relieve fear and pressure from victims. Then, it assesses whether such ideas could be beneficial to include in a New Zealand reform context, particularly in the context of section 12 reform.

Chapter IV takes the responses considered in Chapter III, combined with considerations from Chapters I and II to settle on a solid reform proposal for section 12. In reforming the section, I suggest the role of a Protection Order delegate be specifically provided for, as there is technically already scope for the role in section 12. Evidence considered suggests a delegate could provide resources and assistance that combat many fears and concerns held by victims that would otherwise prevent them reporting violence.

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<sup>9</sup> *X v Y* (1996) 15 FRNZ 263; [1997] NZFLR 167.

## ***Chapter I: The Problem***

### ***A. History of Domestic Violence and Development of Problem-Specific Legislation***

#### ***1. Origins of domestic violence***

In 2011, United Nations Women New Zealand found New Zealand has one of the highest rates of domestic violence compared with its partner OECD (Organisation for Economic Cooperation and Development) countries.<sup>10</sup> Domestic violence is an issue that has affected our society for generations, however it is only in relatively recent times that it has become an issue of public concern.<sup>11</sup> Domestic violence varies greatly in from emotional and psychological abuse to extreme physical abuse, and includes both prolonged and one-off incidences.<sup>12</sup> In historical, traditional family structures “the husband could correct his wife by moderate and reasonable correcting without incurring criminal liability. Further, a rule of thumb applied where it was not unlawful for a husband to correct his wife with a rod if it was “no thicker than his thumb.””<sup>13</sup> Such attitudes may still influence the ongoing problem today.

In New Zealand, the majority of domestic violence cases involve violence inflicted by males against females and children, however this is not an exhaustive stocktake of domestic violence.<sup>14</sup> Aside from reports and predictions, it is impossible to grasp how large the domestic violence problem in New Zealand really is.<sup>15</sup> There is no regular official collection of domestic violence statistics in New Zealand, rather only smaller population-based studies carried out to measure people’s experiences. New Zealand Family Violence Clearinghouse found the number of crisis calls to Women’s Refuge in the last ten years has almost doubled from 41,734 in 2005/2006 to 81,990 in 2014/2015, with the number of calls peaking at 85,794 in 2011/2012.<sup>16</sup>

Justice Wilson in the Canadian Supreme Court case of *R v Lavallee* said, “The notion that a man has a right to ‘discipline’ his wife is deeply rooted in the history of our society. The woman’s

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<sup>10</sup> NZPA “NZ worst for domestic violence – UN report” (24 July 2011) [Stuff.co.nz <www.stuff.co.nz/national/5332717/NZ-worst-for-domestic-violence-UN-report>](http://www.stuff.co.nz/national/5332717/NZ-worst-for-domestic-violence-UN-report).

<sup>11</sup> Nancy Swarbrick “Domestic Violence – Defining Violence” (21 January 2015) Te Ara – The Encyclopedia of New Zealand <<http://www.teara.govt.nz/en/domestic-violence/>>.

<sup>12</sup> Domestic Violence Act, s 3.

<sup>13</sup> W Blackstone *Commentaries on the Laws of England* (Vol 1, 1765) at 442-445 and Olga Cvejic Janit “Protection from Domestic Violence: *The International Survey of Family Law*” (paper presented to European Regional Conference of the International Society of Family Law ‘Family Justice for Whom and How?’ (Chester, July 2007).

<sup>14</sup> “Domestic Violence – Defining Violence”, above n 11.

<sup>15</sup> “Family Violence Statistics” New Zealand Family Violence Clearinghouse <<https://www.nzfvc.org.nz/family-violence-statistics#statistics-at-a-glance>>.

<sup>16</sup> New Zealand Family Violence Clearinghouse “Data Summary: Violence Against Women” (July, 2016) New Zealand Family Violence Clearinghouse <<https://www.nzfvc.org.nz/sites/nzfvc.org.nz/files/DS2-Violence-Against-Women-2016.pdf>>.

duty was to serve her husband to stay in the marriage at all costs 'till death do us part' and to accept as her due any 'punishment' that was meted out for failing to please her husband. One consequence of this attitude was that 'wife battering' was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse, tolerance of it continued and continues in some circles to this day."<sup>17</sup>

The prevalence of abuse between a male and female in romantic relationships has resulted in spin-off descriptors of domestic violence such as 'spousal abuse' and 'intimate partner violence (IPV).'<sup>18</sup> This trend is not exclusive to New Zealand but is a global issue. In Canada, a study found that "a married woman is nine times more likely to be killed by her intimate partner than by a total stranger."<sup>19</sup>

## 2. *The introduction of problem-specific legislation*

The continuance of domestic violence today is mirrored in New Zealand statistics. Women's Refuge estimates that one in three women are abused by their spouses in their lifetime.<sup>20</sup> Further, every year approximately fourteen women are murdered by abusive spouses in New Zealand.<sup>21</sup> A Ministry of Justice publication noted that in a 1999 survey, 73% of female respondents indicated their current or recent partner had been abusive towards them at least once. This figure was even higher in proportion for Maori women specifically, where 90% of them had experienced violence in a current or recent relationship.<sup>22</sup>

The first legislation to specifically address domestic violence in New Zealand homes was the Domestic Protection Act.<sup>23</sup> This was later repealed by the Domestic Violence Act, which was a more thorough response to violence in New Zealand homes.<sup>24</sup> The Domestic Violence Act addresses the consequences of domestic violence and deals with logistics after a domestic violence incident such as property. When the Domestic Violence Bill<sup>25</sup> was first introduced, the Minister of Justice (Hon. D A M Graham) stated "The primary objective of the new Bill is to provide greater protection for victims of domestic violence. The Bill targets violence that is usually hidden, occurring primarily in homes and between people in close relationships, including family members."<sup>26</sup>

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<sup>17</sup> *R. v. Lavallee*, [1990] 1 S.C.R. 852 at page 872.

<sup>18</sup> Janet Fanslow and Elizabeth Robinson "Violence against women in New Zealand: prevalence and health consequences" (2004) 117 NZMJ 1 at 1.

<sup>19</sup> Catherine Christopher "Domestic Violence Courts" *Law Now* (online ed, Alberta, February/March 2002) at 5.

<sup>20</sup> "Family violence statistics", above n 5 and "Family Violence Statistics", above n 15.

<sup>21</sup> Women's Refuge "New Zealand domestic violence statistics" (2014) Women's Refuge <[www.womensrefuge.org.nz/WR/Domestic%20violence/Statistics.htm](http://www.womensrefuge.org.nz/WR/Domestic%20violence/Statistics.htm)>.

<sup>22</sup> Ministry of Justice *Family Violence* (Ministry of Justice, Response to Crime Annual Review 1999) at 6.2.1.

<sup>23</sup> Domestic Protection Act 1982.

<sup>24</sup> Domestic Violence Act 1995.

<sup>25</sup> Domestic Violence Bill 1995 (86-1).

<sup>26</sup> (29 November 1994) 545 NZPD 5332 at 5333.



The Protection Order was widely seen as the pillar of the Act at its inception.<sup>27</sup> Someone who has been victim of a domestic violence incident can seek an order by filing an application and supporting documentation at the Family Court. If the Judge is satisfied there has been violence in the domestic relationship, they will usually make the order, although the respondent to the order will have the chance to rebut the violence claims if they wish. Once an order is made, the violent person cannot use violence against a protected party or parties (this can include children of the abused spouse).<sup>28</sup> A further act of violence, which would breach the Protection Order, could result in up to 3 years imprisonment for the abuser.<sup>29</sup> The abuser usually also has to attend a ‘stopping violence’ programme if they become the respondent to a Protection Order.<sup>30</sup>

As of the 2009 amendment, the Act also provides for Police Safety Orders.<sup>31</sup> A Police Safety Order can be issued by a police officer if they suspect domestic violence has occurred, even if no one makes a complaint.<sup>32</sup> The order can last for up to 5 days and cannot be disputed by either party.<sup>33</sup> The abuser subject to the order must leave the address for the duration of the order.<sup>34</sup> While this may confront the issue of victims not speaking up, the police still have to suspect violence occurring. This most commonly would involve a party or witness to the violence calling the police for such suspicions to occur.

The introduction of Protection Orders and Police Safety Orders that are more specific to the needs of domestic violence were a positive step for violence in New Zealand homes. The introduction of domestic violence legislation with similar orders also rolled out in other commonwealth countries. This occurred with Australian states legislating between 1989 and 2008,<sup>35</sup> Canadian provinces between 2000 and 2011,<sup>36</sup> and the United Kingdom in 2004.<sup>37</sup> Such legislation has raised more awareness to domestic violence and its effect on society, while also providing “punitive, protective and preventive measures.”<sup>38</sup>

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<sup>27</sup> Domestic Violence Act, s 13.

<sup>28</sup> Ministry of Justice “Applying for a protection order” Family Justice <[www.justice.govt.nz/family-justice/domestic-violence/protection-order/applying-for-a-protection-order](http://www.justice.govt.nz/family-justice/domestic-violence/protection-order/applying-for-a-protection-order)>.

<sup>29</sup> Domestic Violence Act, s 49.

<sup>30</sup> Section 51D.

<sup>31</sup> Section 124B.

<sup>32</sup> Section 124B.

<sup>33</sup> Sections 124C and 124K.

<sup>34</sup> Section 124E.

<sup>35</sup> *Domestic Violence Laws in Australia* (The National Council to Reduce Violence against Women and their Children, June 2009).

<sup>36</sup> Government of Canada “Family Violence Laws” (7 January 2015) Department of Justice <<http://www.justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html>>.

<sup>37</sup> Domestic Violence, Crime and Victims Act 2004 (UK).

<sup>38</sup> Cecilia Sardenberg *What Makes Domestic Violence Legislation More Effective?* (Pathways of Women’s Empowerment Policy Paper, Department for International Development, October 2011) at page 3.

### 3. *The ongoing problem with domestic violence today*

Although these legislative steps are progressing in the right direction, they do not necessarily remove the fear associated with domestic violence. A New Zealand Crime and Safety Survey in 2014 found 76% of domestic violence incidences are not reported, yet the number reported is also very high.<sup>39</sup> Police recorded a domestic violence investigation, on average, every five and a half minutes during 2014.<sup>40</sup> These figures exist four years after the introduction of Police Safety Orders in addition to Protection Orders. Such statistics highlight the need for further scrutiny of the Domestic Violence Act, something current Justice Minister Amy Adams has also recognised.<sup>41</sup>

Sarah Huel, an American lawyer and victim of domestic violence herself, is an advocate for domestic violence victims. In an interview she gave, she noted, “Women are the most vulnerable when they leave. That’s when abusers desperately escalate tactics of control. More victims are killed when fleeing than at any other time.”<sup>42</sup>

There are many high-profile stories in New Zealand highlighting the potential dangers to women attempting to leave violent relationships. For example, the recent case of Michael Preston, who was found guilty of murdering his wife, Mei Fan, the day after she took out a Protection Order against him.<sup>43</sup> This highlights the heightened possibilities of violence following a Protection Order being sought, if the abuser is prone to extreme anger and violence. Deborah Anderson affirms, “75% of deaths in domestic violence relationships happen after the woman has tried to leave the relationship.”<sup>44</sup>

Sharwan Lata Singh is another Wellington woman, murdered by her husband who had twice previously breached Protection Orders she had sought against him.<sup>45</sup> Public opinion surrounding her and other similar situations is that Protection Orders are ‘just a piece of paper’.<sup>46</sup> In some cases, these orders, which are designed to protect abused spouses, actually aggravate the abuser to be even more violent, sometimes killing their spouses.

