

**REDUCING CHILD VICTIMS OF FAMILY  
VIOLENCE IN NEW ZEALAND  
A NEW APPROACH TO PROTECTION ORDERS**

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*How were we going to know there were bruises underneath those clothes?*

*Did you ever ask?*

*No.*

*Even though [he] had already been in jail for assaulting James?*

*No, I didn't ask. ... You might as well blame me for whatever happened to James.*

- Father of Ben Haerewa, interview with Diane Musgrave "Death by Silence"  
*60 Minutes* (Television New Zealand, 19 September 1999).

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## Chapter One: Introduction

Bradley and Ellen Livingstone were 9 and 6 years old when they were killed by their father on January 15<sup>th</sup> 2014. Edward Livingstone, who had twice breached a protection order issued against him, travelled to the children's home and killed them both before taking his own life. These children lost their lives not only because the law failed them, but also because family violence retains a terrible prevalence within New Zealand society. It is in memory of Bradley and Ellen, and in the memory of the thousands of other vulnerable children who suffer at the hands of those adults who tower callously above them, that this dissertation is written. There is no single panacea to family violence, certainly not within the law alone. However there are steps that the law can take, and steps which all of New Zealand *must* take, to combat this problem. Children are among the most vulnerable people within our society, and they deserve any protection the law can offer. What follows is an analysis of the protection afforded to children by orders made under section 14 of the Domestic Violence Act 1995.

There are other areas of the law that could have been chosen for consideration. Section 14 has been selected as it exists to protect adults and children, but there are significant gaps which require attention. The second chapter of this dissertation sets the scene with a general overview of some of the most important aspects of the ways in which family violence is being combatted in New Zealand. An overview of relevant statistics and legislation provide the framework from which concerns arise; there is a disconcerting number of child deaths resulting from family violence in New Zealand each year, despite the existence of several legal mechanisms such as restraining and protection orders. A perfunctory discussion on contributing factors as well as current governmental and agency action will provide the platform from which to understand, generally, how the problem is being targeted. Lastly, the chapter identifies areas where there are gaps using two case studies. These gaps are targeted in chapters three and four, which search for ways to improve the efficacy of protection orders.

Chapter three proposes a tiered system for sanctioning breaches of protection orders which gives prominence to the subjective view of a protected person in determining the level of protection necessary. A significant aspect of this system is the provision of a form of electronic monitoring specific to protection orders, which may forewarn a protected person of

a respondent's breach. A child is usually reliant on the actions of adults to secure their safety, and it is for this reason that the protected person is a central focus in chapter three. It is the protected person, often the child's parent, on whom the duty to act when a breach occurs lies. While their actions cannot be ensured, it is hoped that where a protected person does act in response to a breach, the proposals in chapter three will provide a form of protection for both themselves and the child.

Chapter four considers the provision of non-violence programmes which are attended by respondents of protection orders. The law is in a state of transition, and this will be considered with reflection on what the previous law was. Proposed changes will be elucidated, with particular emphasis given to the need for more funding of Maori-specific programmes which offer enormous potential.

The terminology used in this dissertation refers to respondents and protected persons. The term respondent has been chosen as a relatively neutral term, as opposed to phrases such as "abuser", "perpetrator", or "offender" which confer a level of criminality. The same is true of the term protected person. It is hoped this is relatively neutral, as opposed to "victim" which has the same effect of placing a stigma on the respondent in any given case. Many of the situations envisioned in the following chapters may include people who could be rightly categorised as criminals, or even "animals" as one politician has claimed.<sup>1</sup> When one is discussing protection orders, which rely on the civil standard of a balance of probabilities in order to be issued, it is unfair to categorise a respondent in every such situation as being a criminal.

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<sup>1</sup> Interview with Anne Tolley, Minister of Corrections, and Sue Lytollis, Women's Refuge (Kathryn Ryan, Nine to Noon, National Radio, 16 May 2013).

## Chapter Two: The Problem

### I. The Current Situation

The purpose of this chapter is to provide a general overview of the current state of child abuse and family violence in New Zealand, and to provide a platform from which to understand the changes which this dissertation proposes to alleviate the problem. It is intended that this chapter will provide a holistic view of the issue, to illustrate that the suggested reforms contained in chapters three (Protection) and four (Reformation) are not intended to operate in a vacuum.

#### 1. Statistics

Poor welfare for children in New Zealand is something for which we are known for throughout the developed world. The Organisation for Economic Co-operation and Development (OECD) ranked New Zealand 29 out of 30 countries for the health and safety of our children.<sup>2</sup> With poor material well-being (ranked 21<sup>st</sup>)<sup>3</sup> as well as the highest youth suicide rate,<sup>4</sup> our reputation is for a country which struggles to protect its most vulnerable.

The Family Violence Death Review Committee issues annual reports detailing family violence deaths and analysing patterns that arise from this data. It is of significance that in the Fourth Annual Report, analysing the years 2009-2012 (inclusive), the Committee noted that 47% of all homicides were family violence related.<sup>5</sup> This serves to reflect a society which has a prevalent culture of family violence. A total of 126 family violence deaths fell within the FVDRC terms of reference, and of these 37 were children.<sup>6</sup> 17 of these children were known to Child Youth and Family,<sup>7</sup> which highlights the large number of cases in which the ability to intervene existed. 19 of these child deaths were as a result of assault, which was caused by a father/step-father in 13 cases. Mothers are more commonly perpetrators of neonaticide, or

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<sup>2</sup> Organisation for Economic Co-Operation and Development *Doing Better for Children* (OECD Publishing, 2009) at 23, table 2.1

<sup>3</sup> OECD, above n 2.

<sup>4</sup> At 52, figure 2.15.

<sup>5</sup> Family Violence Death Review Committee *Fourth Annual Report* (Health Quality & Safety Commission New Zealand, June 2014).

<sup>6</sup> At 37. 63 were as a result of intimate partner violence, and 26 were intrafamilial violence deaths.

<sup>7</sup> At 56.

fatal neglectful supervision.<sup>8</sup> 17 of the fatal inflicted injury deaths occurred under the age of five.<sup>9</sup> This reflects an important trend, by which the youngest children are killed due to assaults usually perpetrated by fathers, such as head injury or blunt force trauma to other areas of the body.

## 2. Existing legislation

The bulk of New Zealand's legislation which operates to protect children from violence is contained within the Children Young Persons and Their Families Act 1989 and the Domestic Violence Act 1995. The Courts are empowered with several tools under these Acts, ranging from temporary protection orders to removal of children from homes.

The Children Young Persons and Their Families Act states that in all cases, "the welfare and interests of the child or young person shall be the first and paramount consideration, having regard to the principles set out in sections 5 and 13."<sup>10</sup> The section 5 principles are those that apply to the whole Act, whereas the section 13 principles apply only to Parts 2, 3, and 3A, as well as sections 341-350.<sup>11</sup> Of these principles, only two are mandatory. Importantly, section 13(2) provides that Courts "*must* be guided by the principle that children and young people *must* be protected from harm and have their rights upheld, and also the principles in section 5 as well as the following..."<sup>12</sup> While the importance of familial ties and overall whanau involvement is provided for,<sup>13</sup> ss 13(2) and 6 provide that a child's best interests, welfare and protection is of utmost importance.

These principles are particularly important when considering their application under Part 2 of the Act, which is entitled "Care and protection of children and young persons." It is under this part of the Act that restraining orders may be issued and children may be removed from their homes. Before a Court will grant a restraining order under s 87, a declaration to the effect that a child is in need of care and protection must first have been made under s 67.

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<sup>8</sup> At 53. One fatal inflicted injury death was caused by a mother, three by a female caregiver, and two were unknown.

<sup>9</sup> At 54.

<sup>10</sup> Children Young Persons and Their Families Act 1989, s 6. This section excludes from consideration Parts 4 (Youth Justice), 5 (Provisions relating to Youth Court), and sections 351-360 (Appeals from the Youth Court) of the Act.

<sup>11</sup> Part 2 relates to care and protection of children and young persons. Part 3 relates to the procedures under Parts 2 and 3A. Part 3A relates to Trans-Tasman transfers of protection orders and protection proceedings. Sections 341-350 relate to appeals from Family Court decisions.

<sup>12</sup> Emphasis added.

<sup>13</sup> Children Young Persons and Their Families Act 1989, ss 5(a-c) and (e), 13(2)(b-g).



These declarations may be applied for by a social worker, constable, or any other person with leave of the Court.<sup>14</sup> Whether a child is in need of care and protection depends on any of the grounds contained within s 14 being satisfied. These grounds include whether the child is actually, or is likely to be, harmed (this can be by physical, emotional, or sexual harm), among other things.<sup>15</sup> The effect of a restraining order is to prevent a respondent from residing with the child in question, threatening to cause or actually causing physical harm to the child, molesting the child by watching, besetting, waylaying or contacting them in any way, or doing any of the aforementioned to a person with whom the child is residing.<sup>16</sup> These orders will continue to have effect until the child turns 20.<sup>17</sup> The consequence for a breach of a restraining order by a respondent is up to 3 months' imprisonment, or a fine of up to \$2000.<sup>18</sup>

Provisions relating to the removal of a child are contained within ss 39-48 of the Act. A social worker or constable may obtain a warrant on application to a District Court Judge or issuing officer<sup>19</sup> under ss 39 or 40, which allows for search and removal of a child. A warrant under ss 39 and 40 will be issued where there are "reasonable grounds for suspecting that a child or young person is suffering, or is likely to suffer, ill-treatment, neglect, deprivation, abuse, or harm."<sup>20</sup> Under s 39 a child may be removed if the person who performs the search believes, on reasonable grounds, that these forms of maltreatment exist.<sup>21</sup> Under s 40, a warrant may be issued in conjunction with a declaration under s 67, which permits a social worker or constable to search for and remove the child. A child may also be searched for and removed without a warrant, if a constable believes it is *critically* necessary to protect that child from injury or death.<sup>22</sup> If removed, section 43 states that a child may be placed with: their parent or guardian, a person who has previously had care of the child, a member of their family or whanau, or any person approved by a social worker. If none of these options are practicable, the child may be placed in a residence. When removal occurs the child will be in

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<sup>14</sup> Section 68.

<sup>15</sup> Children Young Persons and Their Families Act 1989, s 14(1)(a). Other grounds are contained within s 14(1)(b-i).

<sup>16</sup> A Court may impose all or any of these conditions.

<sup>17</sup> Children Young Persons and Their Families Act 1989, s 90.

<sup>18</sup> Section 89.

<sup>19</sup> Search and Surveillance Act 2012, s 3 defines an issuing officer as a Judge or a person "who is for the time being authorised to act as an issuing officer" (i.e. a Justice of the peace, Community Magistrate, Registrar, or Deputy Registrar).

<sup>20</sup> Both sections include this, though section 40 substitutes "suspecting" with "believing", and also covers situation where a child or young person is "seriously disturbed" and likely to cause harm to themselves, others, or property.

<sup>21</sup> Children, Young Persons and Their Families Act, s 39(3)(b).

<sup>22</sup> Section 42.

the custody of the chief executive of the Ministry of Social Development.<sup>23</sup> This effectively means that unless the child is placed with any of the people named in s 43, he/she will be placed in the care of Child Youth and Family, an organisation which operates under the Ministry.<sup>24</sup>

A central aspect of the Children Young Persons and Their Families Act is the importance placed on the involvement of all whanau in reaching arrangements in regards to children. This is important because it reflects the vital part to be played by family in raising and protecting children. Chapter four (Reformation) considers the way in which whanau may assist in rehabilitating someone who has harmed a child in the past, particularly within the Maori culture.<sup>25</sup>

The Domestic Violence Act 1995 constitutes a significant piece of legislation in providing for the protection of children. Protection orders and associated programmes are contained within Parts 2 and 2A (ss 7-51T), and police safety orders are contained within Part 6A of the Act (ss 124A-124S). Children may be affected by domestic violence by virtue of the definitions offered in sections 3 and 4. Domestic violence may be perpetrated within the context of a domestic relationship,<sup>26</sup> which includes family members, those who share a household, or those in close personal relationships.<sup>27</sup> This seems to include all members of a child's whanau, or someone who may live with or have a close personal relationship with the child; this would tend to imply the inclusion of de facto parents, partners of a child's parent, or a child's guardian. Violence includes not only physical abuse, but also sexual and psychological abuse.<sup>28</sup> This dissertation aims only to explore the ways in which breaches of protection orders may be confronted in order to reduce child death due to physical abuse, thus the other forms of abuse which constitute violence will not be explored in detail.

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<sup>23</sup> This refers to the chief executive of the department responsible for the administration of the Act (section 2), which is the Ministry of Social Development.

<sup>24</sup> A court largely has discretion as to who will have custody under ss 44-47 and 78 of the Act, however these are subject to other existing orders under the Care of Children Act 2004.

<sup>25</sup> Chapter four also contains a cursory discussion on restorative justice, however this is not a central aspect of the rehabilitation discussion.

<sup>26</sup> Domestic Violence Act 1995, s 3(1).

<sup>27</sup> Section 4(1)(b-d).

<sup>28</sup> Section 3(2)(a-c). Psychological abuse includes, but is not limited to, "intimidation; harassment; damage to property; threats of physical abuse, sexual abuse, or psychological abuse; financial or economic abuse..." (s 3(2)(c)(i-v)) and causing or allowing a child to witness any abuse involving a person with whom the child has a domestic relationship (s 3(3)).

Police safety orders were enacted in 2010 as Part 6A of the Domestic Violence Act.<sup>29</sup> They enable a constable to issue an order against a respondent where it is believed it is necessary to do so in order to protect a person in a domestic relationship with the respondent.<sup>30</sup> Police safety orders only operate for a maximum of five days,<sup>31</sup> but have the potential to be made into a temporary protection order by a District Court.<sup>32</sup> Due to the fact that police safety orders are transitory in nature, and have the same general conditions imposed on them as protection orders,<sup>33</sup> they will not be a point of focus during this dissertation.

