

**Restorative Justice in Cases of Domestic and Sexual Violence:
Healing Justice?**

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A woman is raped and beat by her common-law husband of two years, after escalating verbal

and emotional abuse. He is charged and sentenced to three years. Prior to the completion of his sentence, they meet together with a victim-offender mediator. She feels the need to face him to come to terms with the past and determine what relationship they will have in the future, particularly in light of the fact that they have a son and will share custody. The husband is also anxious to meet as he has taken a program called “Healthy Relationships” during day parole in Moncton and this has changed his life. The two meet and she questions him at length about why he did what he did and what had changed to make him different now. He takes full responsibility for what happened and reassures her that she had done nothing to bring the assault on. They agree on how to parent their child and, in the end, she shares that she forgives him for what he’s done. The relationship remains healthy and both report that the mediation was the best thing that could have happened between them.¹

Another victim of domestic violence, participating in family mediation in Dartmouth, Nova Scotia, is being constantly harassed by her ex-husband who is calling everyday and writing letters throughout the mediation. She informs the mediator and is told, “Yes, but we have to go on.”² Yet another women, an Inuit, is seated in a sentencing circle. She is the victim of terrible acts of domestic violence and the circle is meeting to decide what steps should be taken in the criminal case against her husband. She does not speak unless the judge calls upon her to do so, an indication of the measure of control held over her by her husband, who also sits in the circle. Of the many participants in the circle, only three have any supportive relationship to the victim: her sister, the family violence worker and a trusted friend who also happens to be the sister-in-law of the accused. The sentence that is created requires that the victim and accused attend counselling together, a proposal put forward by the accused. Demonstrating a misunderstanding of the life circumstances of this victim of violence, the judge strongly suggests to the victim that this would be a positive step, assuming the victim would speak out should the abuse continue. She hears the suggestion as an order and feels compelled to comply, though it is unlikely that she will speak out about further abuse. She has been silenced not only by fear of her husband but by a process that should have given her voice.³

¹Atlantic Community Justice Project, Stories File, Community Legal Information Association of PEI, Charlottetown, PEI, N.D, pp. 11-12.

²Transition House Association of Nova Scotia, Abused Women in Family Mediation: A Nova Scotia Snapshot, January 13, 2000, p. 8.

³Pauktuutit Inuit Women’s Association, Inuit Women and the Administration of Justice: Progress Report No. 2, Ottawa, Ontario, October 4, 1993, pp. 41-43.

These are just three examples of the many stories that involve alternative criminal justice initiatives — initiatives that attempt to deal with the effects of crime in a setting outside the confines of the regular adversarial criminal justice system. They can be used in conjunction with the regular system (as in the last story) or in place of the system (as in the case of the sentencing circle and, often, in the case of mediation) and are often lumped into categories such as “restorative justice” or “alternate dispute resolution”. These initiatives have applied to the entire range of crimes, from property crimes⁴ all the way to murder.⁵ However, for many reasons, there is great controversy over their application to cases involving domestic or sexual violence. Many opinions exist on the efficacy of such initiatives when they are used in cases involving domestic or sexual violence. Indeed, the first two stories illustrate that these approaches can actually be revictimizing to women. However, there are also examples of women who have expressed satisfaction with the process. The question this paper will examine is whether or not these initiatives — particularly restorative justice initiatives — are effective, or even appropriate, in cases of domestic or sexual violence and, if so, what steps might be taken in order to ensure that women are not revictimized in the process.

The Research

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

⁴In 1974, the first restorative justice project in Canada began in Elmira, Ontario, based on a vandalism case.

⁵A National Film Board of Canada video, Glimmer of Hope, documents a family’s journey with victim’s family-offender mediation following the murder of a daughter in Minnesota.