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<sup>39</sup> “Family violence statistics”, above n 5.

<sup>40</sup> Ibid.

<sup>41</sup> *Strengthening New Zealand’s legislative response to family violence: A public discussion document*, above n 2.

<sup>42</sup> Hara Estroff Marano “Why they stay: A saga of spouse abuse” (1996) 29 *Psychology Today* 56 at 59.

<sup>43</sup> Deborah Morris and Talia Shadwell “Michael Preston found guilty of murdering estranged wife Mei Fan” (24 November 2015) *Stuff.co.nz* <<http://www.stuff.co.nz/national/crime/74327917/Michael-Preston-found-guilty-of-murdering-estranged-wife-Mei-Fan>>.

<sup>44</sup> Deborah J Anderson “The Impact on Subsequent Violence of Returning to an Abusive Partner” (2003) 34 *Journal of Comparative Family Studies* 93 at 93.

<sup>45</sup> Derek Cheng “Man killed wife while on bail for protection order breach” (5 June 2014) *New Zealand Herald* <[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11268093](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11268093)>.

<sup>46</sup> Jadis “Another protection order, another woman dead” (29 November 2013) *Kiwiblog* <[www.kiwiblog.co.nz/2013/11/another\\_protection\\_order\\_another\\_Woman\\_dead.html](http://www.kiwiblog.co.nz/2013/11/another_protection_order_another_Woman_dead.html)>.

Ashlee Edwards' partner and the father of her children, Jimmy Akuhata, murdered Edwards in 2012.<sup>47</sup> Edwards had previously formally informed the police of 8 domestic violence incidences by Akuhata against her. In 2010, Edwards had taken out a Protection Order against Akuhata and in the days before her death, she made a formal complaint to police about his threats towards her including repeatedly breaching the Protection Order and threats to rape her, kill her and chop her head off. Only days later, she was found dead. The police in this case were severely criticised for the way they handled Edwards's complaints and how her death could have potentially been avoided.<sup>48</sup> Specifically, the Independent Police Conduct Authority found the "breaches (of Protection Order) were dealt with independently of one another and that the officer dealing with the second complaint was unaware of the first."<sup>49</sup> Further, "The Authority's investigation also found that there was a failure amongst all of the police involved in this case to take proper ownership of Ms Edwards' first complaint and to appreciate the urgency and significance of the situation."<sup>50</sup>

A report by the Ministry for Social Development indicates that one of the main issues people have with applying for a Protection Order is the possible retaliation of their spouse when they discover such an order has been made against them.<sup>51</sup> Based on the above examples of extreme intimate partner violence in relationships, victims have reason to be worried about these ramifications. Ministry of Justice figures show that between 2006 and 2010 ten thousand people were charged with more than 21,000 incidences of breaching a Protection Order.<sup>52</sup> These statistics indicate more than 2 breaches per person subject to a Protection Order. While some people may not breach these orders at all, there are some that breach them over and over again.

Given the negative publicity about domestic violence, it is understandable why some victims are afraid to ask for help or to leave their situation. Women's Refuge estimates most women in violent relationships will make 4-7 attempts to leave before they are successful in leaving their relationship.<sup>53</sup> Women's Refuge also note the most common reasons women cannot leave is because: a) they fear for their safety if they attempt to leave, b) they have traditional views

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<sup>47</sup> One News "Ashlee Edwards' ex-partner admits killing mother of two" (26 March 2015) TVNZ News <[www.tvnz.co.nz/one-news/new-zealand/ashlee-edwards-ex-partner-admits-killing-mother-of-two-6270748.html](http://www.tvnz.co.nz/one-news/new-zealand/ashlee-edwards-ex-partner-admits-killing-mother-of-two-6270748.html)>.

<sup>48</sup> "Police failed murdered woman" (19 December 2013) Stuff.co.nz <<http://www.stuff.co.nz/national/crime/9535564/Police-failed-murdered-woman>>.

<sup>49</sup> Judge Sir David Carruthers *Police response to complaints made by Ashlee Edwards* (The Independent Police Conduct Authority, 19 December 2013) at [41-44].

<sup>50</sup> *Ibid.*

<sup>51</sup> Alison Towns "Police Initiated Protection Orders and their Potential Impact on Women: A Discussion Document" (2009) 34 *Social Policy Journal of New Zealand* 40 at 53.

<sup>52</sup> "Protection order 'only a piece of paper'", above n 4.

<sup>53</sup> Women's Refuge "The challenges of leaving an abuser" (2015) Women's Refuge: Why doesn't she leave <<http://altest.info/wp-content/uploads/2015/11/why-doesnt-she-leave.pdf>> at page 1.

of relationships, c) they believe their violence is deserved, or d) they believe they can change their partner.<sup>54</sup>

Such a state of mind may contribute to the low rate of reported violence, and the reported struggle many women face in remedying a violent relationship. The Domestic Violence Act as it stands has very limited provision to deal with such circumstances. Aside from Police Safety Orders, there is no specific allowance for personalised assistance, that could assist with victim fear.

## ***B. The Domestic Violence Act's Section 12: Its Purpose and Function***

### *1. The scheme of section 12*

Section 12 was part of the original Act, enacted in 1995.<sup>55</sup> Since its enactment, only one minor change has been made, by changing “a child” to “a person aged 16 years or over” in section 12(1)(a), due to clarification by the Relationships (Statutory References) Act.<sup>56</sup> This minor edit clarified the required age of parties. The historic version stated a child was exempt from section 12, whereas the current version provides that anyone aged 16 years or older can apply. Thus the function of this section has not materially changed since its original drafting in 1995.

A fundamental element of section 12, is how it addresses ‘fear of harm’ as a reason many victims feel uncomfortable seeking a Protection Order on their own.<sup>57</sup> The section relates “principally to cases where, because of the extent of violence and the victim’s fear, the usual procedure for application cannot be invoked. It may be a case of a person who literally is unable to leave the respondent’s presence for fear of harm, or it may extend to a person who is so disempowered by the violence that he or she is unable to make the application personally. The syndrome exemplifies the state of inertia and powerlessness that features in extreme cases of domestic violence.”<sup>58</sup>

Such a description of section 12 means many concerns of fear and helplessness expressed by the Ministry of Justice, Police and Women’s Refuge could be alleviated by the section.<sup>59</sup> The consequences of section 12, in action, may result in “the Court, or an applicant making a

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<sup>54</sup> “The challenges of leaving an abuser”, above n 53.

<sup>55</sup> See full section at Appendix 1.

<sup>56</sup> Relationships (Statutory References) Act 2005, s 7.

<sup>57</sup> Johanna Robertson, Cuba Family Law, Judge Rosemary Riddell *Brookers Family Law – Adult Relationships* (online looseleaf ed, Brookers) at DV12.01.

<sup>58</sup> *Brookers Family Law – Adult Relationships*, above n 57, at DV12.01(2).

<sup>59</sup> “Family violence statistics”, above n 5 and *Strengthening New Zealand’s legislative response to family violence: A public discussion document*, above n 2.

judgment on behalf of the victim as to what is in their best interests.”<sup>60</sup> Section 12 has the potential to be invoked by police, social workers, or relatives who have concerns for the victims’ safety.<sup>61</sup> The consequences of section 12 is that autonomy of the victim is limited to a point if another person is facilitating the seeking of remedies.

## 2. *What was Parliament thinking when it addressed the Domestic Violence Bill?*

When looking at the government rationale for the Domestic Violence Bill, there is little mention of section 12 or anything to do with assisting victims who are unable to use the remedial system alone.<sup>62</sup> After the Bill had faced the select committee, scrutiny of its provisions was almost solely limited to financing resources to support the legislation and provisions relating to the abuser’s rights to firearms.<sup>63</sup> A report presented to the House of Representatives estimated a cost of \$1.2 billion per year to fully support the legislation, including all the support offered to victims and the programmes both optional and mandatory for offenders.<sup>64</sup> This created considerable discussion as to how the government planned to fund the flow-on effects of the legislation. In addition, many held concerns about whether removal of firearms should be mandatory or discretionary following the issuing of a Protection Order.<sup>65</sup> In particular, Hon. Katherine O’Regan, the Associate Minister of Women’s Affairs at the time, expressed her view that the removal of both a firearms licence and any firearms possessed should be automatic.<sup>66</sup>

The only MP throughout the entire Parliamentary process to mention aggravating the abuser during the process of seeking a Protection Order was Jill White (Manawatu).<sup>67</sup> During her speech at the tabling of the Select Committee Report, White said “one anxiety that had been brought particularly to my notice has been that the anger of men, in particular, must be dealt with. If it is not dealt with outside the Bill, some of the provisions of the Bill will aggravate that anger.”<sup>68</sup> The resulting issue is that section 12 is still the only provision to deal with the aggravation of abusers and victim’s fear as a result.

Further, Jill White also affirmed “what concerns me is that those who are abused are those who are most vulnerable, in that they are very often dependant on those who abuse them. They are isolated from mainstream society, and it seems to me that there is very little point in having protection in the law if people do not know that they are protected, and do not know how to

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<sup>60</sup> *Brookers Family Law – Adult Relationships*, above n 57, at DV12.01(2).

<sup>61</sup> *Ibid.*

<sup>62</sup> Domestic Violence Bill, above n 25.

<sup>63</sup> (10 October 1995) 551 NZPD 9581 at 9586.

<sup>64</sup> Suzanne Snively “The New Zealand Economic Cost of Family Violence” (1995) 4 *Social Policy Journal of New Zealand*.

<sup>65</sup> 551 NZPD 9581, above n 63, at 9589.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

access those provisions that are set up for their protection.”<sup>69</sup> Some victims of domestic violence may not know how to access provisions in the Act that are there to protect them, or may be too fearful to use them. This is backed up by the large proportion of violence that is estimated to never be reported in New Zealand.<sup>70</sup>

There was an assumption in Parliament at the time the Bill was introduced that merely providing further legislative solutions would mean everyone who *could* seek protection *would* seek protection. This is affirmed by Minister of Justice, the Hon. D A M Graham during the Bill’s second reading, where he said “...the protected person is in control of the situation [once they have a Protection Order], and if the police officers arrived at an incident they would assess the current status of these conditions by reference to the protected person only.”<sup>71</sup> However, even if such a viewpoint was adopted to empower victims, it only works once the victim has the Protection Order. Often the process of getting the Protection Order is the most anxious time, and such an opinion does nothing to address this. Given this government view when introducing the Act, it is almost surprising section 12 was included at all. In application, the use and success of section 12 in protecting fearful victims has been very remote.<sup>72</sup>

### 3. *The first and last reported attempt to apply section 12*

*X v Y* is the only reported case to have considered the use of section 12.<sup>73</sup> Here, *X* made an application to the Court under section 12(5) objecting to the proceedings for a Protection Order for her against her partner. As this case came before Police Safety Orders, the original application here was made by a police officer on behalf of *X* for protection against *Y*, which was granted. *X*’s parents also supported the application. *X* then applied to have the proceedings discharged. *X*’s evidence to the court indicated she blamed herself for the assault against her by *Y*, and believed she had a level of independence and control in her relationship. *Y* had a list of eleven previous violent convictions spanning from 1981 to 1996, indicating a long pattern of violence rather than an isolated incident. In addition, three of those violent assaults occurred against *X* in the year before these proceedings.

*X* also provided evidence to the Court that varied from her previous statements such as the extent of her injuries from *Y*’s violence and the nature of threats *Y* had made towards her. At one point *X* said in her statement to police “When I threaten to leave (*Y*) does things like shredding my clothes and letting my car tyres down.”<sup>74</sup> The police believed *X* was suffering

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<sup>69</sup> 551 NZPD 9581, above n 63, at 9589.