Protection orders are issued pursuant to section 14 of the Act where a respondent is deemed to be at risk of perpetrating domestic violence against an applicant. When an order is granted to an applicant, it automatically applies to the children of that applicant.<sup>34</sup> For an order to be granted a court must be satisfied that domestic violence has been used against an applicant, a child of the applicant's family, or both, and further that the order is necessary for the protection of the applicant or child.<sup>35</sup> In circumstances where a person is unable to apply for a protection order due to physical incapacity, fear of harm, or other sufficient cause, a court or Registrar may appoint any person to be a representative of that person. This may only take place where it is considered in the best interests of the person to be protected, and reasonable steps have been taken to determine their wishes. If that person objects to an appointment, it may still be made if the court is satisfied that the objection is not freely made.<sup>36</sup> Where the violence may appear to be "minor or trivial", the court must still be attentive to whether a pattern of behaviour is emerging.<sup>37</sup> It is contended that the most critical part of section 14 is subsection (5), which states: "Without limiting the matters that a court may consider ... the court *must* have regard to the *perception of the applicant, or a child of the applicant's family, or both, of the nature and seriousness of the behaviour ... and the effect of that behaviour on the applicant, or a child of the applicant's family, or both.*"<sup>38</sup> This requires the court to adopt a subjective test, focussing on the needs of the person(s) at risk. It will be argued in chapter

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<sup>29</sup> Domestic Violence Amendment Act 2009, s 9.

<sup>30</sup> Domestic Violence Act 1995, s 124B.

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

<sup>32</sup> Section 124N. This jurisdiction only comes into effect where a respondent has refused to comply with, or has contravened, a police safety order.

<sup>33</sup> Section 124E.

<sup>34</sup> Section 16(1).

<sup>35</sup> Section 14(1)(a-b).

<sup>36</sup> Section 12.

<sup>37</sup> Section 14(3).

<sup>38</sup> Section 14(5) (emphasis added).

three (Protection) that the imposition of this subjective test should extend to a court's considerations upon breaches of protection orders.

The standard conditions of all protection orders are contained within section 19 of the Act. These provide that a respondent must not physically, sexually, or psychologically abuse a protected person, damage their property, threaten to engage in the aforementioned behaviour, or encourage others to do the same.<sup>39</sup> Further, a respondent must not watch or be near a protected person's home or any other place that the protected person visits often,<sup>40</sup> follow or stop/accost a protected person,<sup>41</sup> make any contact,<sup>42</sup> or possess or control any weapons.<sup>43</sup> A court may impose any further conditions it deems necessary, such as making allowance for access to children.<sup>44</sup> A protected person may suspend the non-contact provisions by consenting to sharing a dwellinghouse with a respondent, but upon the revocation of this consent the standard conditions resume.<sup>45</sup> Of critical significance to the arguments proposed in this dissertation are the provisions relating to the penalty when a protection order is breached and the provisions relating to the imposition of programmes to be attended by the respondent.

Section 49 provides the central penalising provision for breaches of protection orders. A respondent is liable to up to three years' imprisonment if he or she fails to comply with a condition of the order, or directly contravenes it, without reasonable excuse.<sup>46</sup> Section 49A stipulates that a failure to attend a court-ordered programme without reasonable excuse may yield up to six months' imprisonment, or a fine of up to \$5,000. Section 50 empowers a constable, without warrant, to arrest a respondent who is suspected of offending against s 49. The efficacy and implementation of the enforcement provisions will be the central focus of chapter three.

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<sup>39</sup> Domestic Violence Act 1995, s 19(1)(a-e).

<sup>40</sup> Section 19(2)(a). This includes a protected person's business, place of employment, and educational institution. Section 19(2)(c) and (d) extend this to forbidding a respondent from entering or remaining on any land or building occupied by the protected person, or any land that the protected person is present on in a way that constitutes trespass.

<sup>41</sup> Section 19(2)(b).

<sup>42</sup> Section 19(2)(e). The exceptions to this include in the event of emergency, where it is permitted for access or care of a minor, for attendance of family group or settlement conferences, or for any special condition of a protection order.

<sup>43</sup> Section 21. This may be modified at the Court's discretion under s 22.

<sup>44</sup> Section 27.

<sup>45</sup> Section 20.

<sup>46</sup> Domestic Violence Amendment Act 2013, s 11 increased the penalty from two years to three years, taking effect from September 2013.

The provisions relating to programmes for respondents are currently in a state of transition. Sections 29 to 44 of the Act have been replaced by sections 51A to 51T as of October 2014. The effect of the repeal is to place the regulation of programmes into the hands of the Ministry of Justice. Currently, the Domestic Violence (Programmes) Regulations 1996 provide for an approval panel, which is to be abolished pursuant to s 138 of the Domestic Violence Amendment Act 2013.<sup>47</sup> The Domestic Violence Act dictates that “the court *must* direct a respondent to attend a specified programme, unless the court considers that there is good reason for not making such a direction.”<sup>48</sup> The new ss 51A to 51T will replace ss 29-44. These sections declare that the Secretary has the ability to grant, suspend, or cancel approval of a person or organisation as a service provider.<sup>49</sup> Whether a programme provider qualifies for approval is determined by regulations, which stipulate the processes and criteria for programme approval. It is the objective of chapter four to consider what types of programmes might be most effective in rehabilitating respondents, the values these should reflect, and how they may effectively operate in conjunction with sanctions.

Legislative changes have been made in recent years, such as the introduction in March 2012 of the “Failure to Protect” provision in the Crimes Act,<sup>50</sup> and the Vulnerable Children’s Act which came into effect this year. This Act has the purpose to improve “the wellbeing of vulnerable children.”<sup>51</sup> It was passed in June 2014 and introduces several new features within our child protection laws. Both of these changes will briefly be discussed in the third section of this chapter.

## **II. Factors and action**

The purpose of this section is to consider what types of factors contribute to abuse taking place, and what action is currently underway by various agencies and Parliament to target child abuse.

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<sup>47</sup> The approval panel was constituted under Part 4 of the Domestic Violence (Programmes) Regulations 1996, with specific requirements for membership contained within clause 47.

<sup>48</sup> Domestic Violence Act 1995, s 32(4) states that “good reason” includes circumstances where there is no programme available that is appropriate for a respondent.

<sup>49</sup> Secretary is defined in s 2 as the chief executive of the Ministry of Justice.

<sup>50</sup> Crimes Act 1961, s 195A.

<sup>51</sup> Vulnerable Children Act 2014, s 4.

## 1. Factors

Identifying the factors that may contribute to family violence is critical as once these are understood, they may be addressed in a way that reduces fatalities. Research has identified several factors, such as the frequency with which drug and alcohol use coincides with family violence incidents. One study stipulated that, in the context of child homicide, approximately half of perpetrators had a drug and/or alcohol background (though it was thought that this was an undercount).<sup>52</sup>

It has also been found that there is a higher rate of child death due to family violence in lower socio-economic demographics. From the years 2002-2006, close to half of the children came from the most deprived of the five quintiles created in the study.<sup>53</sup> From 2009-2012, the addresses of 91% of the children who died were known. Of this, 38% were in the bottom fifth socio-economically, and a total of 67% fell in the lower socio-economic half.<sup>54</sup> These figures suggest a relationship between poverty and family violence, something which has been discussed in parliamentary discourse on the failure to protect reforms.<sup>55</sup> It is important to acknowledge that abuse occurs across all socio-economic demographics, but the link between poverty and abuse cannot be ignored and addressing it is one of the ways in which abuse may be combatted.<sup>56</sup>

A further trend that has been identified is the higher incidence of child death amongst Maori children, as well as high numbers of Maori perpetrators. From 2002-2006, Maori made up 47% of child victims and 37% of perpetrators.<sup>57</sup> The Third Annual Report of the FVDRC discovered that while Maori made up 15.17% of the population, they were overrepresented in family violence; 44% of child deaths involved a Maori perpetrator, and 50% involved a Maori child.<sup>58</sup> The Fourth Annual Report showed a drop in these figures; from 2009-2012,

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<sup>52</sup> Jennifer Martin and Rhonda Pritchard *Learning from Tragedy: Homicide within Families in New Zealand 2002-2006* (Ministry of Social Development, Working Paper, April 2010) at 52 and 58.

<sup>53</sup> At 47.

<sup>54</sup> Family Violence Death Review Committee *Fourth Annual Report*, above n 5, at 63.

<sup>55</sup> Su'a William Sio (13 September 2011) 675 NZPD 21235-21236.

<sup>56</sup> M. Claire Dale, Mike O'Brien and Susan St John (eds) *Left Further Behind: How policies fail the poorest children in New Zealand* (Child Action Poverty Group (Inc), Auckland, 2011) at 104.

<sup>57</sup> Martin and Pritchard, above n 52, at 46 and 49. The figures for intimate partner violence were less drastic but still reflected an overrepresentation, with Maori being 28% of perpetrators and 34% of victims (at 28).

<sup>58</sup> Family Violence Death Review Committee *Third Annual Report: December 2011 to December 2012* (Health Quality & Safety Commission New Zealand, June 2013), at 36.

38% of perpetrators and 43% of victims were Maori.<sup>59</sup> Despite this drop, which is also somewhat evident in intimate partner violence deaths,<sup>60</sup> Maori continue to be drastically overrepresented.

Unfortunately, of the three critical factors identified above, all require fundamental shifts in the fabric of New Zealand society in order for change to occur. Despite this, there are still steps the law may take in rehabilitating those who have abused children. Chapter four will aim to identify ways in which those who are respondents of protection orders may be placed in programmes that will effectively reform them.

## 2. Areas of proposed action

There have been some legislative reforms in the area of child protection, as well as several recommendations emerging from prominent bodies such as the Glenn Inquiry and the Family Violence Death Review Committee (FVDRC). The Glenn Inquiry is an independent commission which is currently investigating the incidence of family violence in New Zealand; it released *The People's Report* in June of 2014,<sup>61</sup> and has aimed to release the *Blueprint for Change* in October of 2014. *The People's Report* analysed the current tools that exist to protect victims of family violence, their efficacy, and which tools are and are not working well. The *People's Report* provided valuable insight due to its direct contact with victims and perpetrators. The Inquiry made some recommendations, and their proposed new system will be contained in the *Blueprint*. One of the key areas in which the Glenn Inquiry identified change must occur was in the domain of inter-agency collaboration and information sharing.

### a. Inter-agency collaboration

Disappointingly, children often fall through gaps in the system.<sup>62</sup> The abuse may be known by Child, Youth and Family, or the Police, or the child's school, or perhaps the child will be seen by several medical practitioners with suspicious injuries. Each agency will hold a piece

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<sup>59</sup> Family Violence Death Review Committee *Fourth Annual Report*, above n 5, at 60.

<sup>60</sup> Maori perpetrators decreased from 44% to 29% though Maori victims increased from 31% to 32%. Family Violence Death Review Committee *Third Annual Report*, above n 58, at 36; Family Violence Death Review Committee *Fourth Annual Report*, above n 5, at 49.

<sup>61</sup> Glenn Inquiry *The People's Report: The People's Inquiry into Addressing Child Abuse and Domestic Violence* (2014).

<sup>62</sup> Some case studies to illustrate this may be found in Mark Henaghan and Bill Atkin *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) at 138-146.

of the puzzle but without a high level of communication it is sometimes impossible for the whole picture to be seen. Unfortunately there can be some tension with information sharing and the Privacy Act 1993, particularly Principle 11 which is contained in section 6 of the Act. Principle 11 limits the disclosure of personal information by agencies. The circumstances in which disclosure is allowed include where there is a *serious threat* to the life or health of an individual (Principle 11, (f)(ii)), or potentially where agencies have reached an information sharing agreement under Part 9A of the Act.

The Family Violence Interagency Response System (FVIARS) operates to promote interagency case management where incidences of family violence are reported to the Police. Since its instigation in 2006 the central agencies which implement FVIARS are Child Youth and Family, the Police, and the National Collective of Independent Women's Refuges.<sup>63</sup> It was observed that the information sharing aspect of FVIARS "... was extremely useful for getting a fuller picture of what was happening in a case and formed the basis for more informed risk assessment and decision making regarding interventions."<sup>64</sup> This holistic approach was thought to have improved both victim safety and offender accountability.<sup>65</sup> This is arguably not as attainable where different agencies hold different functions and fail to co-operate to bring their qualities together. Overall the implementation of FVIARS seems to give credence to the idea that greater collaboration between agencies will yield better results in assisting those in danger of family violence.<sup>66</sup>

The Taskforce for Action on Violence Within Families is closely related to FVIARS, and was established in 2005 for the purpose of exploring possible inter-agency and governmental action to combat family violence. Notably the Taskforce has been responsible for spearheading reforms such as the aforementioned creation of police safety orders and the Failure to Protect provision in the Crimes Act 1961, which is discussed below. It has been attempting to revamp FVIARS, including drawing more agencies such as into the inter-agency system and possibly utilising a Whanau Ora approach, however there has been no progress report since December 2012.<sup>67</sup> One of the Taskforce's achievements is the *Are You*

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<sup>63</sup> Sue Carswell, Susan Atkin, Vicki Wilde, Michele Lennan and Lesa Kalapu *Evaluation of the Family Violence Interagency Response System (FVIARS) Summary of Findings* (Ministry of Social Development, August 2010), at 4.

<sup>64</sup> At 16.

<sup>65</sup> At 6.

<sup>66</sup> At 4.

<sup>67</sup> Ministry of Social Development *Taskforce for Action on Violence Within Families – Programme of Action 2012/2013* (December 2012).



*Ok?* Campaign, whose results have received positive endorsement from the Ministry of Social Development as well as the FVDRC.<sup>68</sup>

The FVDRC has advocated for inter-agency collaboration. Recommendations were made in its Third Annual Report,<sup>69</sup> which are summarised with corresponding agency responses in the Fourth Annual Report.<sup>70</sup> The first set of recommendations aimed to increase inter-agency collaboration; these included advocating for a management system in regards to high-risk cases that is consistent nationwide. Child Youth and Family responded that it would work with other agencies within the Children's Action Plan, a government initiative aimed to give effect to the White Paper for Vulnerable Children.<sup>71</sup> The Police responded asserting FVIARS has been reviewed and a new model developed to improve its efficacy.<sup>72</sup>

This small sample of evidence is a brief reflection of the view that many agencies hope to work together effectively, which could go a long way in improving the safety of those children whose voices may otherwise go unheard.

#### b. Vulnerable Children Act 2014

The Vulnerable Children Act 2014, which stemmed from the aforementioned White Paper for Vulnerable Children, aimed to reform several laws related to protecting children. The Act introduces compulsory child protection policies which must be adopted by several key institutions, such as schools and district health boards.<sup>73</sup> The policies must refer to the optional reporting provision in s 15 of the Children, Young Persons and Their Families Act 1989, but will have no legal effect.<sup>74</sup> The purpose of the policies is to “help encourage accurate reporting of suspected maltreatment and to provide clarity about identifying and responding to children who are being maltreated.”<sup>75</sup> Greater awareness and reporting of child abuse within our schools and health providers may improve inter-agency collaboration, as better relationships and understandings may be reached between these agencies.