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

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

Part I: Women's Fight for Justice in the Current System

In the first place, the struggle to have violence against women taken seriously in the criminal justice system must be placed within the context of the continuing effort for women's equality in other areas of society. The issue is multifaceted and includes areas such as employment equity, economic issues, health care, social security, among others. All are intertwined. Therefore, restorative justice and other criminal justice measures should never be removed from this larger lens as initiatives often are only as effective as the society in which they are placed. The work must be interconnected and continuous. However, it is to the smaller lens of criminal justice, and particularly crimes against

women, that we now turn.

In his look at restorative justice in Canada, Kent Roach writes: At a practical level, many feminists may have reasons to be suspicious of and even hostile towards restorative justice. Throughout the last three decades, feminists have fought to have sexual and domestic violence recognized as true crimes that deserve public attention and punishment. Restorative justice has the potential to place these gains in jeopardy by allowing such crimes to be discussed in private settings where women may suffer from a power imbalance and perhaps be blamed for the crimes.⁶ Indeed, the fight to have domestic and sexual violence taken seriously by the criminal justice system has been hard and long.

Traditionally, domestic violence was treated as a “private problem” and was either “dealt with as an annoyance, or even avoided entirely by the formal justice system.”⁷ Between 1909 and 1960, assaulting a wife was considered to be legally different from other assaults.⁸ Instead, an offence of wife battery required a woman to prove that there had been a greater degree of bodily harm. Otherwise, a crime was not considered to have been committed.⁹ Marital rape was not recognized as an offence in Canada until 1983. Until that time, it was presumed that “the marriage contracted endowed husbands with the unrestricted right of sexual access to their wives.”¹⁰ Despite these legal changes, there were still procedural obstacles which kept the abuse of women a private matter. For instance, in most areas, it was left up to the women to charge their abusive partners. This left these women prone to pressure, through threats or kindness, not to proceed.¹¹ Many didn’t. This led to few

⁶Roach, Kent, “Changing punishment at the turn of the century: Restorative justice on the rise”, in *Canadian Journal of Criminology*, Volume 42, Number 3, July 2000, pp. 272-273.

⁷Kilkie, Marke, “Restorative Justice: Exploring the Limits — Mediation as an alternative to the Criminal Justice System in Cases of Domestic Assault”, Winter 1997, supervised research obtained through PATHS, Saskatchewan, p. 35.

⁸Kelly, Katharine D. and Susan J. Haslip, “‘But we don’t mediate wife assault!’: A Case Study of the Proposal to Shift from Court to Mediation as a Response to Woman Abuse”, Faculty of Sociology, Carleton University and Faculty of Law, University of Ottawa, N.D., p. 237.

⁹Ibid.

¹⁰Ibid.

¹¹Kelly and Haslip., op.cit., p. 238.

charges being laid by police and/or the Crown, even though both had the ability to lay charges over a woman's objections.¹² This situation was remedied in the 1980s following pressure from women's groups. Procedural changes were made that forced police officers to arrest men in domestic violence calls if there was evidence of assault.¹³ As well, Crown attorneys could no longer drop charges once laid, despite the wishes of the victim.¹⁴

Eventually, action was also taken to ensure that judges took domestic violence seriously, though this proved to be more difficult as it was claimed that any directive would "interfere with an independent judiciary..."¹⁵ However, steps were taken to sensitize judges through workshops that focused on the impact of abuse on women and the implications for society at large, women, batterers and their families, if such assaults were not taken seriously. As well, it was believed that stiffer sentences would send a message "that wife assault was a crime, that it would not be tolerated, and that abuseres [sic] would be prosecuted to the full extent of the law."¹⁶ Therefore, calls for harsher penalties were made. All of these actions worked to bring domestic violence out of the private sphere into the public domain and increase its profile in the criminal justice system. However, these advances do not necessarily ensure that the needs of battered women are seriously addressed by the current system. Braithwaite and Daly argue that most men are still not held accountable for their violent actions against women. This is due to complaints not being filed by women, evidentiary problems and police indifference, which lead to low rates of prosecution for domestic abuse cases and high rates of plea bargaining and acquittal for those cases which do go forward.¹⁷ Besides this, there are other concerns regarding the current criminal justice system.