<sup>70</sup> “Family violence statistics”, above n 5.

<sup>71</sup> (12 October 1995) 551 NZPD 9730 at 9731.

<sup>72</sup> How Many Protection Orders Granted Under Section 12 (Obtained under Official Information Act 1982 Request to General Manager, District Courts, Ministry of Justice) – attached at Appendix 2.

<sup>73</sup> *X v Y*, above n 9.

<sup>74</sup> At 267 (lines 14-15).

from battered woman's syndrome on the basis of her changing stories and claimed her objection to the proceedings were not freely made. However, there was no scientific evidence of this presented to the Court. Judge MacCormick was reluctant to go against *X*'s claim that she was freely making her decision, in spite of such evidence. Further, the Judge claimed if he considered *X*'s objection was not freely made, he would be disempowering her further by removing her right to autonomously make that decision herself.<sup>75</sup>

Given the evidence presented in *X v Y* and the more recent push for a complete overhaul of the domestic violence remedial system, it is possible the outcome could be different today. The Court was reluctant to take away *X*'s autonomy to make that decision for herself or consider that she may be impaired by the violence in making that decision. While, it can be easy to review a case that is now 20 years old and think today's outcome might be different, the lack of further case law since *X v Y* proves this assumption is difficult to make.

### ***C. Conclusion***

It is possible the potential for case law under section 12 has been replaced by the introduction of Police Safety Orders in the 2009 amendment.<sup>76</sup> This is because Police Safety Orders can be granted without the permission of either party.<sup>77</sup> Police favour Police Safety Order's over applying for a Protection Order on the victim's behalf because the Safety Order gives them more immediate powers.<sup>78</sup> In addition, there is a pathway for a Police Safety Order to lead to a Protection Order later if the victim does not oppose.<sup>79</sup> Section 12 has not been repealed, thus Parliament must have intended the two to have different roles in the variety of measures available to address domestic violence. Section 12 is broader than merely police and can include social or community workers, friends or concerned relatives.<sup>80</sup> Thus, the scarcity of use for section 12 suggests it is not clear enough to encourage an alternative pathway for victims. Specifying the scope of section 12 would give a stronger indication to victims that they don't have to do it alone.

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<sup>75</sup> *X v Y*, above n 9, at 268 (lines 1-6).

<sup>76</sup> Domestic Violence Amendment Act 2009, s 9.

<sup>77</sup> Domestic Violence Act 1995, s 124C.

<sup>78</sup> Interview with Dunedin Central Police Station, Constables (Genevieve Coleman, interview conducted on a Police Observation with Constables on duty, 8 September 2016) – note anonymity requested by Constables.

<sup>79</sup> Domestic Violence Act 1995, s 124N (2)(b).

<sup>80</sup> *Brookers Family Law – Adult Relationships*, above n 57, at DV12.01.

## ***Chapter II: The Role of Personal Autonomy in Domestic Violence Law***

Based on the issues addressed in *X v Y*, victim autonomy is clearly an area of contention in domestic violence law. Personal autonomy is often seen as the pillar of a modern and democratic society and something the law should facilitate.<sup>81</sup> However, there may be times where an alternative approach to extreme autonomy is appropriate in domestic violence situations. Such an approach, when not placing as much responsibility on the victim, may actually increase victim autonomy, even though the victim does less by themselves.

### ***A. The Importance of Personal Autonomy***

Autonomy is the ability to initiate one's own actions and govern one's self.<sup>82</sup> In short, it means you can make your own decisions based on any reason you see fit, or even no reason at all.<sup>83</sup> Every person has autonomy to the extent that they and they alone are the only ones who can initiate their actions.<sup>84</sup> The origins of autonomy link back to ancient Greece where both Plato and Aristotle saw the ultimate experience of humanity was to be self-sufficient and have a minimal dependency on others.<sup>85</sup>

Autonomy has developed as a key aim of liberalism, a broad political notion that supports freedom in all walks of life and neutrality on almost all issues.<sup>86</sup> This includes promoting freedom of trade, free markets and freedom from political coercion.<sup>87</sup> The result of this in the extreme is that everyone in society is completely left to their own devices and all social mechanisms, including economic markets, are free to balance themselves out.<sup>88</sup> This is in contrast to more conservative political views which believe political forces such as governments, need to be involved in regulating society to ensure it is truly free and equal.<sup>89</sup> Such a debate in broader politics often leads to the criticism of neo-liberals for facilitating the 'rich getting richer and the poor getting poorer' when autonomy is granted to individuals to such a high degree.

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<sup>81</sup> Geoff Gilbert "Autonomy and Minority Groups: A Right in International Law?" (2002) 35(2) Cornell Intl LJ 307 at 309.

<sup>82</sup> S Buss *The Stanford Encyclopedia of Philosophy* (Winter 2014 ed, online ed) Personal Autonomy at 1.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> Jane Dryden "Autonomy" Internet Encyclopedia of Philosophy: A Peer-Reviewed Academic Resource <<http://www.iep.utmedu/autonomy/>> at 1a.

<sup>86</sup> J Christman *The Stanford Encyclopedia of Philosophy* (Spring 2015 ed, online ed) Autonomy in Moral and Political Philosophy at 1.

<sup>87</sup> G Gaus, S D Courtland and D Schmitz *The Stanford Encyclopedia of Philosophy* ((Spring 2015 ed, online ed) Liberalism at 1.1.

<sup>88</sup> At 1.2.

<sup>89</sup> At 1.3.



Personal autonomy is seen as an important right to maintain in the law.<sup>90</sup> This is because a person is usually the expert in their own best interests and what will make them happy and support their well-being.<sup>91</sup> Further, an individual should have the final say as their decisions affect them primarily.<sup>92</sup> There are exceptions to this, such as crimes and other negative actions that affect others; in this instance autonomy then is not held to as high a value. However, in most of ordinary human life, autonomy of the individual is a pillar of society.<sup>93</sup> A failure to honour autonomy of individuals would result in some people's values being recognised as superior to those of others.<sup>94</sup>

### *1. Societal and socio-economic influences on personal autonomy*

In assessing autonomy and its enabling of freedom, it would be naïve to not acknowledge the influences of the outside world and society in affecting how we exercise that autonomy. In this sense, society can put limits on our autonomy or persuade us to exercise our autonomy in a certain way. Such influences may make it seem like the decision is autonomous when it is actually heavily influenced by perceptions of societal pressures.<sup>95</sup>

Domestic violence is a prime example of external influences on autonomy. There are times a victim might feel like they want to leave, but due to factors such as wanting to keep the family unit together, they exercise their autonomy to stay in the violent relationship.<sup>96</sup> While this may seem like a genuine, autonomous decision, it is also evident that if the victim did not have the perception that keeping a traditional family unit together was important, they may be more inclined to leave. In this, social norms of what a 'normal family' looks like might have influenced the victim to exercise their autonomy in a particular way.

Despite this cloud on what true autonomy is, today the law in most Western countries recognises autonomy, privacy and freedom of the individual as a basic human right.<sup>97</sup> Indeed the Universal Declaration of Human Rights supports the notion that autonomy is fundamental to human rights.<sup>98</sup>

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<sup>90</sup> "Personal Autonomy", above n 82.

<sup>91</sup> Jaunius Gumbis, Vytaute Bacianskaite and Jurgita Randakeviciute "Do Human Rights Guarantee Autonomy?" (2008) 62/63 Cuadernos Constitucionales de la Catedra Fadrique Furio Ceriol 77 at 79.

<sup>92</sup> Hanna Louise Belden "Why is (Respect of) Autonomy Important?: Possible Cultural Preconceptions Surrounding the Argument for Autonomy" (24 February 2014) Ethical Issues in Health Care <<https://scholarblogs.emory.edu/philosophy316/2014/02/24/why-is-respect-of-autonomy-important-possible-cultural-preconceptions-surrounding-the-argument-for-autonomy/>>.

<sup>93</sup> "Do Human Rights Guarantee Autonomy?", above n 91, at 79.

<sup>94</sup> At 80.

<sup>95</sup> *The Stanford Encyclopedia of Philosophy* Personal Autonomy, above n 82, at 2.

<sup>96</sup> "The challenges of leaving an abuser", above n 53, at page 3.

<sup>97</sup> "Do Human Rights Guarantee Autonomy?", above n 91, at 81.

<sup>98</sup> At 83.

In addition to social norms affecting our judgement of how we perceive our autonomy, economic factors also limit the extent of human autonomy. For example, if someone is living in poverty, with barely enough money to survive each day, their autonomy is severely limited compared with someone who is earning a good wage.<sup>99</sup> This is because with less income and means, the options in how you exercise your autonomy are limited. This supports the criticism of neo-liberalism in that too much autonomy enables the rich to become richer, while the poor become poorer. Linked to such a claim, Claire Renzetti found strong links between economic means and domestic violence during recessionary times in 2007-2009.<sup>100</sup> Furthermore, Renzetti found much higher levels of domestic violence occurring in relationships that also reported economic stress.<sup>101</sup> However, more surprisingly, the correlation is also reversed in that domestic violence in relationships also causes financial troubles, trapping them further into a cycle of poverty and abuse.<sup>102</sup>

## 2. *Should autonomy always be upheld, even to a flaw?*

It is legitimate to question the nature and degree of autonomy that is appropriate in situations where domestic violence is apparent. If patterns of abuse can lead to poverty, and Renzetti suggests poverty limits autonomy, one could infer that autonomy is already limited to some degree. Section 12 has thus far been applied in a narrow and limiting sense, particularly in *X v Y* where victim autonomy was upheld to the extreme.<sup>103</sup> This is because no specification is given to how section 12 might be used to facilitate an application on behalf of a victim. The victim is still responsible for organising a representative to apply on their behalf, which minimises any removal of fear. In *X v Y*, matters infringing on *X*'s ability to exercise her autonomy were not considered. The judicial approach can be likened to Plato and Aristotle's perception of autonomy where true autonomy involves minimum dependency on others.<sup>104</sup>

### ***B. The Appropriateness of Paternalism in the Law***

Paternalism comes from the idea of a parental role, where in regards to a child, the parent knows best.<sup>105</sup> At the time of the theory's inception, the father was seen as the figurehead of the family and knew what was best for their children and their family (hence 'paternalism' rather than

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<sup>99</sup> "Do Human Rights Guarantee Autonomy?", above n 91, at 81.

<sup>100</sup> Claire Renzetti "Economic Stress and Domestic Violence" (September 2009) VAWnet, a project of the National Resource Center on Domestic Violence/Pennsylvania Coalition Against Domestic Violence <[http://www.vawnet.org/applied-research-papers/print-document.php?doc\\_id=2187](http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=2187)>.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> *X v Y*, above n 9.

<sup>104</sup> "Autonomy", above n 85, at 1a.

<sup>105</sup> Claire Andre and Manuel Velasquez "For Your Own Good" (1991) 5(2) Issues in Ethics.