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<sup>68</sup> Carswell, Atkin, Wilde, Lennan and Kalapu, above n 63, at 5; Family Violence Death Review Committee *Fourth Annual Report*, above n 5, at 77.

<sup>69</sup> Family Violence Death Review Committee *Third Annual Report*, above n 58.

<sup>70</sup> Family Violence Death Review Committee *Third Annual Report*, above n 58, at 23-25.

<sup>71</sup> “Action Plan” (25 June 2014) Children's Action Plan <[www.childrensactionplan.govt.nz](http://www.childrensactionplan.govt.nz)>.

<sup>72</sup> Family Violence Death Review Committee *Third Annual Report*, above n 58, at 23.

<sup>73</sup> Vulnerable Children Act 2014, ss 17-18.

<sup>74</sup> Sections 19-20.

<sup>75</sup> Vulnerable Children Bill (150-1) (explanatory note) at 5.

The second critical aspect of the Act is the worker safety provisions. The purpose of this Part of the Act is to “reduce the risk of harm to children by requiring people employed or engaged in work that involves regular or overnight contact with children to be safety checked.”<sup>76</sup> Specified organisations must check all new and current employees,<sup>77</sup> and are prohibited from hiring people who have committed a specified offence, where those people would or could be spending nights with children.<sup>78</sup> The specified offences include, inter alia, sexual crimes, wounding with intent, murder and attempted murder, as well as bestiality and dealing in slaves.<sup>79</sup>

#### c. s 195A Crimes Act

The criminal law also has a part to play in protecting children, whether it is by convicting people who are found to have assaulted or otherwise harmed a child, or by acting to deter potential perpetrators with the threat of sanctions. Section 195A of the Crimes Act 1961, “Failure to protect a child or vulnerable adult”, came into force on March 19<sup>th</sup> 2012 with an aim to do this. The effect of the provision is to penalise those who fail to take reasonable steps to protect a child (or vulnerable adult) who is at risk of death, grievous bodily harm, or sexual assault as a result of the unlawful act or omission of another person. A person is liable only if they have frequent contact or share a household with a child, or are a staff member at a hospital, institution, or residence at which the child resides. The section was a reaction to high profile cases of particularly brutal child abuse, such as that of Nia Glassie, in which a toddler was abused for an extended period of time by several adults.<sup>80</sup> Section 195A aimed to target such a situation, in which another avenue for conviction (with a maximum sentence of 10 years’ imprisonment) could be substituted where a lack of proof of actual murder or manslaughter exists. Although it may seem like an “ambulance at the bottom of the cliff” approach,<sup>81</sup> it was hoped that the threat of criminal conviction may encourage reporting of abuse by those who are in a position to speak up for a child. This may be the case, however with the high threshold for a child to be at risk of death, grievous bodily harm, or sexual assault, some may see what they consider “discipline” as not falling within the scenario the provision envisions.

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<sup>76</sup> Vulnerable Children Act 2014, s 21.

<sup>77</sup> Sections 25-26. Specified organisations are defined in s 24.

<sup>78</sup> Section 28.

<sup>79</sup> Schedule 2, “Specified offences”.

<sup>80</sup> *R v Curtis* HC Rotorua CRI-2007-063-4149, 4 February 2009. Facts at [9-24].

<sup>81</sup> Iain Lees-Galloway (10 May 2011) 672 NZPD 18535.

### III. What is still lacking

It is argued that the existing measures for protection do not go far enough to either prevent harm or rehabilitate offenders to reduce recidivism. The Vulnerable Children Bill initially contained Child Harm Prevention Orders. These were removed, arguably rightly so, as in the eyes of many respondents another piece of paper may be breached as easily as any other court order. Measures such as the Children Young Persons and Their Families Act restraining orders and the Domestic Violence Act protection orders already exist to do the same thing that the CHPO's would have achieved.

There are many stories of child abuse sadly resulting in death, but two have been selected to demonstrate where failings exist. The first is the story of James Whakaruru, a boy who was consistently let down by the inability of agencies to communicate to each other to address a known problem. The second is of Bradley and Ellen Livingstone, who were the victims of a system which allowed their father to breach a protection order twice with very little consequence.

James Whakaruru sustained ongoing abuse from his mother's partner, Ben Haerewa, until his eventual death at the age of 4 in 1999. Lack of inter-agency communication was evident throughout James' short life; when charged with injuring with intent, Haerewa was released on bail with conditions he was not to see James, was not to have access to James' mother's premises, and was to reside with his parents.<sup>82</sup> Child Youth and Family, while aware of the legal action being taken against Haerewa, had no knowledge that he was out on bail and were under the misapprehension he was in police custody. They told James' maternal grandparents to care for him and not to return him to his mother, and remained unaware of Haerewa's circumstances even when the Police found he had breached bail by residing with James and James' mother.<sup>83</sup> Upon conviction, Haerewa was imprisoned with further conditions that he be under supervision upon release, complete an anger management course and counselling (psychological and/or parenting) at the direction of the probation officer; however, due to an administrative error, these never reached the probation officer.<sup>84</sup> A temporary protection order was issued at the request of counsel for child at the time of Haerewa's release, but

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<sup>82</sup> Office of the Commissioner for Children *Final report on the investigation into the death of Riri-o-te-Rangi (James) Whakaruru, born 13 June 1994, died 04 April 1999* (2000) at 11.

<sup>83</sup> At 11.

<sup>84</sup> At 15. The supervision order was not with the court order.

neither CYF nor the Department of Corrections knew of this order which later became final.<sup>85</sup> Haerewa stopped reporting to the probation officer, and continued living with James and James' mother. James was no longer being checked on by CYF, and his mother had little to do with her family by this point.<sup>86</sup> Two serious injuries were recorded in the 12 months before James' death; whether more occurred is uncertain as James was seen by different practitioners.<sup>87</sup>

James' case is an example of legal measures being in place to protect a child, yet a lack of communication and co-operation resulted in inadequate enforcement. The case of the Livingstone children is one in which opportunities to enforce existed, yet were not utilized. A protection order was issued against the children's father, Edward Livingstone, in May 2013 following an application by the children's mother.<sup>88</sup> Livingstone breached the order twice; the first breach resulted in a police diversion,<sup>89</sup> the second in a discharge without conviction.<sup>90</sup> Livingstone travelled to the children's home on January 15 2014 and killed them both before then taking his own life.<sup>91</sup> With hindsight it is easy to stipulate that more ought to have been done to respond to Livingstone's earlier breaches of the protection order. However Livingstone, as an employee of the Department of Corrections, was able to argue that a conviction would be out of all proportion to the gravity of his offending as it may lead to an investigation by the Department.<sup>92</sup> The protected person in that case was reportedly "very anxious and fearful, and she felt alone and unprotected ... she remains fearful ... and describes feeling constantly harassed and fearful for her safety and that of the children."<sup>93</sup> While the judge who allowed Livingstone a discharge without conviction repeatedly asserted that he did not want to "demean or diminish" the considerable impact the breaches had had on Livingstone's ex-wife, his actions effectively did this.<sup>94</sup>

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<sup>85</sup> At 14-16.

<sup>86</sup> At 15

<sup>87</sup> At 16.

<sup>88</sup> *Police v Livingstone* DC Dunedin CRI-2013-012-002610, 15 November 2013 at [7]

<sup>89</sup> At [3]. Whether diversion was an available option in the circumstances has been questioned; David Fisher "Livingstone diversion a mistake" *The Otago Daily Times* (online ed, Dunedin, 25 February 2014).

<sup>90</sup> At [15]. This breach was in the form of repeated calls to his ex-wife's cell phone and landline.

<sup>91</sup> Patrice Dougan, Anna Leask, Brendan Manning and Kurt Bayer "Dunedin shooting: Triple fatal victims mourned" *The New Zealand Herald* (online ed, Auckland, 16 January 2014).

<sup>92</sup> *Police v Livingstone*, above n 88, at [10] and [14].

<sup>93</sup> At [7].

<sup>94</sup> At [12].

The remaining chapters of this dissertation will aim to argue that there should be systems in place that go beyond protection orders, and especially provisions that allow a protected person's views to carry weight. Further consideration will also be given to more effective methods of rehabilitation that may actively reform perpetrators in a way specific to their needs.

## Chapter Three: Protection

*Domestic Violence Act 1995, s 5: “The object of this Act is to reduce and prevent violence in domestic relationships by recognising that domestic violence, in all its forms, is unacceptable behaviour; and ensuring that, where domestic violence occurs, there is effective legal protection for its victims.”*

### I. Changing the system

Presently, the system surrounding protection orders is not doing enough to prevent recidivism. Further, protected people themselves do not always feel safe; a spokeswoman from Women’s Refuge as well as some who spoke to the Glenn Inquiry felt there was sometimes a lack of enforcement of orders following a breach.<sup>95</sup> The following discussion will not explore enforcement at the reporting stage; instead it will be constrained to those instances where a breach has occurred and been proved in court. Although the focus of this dissertation is on physical harm resulting in death, this discussion considers a breach in its full meaning as in the Domestic Violence Act, i.e. to do *any* act in contravention of, or fail to comply with a direction in, a protection order.<sup>96</sup> This includes non-physical contact, for example calling or texting.

On the 2<sup>nd</sup> of July 2014, it was announced that a series of intended reforms are being developed.<sup>97</sup> These reforms include, inter alia, mobile safety alarms with GPS technology for victims, as well as GPS monitoring of “high risk” domestic violence offenders.<sup>98</sup> This dissertation explores the possibility of using “panic buttons” and GPS monitoring of respondents in considering measures which may effectively prevent fatalities. It is argued that these new systems are midway between allowing a breaching respondent to walk free, and incarcerating them. It must be reiterated that attempts to combat family violence require a holistic approach, and it is impossible to fully cover the abundance of potential issues that

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<sup>95</sup> Interview with Anne Tolley and Sue Lytollis, above n 1. *The People’s Report*, above n 61, at 83; “Often people’s stories were about some Police officers’ lack of action regarding breaches of protection order” and, from a victim, “The Police pick and choose whether to act on a complaint about a breach of a protection order.”

<sup>96</sup> Domestic Violence Act 1995, s 49. Excludes failure to attend programmes.

<sup>97</sup> Anne Tolley and Judith Collins “Chief Victims Advisor underpins package to prevent family violence” (2 July 2014) Beehive: the official website of the New Zealand Government <[www.beehive.govt.nz](http://www.beehive.govt.nz)>.

<sup>98</sup> Monitoring of respondents will involve “exclusion zones” such as the victim’s home and work. Any entry into these zones will trigger an alarm. (02 July 2014) 700 NZPD 19115. The Minister of Corrections also stated this could include areas such as the schools of children who may be at risk (in Interview with Anne Tolley and Sue Lytollis, above n 1).

may arise in this discussion. Such issues include, for example, the value of risk profiling and the judicial discretion permitted by s 49.

Risk profiling can be valuable in assessing whether a respondent is likely to offend, and has come to the fore in recent years as the New Zealand Police have adopted the Ontario Domestic Assault Risk Assessment (ODARA) tool, which assesses the likelihood of recidivist domestic violence. It is an actuarial instrument which evaluates 13 factors in relation to a particular respondent. These factors include, inter alia, substance abuse, a history of domestic violence, and the victim's subjective fear that the respondent will repeat the violence.<sup>99</sup> The New Zealand Police published a report examining various risk assessment tools,<sup>100</sup> in which ODARA was observed to be the "most accurate in a police setting ... [garnering the] most support in the literature as a tool to predict family violence recidivism."<sup>101</sup> The adoption of ODARA by the Police is a relatively recent development, and provides insight into the ways that the issue of family violence is being reviewed and approached from new angles.

Section 49 provides a wide scope of judicial discretion. Respondents are able to breach protection orders without consequence if they can show "reasonable excuse."<sup>102</sup> The principles of the Sentencing Act 2002, which are treated equally, are also able to be construed in favour of leniency in regards to a respondent, in particular: the need to consider the gravity

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<sup>99</sup> N. Zoe Hilton, Grant T. Harris, Marnie E. Rice, Carol Lang, Catherine A Cormier and Kathryn J. Lines "A Brief Actuarial Assessment for the Prediction of Wife Assault Recidivism: The Ontario Domestic Assault Risk Assessment" (2004) 16 Psychol Assess 267 at 271 stipulates all the factors as follows: whether the respondent 1) has a prior domestic assault against a partner or child on record, 2) has a prior non-domestic assault against anyone other than a partner or child on record, 3) has had a prior sentence to a term of 30 days or more, 4) has a prior failure on conditional release including bail, parole, probation, no-contact order, 5) has threatened to harm or kill anyone during index offence, 6) unlawful confinement of victim during index offence, 7) victim fears repetition of violence, 8) victim and/or offender have more than one child together, 9) offender is in stepfather role in this relationship, 10) offender is violent outside the home (to people other than a partner or child), 11) offender has more than one indicator of substance abuse problem, 12) offender has ever assaulted victim when she was pregnant, 13) victim faces at least one barrier to support.

<sup>100</sup> Melanie Brown *Family Violence Risk Assessment: Review of International Research* (New Zealand Police, August 2011).

<sup>101</sup> At 39. It is important to note that the report goes on to suggest a different tool for use to predict *lethality*, as opposed to recidivism broadly. However at page 8 of the report it was observed that although ODARA does not attempt to identify cases most likely to end in death, "research indicates that high scores on the ODARA indicate a higher risk of serious harm or lethality."