A report by the Provincial Association Against Family Violence (PAAFV) in Newfoundland, Keeping an Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice and Alternative Dispute Resolution, reports that, "Victims have concerns about not being part of the process and

¹²Ibid.

¹³Ibid., p. 239.

¹⁴Ibid.

¹⁵Ibid.

¹⁶Ibid.

¹⁷Kelly and Haslip, op.cit., p. 240.

sometimes feel like they are on trial instead of the person who has committed the crime. This has been particularly true for women who are victims of abuse and violence. The system is often very confusing and overwhelming.”¹⁸ It also reports that the way the current system operates tends to keep offenders in the system rather than encouraging them to stop offending.¹⁹ The Church Council on Justice and Corrections, in its 1996 compendium of alternative justice programs, highlights these and other concerns with the criminal justice system. The Council notes that recent research into the experience of victims has found that “contact between the victim and the administration of criminal justice has been primarily a source of revictimization, frustration, disappointment and annoyance rather than a contribution to the solution to the victim’s problems.”²⁰ It argues that the victim’s needs are overlooked by an adversarial system in which the main purpose of proceedings is to establish guilt and attach a sentence which has little to do with the actual harm done and does not speak to true accountability.²¹ Furthermore, it is argued that the current system overlooks the community context of crime, failing to consider initiatives that could be taken in order to prevent crime in the future.²²

These concerns are even more prominent within the cultural context of Inuit and other Aboriginal communities. Pauktuutit Inuit Women’s Association of Canada, a national, non-profit organization representing Canadian Inuit women, states that there is “...a general consensus amongst all those involved or affected that the current criminal justice system has been failing Inuit and other Aboriginal peoples across Canada.”²³ I will not expound on this particular research any further as it is well assumed within this field that this is tragically true. It becomes even more tragic within the context of Inuit and other Aboriginal women dealing with cases of violent domestic abuse and sexual

¹⁸Provincial Association Against Family Violence, Newfoundland and Labrador, Keeping an Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice and Alternative Dispute Resolution, St. John’s, Newfoundland, June, 1999, p. 24.

¹⁹Ibid.

²⁰The Church Council on Justice and Corrections, Satisfying Justice: Safe Community Options that attempt to repair harm from crime and reduce the use or length of imprisonment, Ottawa, Ontario, 1996, p. X.

²¹Ibid., p. XI

²²Ibid., p. XII

²³Pauktuutit Inuit Women’s Association, Setting Standards First, Ottawa, Ontario, N.D. (post-1994), p. 2.

assault.

Tracy Porteous, a B.C. participant in a conference on domestic violence and restorative justice sponsored by the Provincial Association of Transition Houses of Saskatchewan (PATHS), summed up some of these concerns regarding the system:

I think it's important to acknowledge, though, that I think we've also all been saying for quite some time that the system is far too adversarial, that women and others who have been victimized have been saying that they feel brutalized by the court process, that they have been revictimized in their involvement. They have been saying that they don't feel very central to a process that is very, very central and very, very personal. I think that advocates have been saying that there isn't enough staff in the current system for community services and police and crown to really be able to deal effectively [with these cases]...²⁴

Tracy later expressed the thought that moving to an alternate vision might be appropriate, referring to restorative justice initiatives.²⁵

Part II Restorative Justice: What are we talking about?!

When the staff at The Church Council were writing the text for their restorative justice reflection sheet, we quickly agreed on a title: "Restorative Justice: What Are We Talking About?!" There was very good reason for this. It had become clear that the term "restorative justice" was being used by different people and different groups to mean many different things. The same was discovered in undertaking this research. Various statements were found which made reference to the ambiguous nature of a definition. Pauline Bush, Executive Director of the Regina Alternative Measures program, stated at the Saskatchewan PATHS conference, "I think there needs to be a lot more understanding of what restorative justice stands for before we continue within this dialogue because clearly it's something that's not understood within the room."²⁶ Irene Smith, the Executive Director of the Avalon Sexual Assault Centre in Halifax, Nova Scotia and also a participant at the PATHS conference, noted that the definition of restorative justice was elusive in her experience with the new policy in Nova

²⁴Provincial Association of Transition Houses of Saskatchewan, proceedings from conference, "Restorative Justice: Is it justice for battered women?", tape two, April 15, 2000.