‘maternalism’).<sup>106</sup> Today, however, paternalism holds a much broader and diverse meaning. It largely refers to the government as a ‘benign parent’,<sup>107</sup> where just like a parent has the right and obligation to overrule their children on matters, the government has “the right and obligation to overrule the preferences of those deemed incapable of knowing their true interest.”<sup>108</sup>

Thomas and Buckmaster’s research paper for the Parliament of Australia outlined three key elements that characterise a paternalistic action. These are: a) the action involves interference in a person’s choice or opportunity to choose, b) the action has the objective of furthering the person’s perceived good or welfare, and c) the action is made without the consent of the person concerned.<sup>109</sup> It is not difficult to think of many situations in New Zealand law where such paternalistic elements could apply. Obvious examples include road safety laws and criminal law.<sup>110</sup> What is also fairly straightforward is the rationale for such laws. Having these rules in place helps keep society safer, helps keep individuals safer and reduces the flow-on effect of such actions costing the government money later in terms of medical treatment and Accident Compensation Corporation claims (ACC) for preventable accidents.<sup>111</sup> These things we, as a society, largely accept as beneficial and support the implementation of such law.

One of the main issues with paternalism is “the conflict of two important values: 1) the value we place on the freedom of persons to make their own choices about how they will lead their lives, and 2) the value we place on promoting and protecting the wellbeing of others.”<sup>112</sup> Somewhere in this collision of ideas, there is a divide where people prefer one value over the other, and this can change depending on the situation. Arguably, the current state of domestic violence law in New Zealand leans in favour of “the value of freedom” or autonomy, when it comes to the implementation of section 12. This is because there is no specified way to facilitate the application for a Protection Order on behalf of a victim. Currently, although the provision is there, the method for finding a representative to apply on your behalf is left completely open, decreasing the likelihood of use. This upholds autonomy to the extreme because the victim, who is meant to be sheltered from fear via the use of section 12, is forced to find a representative on their own.

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<sup>106</sup> “For Your Own Good”, above n 105.

<sup>107</sup> Matthew Thomas and Luke Buckmaster *Paternalism in social policy when is it justifiable?* (Social Policy Section, Parliament of Australia, Research Paper no. 8 2010-11, 15 December 2010).

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Land Transport Act 1998 imposes restrictions on driver’s ability to drive autonomously by way of licencing, alcohol limits and road rules. Crimes Act 1961 imposes various criminal sanctions on actions carried out against other people such as violence to others, among many others.

<sup>111</sup> The Judicial Learning Center “Law and the Rule of Law” (2015) The Judicial Learning Center <<http://judiciallearningcenter.org/law-and-the-rule-of-law/>>.

<sup>112</sup> “For Your Own Good”, above n 105.

### 1. *Should paternalism be extended in the law?*

Some branches of moral philosophy conflict with paternalism and argue that a decision made freely by a person should never be overridden.<sup>113</sup> Stuart Mill, a British philosopher, saw the extent of moral philosophy to mean “persons must be left free to make their own choices about how they will lead their lives even if these choices are considered reckless, stupid or otherwise “bad” choices by others.”<sup>114</sup> Another critique of paternalism by renowned philosopher Immanuel Kant is that paternalism violates “the equal dignity of all human beings.”<sup>115</sup> By not allowing someone their right to freely choose on their own, we undermine their ability to make their own decision, which creates an unequal society.<sup>116</sup> However others think happiness, health and wellbeing may be justified objectives to achieve, at the temporary expense of freedom. This is because the long term benefits of these values outweigh any temporary loss of freedom.<sup>117</sup>

Robert Goodin, a political philosopher, posits some conditions of paternalist laws for them to be acceptable in a modern and free society.<sup>118</sup> These are that “the state should only intervene in instances where high-stakes decisions are involved and/or where decisions are more or less irreversible.”<sup>119</sup> Further, Goodin proposes that “paternalism is only justifiable in instances where public officials better represent a person’s own preference than the person might have done through his or her own actions or choices.”<sup>120</sup> The result of such confines to paternalistic measures in the law mean the state would be less likely to create measures solely for its own benefit.<sup>121</sup> Rather, the use of paternalistic measures “confines itself to the reasoning failures of the individual” and the result would be induced when the state’s objective preference for an individual rectifies failures that would have resulted from the individuals own decision.<sup>122</sup>

### C. *Herring’s Care-Based Approach. A Balance Struck?*

Jonathan Herring, a professor in law at the University of Oxford, is a leading writer on the law and vulnerable people. Herring argues the law has “systematically failed to recognise care and caring relationships. Instead, law’s obsession with individual rights and the privileging by law of the “able, autonomous and unattached adult”<sup>123</sup> has led to a focus on the freedom and

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<sup>113</sup> “For Your Own Good”, above n 105.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> *Paternalism in social policy when is it justifiable?* above n 107.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> J Herring *Caring and the Law* (1<sup>st</sup> ed, Hart Publishing, Oxford, 2013).

autonomy of individuals and a failure to recognise or value the work of carers and the importance of caring relationships.”<sup>124</sup> Herring sees relationships existing between all people and the role of law should be to uphold such relationships in a caring manner.<sup>125</sup> Further, “Herring imagines a society where care is not devalued or the cause of disadvantage but, rather, protected and facilitated through law and broader social policies.”<sup>126</sup> In the context of domestic violence and Herring’s views of a care-centred law, Herring sees that “those suffering abuse have a human right to protection from such abuse.”<sup>127</sup>

Domestic violence situations are already centred around relationships and close proximal distance with people. Such factors are often why domestic violence is viewed as such a large scale problem as close and intimate relationships are one of the main places a person should feel safe and protected. Thus, using Herring’s care-based ideas in domestic violence law may better address the nature of domestic relationships and now they are treated in the law. It can be seen, given the current approach in section 12, that law focused too much on autonomy may not best address the relational and multifaceted nature of domestic violence.

Herring argues, in his article *Righting Domestic Violence* with Shazia Choudhry, that “human rights, properly understood, provide a powerful vehicle to require, not inhibit, legal intervention in cases of domestic violence.”<sup>128</sup> Herring and Choudhry posit three main responses to the arguments that support personal autonomy over intervention in domestic violence situations: true autonomy, interests of the state and the protection of children.

*Firstly*, Herring and Choudhry recognise that in many cases of domestic violence, the victim’s true autonomy is already lost by being in such a vulnerable position.<sup>129</sup> Herring and Choudhry found decisions by victims to not speak out or prosecute their abuser was often due to fear of “retaliatory attacks or other hardships.”<sup>130</sup> They also highlighted the danger “that the state’s failure to protect adequately an individual who has made a complaint of domestic violence creates a reluctance on the victim’s behalf to pursue a prosecution, which, in turn, is used to justify non-intervention by the state.”<sup>131</sup> Herring and Choudhry recognise there are often two competing wishes of a domestic violence victim, where they want the relationship to continue but want the violence to stop.<sup>132</sup> This is often due to the wider implications of relationships or

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<sup>124</sup> Sarah Buhler “Book Reviews: Jonathan Herring, *Caring and the Law*” (2015) 27 CJWL/RFD 336 at 336 and J Herring *Caring and the Law* (1<sup>st</sup> ed, Hart Publishing, Oxford, 2013).

<sup>125</sup> At 337.

<sup>126</sup> Ibid.

<sup>127</sup> At 341.

<sup>128</sup> Shazia Choudhry and Jonathan Herring “Righting Domestic Violence” (2006) 20 IntlJLPolyFam 95 at 96.

<sup>129</sup> At 101.

<sup>130</sup> Ibid.

<sup>131</sup> At 102.

<sup>132</sup> Ibid.

the involvement of children. Given these competing ideas, it can be difficult to ascertain which should be preferred.

Herring and Choudhry make an analogy to suicide laws in that “it is generally agreed that it is permissible to intervene to prevent a person who is attempting to commit suicide.”<sup>133</sup> They argue that when a situation is life or death, the state should be entitled to intervene and ensure it is a genuine belief of the victim.<sup>134</sup> Impacts of domestic violence on a victim can be “low self-esteem, dependence upon the perpetrator, feelings of hopelessness about ending the relationship, and a tendency to minimise or deny the violence.”<sup>135</sup> Thus, only when a victim is away from such effects of violence could the state be sure they are making a genuine choice about the relationship.<sup>136</sup> This notion supports facilitative intervention for victims to ensure they are provided with a range of remedial options.

*Secondly*, the interests of the state should provide another justification for intervention into violent relationships. Beyond sending a clear message that violence in homes is unacceptable, a key reason the state should address domestic violence is the resulting flow-on costs to the state.<sup>137</sup> These include health, social, housing and legal services estimated to cost between \$4 and \$7 billion per year.<sup>138</sup> A further risk of the state not actively participating in the reduction of domestic violence is the message it sends to the abusers. If the state is not taking claims of violence or its consequences seriously, “if anything, he (the abuser) may be emboldened to continue the conduct against other partners.”<sup>139</sup>

*Finally*, the protection of children is another reason the state should look to intervene more in domestic violence situations. There is a higher chance of child abuse occurring in homes where domestic violence is occurring.<sup>140</sup> Further, there can be negative flow-on effects for children witnessing violence in their homes, even if they themselves are not subjected to it.<sup>141</sup> Such effects include psychological effects and illnesses, feeling like they are to blame for the violence or thinking violence is part of a normal life.<sup>142</sup> These effects could also contribute to even higher costs of domestic violence in the longer term.

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<sup>133</sup> “Righting Domestic Violence”, above n 128, at 103.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> At 104.

<sup>138</sup> Sherilee Kahui and Suzanne Snively *Measuring the Economic Cost of Child Abuse and Intimate Partner Violence to New Zealand* (The Glenn Inquiry, 2014).

<sup>139</sup> “Righting Domestic Violence”, above n 128, at 104.

<sup>140</sup> *Ibid.*

<sup>141</sup> At 105.

<sup>142</sup> *Ibid.*

Herring and Choudhry see the role of autonomy is to enable the development of individuals without outside interference.<sup>143</sup> However, without state assistance in many domestic violence situations, the victim is prevented from developing as an individual while in an oppressive situation.<sup>144</sup> “To leave a person in an abusive relationship which is restricting her ability to develop her life as she wishes is not respecting her privacy, quite the opposite.”<sup>145</sup> Most importantly, Herring and Choudhry recognise the multifaceted response domestic violence requires and warn against thinking “once the court has made an order or a conviction is made there is a victory: the victim has been protected.”<sup>146</sup>

#### ***D. Conclusion***

Autonomy and paternalism, as competing approaches in law, have a long standing and complex tension. While there are clear merits to both, it cannot be denied that utilising only autonomy or only paternalism would be catastrophic: a balance needs to be struck. Based on serious and concerning trends in domestic violence in New Zealand, the current preference for autonomy in domestic violence law and in the interpretation of the Domestic Violence Act may need reconsideration. The approach suggested by Choudhry and Herring in their work with vulnerable people supports a more facilitated approach to domestic violence law. Some might see assistance with seeking remedies as impeaching on true autonomy (taking the ancient Greek approach). However, assisting victims of violence in seeking remedies can be a care-based approach to the law that facilitates a victim’s autonomy more, rather than inhibits it.

In her 1993 paper, Ruth Busch wrote “The present government’s cutbacks in spending on benefits, women’s refuge funding, health care services, legal aid, accident compensation, education and housing – can anyone believe that the results of these policies will enable abused spouses and children to more easily escape from their batterers?”<sup>147</sup> Even 23 years later, with the inclusion of specific and targeted legislation, this statement still highlights current criticisms of domestic violence remedies in New Zealand. Thus a care-based approach that provides assistance to victims seeking remedies, supports autonomy in a positive manner and may assist with a real (not only reported) reduction in domestic violence.

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<sup>143</sup> “Righting Domestic Violence”, above n 128, at 110.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> K Lewis, R Dobash and K Cavanagh “Law’s progressive potential: The value of engagement with the law for domestic violence” (2001) 10 Social and Legal Studies 105-30.