<sup>102</sup> Domestic Violence Act 1995, s 49(2).

of offending,<sup>103</sup> the seriousness of the offence,<sup>104</sup> the requirement for the least restrictive outcome possible,<sup>105</sup> and the duty to avoid a disproportionate sentence considering the offender's circumstances.<sup>106</sup> It is arguable that these principles, used objectively, do not necessarily translate appropriately to cases of protection order breaches, which often occur within domestic relationships which are inherently private. In particular the gravity of the offending and the seriousness of the offence are considerations which are extremely unique to the parties concerned, and may not be easily understood in an objective sense by a judge who has a duty to maintain consistency in following similar sentencing approaches as in "similar offences in similar circumstances."<sup>107</sup>

It is arguable that s 49 should include a mandatory consideration of the protected person's perception. It seems contradictory that the Court *must* have regard to the perception of this person in deciding whether to issue the protection order,<sup>108</sup> yet there is no such requirement when an order has been breached. It is a principle of the Sentencing Act that such considerations are relevant,<sup>109</sup> yet in practice this has the potential to be overshadowed by other principles such as those traversed above. As extracts from the Livingstone judgment included in Chapter Two demonstrated, the protected person in that case was immensely affected by the offending, however the respondent was nonetheless discharged without conviction and suffered very minimal sanctions.<sup>110</sup> It is suggested that the requirement that a protected person's perception have weight be given a higher status in cases of protection order breaches, and set above the general principles of the Sentencing Act.

## **II. The Tiered Approach**

It is proposed that the mandatory consideration of the perception of a protected person be used by the Courts to guide them in administering a new system of sanctioning offenders, which has here been termed "the tiered approach." The ensuing discussion explores some short-term measures that may operate to protect victims who require protection immediately. The tiered approach is a loose structure within which respondents who breach protection orders may be sanctioned. It is hoped that the view of a protected person will provide real

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<sup>103</sup> Sentencing Act 2002, s 8(a).

<sup>104</sup> Section 8(b).

<sup>105</sup> Section 8(g).

<sup>106</sup> Section 8(h).

<sup>107</sup> Section 8(e).

<sup>108</sup> Domestic Violence Act 1995, s 14(5)(a).

<sup>109</sup> Sentencing Act 2002, s 8(f).

<sup>110</sup> A \$500 donation to Dunedin Stopping Violence; *Police v Livingstone*, above n 88, at [16-17].



guidance as to whether a respondent poses an appreciable risk which warrants the imposition of a relevant tier.

Tier One is the current system as outlined above, whereby a respondent has a protection order issued against them which restricts their ability to approach or contact a protected person. If a protection order is breached by a respondent, then Tier Two may apply. Tier Two represents a departure from the current system, involving two different directions available for a court to make. These will be explained in more detail below, however put briefly are “panic buttons” for a protected person, or electronic monitoring of a respondent. While electronic monitoring is already available within the hierarchy of potential sentences,<sup>111</sup> it is proposed that protection order breaches should consider this as a minimum response in cases where protection is necessary. Should a respondent breach again, then Tier Three may apply, which is imprisonment. Like Tier One, Tier Three does not represent a shift from the current law as imprisonment for breach of a protection order is already provided for by s 49(3), as discussed above in chapter two.

It is not proposed that the tiered approach need be followed to the letter. Depending on the seriousness of the breach, different sanctions may be imposed at different stages. For example a particularly threatening respondent may have Tier Two sanctions imposed at the issue of a protection order for the victim’s safety; however this discretion should only be exercised where a criminal conviction is issued concurrently.<sup>112</sup> A particularly severe breach at Tier One may warrant imprisonment before the Tier Two stage is trialled.

### **III. Panic buttons**

Panic buttons may take different forms. For example, in the context of the United States, they have been trialled as triggers within a protected person’s home.<sup>113</sup> In Argentina, they have taken the form of a portable, GPS tracking device to be carried by the protected person.<sup>114</sup> Both types send an alert to emergency services.

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<sup>111</sup> Sentencing Act 2002, s 10A.

<sup>112</sup> For example under s 194(b) of the Crimes Act 1961.

<sup>113</sup> Debra Sheer Haverson “AS/400 speeds domestic violence response” (1996) 9 MIDRANGE Systems 12, and Nancy Pfister “New device helps domestic violence victims (2000) 17 Orlando Business Journal 11.

<sup>114</sup> Craig Paterson and Kerry Clamp “Innovating Responses to Managing Risk: Exploring the Potential of a Victim-Focused Policing Strategy” (2013) 8 Policing: A Journal of Policy and Practice 51.

When triggered, the US panic buttons would instigate a response from police, who were able to be en route to the home within 45 seconds.<sup>115</sup> While travelling, an officer would be fed information on the specific case in question, for example a description of the respondent and whether he/she was known to have a weapon.<sup>116</sup> Thus a protected person may summon emergency services, who are able to respond quickly and effectively having been familiarized with their individual circumstances in transit. This would work best in urban areas where emergency services have the opportunity to get to the scene quickly. While this may be an effective tool in many circumstances of breach, its efficacy may be questionable where a respondent travels to a protected person's home with the intention of killing them and/or their children. In these circumstances, triggering an alarm may be too late, no matter how efficient the response.

This problem is again encountered when considering the type of portable panic button trialled in Argentina.<sup>117</sup> These buttons simultaneously contact emergency services and allow for direct communication, while also utilizing GPS technology so that the location of the protected person is readily identifiable.<sup>118</sup> Once location is established, a response may then be coordinated with the nearest police authority that is able to respond. As with the aforementioned US use of panic buttons, information on the individual case is communicated to the responding officers as well as a photograph of the protected person, which ensures they are readily identifiable if located in a public area.<sup>119</sup> This study acknowledged the limits of utilizing panic buttons, in that it “[cannot] provide the physical protection required in the highest risk cases.”<sup>120</sup>

Thus while panic buttons may provide a method by which breaches may be discouraged, as well as assistance where non-fatal breaches occur, they may not prove effective where a potential homicide is imminent. It is possible that, in deciding whether panic buttons or electronic monitoring ought to be used, effective models of risk assessment such as ODARA may be utilized in conjunction with considerations of the protected person's perception.

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<sup>115</sup> Haverson, above n 113.

<sup>116</sup> At 12.

<sup>117</sup> Paterson and Clamp, above n 114.

<sup>118</sup> At 53.

<sup>119</sup> At 53.

<sup>120</sup> At 55.

#### IV. Electronic monitoring

Electronic monitoring provides a method by which authorities can directly monitor a respondent's movements. A study conducted in the United States found that electronic monitoring had the potential to increase the efficacy of protection orders.<sup>121</sup> The context of this study used electronic monitoring as a form of "diversion." This refers to methods which are used before a charge is laid and/or the trial process to "divert" offenders from the criminal justice system and thus from incarceration.<sup>122</sup> For the purposes of the following analysis, the results of this study will be considered in light of how they may apply to protected persons who have breached a protection order and are liable to Tier Two sanctions.<sup>123</sup>

There are many potential benefits in using electronic monitoring. Protection orders can be breached, and if the respondent denies a breach, there may be little or no proof with which a protected person can claim their version of events as the correct one.<sup>124</sup> Monitoring provides a way by which any attempted or actual physical contact will be objectively verified, and can act as a deterrent to respondents.<sup>125</sup> Further, it provides a way by which supervising authorities can immediately be aware of a breach and can respond accordingly.

The study used radio-frequency technology, as opposed to GPS.<sup>126</sup> This consisted of a transmitter attached to the respondent's ankle, and a transmitter at his/her residence as well as the protected person's residence. Thus supervising officers were alerted once the respondent left his own residence, and also when the respondent came within 500 feet of a protected

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<sup>121</sup> Peter R Ibarra and Edna Erez "Victim-centric Diversion? The Electronic Monitoring of Domestic Violence Cases" (2005) 23 Behav. Sci. Law 259.

<sup>122</sup> At 259-260.

<sup>123</sup> For this reason, many of the criticisms identified by the study on the use of electronic monitoring become redundant. These include the way that monitoring a person before they have been formally charged or tried "flies in the face of the presumption of innocence" (at 265). A further criticism considered the phenomenon of "net-widening", by which people who would ordinarily have fallen out of the criminal justice system are drawn into it, resulting in a prolonged "entanglement" with the criminal justice system (at 272-273). Judges who may ordinarily have refrained from sanctioning a person may see electronic monitoring as a safeguard; "Nobody wants to be the next judge who let [a murderous defendant] go free." (at 273). These criticisms are less applicable to the tiered model, which operates on the basis that a breach of a protection order has been proved and the only question remaining is as to the appropriate sanction.

<sup>124</sup> At 262: "... the issue can come down to a 'he said, she said' situation in the absence of proof that the defendant made the contact alleged in their affidavit."

<sup>125</sup> At 262.

<sup>126</sup> At p 263. Such technology is also available in New Zealand: Department of Corrections "Electronic Monitoring" <[www.corrections.govt.nz](http://www.corrections.govt.nz)>.

person's home.<sup>127</sup> The potential that such technology could have in the context of protection orders is enormous. It is impossible to monitor every aspect of people's lives, and as will be discussed in the following paragraph, electronic monitoring will not guarantee protection. However it is an important step which may provide some level of warning to authorities and protected persons. As discussed above in relation to panic buttons, police may be able to act as soon as a threat is known to exist. However with electronic monitoring this knowledge will come at the moment a respondent breaches curfew. A response may then be coordinated, perhaps with such information on the individual case at hand as was considered in the discussion on panic buttons. Further, a protected person may be equipped with things such as "a pager to receive messages from the monitoring center ... a cellular phone pre-programmed to notify authorities ... [and/or] a field-monitoring device to alert her to the approach of the defendant while she is away from her home receiver."<sup>128</sup> Providing a protected person with the ability to be forewarned may prove an invaluable tool. Police resources may not extend to attending on every breach that occurs, nor will they necessarily reach the protected person's home in time. As soon as a respondent breaches curfew and a protected person is alerted, he/she may then respond by taking necessary measures to avoid any potential confrontation or threat of harm.

There are some adverse consequences of electronic monitoring. These include the stigma associated with having an ankle bracelet, particularly in terms of a respondent's employer.<sup>129</sup> There is also an inherent loss of liberty that comes with supervision and curfews, however such considerations are true of any form of electronic monitoring regimen. A respondent issued with a protection order will be aware that a breach is a criminal offence by virtue of s 49, and if electronic monitoring is imposed on them as a result it is arguably a foreseeable consequence which they may be expected to endure in the interests of a protected person's safety. As will be discussed in chapter four, such monitoring may contribute to the rehabilitation of a respondent, which could serve to mitigate any perceptions of electronic monitoring being an unduly severe sanction.

In a practical sense electronic monitoring does not provide for a flawless and impenetrable wall of protection. The study observed that monitoring may provide warning to a protected person and the authorities and act as a deterrent to a respondent but "will not deter someone

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<sup>127</sup> Ibarra and Erez, above n 121, at 263.

<sup>128</sup> At 263.

<sup>129</sup> At 272.

who is determined to hurt a ‘protected’ party and [is] unconcerned about the personal consequences.”<sup>130</sup> It seems that imprisonment is the only way to ensure a person is physically restrained from attempting contact. Further, the study observed that monitoring only extends as far as monitoring physical contact and does not provide safeguards against incidents such as texting or calling.<sup>131</sup> As a digression, it is worth noting that the cost to the taxpayer of monitoring versus imprisonment in the US was USD\$7.16 per day for a respondent to be monitored, and USD\$65 to house them in prison.<sup>132</sup>

While not a perfect system, electronic monitoring has the potential to be invaluable as a measure of indirect protection. As briefly mentioned above, the technology has the potential to provide a protected person with a forewarning as soon as a respondent breaches curfew and leaves their home. The protected person may then have a safety plan in place by which they may travel, along with any children, to a trusted person’s home or an agency such as Women’s Refuge. This would be effective in both rural and urban settings, which is something that was not achieved by panic buttons, whose effectiveness was relatively limited to urban situations. Rurally, a protected person will likely live far enough away from a respondent that at the first alert of breach of curfew the protected person can travel to a safe location. Should the protected person live in an urban location the same process could presumably take place.

Had such measures been in place in the Livingstone case, tragedy may have been avoided. Had Katharine Webb’s subjective fear been taken account of, and electronic monitoring in place, it is possible she may have had the opportunity to leave her property before her ex-husband arrived. Such observations are easy to make with the benefit of hindsight; however it is important that such tragedies be considered in such light for the benefit of future potential victims.

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<sup>130</sup> At 263, footnote 8.

<sup>131</sup> At 263.

<sup>132</sup> At 266.

## Chapter Four: Reformation

*You can't just be one sided and say "go out and sin no more". You've got to say, "let us help you sin no more".*<sup>133</sup>

### I. Provision of programmes in New Zealand

Currently, the New Zealand legislation relating to the provision of non-violence programmes under the Domestic Violence Act 1995 is in a state of transition. The current and future law (as of October 2014) will be described, followed by an analysis of the approval process for programme providers, and the efficacy of such programmes. Next, it will be proposed that the approval of programmes should take into account a new focus providing for more Maori-specific programmes with reference to restorative justice processes. Lastly an analysis of how rehabilitation and protective measures may interact concurrently will be considered.

#### 1. Legislation

This section gives a general overview of the process involved when prescribing a non-violence programme to a respondent who has been issued with a protection order. An analysis of what the changing law means for the current process will also be discussed.

##### a. Direction to a rehabilitative programme

As was traversed briefly in chapter two, the current law on rehabilitative programmes requires the Court to presume a respondent must attend a programme where a protection order is imposed; however this presumption may be displaced if there is a "good reason" for not making such a direction. This may include (without limiting subsection (1)) circumstances where there is "no programme available that is appropriate for the respondent, having regard to his or her *character and personal history* and any other relevant circumstances".<sup>134</sup> The frequency with which courts have directed respondents to programmes when issued with a protection order has been decreasing. In the financial year 2011/2012, there were 4,074 temporary and/or final protection orders granted; 3,767 of these included a referral to a programme (92%). In the year 2012/2013, 3,732 of 4,147 protection

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<sup>133</sup> Ibarra and Erez, above n 121, at 269 quoting an American judge.