²⁵Ibid.

²⁶Ibid., tape one, April 14, 2000.

Scotia and that this could lead to serious consequences.²⁷ She questioned how the limits of the program could be defined if the actual program could not.²⁸ Bev Poitras, another conference participant noted the differing definitions within the Aboriginal community when she stated that, “Sentencing circles have different meanings...Each community is unique and each community decides what a sentencing circle is to them. So, when you say a sentencing circle in one community, it doesn’t mean the same thing in another community.”²⁹ To be sure, definitions of restorative justice vary considerably.

Judge Bria Huculak took the PATHS conference participants through the evolution of the definition:

I want to start out with a definition because I think it’s a particularly good one. This is just a sentence: Restorative justice is a way of thinking, a way of behaving, and a way of measuring. This was written in 1995...In 1990, some writers had described restorative justice as a response to criminal behaviour that seeks to restore losses suffered by crime victims and facilitate peace and tranquility among opposing parties. It was in 1991 described as having principles of support and reparation for the victim with mediation being used if necessary, reparation to the victim or the community, and cooperation in the rehabilitation of the offender with the limited use of restrictions or detention.³⁰

In *Keeping an Open Mind*, the Provincial Association Against Family Violence agrees with the philosophy approach when it defines restorative justice not as a distinct model or system of law but as a philosophy or vision which keeps in mind the needs of the victim, the community and the offender.³¹

The Association cites community justice forums and sentencing circles as restorative justice initiatives and identifies some forms of alternate dispute resolution as restorative in nature, while others are not.³² Throughout this research, I also found that others focused on shaming³³ and

²⁷PATHS Conference, tape there, April 15, 2000.

²⁸Ibid.

²⁹Bev Putra, PATHS Conference, tape two, April 15, 2000.

³⁰PATHS Conference, tape one, April 14, 2000.

³¹PAAFV, op.cit., p. 30.

³²Ibid., p. 31.

³³Kelly and Haslip, op.cit., p. 256.

forgiveness³⁴ and defined restorative justice as being for the benefit only of the victim and not the abuser³⁵ — all presuppositions that would be challenged by many in the field. Others included programs or models within their definitions which would not be identified as restorative justice initiatives by others. These included: family mediation and alternative dispute resolution,³⁶ as well as victim assistance and victim participation in the criminal justice process.³⁷ It is important to note, therefore, that opinions on restorative justice initiatives may be formed on the basis of the experience of programs that are not truly restorative in nature.

There were some common areas, however. Overall, most agreed that restorative justice is a philosophical approach to crime which includes a focus on three areas: the victim, the offender and the community. They also agreed that restorative processes mean to meet the needs of each person affected by crime, and particularly those of the victim. It does seem apparent that the first step in taking this conversation further would be to come to an agreement on what restorative justice actually is.

For the purposes of this paper, and perhaps a way forward, I will use the description of restorative justice and the five essential components of the approach, as outlined in The Church Council's reflection sheet. Restorative justice is described as:

...the popular name given to a wide range of emerging justice approaches that aim for more healing and satisfying responses to crime. While each approach is different, these processes try to give active participation to those directly involved or affected. Everyone hears each other's experiences, feelings and questions. Together, they sort out matters of accountability, safety, and the need for a fair and meaningful course of action.³⁸

³⁴Irene Smith, at the PATHS Conference, stated that the program restorative justice encourages forgiveness and that we are not in the business of forgiving sexual assault and domestic violence. PATHS Conference, tape there, April 15, 2000.

³⁵In her paper, which was presented by Virginia Fisher at the PATHS Conference, Judy White (alias) refers to mediation and states that this understanding would need to be in place before an initiative like mediation could be of benefit. PATHS Conference, tape two, April 15, 2000.