<sup>147</sup> Ruth Busch ““Was Mrs Masina Really ‘Lost?’”: An Analysis of New Zealand Judges’ Attitudes Towards Domestic Violence” (1993) 8(1) OtagoLRev 17 at 50.

### ***Chapter III: An Analysis of Overseas Measures Used to Minimise Fear for Domestic Violence Victims***

Given the positive potential of a care-based, facilitative approach to remedying domestic violence, it is worth considering how other countries are approaching this. This chapter looks to the United Kingdom, Canada and Australia for comparable facilitative approaches to violence. Specifically, it examines legislative measures that are designed, like section 12, with the object of removing victim fear.

#### ***A. Criminalising Coercive Behaviour***

In an intriguing move, the United Kingdom criminalised “controlling or coercive” behaviour against a partner or family member in 2015.<sup>148</sup> Such an offence is punishable by up to five years imprisonment.<sup>149</sup> The aim of the new law is to outlaw “sustained patterns of behaviour that stop short of serious physical violence, but amount to extreme psychological and emotional abuse.”<sup>150</sup> The criminalisation of such behaviour is significant because it adds an element very common to domestic violence as a criminal offence. Largely in New Zealand, there are no specific crimes for domestic violence and responses mostly come in the form of civil orders, or general criminal offences, such as assault.<sup>151</sup> However, when creating guidelines for the use of the new provision, the United Kingdom Government said “Victims of controlling or coercive behaviour may not recognise themselves as such. Therefore it is important that the new offence is considered by the police and other authorities in attendance at all call-outs including those of domestic violence and abuse.”<sup>152</sup> Thus, it can be seen as a tool to use where there doesn’t appear to be any physical violence and the victim doesn’t ask for a Protection Order. This is because it punishes behaviour that often is not considered violent by a victim. However, catching this behaviour early could be helpful in removing fear from a victim as their abuser can be arrested before any physical violence occurs.

In the recent announcement by New Zealand Government to overhaul current domestic violence laws, specific offences for emotional or psychological abuse were intentionally left out of the

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<sup>148</sup> Serious Crime Act 2015, s 76 (UK).

<sup>149</sup> Ibid.

<sup>150</sup> “UK to criminalise coercive, controlling and psychological abuse” (20 January 2015) New Zealand Family Violence Clearinghouse <<https://nzfvc.org.nz/news/uk-criminalise-coercive-controlling-and-psychological-abuse>>.

<sup>151</sup> Crimes Act 1961, ss188-196.

<sup>152</sup> Home Office *Controlling or Coercive Behaviour in an Intimate or Family Relationship* (Home Office, Statutory Guidance Framework, December 2015) at page 10.



announcement.<sup>153</sup> The Government said when they looked at the outcomes the United Kingdom had had since implementing the novel measure, the results had been less than they expected.<sup>154</sup> Prime Minister John Key said “We had a look at the UK, who are the only jurisdiction that have so far made it a criminal offence. To date, they haven’t found it as effective as they’d thought. The information I’ve had is that they’ve only managed to prosecute under it, where there’s also been physical violence.”<sup>155</sup> Thus, it is not entirely surprising why the New Zealand Government decided to adopt alternative methods to decrease violence levels. If coercive and controlling behaviour is only used when there has also been physical violence, it loses its potential to remove fear by addressing situations before they escalate to physical violence.

## **B. Domestic Violence Disclosure Scheme**

Another unique measure in the United Kingdom is the domestic violence disclosure scheme (DVDS), also known as Clare’s law.<sup>156</sup> This allows a person to ask the police to “check whether a new or existing partner has a violent past (right to ask). If police checks show that a person may be at risk of domestic violence from their partner, the police will consider disclosing the information (right to know).”<sup>157</sup> The purpose of Clare’s law, according to the Greater Manchester Police, is to remove fear and afford better protection by giving potential victims information to aid in their decision to stay in a relationship or not.<sup>158</sup> Although some critics were sceptical, between March and December 2014, there were 4724 applications and 1938 disclosures made.<sup>159</sup> Criticisms of Clare’s law include the claim that the United Kingdom Government naively assume people would leave their partner if they found out they had an abusive history.<sup>160</sup> This is supported by the notion that victims are the most vulnerable to abuse when they try to leave; a statement that is mirrored in New Zealand domestic violence analysis.<sup>161</sup> A strong argument against Clare’s law is that “most victims of domestic violence do not lack information. They know that their partner is violent or has the potential to be violent. What they lack is either an escape route or the ability to survive without their

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<sup>153</sup> Stacey Kirk “Strangulation, coercion to marry and family violence to be new crimes with tough sentences – Govt” (13 September 2016) Stuff.co.nz <<http://www.stuff.co.nz/national/politics/84189235/family-violence-response-to-undergo-major-overhaul-govt>>.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> John Woodhouse and Noel Dempsey *Domestic Violence in England and Wales* (House of Commons Library, Number 6337, 6 May 2016) at page 11.

<sup>157</sup> At 11-12.

<sup>158</sup> Greater Manchester Police “Domestic Violence Disclosure Scheme (DVDS)” (6 June 2016) Greater Manchester Police Advice Centre <<http://www.gmp.police.uk/content/section.html?readform&s=903BB34BE34EDA3180257A71002DE9EE>>.

<sup>159</sup> *Domestic Violence in England and Wales*, above n 156, at page 12.

<sup>160</sup> Sandra Horley “Clare’s Law is little help if the police don’t perform their basic duty” (6 March 2012) *The Guardian* <<https://www.theguardian.com/commentisfree/2012/mar/06/clares-law-police-domestic-violence>>.

<sup>161</sup> Ibid and “The challenges of leaving an abuser”, above n 53, at page 1.

partner...[Such victims] need refuges and domestic violence charities to support and counsel them.”<sup>162</sup>

### *C. Community Facilitation and the Role of a Delegate*

Providing alternative pathways for applying for Protection Orders and their equivalents is not a new concept, in New Zealand or overseas.<sup>163</sup> However most provisions of this nature are vague in their wording, limiting the application to a police officer or lawyer or ‘any other person.’ Based on the lack of use of section 12 in New Zealand, such vagueness may deter people from attempting to use the section as a means to simplify the process of applying for a Protection Order.<sup>164</sup>

#### *1. Untapped potential in Newfoundland and Labrador*

Vagueness in such measures is exemplified in Newfoundland and Labrador, Canada, in their Family Violence Protection Act.<sup>165</sup> Here, a police officer, lawyer or a member of a class of people (as regulated by the Minister responsible) can apply on a person’s behalf for a Protection Order, with their consent.<sup>166</sup> The downside is that the Minister has not regulated any class of additional people who are able to apply for Protection Orders on behalf of people. The possibility of positive, facilitative approaches exists in their Act, however it is unfortunate that 11 years since the Act came into force, there is still no regulations in place. If a specific class of people were regulated for, it could provide a specific and simplified pathway to obtaining protection remedies.

#### *2. Manitoba’s Protection Order Delegates*

In Manitoba, Canada, domestic violence rates have steeply declined in the ten years from 2004 to 2014.<sup>167</sup> In 2004, Manitoba had the third highest rate of domestic violence in Canada, and in 2014 they reported the second lowest rate at just over 2.5% of their population reporting violence.<sup>168</sup> However, Manitoba has a very high level of Protection Order applications declined

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<sup>162</sup> Lucy Reed “Why Clare’s Law won’t prevent domestic violence” (22 July 2011) The Guardian <<https://www.theguardian.com/society/2011/jul/22/why-clares-law-wont-prevent-domestic-violence>>.

<sup>163</sup> Domestic Violence Act 1995, s 12.

<sup>164</sup> How Many Protection Orders Granted Under Section 12, above n 72.

<sup>165</sup> Family Violence Protection Act SNL 2005 c F-3.1.

<sup>166</sup> At section 4(2).

<sup>167</sup> Jacques Marcoux “Men, women report equal spousal violence rates – but severity differs” (21 January 2016) CBC News <<http://www.cbc.ca/news/canada/manitoba/men-women-report-equal-spousal-violence-rates-but-severity-differs-1.3413621>>.

<sup>168</sup> Ibid.

with 54% as at November 2015.<sup>169</sup> One of the reasons this number is so high is believed to be because victims often do not know how the process works and when they apply for a Protection Order, they do not know how to put a convincing case to the Justices of the Peace.<sup>170</sup>

One key tool that is provided for in Manitoba through their Domestic Violence and Stalking Act, is the role of a Protection Order Designate (POD).<sup>171</sup> Protection Orders can be made either in person or by telephone with the assistance of a delegate (a lawyer, police officer or a POD). Despite the declining rate of Protection Orders granted, the majority of successful applications involve POD assistance.<sup>172</sup> POD's are delegates who often work in domestic violence shelters, charities or other community organisations. They have "received special training and have been designated by the Minister of Justice to assist applicants for Protection Orders. In this way, persons needing immediate relief are able to request an order 24 hours a day."<sup>173</sup> This role could be implemented into New Zealand law in a more specific way, given that technically section 12 already provides for such assistance. In particular, allowing trained delegates from charities such as Women's Refuge, to apply on behalf of their users might encourage more victims to utilise domestic violence remedial processes in New Zealand.

### 3. *New South Wales Victim Survey*

A study in New South Wales, Australia, into the process for women seeking Protection Orders also highlighted the positive response victims had to support people in the domestic violence remedial process.<sup>174</sup> The study quoted one victim describing the process as "It's like this maze that you have to make your way through."<sup>175</sup> A large theme in the study was the fear victims felt after applying for a Protection Order and before the hearing. Woman 33 in the study said "...I couldn't go to Court because I couldn't face him. My domestic violence lady actually went to Court for me and did the AVO (Apprehended Violence Order)."<sup>176</sup> Having assistance with the process certainly relieved the pressure on woman 33 in this instance. Specific domestic violence courts might also alleviate victim fear about the court process, especially as some

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<sup>169</sup> "54% of protection orders denied: Manitoba attorney general" (5 November 2015) CBC News <<http://www.cbc.ca/news/canada/manitoba/54-of-protection-orders-denied-manitoba-attorney-general-1.3305296>>.

<sup>170</sup> Ibid.

<sup>171</sup> The Domestic Violence and Stalking Act CCSM, c D93.

<sup>172</sup> "54% of protection orders denied: Manitoba attorney general", above n 169.

<sup>173</sup> Manitoba Government "Manitoba Justice: Domestic Violence"

<<http://www.gov.mb.ca/justice/domestic/prevent.html>>.

<sup>174</sup> From here on referred to as the 'New South Wales Victim Survey.'

<sup>175</sup> Dr Lesley Laing "It's like this maze that you have to make your way through": *Women's experiences of seeking a domestic violence protection order in NSW* (Law and Justice Foundation of New South Wales, 2013) at page 1.

<sup>176</sup> At page 26.

victims have never been to court before. Woman 5 in the study highlighted this by saying “I found it very intimidating. I’ve never been in a Court before... and I just felt quite scared.”<sup>177</sup>

One trend in the study, that reflects positively on New Zealand practice, is the fear victims had about what happens when their AVO expired. Woman 28 said “I do have a lot of concern come the end of my AVO. I have felt that – because I feel like that’s been my security blanket.”<sup>178</sup> In New Zealand, Protection Orders are permanent unless a party applies to the court to have the order removed. So this element of fear is less likely to occur in a New Zealand context. An additional reason that supports the inclusion of community delegates more in domestic violence processes is the views some victims have of the police in responding to domestic violence incidences. Woman 1 said of the New South Wales Police:

*“Before this relationship, I had no reason to even be involved with the Police whatsoever, sort of thing. So I was thinking, you know, Police will help me. They’ll help me. They’re there to help. They’re there to protect me. They’re there to, you know, look after me and make sure that I’m OK and that my kids are ok. And then I got there and it was just like total opposite of what I thought should happen.”<sup>179</sup>*

It is important a delegate role in a community setting is addressed, especially after insights into the police as seen in the New South Wales Victim Survey. In particular, many Maori people in New Zealand are over-represented both in domestic violence statistics and in the criminal justice system as a whole.<sup>180</sup> Thus, providing a pathway that involves specialised assistance with Protection Orders without the need for police may encourage more victims to seek help.