<sup>134</sup> Domestic Violence Act 1995, s 32(4). Emphasis added.

orders included a referral (90%). In the year 2013/2014, 3,978 of 4,660 protection orders resulted in referral (85%).<sup>135</sup>

The proposed reform of this section as it stood prior to referral to the Select Committee maintained the inclusion of the considerations mentioned above.<sup>136</sup> These factors had existed in s 32 since its commencement in July 1996,<sup>137</sup> however the proposed new s 32 elicited a negative response in submissions to the Select Committee. It was observed that doing “nothing but [restructuring] the same wording” preserves “vague reasons [leaving] far too much room for judges to decide not to direct respondents to programmes for very little reason.”<sup>138</sup> Some took a more cynical view, with one submission stating “judges seem loath to punish men they believe are of such ‘good character’ (i.e. from the right side of the tracks) so as not to require a penalty for their offending”, citing the Bristol case.<sup>139</sup>

Following the Select Committee stage, s 32 was replaced with its equivalent s 51D.<sup>140</sup> This section retained its wording during the passage of the Domestic Violence Amendment Act<sup>141</sup> and thus came into force as such in October 2014. The new wording removed any of the considerations that had previously existed, stating the reasons for exercising the discretion to refrain from directing a respondent to attend a non-violence programme were (a) if no service provider is available or (b) if there is any other good reason to not make the direction.<sup>142</sup> As of yet it is not clear whether this will have a substantial impact on the frequency with which the courts will direct a respondent to attend a non-violence programme. The same considerations may continue to be utilised by judges despite their removal from legislation, or the process may be left to judicial determination as to what constitutes a “good reason”.

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<sup>135</sup> Cases with protection orders granted in Family and Criminal Courts and referrals to non violence programmes in the last three financial years, nationally (Obtained under Official Information Act 1982 Request to the General Manager of District Courts, Ministry of Justice).

<sup>136</sup> At clause 40 of the Family Court Proceedings Reform Bill (90-1). The provision was re-formatted to be in list form followed by a general reference to “any other good reason” for not making a direction. The full clause is contained in the attached appendix.

<sup>137</sup> The Domestic Violence Act came into effect on 1<sup>st</sup> July 1996 pursuant to cl 3(1)(b) Domestic Violence Act Commencement Order 1996.

<sup>138</sup> SHINE – Safer Homes in New Zealand Everyday “Submission on Family Court Proceedings Reform Bill to the Justice and Electoral Committee” at 18.

<sup>139</sup> Homeworks Trust “Submission to the Family Court Proceedings Reform Bill” at [25]. See Ruth Busch and Neville Robertson “I Didn’t Know Just How Far You Could Fight: Contextualising the Bristol Enquiry” (1994) 2 Wai L Rev. 41 on the Bristol case.

<sup>140</sup> Family Court Proceedings Reform Bill (90-2), cl 52A.

<sup>141</sup> Domestic Violence Amendment Act 2013, s 13.

<sup>142</sup> Section 51D(2).

## b. Assessment stage

A critical amendment to s 32 was the introduction of an assessment stage prior to referral, which is aimed to ensure that the “programme is provided based on the violent person’s needs.”<sup>143</sup> This received support from the opposition<sup>144</sup> and in submissions to the select committee,<sup>145</sup> however was not without criticism. In the submission of the Family Court Judges of New Zealand, it was stated that although the assessment will allow greater flexibility in allocating a programme to a respondent, this does not go far enough. The Judges argued that correspondingly the Courts are limited by their inability to prescribe programmes outside of the non-violence model.<sup>146</sup> It was observed that consistently prevalent issues in cases of family violence, such as alcohol and drugs, may need to be addressed by allowing Judges to direct respondents to programmes that address these types of substance abuse.<sup>147</sup>

The assessment stage is an entirely new addition to the Act. Previously, under s 32, it had been the domain of the Courts to allocate an approved programme for the respondent to attend. However s 51D now dictates that the Court must first order an assessment before directing programme attendance. “Assessment” is defined in the interpretation section of the new Part 2A as being “an assessment undertaken by a service provider to determine (a) the extent to which the respondent poses a safety risk to any person or the public, and (b) what, if any, non-violence programme is the most appropriate for the respondent to attend.”<sup>148</sup> It is not clear from the legislation whether a Court is bound to accept the recommendation of a service provider, or whether a discretion remains to direct the respondent to go to a different programme. It was hoped that this new practice may improve the process so that the provision of programmes will be more effective, a way to “tailor the services to more effective responses.”<sup>149</sup>

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<sup>143</sup> Judith Collins (03 September 2013) 693 NZPD 13208.

<sup>144</sup> Phil Goff (18 September 2013) 693 NZPD 13487.

<sup>145</sup> Relationships Aotearoa “Submission from Relationships Aotearoa to The Ministry of Justice Re: Family Court Proceedings Reform Bill”, at 20.

<sup>146</sup> Family Court Judges of New Zealand “Family Court Proceedings Reform Bill 2012: Submission of the Family Court Judges of New Zealand” at [99-100].

<sup>147</sup> At [100 and 101].

<sup>148</sup> Domestic Violence Act 1995, s 51A.

<sup>149</sup> Phil Goff, above n 144.



### c. New and removed provisions

Most of ss 29-44 of the Domestic Violence Act effectively continues with some amendments under different section numbers (ss 51A-51T), with the exception of sections 30-31 and 38. Section 30 was a commencement provision, and thus is now redundant.

Section 38 allowed a programme provider the discretion to excuse a respondent from a failure to attend one or more sessions.<sup>150</sup> The new provisions that seem to come into effect where a respondent fails to attend a session are sections 51M(1)(b), 51N(1)(b), and 51T. S 51M(1)(b) requires a service provider to notify the Registrar if “the respondent is not participating fully in the programme, and this is significantly affecting the respondent’s ability to benefit fully from the programme”; this may be taken to include failed attendance, though would likely include chronic failure as opposed to one due to, for example, “illness or injury”.<sup>151</sup> This conclusion may be reached by considering the seriousness of the consequences of a notification under s 51M.<sup>152</sup> These are that the Registrar must either refer the respondent to a new service provider, or bring the matter to the attention of a Judge.<sup>153</sup> Section 51N(1)(b) applies where a respondent fails to “attend a non-violence programme in accordance with terms of attendance settled under s 51L.”<sup>154</sup> Upon this failure, the service provider must notify the Registrar who will then utilise powers available under s 51O; either to call the respondent before the court or to refer the matter to a Judge, who may choose to exercise its power to call the respondent before the court.<sup>155</sup> If either the Registrar or the Court calls the respondent before the Court, s 51Q comes into effect. This allows the court to “confirm, vary, or discharge the direction or change the terms of attendance” and, in doing so, is then required to warn the respondent that non-compliance with a direction is an offence punishable by imprisonment. This is provided for by s 51T, which states that failure to comply with a direction made under s 51D is an offence, which could result in up to a \$5,000 fine or 6 months’ imprisonment.

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<sup>150</sup> An excusal may be made due to “special conditions” (Domestic Violence Act 1995, prior to October 2014, s 38(1)), or illness or injury (s 38(2)) but a respondent may have to make up for the missed session (s 38(3)).

<sup>151</sup> A consideration under the old s 38(2).

<sup>152</sup> This may also be supported by the statement by the Ministry of the Justice, that the programme provider will report to the court where there has been “*significant* non-attendance by a respondent at non-violence programmes.” Ministry of Justice *Domestic Violence Service Provider Update* (May 2014), at 16.

<sup>153</sup> Domestic Violence Act 1995, 51M(3).

<sup>154</sup> Section 51L requires the service provider and respondent to agree on the terms of attendance, such as the number of sessions, and the place, date, and time of the sessions.

<sup>155</sup> Section 51P. The power to call a respondent before the court is found in section 82.

Thus as the legislation currently stands it seems that failure to attend a session will not be excusable at the discretion of the service provider, but will instead result in a somewhat convoluted process. It may be that the new regulations will provide for this scenario, as it seems bound to occur relatively frequently. The repeal of s 38 received some criticism for other reasons, one organisation expressing concern that programmes would no longer be obliged to ensure programme attendance.<sup>156</sup>

Section 31 states that a protected person and a respondent cannot be required to attend a session at which the other is present. When first introduced, the Family Court Proceedings Reform Bill proposed to amend s 31 to essentially have the opposite effect.<sup>157</sup> Provided both parties consented and the programme provider was satisfied that no safety risk existed,<sup>158</sup> the protected person and respondent would be permitted to attend the same session.<sup>159</sup> This proposed reform encountered great resistance; some submitters desiring a more comprehensive process to ensure safety, while others opposed the entire idea of joint programmes as a whole.<sup>160</sup>

Recommendations included limiting the circumstances in which a joint programme would be appropriate by going beyond the requirement that a programme provider merely needed to be satisfied no safety issues exist before the programme could go ahead. It was proposed that joint programmes only be sanctioned where every measure has been taken to maximise safety. This proposal came in several different forms; one submitter suggested a system of management and arrangements be provided for by the legislation.<sup>161</sup> Another submission suggested limiting instances of joint counselling to cases of “low level violence.”<sup>162</sup> A

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<sup>156</sup> SHINE Submission, above n 138: “It is important that the law provide clarity around programme attendance, and provide an assumption that missed sessions must be made up. Without this section in law, it is likely that there will be enormous variation between programmes’ attendance requirements, and providers will no longer be accountable to the courts for ensuring that respondents regularly attend the programme.”

<sup>157</sup> Family Court Proceedings Reform Bill (90-1), clause 40.

<sup>158</sup> Clause 40: The provider was to be one “authorised to undertake both domestic violence support programmes and non-violence programmes”

<sup>159</sup> Clause 40.

<sup>160</sup> National Collective of Independent Women’s Refuges Inc. “Submission on the Family Court Proceedings Reform Bill” at 6, had “strong concerns about whether joint programmes (in and of themselves) can ever be truly safe for any of the participants,” preferring any contact between the parties to occur in the context of whanau and pasifika based programmes.

<sup>161</sup> Every Child Counts “Submission to the Justice Select Committee on the Family Court Proceedings Reform Bill”, at 15.

<sup>162</sup> Auckland District Law Society Inc “Submissions on the Family Court Proceedings Reform Bill by the Family Law Committee of the Auckland District Law Society Incorporated” at [272].

suggested alternative was for joint programmes to only be considered where a respondent has already fully completed a programme on their own.<sup>163</sup>

Something which was seen to be a recurring concern in submissions, and which is critical when considering the area of family violence, is the inherent power imbalances which exist in violent relationships. One submission warned against underestimating the “controlling dynamics of domestic violence,” advocating for programme providers to be trained so that women and children could remain safe.<sup>164</sup> It was suggested that the process should take into account that parties to a protection order, particularly the applicant, may not be able to fully consent to joint programmes.<sup>165</sup> This was described in one submission as being due to the “pattern of dominance”, which permits a perpetrator physical and psychological control over an applicant.<sup>166</sup>

One proposal was that a joint programme should be demonstrably justified by a programme provider to be *needed*.<sup>167</sup> It is not entirely clear what is meant by this, but it is possible that the concept of reconciliation was a consideration.<sup>168</sup> If correct, it seems questionable to have preservation of a relationship as a goal, particularly where children are likely to be affected. The situation is intrinsically an unsafe one; it was observed that to consider no safety concerns exist is “ludicrous given that the couple are an applicant and respondent of a protection order.”<sup>169</sup> This remains true of children that are party to the relationship, as it may be against their interests for their parent(s) to be put in a situation where restoration of a potentially violent relationship is promoted. Concerns as to the consequences of the proposed s 31 for children were notably underrepresented in submissions; the Children’s Commissioner suggested an amendment that the provider of a joint programme be satisfied it will not be “contrary to the welfare and best interests of any protected child.”<sup>170</sup> Given the hostile response to the proposed s 31 it is unsurprising that it was removed entirely from the Bill.

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<sup>163</sup> SHINE Submission, above n 138 at 17.

<sup>164</sup> Women’s Centre Rodney “Submission on the Family Court Proceedings Reform Bill” at 6.

<sup>165</sup> Equal Justice Project “Submission: Family Court Proceedings Reform Bill” at 11; Community Law Canterbury “Submission on the Family Court Proceedings Reform Bill” at 5; SHINE Submission, above n 138, at 17 (observing that applicants may feel coerced).

<sup>166</sup> Equal Justice Project Submission, above n 165, at 11.

<sup>167</sup> At 12.

<sup>168</sup> As it was in the Women’s Centre Rodney Submission, above n 164, at 6.

<sup>169</sup> At 6.

<sup>170</sup> Children’s Commissioner “Submission to Justice and Electoral Committee: Family Court Proceedings Reform Bill” at 10.

Currently, a programme provider must notify the Registrar of both the conclusion of a non-violence programme as well as the extent to which the respondent participated.<sup>171</sup> The proposed amendment to s 40 removed any requirement to report on the respondent's participation,<sup>172</sup> which resulted in strong criticism from the Family Court Judges of New Zealand. The Judges considered that in removing this critical aspect of s 40 the Bill contradicted the Ministry of Justice's express statement that "a final outcomes report" would be provided upon completion of a programme.<sup>173</sup> The Judges suggested this aspect of the section be re-instated, and further advised that an applicant should be given the opportunity to contribute to a report.<sup>174</sup> Ultimately, the Domestic Violence Amendment Act equivalent of s 40 (s 51R) contained the first of the Judges' recommendations, i.e. that the respondent's participation be reported on, but did not contain anything pertaining to an applicant's ability to contribute to that report.

## 2. Regulations

The regulations made under the Domestic Violence Act 1995 were critical in determining which providers are approved to deliver programmes to respondents. The process of approval was a two-stage one, requiring clearance from the chief executive before being referred to the approval panel.<sup>175</sup> As of 1<sup>st</sup> October 2014, the approach to authorising providers has been transformed.

### a. Purpose of programmes

The purpose of programmes may be deduced by reference to the overall objects provided by s 5 of the Domestic Violence Act, and reg 32 of the Regulations, entitled "Goals of respondents' programmes". The object of the Act is "to reduce and prevent violence in domestic relationships by recognising that domestic violence, in all its forms, is unacceptable behaviour; and ensuring that, where domestic violence occurs, there is effective legal protection for victims."<sup>176</sup> These objects are said to be achieved by virtue of orders under the

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<sup>171</sup> Domestic Violence Act 1995, s 40.

<sup>172</sup> Family Court Proceedings Reform Bill 90-1, 27<sup>th</sup> November 2012, clause 43, s 40.

<sup>173</sup> Family Court Judges of New Zealand submission, above n 146, at [106].

<sup>174</sup> At [107].

<sup>175</sup> Domestic Violence (Programmes) Regulations 1996, reg 13A(2). As in the Domestic Violence Act 1995, the chief executive is defined as the chief executive of the Ministry of Justice (reg 2(1)).

<sup>176</sup> Domestic Violence Act 1995, s 5(1)(a-b).