Lawyers are often specified as a group who can apply on behalf of others for Protection Orders. However, a facilitative approach should remove the requirement of hiring a lawyer and ensure the remedial system is user friendly and without confusing legal barriers. While legal aid in domestic violence situations doesn’t always have to be paid back, if a victim cannot afford to pay for a lawyer on their own, the additional difficulty of applying for legal aid to have a lawyer assist with a Protection Order application may be too complicated for some victims.<sup>181</sup> Having a community delegate, that is funded by the Government, facilitate the process for the victim in a positive manner would remove aspects of fear in the process and result in more decisive outcomes by victims.

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<sup>177</sup> “It’s like this maze that you have to make your way through”: Women’s experiences of seeking a domestic violence protection order in NSW, above n 175, at page 26-27.

<sup>178</sup> At page 32.

<sup>179</sup> At page 38.

<sup>180</sup> Gareth Thomas “Maori police numbers up; more wanted” (4 November 2014) Te Ao Maori Radio NZ <<http://www.radionz.co.nz/news/te-manu-korihī/258560/maori-police-numbers-up-more-wanted>>.

<sup>181</sup> Ministry of Justice “Going to Court: Do you need to pay back your legal aid?” (7 September 2016) Ministry of Justice <<https://www.justice.govt.nz/courts/going-to-court/legal-aid/do-you-need-to-pay-back-your-legal-aid/>>.

#### 4. *Victoria's Royal Commission into Family Violence*

Recently, the State of Victoria, Australia, launched a Royal Commission into Family Violence, which was released in March 2016.<sup>182</sup> Preceding this report was the death of Luke Batty, killed in broad daylight with a cricket bat and a knife by his father, Greg Anderson, who had a long history of violence with Luke's mum, Rosie Batty.<sup>183</sup> The Royal Commission report notes that Luke Batty's death and Rosie's subsequent advocacy in stopping domestic violence was a key factor in the establishment of this commission.<sup>184</sup> One of the main limitations identified, as has also been the case in the United Kingdom and New Zealand,<sup>185</sup> is that current responses to family violence, especially legislated responses, assume that women will leave their home when family violence occurs.<sup>186</sup>

The Commission's report also affirmed the importance of specialist family violence services such as community organisations (in New Zealand, Women's Refuge is the most notable domestic violence organisation).<sup>187</sup> When the Commission spoke to victims in Victoria, many said they "valued the support of specialist family violence services – especially when there was continuity of contact and flexibility to adapt to needs that change with time."<sup>188</sup> The Commission recognised high demand for such services and a shortfall in supply leading to lost opportunities to intervene early in many situations.<sup>189</sup> Interestingly, the Commission recognised the wide range of people involved in a domestic violence situation. They recognise that "family members and friends are often first to become aware of family violence. It is important that the community has ready access to information and resources about how to recognise and respond to family violence."<sup>190</sup> Such comments made by the Commission also support the increased role Manitoba has given their community delegates by way of a trained authority to assist with Protection Order applications.<sup>191</sup> These measures to involve the community and charitable organisations more would assist victims in a more holistic and supportive setting.

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<sup>182</sup> *Royal Commission into Family Violence* (State of Victoria, Parl Paper No 132 2014-16, March 2016).

<sup>183</sup> Monique Ross "Father who killed son, Luke Batty, at cricket ground had history of mental illness, says boy's anguished mother" (14 February 2014) ABC News <<http://www.abc.net.au/news/2014-02-13/mother-in-shock-after-son-killed-by-father-at-cricket-oval/5258252>>.

<sup>184</sup> *Royal Commission into Family Violence*, above n 182, at page 1.

<sup>185</sup> "Clare's Law is little help if the police don't perform their basic duty", above n 157 and "The challenges of leaving an abuser", above n 52.

<sup>186</sup> *Royal Commission into Family Violence*, above n 182, at page 6.

<sup>187</sup> At page 21.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> *Royal Commission into Family Violence*, above n 182, at page 21.

<sup>191</sup> "Manitoba Justice: Domestic Violence", above n 173.

## **D. Further Reform Ideas in Support of Facilitative Approaches**

### **1. Information Sharing**

One key area Victoria's Royal Commission examined was information sharing, especially between agencies.<sup>192</sup> Although many serious domestic violence incidences that result in death are hard to predict, some situations could have benefitted from accurate sharing of information between the police, courts and other community organisations involved. Barriers to accurate information sharing include complex privacy legislation protecting the use of people's personal information.<sup>193</sup> In a New Zealand setting, this reform suggestion could take place by sharing information between courts, police and community organisations such as Women's Refuge to ensure consistency and accuracy when dealing with incidences of violence. Better sharing of information, particularly if community delegates were included in New Zealand reform, is essential to ensuring the quality and function of such a role.

### **2. Ontario's Integrated Domestic Violence Court**

One method that has been utilised in Ontario, Canada, that is also under consideration in New Zealand is the use of a specific domestic violence court. Ontario's Integrated Domestic Violence Court (IDVC) was launched as a two-year trial in June 2011.<sup>194</sup> The aims of the court were to make the system easier to use, achieving consistency between family and criminal courts and to resolve matters faster.<sup>195</sup> The project approach was "One-family, one-judge", a clear move to streamline and simplify the process of dealing with domestic violence in the legal system and make it more user-friendly.<sup>196</sup> While the IDVC had initial problems, particularly around streaming of cases into the different jurisdictions, there have been clear successes with other provinces going on to also adopt domestic violence courts.<sup>197</sup> Evidence from the first few years of IDVC in Ontario suggest despite there being minimal reduction in breaches of peace bonds (Protection Order equivalents), "there is some evidence that the courts push to register first-time offenders in spousal-abuse intervention programs has cut the rate of repeat offences."<sup>198</sup> This is one measure that New Zealand has considered, but not yet implemented.<sup>199</sup>

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<sup>192</sup> *Royal Commission into Family Violence*, above n 182, at page 20.

<sup>193</sup> *Ibid.*

<sup>194</sup> Ivanna Vaccaro "A Legislative Response to Domestic Violence in Ontario Families" Raviele Vaccaro Law LLP <<http://www.rvlaw.ca/Family/A-Legislative-Response-to-Domestic-Violence-in-Ontario-Families.html>>.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> "Research Library – Domestic Violence" Victims of Violence <<http://www.victimsofviolence.on.ca/research-library/domestic-violence/>>.

<sup>198</sup> Margaret Philp "A day in domestic-violence court" *The Globe and Mail* (23 June 2000)

<<http://www.theglobeandmail.com/news/national/a-day-in-domestic-violence-court/article1040764/>>.

<sup>199</sup> *Strengthening New Zealand's legislative response to family violence: A public discussion document*, above n 2.

The success and streamlining of such specialist courts may entice New Zealand to follow suit with Canadian counterparts. Further, making domestic violence solutions more accessible and specialised may entice more victims to seek relief under these specialised courts, empowering them to exercise their autonomy in a positive manner. Having domestic violence solutions embedded in both the criminal and civil jurisdictions and split between courts is confusing for victims. If there was one court, it could provide a clear avenue of remedies for victims whilst removing a large portion of the current processes in seeking help. Such a step would also support the streamlining of section 12 to make the system as a whole more user-friendly.

### ***E. Conclusion***

Looking at the varied approaches, from novel criminal offences to disclosure schemes and varied community involvement programmes; there is plenty to consider in reforming New Zealand's domestic violence law. The inclusion of a community delegate to facilitate the process of seeking remedies for a victim, similar to the POD in Manitoba, is likely to have a positive impact on domestic violence victims in New Zealand. However, care needs to be taken to avoid problems when implementing such a scheme. Essential requirements should include a clear role description for a delegate, that is written into section 12, as well as a specific training programme for the delegates to ensure a consistent approach to assistance. Measures such as this, paired with the possibility of more formal arrangements for inter-agency information sharing and the possibility of a specific court all lend themselves to a more facilitative and care-based approach to remedying domestic violence.

## ***Chapter IV: Reforming Section 12.***

### ***A. The Dormant State of Section 12***

Section 12 has been rarely used, given it has been in force for more than 20 years. To put context to this scarce use: In 2014 alone, almost 102,000 incidences of domestic violence were reported to police.<sup>200</sup> Further, an estimated 70-80% of domestic violence in New Zealand is never reported to the police.<sup>201</sup> Given these high figures, it is rather alarming that only 80 applications have been made for a Protection Order under section 12 since 1995.<sup>202</sup> Of these Protection Order applications, only 43 had a Protection Order made as a result.<sup>203</sup> A further 7 applications were not granted but had a Protection Order made nonetheless.<sup>204</sup> The General Manager of District Courts suggests this might be due to applications being “discontinued or withdrawn and a Protection Order had been granted without a representative.”<sup>205</sup> That gives a total of 50 Protection Orders obtained out of 80 applications in 21 years.

There is clearly a disconnect between reported and actual levels of domestic violence, despite legislative measures in New Zealand’s Domestic Violence Act being widely regarded as sound.<sup>206</sup> New Zealand’s Protection Orders and Police Safety Orders provide a range of remedies that are both autonomous, paternalistic, temporary and permanent. Of particular note, New Zealand is one of the only jurisdictions where Protection Orders can be permanent and have no expiration date unless discharged by a court.<sup>207</sup> Yet, reported domestic violence incidences suggest these measures alone have not succeeded in effectively reducing rates of violence in New Zealand.<sup>208</sup>

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<sup>200</sup> “Family violence statistics”, above n 5.

<sup>201</sup> *Ibid.*

<sup>202</sup> How Many Protection Orders Granted Under Section 12, above n 72.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

<sup>206</sup> Bill Atkin and Sean Brennan “Police Safety Orders in New Zealand: getting the balance right?” (2016) 8 NZFLJ 176 at 176 and 177.

<sup>207</sup> Domestic Violence Act 1995, s 45.

<sup>208</sup> *Strengthening New Zealand’s legislative response to family violence: A public discussion document*, above n 2.



## **B. Underlying Reasons**

### *1. Confusion*

One flaw of New Zealand's domestic violence remedial system, which has become apparent through this research and is identified by others is the complexity of the system and the process in seeking protection.<sup>209</sup> There are many facets involved including the police, an independent charity or refuge, the civil nature of applying for Protection Orders, and the criminal nature of charges arising from a domestic violence incident. The overlap, particularly in civil versus criminal jurisdictions, is easily confusing to anyone without a legal education. Further, the suggestion that victims should consult a lawyer, often using legal aid, adds another dimension of difficulty to seeking protection. It is difficult to imagine how a victim, who has struggled with deciding to speak out, can then be expected to hire a lawyer, apply for legal aid, apply for a Protection Order and then possibly seek criminal charges against their abuser.