Act,<sup>177</sup> efficient and simple processes,<sup>178</sup> programmes for both victims and respondents,<sup>179</sup> and by effective sanctions.<sup>180</sup>

Reg 32(1) states that the primary objective for programmes is to stop or prevent domestic violence on the part of respondents, in line with s 5 of the Domestic Violence Act. Reg 32(2) summarises the ways in which respondents' behaviour may be changed:

### **32. Goal of respondents' programmes**

...

(2) Every programme for respondents ... must have the goal of the changing behaviour of those respondents ... by—

(a) increasing understanding about the nature and effects of domestic violence, including the intergenerational cycle of violence; and

(b) increasing understanding about the object of the Act and the way in which the Act operates, including the effect of protection orders and the consequences of breaching protection orders; and

(c) increasing understanding about the social, cultural, and historical context in which domestic violence occurs; and

(d) increasing understanding about the impact of domestic violence on the victim, including its effect on children; and

(e) increasing understanding about the effect that patterns of abusive behaviour have on the victim; and

(f) developing skills to deal with potential conflicts in non-abusive ways.

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<sup>177</sup> Domestic Violence Act 1995, s 5(2)(a) “empowering the court to make certain orders to protect victims of domestic violence.”

<sup>178</sup> Section 5(2)(b) “ensuring that access to the court is as speedy, inexpensive, and simple as is consistent with justice.”

<sup>179</sup> Section 5(2)(c) “providing, for persons who are victims of domestic violence, appropriate programmes” and s 5(2)(d) “requiring respondents and associated respondents to attend programmes that have the primary objective of stopping or preventing domestic violence.”

<sup>180</sup> Section 5(2)(e) “providing more effective sanctions and enforcement in the event that a protection order is breached.”

Many of these mandatory considerations are education-centric, aiming to “increase understanding” of various aspects of domestic violence. It is commendable that underlying features are targeted, such as the cyclical aspect of family violence, its context, and its effect on people who suffer. Without addressing the roots of the problem, efforts to reform and actively adjust behaviour (as reg 32(2)(f) aims to achieve) may be destined to fail as old habits resume. Unfortunately, although this approach to programmes looks good on paper, in practice respondents often do resume their previous way of living. As one perpetrator of family violence commented to the Glenn Inquiry, “... *All the life skills we learn, we learn through repetition. And when your life skills are a repetition of violence after violence after violence, that’s what you learn and that’s what you carry.*”<sup>181</sup> The recommendations as proposed by the Glenn Inquiry will be discussed later in this chapter.

#### b. Approval process

Programme providers were approved based on whether they meet the requirements contained in regs 15 and 16 (individuals), or regs 21 and 22 (agencies).<sup>182</sup> If the chief executive called for applications,<sup>183</sup> all applications were required to be considered.<sup>184</sup> The chief executive would refer an applicant to the approval panel if regs 15(3) and 16 were met (in the case of an individual), or if reg 22 is met (in the case of an agency).<sup>185</sup> The approval panel was constituted by virtue of Part 4 of the Regulations (regs 46-58), but was disestablished and all its prior approvals have been declared invalid.<sup>186</sup>

Thus, as of October 1<sup>st</sup> 2014, existing approval of programmes became void.<sup>187</sup> Newly enacted section 51B of the Domestic Violence Act empowers the Secretary to contract a

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<sup>181</sup> *The People’s Report*, above n 61, at 115.

<sup>182</sup> These regulations have since been repealed.

<sup>183</sup> Domestic Violence (Programmes) Regulations 1996, reg 12.

<sup>184</sup> Regulations 13A(1)(a) and 19A(1)(a).

<sup>185</sup> Under reg 13A(2) the chief executive will not refer an individual programme provider to the approval panel if that individual has been the respondent of a protection order, or has been convicted of a domestic violence offence, in the 3 years preceding the application (reg 13A(2)). In order to reach the approval panel stage an individual must also satisfy the requirements of reg 16, which pertain to various conditions relating to authenticity. These include, inter alia, that the individual is a member of a professional body which has a code of ethics, effective complaints procedure, and continuing education requirements. Under reg 19A(2), an agency will only be referred to the approval panel if satisfied the agency meets the requirements under reg 22. This is similar to reg 16, in that it pertains to ensuring legitimacy by virtue of ethics, complaints procedure, and ongoing education.

<sup>186</sup> Domestic Violence Amendment Act 2013, s 138.

<sup>187</sup> Domestic Violence Service Provider Update, above n 152, at 2.

provider to provide services if that provider satisfies criteria made by regulations pursuant to s 127(a)(ii). The Ministry of Justice has stated that such criteria will include the following:

The programmes must observe the below principles–

- “The safety of protected people and their children is paramount.
- Respondents must be held accountable for their behaviour.
- Programmes should be responsive to the individual needs of participants.
- Challenging domestic violence requires a sustained commitment to safe and research-informed practice.
- Improving safety and accountability is best achieved through an integrated, systemic response that ensures agencies work together.”<sup>188</sup>

The provider must–

- “demonstrate a credible history of working in applicable domestic violence services
- meet the Ministry of Social Development Standards for Approval at Level 2<sup>189</sup>
- demonstrate an ability to meet the Ministry of Justice domestic violence provider Code of Practice relevant to the approval type sought.”<sup>190</sup>

If a provider satisfies the above three requirements, they are eligible to be contracted by the Secretary. The remainder of this section aims to consider the efficacy of programmes under the previous system, and the next part of this chapter will propose ways in which the Secretary may consider a new focus when approving programmes in terms of greater contracting of Maori-specific programmes.

### 3. Efficacy

Former Principal Family Court Judge Peter Boshier criticised the value of non-violence programmes, making important observations about the results for respondents.<sup>191</sup> Judge Boshier noted that several evaluations of programme success yielded promising results, such

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<sup>188</sup> At 5.

<sup>189</sup> The requirements for attaining Level 2 approval may be found at Ministry of Social Development *Community Service Standards for Approval* (2014).

<sup>190</sup> Domestic Violence Service Provider Update, above n152, at 2.

<sup>191</sup> Peter Boshier, Principal Family Court Judge “Are stopping violence programmes worthwhile?” (speech at Domestic Violence Hui, North Shore, Auckland, 16 February 2009).

as a report issued by the Institute of Criminology at Victoria University in 2000.<sup>192</sup> This report involved interviewing respondents at their entry into programmes, immediately after they concluded, and a follow up 3 months later.<sup>193</sup> Prima facie the report indicated an incredibly positive outlook for respondents exiting non-violence programmes. Judge Boshier's observations were as follows:

*98% of men reported that others were very or completely safe with them after completing the programme and an identical percentage reported that they now had a good understanding of the effects of violence on their partner/ex-partner. Furthermore, 65% felt they were a lot better able to control their behaviour, communicate with others, manage strong emotions and stress, deal with conflict and anger in non-abusive ways and manage high-risk situations. Finally, 77% said they were very confident about staying non-violent in the future.*<sup>194</sup>

However Judge Boshier went on to highlight the defects that may be present in such reports, such as lack of consideration for those who have dropped out and reliance on respondents to comment on themselves; presumably a weakness as it is impossible for them to be objective as to their own behaviour and prospects for future violence.<sup>195</sup> Importantly Judge Boshier also commented on the period in which reviews were undertaken – as stated above, 3 months after completion in the Victoria University Report. He observed that “the longer the follow-up the less positive the results look.”<sup>196</sup> A notable factor may be where respondents resume old patterns by re-acquainting themselves with people who share the types of “life skills”<sup>197</sup> that allow the proliferation of family violence. These types of social connections may operate in conjunction with other influences such as substance abuse, which can be an aggravating factor in incidences of family violence.<sup>198</sup>

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<sup>192</sup> Ken McMaster, Gabrielle Maxwell and Tracy Anderson *Evaluation of Community Based Stopping Violence Programmes: Prepared for the Department of Corrections* (Institute of Criminology, Victoria University of Wellington, July 2000).

<sup>193</sup> Boshier, above n 191, at xiii.

<sup>194</sup> At 8, footnotes omitted.

<sup>195</sup> The problem with self-reporting was also observed in Neville Robertson “Stopping Violence Programmes: Enhancing the safety of battered women or producing better-educated batterers?” (1999) 28 *New Zealand Journal of Psychology* 68, at 72 as men “under-report their violence.”

<sup>196</sup> Boshier, above n 191, at 8-9.

<sup>197</sup> *The People's Report*, above n 61, at 115.

<sup>198</sup> Gordon Harold “Families and children: a focus on parental separation, domestic violence and child maltreatment” in *Improving the Transition: Reducing social and psychological morbidity during*



It has been observed that programmes need to target the causes of violence. As one study noted, respondents “typically receive immediate positive reinforcement for their use of violence (e.g. compliance, chores done, availability of partner for sex) while negative consequences are rare, and when they do occur, usually occur well after the battering.”<sup>199</sup> Such lifestyles which have been reinforced over time are difficult to counteract. The study identified five approaches to combatting violence, all of which have defects.<sup>200</sup>

The ventilation model, which does not have much in the way of validation within the research, aims to assist respondents and protected persons to express anger “by teaching them to fight fairly and cathartic exercises such as hitting one another with styrofoam bats.”<sup>201</sup> A second model, that of insight-oriented therapy, serves to target unresolved issues present in the respondent’s psyche. This approach was criticised for “[ignoring] the functional value of violence in maintaining ... control.”<sup>202</sup> While this may be true in some cases, it is arguable that in others it is equally as important to consider both of these aspects of a respondent’s motivation for engaging in violence.

The systems or interactional approaches see a victim of family violence as being “as culpable as her attacker,” due to violence occurring as an “interactive, dynamic interpersonal transaction.”<sup>203</sup> Such an approach is victim-blaming, and seems somewhat illogical; as was observed it “risks seriously jeopardising the safety and autonomy of battered women.”<sup>204</sup> Cognitive behavioural approaches consider family violence in light of learning habits from “role models (especially parents) and trial and error learning experiences in which the behaviour is rewarded” and teaches various skills, such as understanding the negative consequences of violence, and better ways to recognise and react to triggers.<sup>205</sup> An approach along these lines has potential, in that it allows room for deeper understandings of where the violence has come from. The final approach discussed was the pro-feminist treatment model, which considers that men and women possess unequal power. The approach seeks to remove

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*adolescence: A report from the Prime Minister’s Chief Science Advisor*, (Office of the Prime Minister’s Advisory Committee, Wellington, May 2011) at 183.

<sup>199</sup> Robertson, above n 195, at 68-69.

<sup>200</sup> Discussed at 69-71.

<sup>201</sup> At 69.

<sup>202</sup> At 69.

<sup>203</sup> At 70.

<sup>204</sup> At p 70. The examples quoted within the article included “a woman’s refusal to have sex, her ‘nagging’ or her ‘over-involvement with the children’.”

<sup>205</sup> At 70.

patriarchal structures in relationships, and the safety of women takes precedence.<sup>206</sup> It was observed that this approach may be “biased, based only on the experiences of victims.”<sup>207</sup>

It seems, of the above approaches, that neither is a perfect fit. Judge Boshier observed that “one size does not fit all.”<sup>208</sup> He expressed support for a screening approach to better rehabilitate respondents in a way appropriate to their complex, idiosyncratic circumstances.<sup>209</sup> The generality of some programmes was also observed by the Glenn Inquiry, characterising such programmes as “jack of all trades but master of none.”<sup>210</sup> A screening approach as envisioned by the Judge may have some parallels to the new sections of the Domestic Violence Act which require an “assessment” stage to determine whether a programme is suitable to a particular respondent. Adopting an approach unique to the individual needs of respondents was discussed in terms of the over-representation of Maori in family violence cases, and Judge Boshier indicated his support for the provision of Maori-specific programmes.<sup>211</sup> The importance of programmes designed to target Maori needs has been discussed by others, and will be addressed in the final section of this chapter.

The last area in which Judge Boshier suggested there may be improvement was to allow respondents an opportunity to attend more programmes. He suggested that this could be helpful in facilitating the maintenance of positive networks and in encouraging prolonged learning.<sup>212</sup> The idea that respondents’ stopping violence education does not necessarily end at the conclusion of a prescribed programme is something that has also been explored by the Glenn Inquiry. The Inquiry observed that currently there is “little or no follow-up to make sure [respondents attend] or to check how effective the programme was.”<sup>213</sup> However a critical aspect of the People’s Report was the need for prolonged and in-depth counselling to be offered to respondents, which will be briefly discussed in the final section of this chapter.

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<sup>206</sup> At 70.

<sup>207</sup> At 70.

<sup>208</sup> Boshier, above n 191, at 10.

<sup>209</sup> At 9-10.

<sup>210</sup> *The People’s Report*, above n 61, at 105.

<sup>211</sup> Boshier, above n 191, at 10-11.

<sup>212</sup> At 11-12. The proposed s 40A referred to by Judge Boshier did not get enacted, which would have allowed a respondent to request the provision of more programmes.

<sup>213</sup> *The People’s Report*, above n 61, at 104.

## II. Proposed changes

It has been observed that “[p]olice and court responses to violence in the home are often reactive and short-term and do not address the underlying causes.”<sup>214</sup> As has been discussed, the efficacy of programmes is questionable. The law can only go so far in providing for what programmes should involve. Government reforms, particularly the newly introduced “assessment” stage, may operate to better place respondents in appropriate programmes. The criteria which the Secretary will consider before approving a programme have already been traversed. The remainder of this chapter aims to advocate for an important change of focus which the Ministry ought to have when considering what types of programmes are needed to improve the current system. It will be argued that such considerations should include the importance of providing for Maori-specific programmes, due to the prevalence of Maori perpetrators. The availability of extended, long-term counselling for respondents will be touched on. Lastly a consideration as to how protection of victims and rehabilitation of offenders may interact will be considered.

### 1. Restorative justice

Restorative justice is a critical aspect of New Zealand’s criminal justice system, but must be limited to a fairly cursory analysis at this point. Restorative justice may be loosely described as a voluntary process in which an offender and a victim may consent to meet face-to-face and endeavour to find a way to repair the harm caused.<sup>215</sup> An example of restorative justice operating in a family law setting is by virtue of family group conferences. These conferences are provided for by ss 20-38 of the Children, Young Persons, and Their Families Act 1989. The purpose of these are to consider matters relating to the care or protection of a child, and to formulate plans in relation to a child having regard to the principles in sections 5, 6 and 13.<sup>216</sup> The conferences are a way in which families can resolve problems privately without the intervention of a removed court. A care and protection co-ordinator has power under ss 19(2)(a) and 20 to convene a conference where a child may be in need of care and protection, although the Ministry of Justice has stated that in the case of protection orders this is the

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<sup>214</sup> Paul Nixon “Ma Matou Ma Tatou – Working Together to Change Young Lives: Where to Next with Child Protection in New Zealand?” in Anne Hayden, Loraine Gelsthorpe, Venezia Kingi and Allison Morris (eds) *A Restorative Approach to Family Violence* (Ashgate Publishing Ltd, Surrey, England, 2014), at 45.

<sup>215</sup> Ministry of Justice “Restorative Justice” <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>216</sup> Children, Young Persons, and Their Families Act, s 68. Principles 5, 6, and 13 were discussed in chapter two of this dissertation.

exception rather than the rule.<sup>217</sup> Restorative justice is available within the criminal justice system where an offence has been committed, as is the case where protection orders are breached.<sup>218</sup>

Some providers offer a restorative justice approach within programmes, whereby a respondent and a protected person may have a mediated conference, provided the usual requirement of consent by both parties is met.<sup>219</sup> The importance of counteracting power imbalances was discussed earlier in this chapter in the context of the old s 31 of the Domestic Violence Act,<sup>220</sup> and has been acknowledged as a critical consideration when attempting to utilise restorative justice processes in violent relationships. Ken McMaster stated that while restorative justice can be hugely beneficial to both parties where successful, there is a risk of re-victimization and exacerbation of power imbalances.<sup>221</sup> Among his suggestions for attaining the greatest results from restorative justice were ensuring facilitators are thoroughly trained,<sup>222</sup> and that a focus on breaking an ongoing cycle be put in place.<sup>223</sup> Although there is a lot of emphasis on the effect of restorative justice on the victim, McMaster observed it stands to benefit a respondent also. The anxiety of the courtroom can mean respondents are not always fully aware of what is being said by the protected person or the judge; in contrast, a conference can be an environment in which some respondents may be better able to listen and develop a greater understanding.<sup>224</sup>

## 2. Maori-specific

It is critical to observe that restorative justice is often discussed in terms of intimate partner violence. Children, by virtue of their age, are usually not able to be active participants in restorative justice processes. This is not to say their interests are not considered; as discussed earlier, family group conferences occur where care and protection concerns exist. These

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<sup>217</sup> Ministry of Justice “What is a Protection Order?” <[www.justice.govt.nz](http://www.justice.govt.nz)>.

<sup>218</sup> Sentencing Act 2002, s 25(1)(b-c).

<sup>219</sup> Ken McMaster “Restoring the Balance: Restorative Justice and Intimate Partner Violence” in Anne Hayden, Loraine Gelsthorpe, Venezia Kingi and Allison Morris (eds) *A Restorative Approach to Family Violence* (Ashgate Publishing Ltd, Surrey, England, 2014), example provided at 95-102.

<sup>220</sup> In relation to the proposed reform of s 31 of the Domestic Violence Act 1995, which did not get past the Committee stage.

<sup>221</sup> McMaster, above n 219, at 103-104.

<sup>222</sup> At 103.

<sup>223</sup> p 103. This includes carefully monitoring apologies to ensure they are not given undue weight.

<sup>224</sup> McMaster, above n 219, at 104. At 105: in the words of one respondent “You look at why you do things and how come you’ve done it. These things don’t get touched upon normally.”

conferences provide a bridge to considering the role that the Maori culture may play in rehabilitating respondents.

The Glenn Inquiry traced the prevalence of child abuse and family violence in the Maori population back to colonisation, arguing that the European perception of a patriarchal society resulted in a gradual disengagement with their original identity and the high regard women and children had been held in.<sup>225</sup> The Glenn Inquiry considered community-based programmes which adopted a Maori-specific approach, stating that these approaches “are grounded in a holistic and collective world view that contrasts with mainstream methods that tend to focus on individuals and promote siloed approaches to service delivery ... they take a whole whanau approach that includes all its members, and look at more than just domestic violence.”<sup>226</sup> Involving the entire whanau is an important way in which a group of people with a shared interest in protecting those affected by violence, and assisting those who are in the process of rehabilitation, are able to come together in a joint enterprise to achieve such goals. Further, once the violence is known within the whole whanau, they may then participate in decision-making and hold a respondent accountable.<sup>227</sup> The Glenn Inquiry indicated that community organisations exist which aim to provide services that educate Maori on their culture, and can achieve positive results in terms of respondents’ perceptions of their own violent behaviour. By looking beyond the actual acts of violence such providers are able to aim to source the root of the problem, by “[revolving] around Maori infrastructure – kaumatua, kuia, hui and marae.”<sup>228</sup> This is something Judge Boshier had emphasised as a critical aspect of what programmes should be aiming to achieve;<sup>229</sup> in many cases, abusive behaviour represents a shell and unless the kernel of the problem is targeted cycles will repeat. The Glenn Inquiry observed that many respondents “have their own stories of being victims of child abuse, neglect and domestic violence. Healthy whanau is contingent on all members of the whanau healing, and that includes [respondents].”<sup>230</sup>

This represents a critical aspect of the Maori-specific approach that many community-based providers are engaged in developing. While respondents may have committed acts of abuse in the past, such programmes view the process as an opportunity for healing a respondent’s

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<sup>225</sup> *The People’s Report*, above n 61, at 127-128. Loss of culture was also observed as a factor by Robertson, above n 195, at 71.

<sup>226</sup> *The People’s Report*, above n 61, at 132.

<sup>227</sup> Robertson, above n 195, at 71.

<sup>228</sup> At 71.

<sup>229</sup> Boshier, above n 191, at 9.

<sup>230</sup> *The People’s Report*, above n 61, at 133.

hurt.<sup>231</sup> This wider approach represents a contrast between programmes that aim to address singular factors that contribute to a respondent's behaviour, such as anger management, or alcohol and drug abuse. Protecting victims of abuse is undoubtedly of utmost importance, however there have been complaints that the strong victim-focus causes lack of attention to assisting respondents, who will end up on a "[road] into jail" due to lack of support.<sup>232</sup> The Inquiry stated that "the response should not be about pathologising people, but rather addressing their trauma so that people are able to understand it, can develop new ways of functioning and coping with it, in order to heal ... Part of this healing journey involves strengthening people's cultural identity, and healing their wairua [spirit]."<sup>233</sup>

There is some provision for Maori-specific programmes in the Regulations.<sup>234</sup> Reg 27, "Maori concepts and values," provides that where attendees are *primarily* Maori, programmes must take into account tikanga Maori. Such values and concepts include: the prestige attributed to women and children (as well as to men), family relationships, and various dimensions of personal health (spiritual, psychological and physical). While these considerations are useful, there is no requirement within the regulations for a minimum number of Maori-specific providers. Some of the existing community-based, non-governmental organizations have attested their lack adequate funding hinders progress.<sup>235</sup> This lack of funding has also been identified as hindering meaningful, constructive use of counselling for respondents, particularly in breaking the cycle of abuse. The Glenn Inquiry propounded the view that free, long-term counselling must be offered if people are to "learn new ways of behaving and coping [or they risk] perpetuating the cycle of violence." This supports the position advocated earlier in this chapter, which is that the task of reforming a respondent does not end once a programme is completed.<sup>236</sup>

### 3. Rehabilitation in conjunction with protection

The following discussion aims to suggest ways in which rehabilitation may still occur in circumstances where a respondent has not meaningfully engaged with the rehabilitative process, and further sanctions have been imposed on him/her as a result. Commentators may

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<sup>231</sup> At 134.

<sup>232</sup> At 106.

<sup>233</sup> At 134.

<sup>234</sup> Domestic Violence (Programmes) Regulations 1996; regulations 15(1)(e), 27, 32(2)(c), and 26(c).

<sup>235</sup> *The People's Report*, above n 61, at 135.

<sup>236</sup> Currently programmes consist of 30-50 hours, as per the Domestic Violence (Programmes) Regulations 1996, reg 33(b)(i).

consider some respondents are beyond the possibility of reform;<sup>237</sup> however as has been argued the process of rehabilitation can require prolonged and intensive involvement in order to break habits accumulated over a lifetime.

As traversed in chapter two, the present law can result in up to three years' imprisonment for breaches of protection orders. The Inquiry stated that frontline workers and perpetrators stressed that the prison environment lacks adequate support. It was suggested that this may be alleviated with better access to mental health services generally.<sup>238</sup> Counselling targeted at resolving triggers and the inter-generational aspect of family violence were also thought to be lacking.<sup>239</sup> Preparing respondents for their release by developing their work skills was also said to be helpful in making for a better transition.<sup>240</sup>

The tiered approach to punishment, as discussed above in Chapter Three, provides a new lens through which to consider the provision of rehabilitative programmes. The implementation of panic alarms and electronic monitoring would allow for victims to be protected while maintaining respondents' ability to continue rehabilitative programmes. The aforementioned American study regarding electronic monitoring explored the potential advantages of electronic monitoring in providing rehabilitation for a respondent. These advantages occurred by virtue of an ongoing, regular relationship between a probation officer and respondent, and by the imposition of a forced structure on the respondent's lifestyle.<sup>241</sup>

In one of the case studies used, respondents would meet with officers once a week. This provided not only for direct supervision of a respondent's activities and attitudes, but also gave some respondents the sense that someone was "trying to 'help' them get 'their lives back on track'".<sup>242</sup> Officers had the opportunity to pick up on any potentially troubling behaviour on behalf of the respondent,<sup>243</sup> as well as having the opportunity to inspect respondents' premises for any prohibited "trigger" items; for example alcohol, drugs, or

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<sup>237</sup> Diane Musgrave "Death by Silence" *60 Minutes* (Television New Zealand, 19 September 1999). Russell Fairbrother, lawyer for Ben Haerewa (perpetrator of James Whakaruru case): "I'm sure he won't reoffend against a child, but I don't see his attitude to violence changing." "Are you saying it's hopeless? Nothing will change this man?" "Yes, I am saying that."

<sup>238</sup> *The People's Report*, above n 61, at 99.

<sup>239</sup> At 67.

<sup>240</sup> At 67.

<sup>241</sup> Ibarra and Erez, above n 121, at 267-271.

<sup>242</sup> At 269.

<sup>243</sup> At 269: "For instance, during one visit a defendant brought up the subject of the prosecuting witness and said, 'What comes around goes around. She'll get hers.' The probation officer arrested the man on the spot..."

weapons.<sup>244</sup> Further, officers had the ability to test respondents' urine for the presence of substances such as alcohol and narcotics; this provides a window by which, should such substances be present, the officer could encourage a respondent to voluntarily enter a programme designed to target such abuses.<sup>245</sup> Electronic monitoring required respondents to adhere to a schedule by which they had to be at home for certain hours of the day. This structure was considered of "latent 'rehabilitative' value ... tethering [the respondents] to 'stable' home environments."<sup>246</sup> One respondent observed that this prevented him from "[sitting] in the bar all night"; a forced structure "put [him] on a straight line."<sup>247</sup>

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<sup>244</sup> At 268.

<sup>245</sup> At 270.

<sup>246</sup> At 270.

<sup>247</sup> At 271.



## Chapter Five: Conclusion

What has been proposed is not a perfect model to prevent breaches of protection orders and subsequent fatalities. However it is a starting point to serve as a foundation for future efforts. As was emphasised in chapter two, change cannot be left to the law alone. True change will only occur if people, ideas, and perceptions of violence can be changed. In the short-term, protection must be more proactive. Those who have suffered through violence, and who have witnessed their children suffer through violence, are in a better position than a judge to recognise the capabilities of someone who has harmed them.

Attempts must be made to reform those who harm children. The cycle of abuse will continue to repeat unless attempts are made to change people's very perception of what family life consists of; for many, violence is all they have ever known. Imprisoning respondents will achieve very little, and may serve only to disillusion people's faith in the system. Reformation is a long-term solution as it requires overhauling a person's entire lifestyle. It requires an in-depth and sympathetic approach, with better enforcement of attendance at effective programmes, long-term follow-up periods, and greater provision for Maori-specific providers.

The law had done all it could to save James Whakaruru. What happened to him was due to a combination of lack of inter-agency collaboration, several oversights, and a lack of whanau awareness. Ben Haerewa, himself a victim of abuse from childhood,<sup>248</sup> was pushed through a system which placed him in an anger management programme and prison. James' mother failed to alert the appropriate authorities and to enforce the protection order issued against Haerewa, and as a result suffered the loss of her son. James was consistently let down by a system whose flawed communication and lack of co-ordination meant his situation was misunderstood and overlooked.

In contrast, Bradley and Ellen Livingstone's mother desperately attempted to utilise the tools offered by the system. Edward Livingstone was able to breach the protection order three times, the final incident proving fatal. He acted in a way that reflected a deeply troubled man,

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<sup>248</sup> "Death by Silence", above n 237, interview with Haerewa's father.

and whether he could have been reformed will now never be known. Their lives of the Livingstone children were snuffed out because, unfortunately, the law could not provide the tools necessary to protect them. Their potential will never be realised. Their mother will live the rest of her life grieving for them. It is hoped that not only the legislature but all of New Zealand society will remember the children who are lost to violence, and will take action accordingly through every mechanism possible, as they are unable to speak up for themselves.

*He who passively accepts evil is as much involved in it as he who helps to perpetrate it. He who accepts evil without protesting against it is really cooperating with it.*

- Martin Luther King<sup>249</sup>

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<sup>249</sup> Howard McGary “Psychological Violence and Institutional Racism: The Moral Responsibility of Bystanders” in Laurence Thomas (ed.) *Contemporary Debates in Social Philosophy* (Blackwell Publishing Ltd, Oxford, 2008) at 303.

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## Appendix

### Family Court Proceedings Reform Bill 90-1

#### **40 Sections 31 to 35 replaced**

Replace sections 31 to 35 with:

##### **“31 Joint programmes**

“(1)If the conditions in **subsection (2)** are satisfied, a programme provider may arrange for—

“(a)a protected person to whom a domestic violence support programme is provided to attend a non-violence programme at which—

“(i)the respondent is present; or

“(ii)an associated respondent is present; or

“(b)the respondent to whom a non-violence programme is provided to attend a domestic violence support programme at which a protected person is present; or

“(c)an associated respondent to whom a non-violence programme is provided to attend a domestic violence support programme at which a protected person is present.