The New South Wales Victim Survey found many women were intimidated or afraid of the process and that often led them to back out of making a statement to the police.<sup>210</sup> Woman 31 remarked of the Court process "So it's them by themselves against this big Court system – it's like they're stepping into two different worlds and you wonder why we feel so torn because it's like, I don't even understand the language that these people are speaking. I don't understand what they want from me. I'm being put on show like I've done something wrong and I'm the victim."<sup>211</sup> New South Wales also have a court support and advocacy programme for victims when going through the process of obtaining a Protection Order. This programme received many positive remarks in the survey, with Woman 2 saying "...she was just – she was very understanding and she was saying – she'll be somebody I'd say would be very helpful to get in contact with because I think she realises how difficult it is for women to go through this process and how often – and the number of times that they do feel very let down."<sup>212</sup> Remarks in this study show both the confusion as to the legal processes involved in seeking protection, and also the positive role that delegated support people had with victims, particularly in the court environment.

Similarly, in New Zealand, confusion as to the complexity of the domestic violence system and processes may well be a contributing factor to the levels of unreported violence. Victims are often so scared to speak out in the first place, that if they do decide to, they would likely want a simple and user-friendly process to obtaining protection, remedies and support. Trying to

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<sup>209</sup> *"It's like this maze that you have to make your way through": Women's experiences of seeking a domestic violence protection order in NSW*, above n 175.

<sup>210</sup> At page 24.

<sup>211</sup> At page 26.

<sup>212</sup> At page 27.

navigate a difficult process on their own may open up the victim to higher risks. These could include heightened fear of their abuser if they are caught trying to obtain an order, or the victim becoming overwhelmed by the process and deciding not to apply for a Protection Order. Making the decision to do something about domestic violence is likely to be hard enough, without having to battle the system as well. If a victim tried to apply for a Protection Order, and found it too difficult, they would probably be less likely to attempt to end the violence, as they would see no solutions.<sup>213</sup>

## 2. *Fear*

Although there are many different ways in which fear can be a common feeling in the cycle of domestic violence, two of the most common forms are fear of retribution and fear of the police

### (a) Fear of Retribution

Fear of retribution refers to the victim's fear that their abusive partner will retaliate in an even more abusive manner when they find out a victim has sought help. This can be a real barrier to victims making the decision to seek help, especially given the complex nature of applying for a Protection Order currently. The New South Wales Victim Survey found many women feared the consequences of their actions in seeking help.<sup>214</sup> Women who are unfamiliar with the legal system and the criteria for a Protection Order feared the consequences if they were unsuccessful. Woman 35 in the study affirmed this view in saying "It was scary...Because I didn't know whether they were going to give the AVO to me or whether they were going to say no."<sup>215</sup>

Another commonly held fear occurs during the time period between applying for a protection order and the court hearing to grant the order. Woman 7 commented on this process in saying "He was arrested on the Friday night and Court was on the Wednesday...And [those days in between] were terrible. The first thing I had to do was to change the locks on the house and there had been quite a lot of break ins around town and I had to wait and they didn't get that done until late Sunday afternoon... So I lived in fear for those couple of days until I had my locks changed."<sup>216</sup> Thus, it seems the time delays involved in the process are often contributors to the fear victims feel when attempting to leave a domestically violence situation.

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<sup>213</sup> "The challenges of leaving an abuser", above n 53.

<sup>214</sup> "It's like this maze that you have to make your way through": Women's experiences of seeking a domestic violence protection order in NSW, above n 175, at page 23.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

### (b) Fear of the Police

Another reason some victims are reluctant to obtain formal protection is because they fear the police. Woman 12 in the New South Wales Victim Survey said of her experience in dealing with the police “I felt let down [when the offender was not charged for breaches] ...But the Police never done nothing...I felt a little bit safer with that paper. But when he kept breaking it and getting away with it, I thought it made me a bit funny, you know... Because I wasn’t given a fair go...”<sup>217</sup> Furthermore, woman 21 said “I was assaulted as soon as it ran out. I rang the Police and do you know what they said when they got out here to the house? This AVO’s expired, there’s nothing we can do. I thought ‘you’re joking.’”<sup>218</sup>

Such comments are not uncommon to hear about the treatment of domestic violence victims by police and it is not surprising then that this results in a reluctance to involve police. The distrust of police by some in the community is not a new concept. Policing is more prevalent in lower socio-economic areas, and domestic violence is also more prevalent in lower socio-economic areas.<sup>219</sup> Thus, it is not surprising that those who are most likely to be suffering from domestic violence also have the least trust in our police and are reluctant to call them when something goes wrong. Such a distrust is not unique to New Zealand; the Los Angeles Police Department (LAPD) states on their website that victims of domestic violence often fear police will not take their claims seriously.<sup>220</sup>

### 3. *Relieving fear and confusion*

These key barriers in New Zealand’s domestic violence system are not specifically addressed in the legislative response currently. Evidence from the New South Wales Victim Survey and Manitoba, suggest positive links with community-based support. Comments in the New South Wales Victim Survey were positive about the calming, helpful and supportive presence provided by support people. However, these support people are available more in the context of the court hearing aspect of Protection Orders. Given the scheme of section 12, there is technically already scope for using a delegate or support person to aid the process of applying a Protection Order. However, the statistics indicating the use of section 12, suggest the scope has not been used to its full potential in assisting domestic violence victims.

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<sup>217</sup> “It’s like this maze that you have to make your way through”: *Women’s experiences of seeking a domestic violence protection order in NSW*, above n 175, at page 31.

<sup>218</sup> At page 32.

<sup>219</sup> “Economic Stress and Domestic Violence”, above n 100.

<sup>220</sup> LAPD “Domestic Violence: Reasons Why Victims Stay with Their Batterers” (2016) Los Angeles Police Department: Get Informed <[http://www.lapdonline.org/get\\_informed/content\\_basic\\_view/8877](http://www.lapdonline.org/get_informed/content_basic_view/8877)>.

### *C. Proposed Reform of Section 12*

My proposed reform of section 12 involves creating a specific role of a domestic violence delegate, similar to that in Manitoba.<sup>221</sup> To be a delegate, one would undergo comprehensive training in both domestic violence patterns and behaviours, as well as have a thorough understanding of the different methods of protection available to a victim in both the criminal and civil jurisdictions. While these delegates can come from a wide variety of backgrounds, it is predicted the majority would largely be people involved with organisations such as Women's Refuge and other non-profit organisations designed to aid victims of domestic violence.

Delegates would service a vital role in providing support and assistance to victims and aid in the process of seeking protection from violence. When used appropriately, a delegate would remove key fears victims of domestic violence may face when deciding whether to seek help or not. A delegate would assist in the process of gaining a Protection Order, or other remedies sought, and could provide advice on the best remedy or combination of remedies for a victim. Having a support person assist in this process could remove the confusion victims may associate with the complexity of the process and the amount of time it may take to navigate the process. In addition, it could remove elements of the fear of retribution because the process is likely to be speedier if a victim has a qualified person assisting them. Finally, a delegate would address the fear of the police as they provide an alternative help point for victims who fear the police themselves or the heightened consequences that could be possible with police involvement.

#### *1. The relationship between autonomy and the role of a delegate*

The role of a domestic violence delegate fits well with Choudhry and Herring's care-based approach to domestic violence law. Their argument of autonomy already being lost by the victims of domestic violence is hard to disagree with.<sup>222</sup> Choudhry and Herring argue that only when a victim is away from the negative side effects of an abusive relationship can they make a genuine choice about the future of their relationship and how best to proceed.<sup>223</sup> Thus, the role of a delegate, when used in the manner intended, would provide a safe space for a victim to assess their options with an objective and trained third party. Further, victims then have the support and resources they need to immediately proceed with any measures they decide are appropriate.

With the Protection Order delegates model, the victim has to take the first step and seek this assistance. This could be through referral to a delegate by the police or by women coming

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<sup>221</sup> The Domestic Violence and Stalking Act CCSM, c D93.

<sup>222</sup> "Righting Domestic Violence", above n 128, at page 101.

<sup>223</sup> At page 103.

directly to delegates or organisations that house delegates. A delegate would not be able to action remedies without the official consent of the victim, however the relationship between a victim and their delegate would open positive opportunities for the delegate to reason with a victim as to the objective danger of their situation. While some may criticise the victim/delegate relationship as paternalistic, leaving a victim to navigate domestic violence remedies alone arguably inhibits autonomy more.

Rather than being a paternalistic solution to domestic violence, a delegate is more of a facilitator of autonomy. Training would focus on how to best facilitate the victims wishes while also ensuring safety of parties involved. A delegate can guide the victim through the process to obtain the end result that the victims wants, whether that be a Protection Order, investigating a criminal offence or any other measure fit for the situation. One reason for this distinction is that effective solutions in domestic violence situations rarely work long term unless the victim is involved.<sup>224</sup> While victimless prosecutions are becoming increasingly utilised,<sup>225</sup> civil remedies to protect victims, only work if the victim wants them. If a Protection Order was forced on a victim who didn't want it, the victim is unlikely to enforce the effects of the Protection Order anyway, rendering it 'just another piece of paper.'<sup>226</sup>

## 2. *The inclusion of delegates in the scheme of section 12*

The proposed role of a delegate technically already fits the scope of section 12, both in the wording and in the Parliamentary intent.<sup>227</sup> However, given the lack of use the section has received, it is likely victims either do not know the section is there or do not know how to use it.<sup>228</sup> It is also possible that volunteers or workers from support organisations are not aware that they can assist victims so directly in the process. Given this, it is proposed that section 12 be reformed to specifically include the role of a delegate as a person capable of assisting a victim through the process of obtaining a Protection Order. Further, the specific training elements and other processes involved in offering the delegate service should also be regulated to provide consistency among delegates and the service provided to all victims.

This reform of section 12 need not be seen as a dramatic change in domestic violence law as we know it in New Zealand. Rather, it is specifying and simplifying provisions in the law that already exist. This reform will make section 12 more user friendly, provide more direct support

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<sup>224</sup> Darrell Payne and Linda Wermeling "Domestic Violence and the Female Victim: The Real Reason Women Stay!" (2009) 3(1) Journal of Multicultural, Gender and Minority Studies.

<sup>225</sup> Martin Sleight "A change in the landscape for victimless prosecutions?" (6 March 2015) Park Square Barristers <<http://www.parksquarebarristers.co.uk/news/victimless-prosecutions/>>.

<sup>226</sup> 'Protection order 'only a piece of paper'', above n 4.

<sup>227</sup> 551 NZPD 9581, above n 63, at 9589.

<sup>228</sup> How Many Protection Orders Granted Under Section 12, above n 72.

to victims whilst still maintaining their autonomy, and provide more effective solutions to domestic violence in New Zealand.

### 3. *Connections to wider reform*

Based on evidence from other jurisdictions, a specific domestic violence court would also work favourably to simplify solutions for domestic violence. This would involve the blending of civil and criminal jurisdictions into one separate and specialised jurisdiction for cases involving domestic violence. The exact details of what this court might look like, however, need more in depth examination.

What is clear from other jurisdictions, namely the Integrated Domestic Violence Court (IDVC) of Ontario, is that there can be a real advantage to streamlining the system. As yet, there hasn't been a jurisdiction where a delegate role or similar, and a specialised court have been combined. Despite this, doing so would simplify the system for victims and also make the role of a delegate fit into a clear system of resolving domestic violence. A specific court would also create a further statement against domestic violence in our society. It would prevent problems that often arise with failure to accurately share information between criminal, civil and family jurisdictions in New Zealand and overseas. This was recognised as a key reason for creating the IDVC in Ontario,<sup>229</sup> as well as a key issue identified in Victoria's Royal Commission.<sup>230</sup> Having all information relating to a case heard in the same court would create a more accurate system, where currently this is not always done well. There are occasions where, for example, criminal matters between spouses are not communicated effectively to the Family Court when working on parenting agreements or other civil matters, and vice versa.