“(2)The conditions referred to in **subsection (1)** are that—

“(a)the protected person agrees; and

“(b)the respondent or, as the case may be, the associated respondent agrees; and

“(c)the programme provider is satisfied that no safety issues exist; and

“(d)the programme provider is authorised to undertake both domestic violence support programmes and non-violence programmes.

##### **“Non-violence programmes**

##### **“32Direction to attend assessment and non-violence programme**

“(1)On the making of a protection order, the court must direct the respondent to—

“(a)undertake an assessment with a programme provider to determine the most appropriate non-violence programme for the respondent to attend; and

“(b)attend the non-violence programme that the programme provider determines to be the most appropriate.

“(2)The court need not make a direction under **subsection (1)** if—

“(a)there is no non-violence programme available that is appropriate for the respondent, having regard to—

“(i)the respondent's character; and

“(ii)the respondent's personal history; and

- “(iii)any other relevant circumstances; or
- “(b)the court considers there is any other good reason for not making a direction.
- “(3)Where the court makes a direction under section 17 that a protection order apply against an associated respondent, the court may, if it considers it appropriate in all the circumstances to do so, direct the associated respondent to—
  - “(a)undertake an assessment with a programme provider to determine the most appropriate non-violence programme for the associated respondent to attend; and
  - “(b)attend the non-violence programme that the programme provider determines to be the most appropriate.

### **“33Terms of direction that respondent or associated respondent attend non-violence programme**

When the court makes a direction under **section 32**, it must state in the direction that the respondent or associated respondent, as the case requires,—

- “(a)attend the non-violence programme for the number of sessions in each month that the programme provider may from time to time specify in accordance with regulations made under this Act, or, if no such regulations apply, as determined by the Registrar of the court; and
- “(b)attend the non-violence programme for the first time on a date and at a time and place to be advised by the programme provider as soon as practicable after the direction is made.

### **“34Registrar to arrange programme provider**

After the court has made a direction under **section 32**, the Registrar must without delay—

- “(a)refer the respondent or associated respondent, as the case requires, to a programme provider; and
- “(b)notify the programme provider that the direction has been made.

### **“35Programme provider to arrange meeting with respondent or associated respondent**

“(1)As soon as possible after receiving a notification under **section 34**, the programme provider must arrange to meet the respondent or associated respondent, as the case may be, at a time and place the programme provider thinks fit, to—

- “(a)assess the respondent or associated respondent; and
- “(b)determine the most appropriate non-violence programme for the respondent or associated respondent to attend.

“(2)After determining the most appropriate non-violence programme for the respondent or associated respondent to attend, the programme provider must inform the respondent or associated respondent of—

- “(a)the non-violence programme that the respondent or associated respondent is required to attend; and
- “(b)the importance of attending that programme; and
- “(c)when and where the respondent's or associated respondent's first attendance at that programme is required.

### **“35A Referral to different programme provider**

“(1) This section applies if at any time during the provision of a non-violence programme the programme provider—

“(a) believes, on reasonable grounds, that the programme is no longer appropriate for the respondent or associated respondent; or

“(b) considers that the respondent or associated respondent is not participating fully in the programme, and that this is significantly affecting the respondent's or associated respondent's ability to benefit fully from the programme.

“(2) The programme provider may request the Registrar of the court to refer the respondent or, as the case requires, the associated respondent to a different programme provider.

“(3) On receipt of a request under **subsection (2)**, the Registrar of the court may—

“(a) refer the respondent or associated respondent, as the case requires, to a different programme provider; and

“(b) notify that other programme provider of the direction made under **section 32**.

“(4) If a programme provider receives a notification under **subsection (3)**, that notification is to be treated as if it were given under **section 34**.”

## Domestic Violence Act 1995 as of October 2014

### **51B Service providers**

- (1) The Secretary may decide to grant, suspend, or cancel an approval of a person or an organisation as a service provider.
- (2) A person or an organisation seeking an approval under subsection (1) must follow the process (if any) prescribed by regulations made under section 127(a)(i).
- (3) In deciding whether to grant, suspend, or cancel an approval under subsection (1), the Secretary must apply the criteria (if any) prescribed by regulations made under section 127(a)(ii).
- (4) The Secretary must publish on an Internet site maintained by or on behalf of the Ministry of Justice a list of service providers.

### **51D Direction to attend assessment and non-violence programme**

- (1) On making a protection order, the court must direct the respondent to—
  - (a) undertake an assessment; and
  - (b) attend a non-violence programme.
- (2) The court need not make a direction under subsection (1) if—
  - (a) there is no service provider available; or
  - (b) the court considers that there is any other good reason for not making a direction.

### **51L Service provider and respondent to settle terms of attendance at non-violence programme**

- (1) Before providing a non-violence programme to a respondent, the service provider must settle in writing with the respondent the terms of attendance, which must include—
  - (a) the number of programme sessions that the respondent must attend; and
  - (b) the place, date, and time of the first programme session, and all subsequent sessions, that the respondent must attend.
- (2) The service provider must provide to the Registrar a copy of the terms of attendance that the service provider has settled with the respondent.

(3) If a service provider is not able to settle with a respondent the terms of attendance, the service provider must notify the Registrar.

(4) On receipt of a notice under subsection (3), the Registrar must—

(a) settle the terms of attendance with the respondent and the service provider;  
or

(b) bring the matter to the attention of a Judge.

(5) When a matter is brought to the attention of a Judge under subsection (4)(b), the Judge may make such further directions as the Judge thinks fit in the circumstances.

### **51M Notice to be given to court if continued provision of non-violence programme inappropriate**

(1) Subsection (2) applies if at any time during the provision of a non-violence programme the service provider considers that—

(a) it is no longer appropriate or practicable for the service provider to provide the programme to the respondent; or

(b) the respondent is not participating fully in the programme, and that this is significantly affecting the respondent's ability to benefit fully from the programme.

(2) The service provider must—

(a) notify the Registrar; and

(b) send to the Registrar all information relating to the respondent that is held by the service provider.

(3) After receiving a notification under subsection (2)(a) and the information referred to in subsection (2)(b), the Registrar must—

(a) make a new referral under section 51G to a different service provider; or

(b) bring the matter to the attention of a Judge.

(4) When a matter is brought to the attention of a Judge under subsection (3)(b), the Judge may make such other orders or directions as the Judge thinks fit in the circumstances.

### **51N Notice of non-compliance with direction**

(1) This section applies if the court makes a direction under section 51D and the respondent fails to do either or both of the following:

(a) undertake an assessment with the service provider to whom notice of the direction has been given under section 51G:

(b) attend a non-violence programme in accordance with terms of attendance settled under section 51L.

(2) The service provider must give written notice to the Registrar of the respondent's failure.

(3) Notice under subsection (2) must be given within 7 days of the respondent's failure.

## **51O Powers of Registrar on receipt of notice under section 51N**

(1) On receiving a notice under section 51N, the Registrar must, without delay,—

(a) exercise the powers under section 82, as if he or she were the court referred to in that section, to call the respondent before the court; or

(b) bring the matter to the attention of a Judge so that the Judge may consider whether to exercise the power conferred by section 51P in relation to the respondent.

(2) If the Registrar exercises the powers under section 82 in the manner allowed by subsection (1)(a), then, subject to any regulations made under this Act, section 82 applies so far as applicable and with the necessary modifications as if the respondent were a witness in proceedings.

## **51P Judge may call respondent before court**

(1) If, under section 51O(1)(b), a Registrar brings a matter to the attention of a Judge, subsection (2) applies.

(2) A Judge may exercise the powers under section 82 to call the respondent before the court.

(3) If a Judge exercises the powers under section 82, that section applies, so far as applicable and with all necessary modifications, as if the respondent were a witness in proceedings.

## **51Q Respondent called before court**

(1) If a respondent appears before the court under section 51O(1)(a) or 51P(2), the court may, after hearing from the respondent, confirm, vary, or discharge the direction or change the terms of attendance.

(2) If the court confirms or varies a direction under subsection (1), the Judge must warn the respondent that non-compliance with the direction is an offence punishable by imprisonment.

(3) Failure to give the warning required by subsection (2) does not affect the validity of the direction confirmed or varied.

## **51R Notice of completion and outcome of non-violence programme**

(1) When a respondent has completed a non-violence programme, the service provider must, without delay, provide to the Registrar a report that—

(a) states whether, in the opinion of the service provider, the respondent has achieved the objectives of the non-violence programme; and

(b) advises of any concerns that the service provider has about the safety of any protected person.

(2) On receiving a report under subsection (1), the Registrar must—

(a) forward a copy of that report to a Judge; and

(b) arrange for the protected person to be notified—

(i) that the respondent has completed a non-violence programme; and

(ii) that a report has been provided by the service provider of that non-violence programme under subsection (1); and

(iii) of any concerns that the service provider has about the safety of the protected person advised in that report.

(3) On receiving a copy of a report under subsection (2)(a), the Judge may make such orders or directions as the Judge thinks fit in the circumstances.

## **51T Offence to fail to comply with direction**

A respondent who fails, without reasonable excuse, to comply with a direction made under section 51D commits an offence and is liable on conviction to—

(a) a fine not exceeding \$5,000; or

(b) a term of imprisonment not exceeding 6 months.

Domestic Violence (Programmes) Regulations 1996 (now repealed)

**15 Requirements for approval as individual programme providers**

(1) Every applicant for approval as an individual programme provider must have the following:

(a) knowledge and understanding of the nature and effects of domestic violence:

(b) knowledge and understanding of the dynamics of violent domestic relationships:

(c) knowledge of, and skills and expertise in relation to, the client group for which the applicant wishes to provide a programme:

(d) where the application relates to the provision of a group programme, group facilitation skills:

(e) where persons in the client group for which the applicant wishes to provide a programme are likely to be primarily Maori, knowledge and understanding of tikanga Maori, including the Maori values and concepts set out in regulation 27:

(f) where persons in the client group for which the applicant wishes to provide a programme are likely to belong primarily to any other cultural or ethnic group, knowledge and understanding of the relevant values and beliefs of that group.

(2) Where—

(a) an applicant applies for approval as an individual programme provider; and

(b) at any time within the 3 years immediately before the date of the application,—

(i) the applicant has been a protected person; or

(ii) the applicant has been the victim of a domestic violence offence,—

the applicant must show that he or she has addressed the effects of domestic violence on his or her own life.

(3) An applicant must not be approved as an individual programme provider if, at any time within the 3 years immediately before the date of the application,—

(a) a protection order has been made against the applicant; or



(b) the applicant has been convicted of a domestic violence offence.

(4) Subject to subclause (3), where—

(a) an applicant applies for approval as an individual programme provider; and

(b) at any time, whether before or after the commencement of these regulations,—

(i) a protection order has been made against the applicant; or

(ii) the applicant has been convicted of a domestic violence offence,—

the applicant must not be approved unless the applicant shows that he or she has accepted responsibility for his or her violent behaviour.

## **16 Further requirements for approval as individual programme providers**

(1) Every applicant for approval as an individual programme provider must,—

(a) be a member of a professional body, or accountable to an organisation, being a body or organisation which, in the opinion of the chief executive, has in place—

(i) a code of ethics or practice; and

(ii) an effective complaints procedure; and

(iii) an appropriate level of continuing education for its members or for the people who are accountable to it, as the case may be; and

(b) where the applicant holds himself or herself out as being a member of a professional body of the kind referred to in paragraph (a), hold such current membership of that body as permits the applicant to practise his or her profession without limitation or restriction; and

(c) receive an appropriate level of peer supervision or peer review, whether that supervision or review is provided by a professional body or organisation of the kind referred to in paragraph (a) or otherwise.

(2) Every applicant for approval as an individual programme provider must have in place systems that will—

(a) ensure the assessment and ongoing review of the needs of people attending programmes that the applicant provides; and

- (b) provide for communication between the applicant and any other programme provider who is providing a programme to any other person who is protected by, or subject to, the same protection order; and
- (c) ensure, to the greatest extent possible, the safety of every person during his or her attendance at programmes provided by the applicant; and
- (d) provide for regular monitoring and evaluation of the effectiveness of such programmes and the presentation of such programmes.

## **21 Requirements for approval as approved agencies**

(1) Subject to subclause (2)(b) of this regulation, every applicant for approval as an approved agency must have in place a system which ensures that only those persons who meet the requirements set out in regulation 15 are authorised by that agency to provide programmes.

(2) Every applicant for approval as an approved agency must have in place systems which ensure that, where the approved agency authorises any person to provide a programme,—

- (a) the authority has effect for a stated period, being not more than the duration of the agency's approval; and
- (b) the authority is made subject to conditions if the agency is satisfied that any of the circumstances set out in any of paragraphs (a) and (b) of regulation 18(1) applies; and
- (c) the authority is varied, or the conditions imposed on the authority are discharged, if the agency is satisfied that the authorised person meets those conditions; and
- (d) the authority is reviewed at regular intervals, taking into account—
  - (i) whether the authorised person continues to meet the requirements of regulation 15; and
  - (ii) where regulation 22(2) applies, whether the authorised person continues to meet the requirements of regulation 16(1),—
  - (iii) [Revoked]

for the purpose of determining whether the authority should be renewed when it expires; and

- (e) the authority is cancelled,—
  - (i) if the authorised person no longer meets all or any of the requirements of regulation 15; or

(ii) where regulation 22(2) applies, if the authorised person no longer meets all or any of the requirements of regulation 16(1); or

(iii) if the authorised person ceases to provide the programme for the agency.

## **22 Further requirements for approval as approved agencies**

(1) Subject to subclause (2), every applicant for approval as an approved agency must have in place, or be accountable to another organisation which has in place,—

(a) a code of ethics or practice; and

(b) an effective complaints procedure; and

(c) a relevant level of continuing education and an appropriate level of peer supervision or peer review for authorised persons.

(2) An applicant for approval as an approved agency is not required to meet the requirements of subclause (1) of this regulation where, subject to regulation 21(2)(b), that applicant has in place a system which ensures that only those persons who meet the requirements of regulation 16(1) are authorised by that agency to provide programmes.

(3) Every applicant for approval as an approved agency must have in place systems that will—

(a) ensure the assessment and ongoing review of the needs of people attending programmes that the applicant provides; and

(b) provide for communication between the authorised person and any other programme provider who is providing a programme to any other person who is protected by, or subject to, the same protection order; and

(c) ensure, to the greatest extent possible, the safety of every person during his or her attendance at programmes provided by the applicant; and

(d) provide for regular monitoring and evaluation of the effectiveness of such programmes and the presentation of such programmes.