New Zealand can learn a lot from the successes and failures of other jurisdictions in terms of implementing such measures. In Ontario, one of the downfalls of the IDVC initially was not having a clear jurisdictional boundary as to what the court would hear and not hear.<sup>231</sup> This created issues where victims did not know if they were able to proceed through the IDVC when their case had multiple aspects. Creating a clear jurisdiction so the community knows the role of the court is essential to ensuring its positive function in society from the outset.

The introduction of a specific domestic violence court in New Zealand would work well with the suggested reforms of section 12 and the proposed role of a delegate. It would provide one streamlined response to domestic violence and a simplified and effective experience for many victims who live in fear. The role of a delegate would work in the current set up, however it would be even more effective if combined with a holistic, streamlined approach to domestic

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<sup>229</sup> "A Legislative Response to Domestic Violence in Ontario Families", above n 194.

<sup>230</sup> *Royal Commission into Family Violence*, above n 182.

<sup>231</sup> "Research Library – Domestic Violence", above n 197.

violence in society as a whole. These ideas in their entirety are not in themselves groundbreaking; the Ministry of Justice is already looking at ways to “develop a more coordinated system for providing to family violence.”<sup>232</sup> Further, as recognised in the Ministry of Justices’ most recent discussion document, “a holistic approach is important for addressing family violence in whanau Maori.”

As discussed in Chapter 1, there are much higher rates of domestic violence among Maori than other cultural groups in New Zealand. Thus it is crucial to consider Maori and “continue to shift to a whanau-based delivery model grounded in tikanga.”<sup>233</sup> A delegate facilitating the process of applying for a Protection Order upholds whanau and tikanga Maori principles because it supports Maori world view of those with knowledge passing on their expertise to those without such knowledge.<sup>234</sup> Further, the Ministry of Justice has indicated their desire to explore “empowering Police, or an approved NGO or iwi service provider to apply for a Protection Order on a victim’s behalf... [this] could help to shift the responsibility away from the victim, and may reduce pressure being applied to the victim by the perpetrator.”<sup>235</sup> Thus, the ideas for reform contained in this dissertation support, rather than negate, ideologies of reform already held by key organisations involved with domestic violence remedies in New Zealand.

#### ***D. Recent Government Announcement as to Family Violence***

On 13 September 2016, the Government announced a package of law reforms to the Domestic Violence Act based on response received in relation to the Ministry of Justices’ recent discussion document.<sup>236</sup> The Government acknowledges “victims can find Protection Orders difficult to apply for, due to a complicated process and costs of legal advice.”<sup>237</sup> Reform will include “simpler applications forms, Non-government organisations (NGOs) can apply on behalf of particularly vulnerable victims who are unable to apply themselves and Pilot funded approved NGOs to help victims with applications.”<sup>238</sup> The Ministry of Justice affirms “Hon

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<sup>232</sup> *Strengthening New Zealand’s legislative response to family violence: A public discussion document*, above n 2, at page 9.

<sup>233</sup> At page 14.

<sup>234</sup> “Tikanga Maori protocol overview” (2016) Te Taura Whiri i te Reo Maori <<http://www.tetaurawhiri.govt.nz/learn-te-reo-maori/tikanga-maori/>> and Tai Walker “Whanau – Maori and family: Contemporary understandings of whanau” (5 May 2011) Te Ara The Encyclopedia of New Zealand <<http://www.teara.govt.nz/en/whanau-maori-and-family/page-1>>.

<sup>235</sup> *Strengthening New Zealand’s legislative response to family violence: A public discussion document*, above n 2, at page 21.

<sup>236</sup> *Strengthening New Zealand’s legislative response to family violence: A public discussion document*, above n 2.

<sup>237</sup> Ministry of Justice “Safer Sooner: Strengthening family violence laws” (13 September 2016) Justice.co.nz Key Initiatives <<http://justice.govt.nz/justice-sector-policy/key-initiatives/reducing-family-and-sexual-violence/safer-sooner>>.

<sup>238</sup> Ibid.

Amy Adams, Minister of Justice will introduce a Family Violence Bill to Parliament in the coming months.<sup>239</sup>

Interestingly, some of the reform outlined by the Government to remove fear are avenues already available by way of section 12, including NGOs applying on behalf of victims. Until the Bill is introduced, it is difficult to know whether such reforms will involve change to section 12, however there is certainly an opening for modification. Approved NGOs helping victims to apply for Protection Orders fits with the role of a delegate and yet this too is technically already provided for in the current Domestic Violence Act. It is hoped the Government, when drafting the Bill, will consider specifying avenues for facilitation. A specific delegate role is necessary to draw more attention to the existing remedial avenues available to victims. If the Government were to simply insert a section stating that NGOs can help victims, this too puts pressure on the victim at the expense of the care-based approach suggested here. Providing clear guidelines for use of the NGOs services and facilitation options is key to the success of such a reform.

#### ***E. Conclusion***

Given the current low use of section 12, and the differences in statistics between Protection Orders granted and the astounding estimated rates of unreported violence, it is clear something has to change. A delegate is someone who is specifically trained to assist and guide a victim through the process of seeking remedies to the domestic violence they are suffering. The role of a delegate minimises various sorts of fear and confusion currently experienced in the process. A delegate will enable, not inhibit, autonomy because they allow the victim easy and informed access to remedies in a safer way than a victim may be capable of doing themselves. Delegates support a more holistic approach to domestic violence remedies, and would be well suited in pairing with a specific domestic violence court which houses domestic violence cases, whether civil or criminal, in one user-friendly place. High levels of domestic violence among Maori warrant a delegate role to support appropriate responses that are in line with whanau and tikanga Maori. Delegates, particularly from iwi organisations, support this fully. The Ministry of Justice is also considering a more integrated model of responding to domestic violence currently. Reform of section 12 to provide delegates is an essential component to seeing real change in domestic violence rates in New Zealand.

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<sup>239</sup> “Safer Sooner: Strengthening family violence laws”, above n 237.



## ***Conclusion***

Having a more facilitative, holistic approach to remedying domestic violence is essential to ensure horrific rates of domestic violence are lowered in New Zealand. The opportunities provided for in section 12 can remove fear and confusion for victims by providing protection from facing the process alone. The potential held in section 12 has been ignored and undermined by the Government, particularly when the gap between reported and estimated violence is so extreme.

Providing a specific and prescribed alternative avenue to individual applications for a Protection Order will encourage more victims to come forward. Applying via a delegate will not undermine victim autonomy as such a care-based approach enables more autonomy than the victim would otherwise have. Currently, the process of applying for a Protection Order removes autonomy from some victims due to its complicated, untimely and expensive nature. The role of a delegate is a specific person assigned to a victim to assist with all remedial options. This enables the victim's autonomy further by providing access to more options than they would otherwise have.

Evidence from studies in other jurisdictions show that delegates are well-used and appreciated by victims and effective in lowering violence rates to some extent. Further, they provide support to victims during a difficult time. Delegates would provide an integral role in removing fear faced by victims and encourage more victims of violence to come forward. While it is not yet clear if the current Government's new measures will cover the reform suggestions contained in this dissertation, there are hints of movement in the direction of more facilitative approaches. Specificity is key in ensuring new measures are used to their full potential. Otherwise, the autonomy we seek to enable through facilitation is undermined if the victim has to organise a representative on their own.

“Laws are the not the whole picture. We can't legislate our way out of this. But they are a cornerstone element in how we respond to confronting family violence.”<sup>240</sup> New Zealand's domestic violence laws need to provide user-friendly methods for victims to confront violence in their homes effectively. A delegate answers this framework well and will put New Zealand on the path to “doing better” with our response to domestic violence.<sup>241</sup>

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<sup>240</sup> *Strengthening New Zealand's legislative response to family violence: A public discussion document*, above n 2.

<sup>241</sup> *Ibid.*

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## New Zealand Legislation

# Domestic Violence Act 1995

- Warning: Some amendments have not yet been incorporated

### 12 Applications on behalf of certain other persons

- (1) This section applies where—
- a person aged 16 years or over (other than a person to whom section 11 applies) is eligible to apply for a protection order; and
  - that person is unable, whether by reason of physical incapacity or fear of harm or other sufficient cause, to make the application personally; and
  - it is desirable that the protection order be sought on an application without notice.
- (2) Where this section applies, the court or a Registrar may, on an application without notice made by an adult person who is not under disability, appoint any adult person to be a representative of another person for the purpose of making and prosecuting, on behalf of that other person, an application for a protection order.
- (3) Where an application for the appointment of a representative is made pursuant to subsection (2), the court or Registrar must make the appointment sought if the court or, as the case requires, the Registrar is satisfied,—
- that reasonable steps have been taken to ascertain the wishes of the person to whom the application relates in relation to the matter; and
  - where the wishes of that person have been able to be ascertained,—
    - that the person does not object to the appointment; or
    - that the person's objection is not freely made; and
  - that it is in the best interests of the person to whom the application relates to make the appointment; and
  - that the proposed appointee—
    - consents in writing to the appointment; and
    - is not under disability; and
  - that there is unlikely to be any conflict between the interests of the proposed appointee and the interests of the person in respect of whom the application is made.
- (4) The fact that an application for a protection order is made, on a person's behalf, by a representative appointed pursuant to this section does not prevent the person on whose behalf the application is made from being heard in the proceedings.
- (5) Without limiting subsection (3)(b), where—
- a representative appointed pursuant to this section applies, on another person's behalf, for a protection order; and
  - at any time before the application is determined, the other person objects to the continuation of the proceedings,

then, unless the court is satisfied that the objection is not freely made, no further steps may be taken in the proceedings.

Section 12(1)(a): amended, on 26 April 2005, by section 7 of the Relationships (Statutory References) Act 2005 (2005 No 3).

**12 AUG 2016**

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Dear Ms Coleman

**Official Information Act 1982 request**

Thank you for your Official Information Act 1982 request of 15 July 2016, requesting information relating to protection orders granted under the Domestic Violence Act 1995 (the Act).

In regards to your enquiry about the number of temporary protection orders granted under section 124N(2)(b) of the Act, I refer you to the attached table.

I have outlined the answer to your enquiries about applications and protection orders made under section 12 of the Act below. Please note that the following figures were recorded as at 26 July 2016. The data includes all the applications captured in the Ministry's Case Management System which has been in use in all District Courts since October 2003.

*How many applications have there been for protection orders under section 12 of the Act?*

- 81 applications have been filed under section 12 of the Act.
- 80 have a final outcome and one is currently pending an outcome.

*How many of these applications have been granted and a protection order given?*

- Of the 80 applications with a final outcome, 49 were granted.
- Of the 49 that were granted, 43 had a protection order made.
- Please note that a further seven applications filed under section 12 of the Act were not granted but had a protection order made. In these circumstances the application may have been discontinued or withdrawn and a protection order has been granted without a representative. Accordingly, a total of 50 applications under section 12 of the Act have had a protection order made.

*How many of these applications have resulted in no protection order granted?*

- Of the 80 applications with a final outcome, 30 have not had a protection order made.

I trust this information assists.

Yours sincerely



Heather Baggott  
General Manager, District Courts

Ref: 57928

**Number of temporary protection orders granted under section 124N(2)(b) of the Domestic Violence Act 1995, by financial year**

Year	Number of Protection Orders granted
2009/2010	0
2010/2011	34
2011/2012	44
2012/2013	66
2011/2012	27
2013/2014	69
2014/2015	68
2015/2016	100

**Please note:** This provision of the Domestic Violence Act 1995 came into force on 1 July 2010.

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OFFICIAL INFORMATION ACT