³⁶Transition House Association of Nova Scotia, op.cit., and Marke Kilkie, op.cit.

³⁷Pauktuutit, Setting Standards First, op.cit., p. 3. Although supplying victim assistance and victim participation would definitely be present in any restorative justice initiative, many would argue that on their own, they do not constitute a restorative approach.

³⁸The Church Council on Justice and Corrections, "Restorative Justice: What Are We

As well, five elements must be present in order to consider an initiative to be restorative in nature.

First of all, restorative justice invites full participation and agreement. This means that room is made within the process for the voices of all who are affected to be heard. This includes the victim, the offender, their families and friends, as well as people from the community who have been affected.³⁹

Secondly, restorative justice attempts to heal what has been broken. It focuses on the needs of the victim (e.g. what does she need to help heal the trauma; restore a sense of safety, etc.), offender (e.g. what is needed to ensure the harm never reoccurs; what is needed to ensure his adherence to any agreement, etc.), and community members (e.g. what will help them feel safer, what steps can be taken to improve their community so crime is less likely to happen in the future, etc.).⁴⁰

Thirdly, restorative justice initiatives seek full and direct accountability. Accused persons face their victims and others who have been affected and are given the opportunity to explain their behaviour, take full responsibility and be part of a process which decides on a way forward which meets the needs of all concerned.⁴¹

Restorative justice also seeks to reunite that which has been divided. Crime divides community into an “us-them” way of thinking which is unhealthy. Restorative initiatives find ways of bridging this gap so that “the “us” and “them” are connected within a healthy community. It is important to note that this reunification looks at breaking down the isolation within community that occurs following a crime — isolation felt by both the accused and the victim, as well as other community members who have been affected. Restorative justice initiatives do not necessarily seek to reunite the victim and offender in what has been an unhealthy, abusive relationship.⁴²

Finally, restorative justice initiatives strive to strengthen community in order to prevent

Talking About?!", reflection sheet, Ottawa, Ontario, 2000, p. 1.

³⁹Ibid, p. 3., borrowed from Susan Sharpe, Restorative Justice: A Vision for Healing and Change.

⁴⁰Ibid.

⁴¹The Church Council, “Restorative Justice: What Are We Talking About?!", op.cit., p. 3.

⁴²Ibid.

further harm by “building relationships and addressing the underlying social problems that create crime in the first place.”⁴³

Many programs and models fall within the above definition. These include family group/accountability conferences, victim-offender mediation or reconciliation (which may or may not have community members present), sentencing circles, healing or community circles, community justice panels, circles of support and accountability for sexual offenders, and others. For the purposes of this discussion, those initiatives which meet the five standards outlined above will be considered as restorative justice initiatives. Others, such as family mediation, will be considered in this paper only in so far as experiences within that framework have led to lessons which are applicable to restorative justice initiatives as well.⁴⁴

Having set a definition, the question remains whether or not restorative justice is an effective tool in meeting the needs of women victims of domestic and sexual violence. Opinions on this subject range from those who state restorative justice should never be used, to those who think that benefits are possible in the future, to those who believe that current programs are beneficial.

In a recent volume of “Interaction”, the publication of The Network Interaction for Conflict Resolution, Kathleen Cleland Moyer recounted an incident which took place at a gathering of people in the field:

Last May...one of the executive directors involved with women’s groups confronted a consortium of federal civil servants and directors from non-profit agencies with a challenge and plea that was hard to ignore: ‘What do we have to do to convince you that restorative justice is harmful to victims? Representatives from victims groups across Canada have tried to talk to you about this. Why will you not listen? Women’s lives are at stake!’ No one responded: not the John Howard Society, Salvation Army, Church Council on Justice and Corrections nor the Network...The truth was all of us were savvy enough to know she wasn’t asking for a response that involved discussion or dialogue, rather a strong clear message about restorative justice was being delivered. The message was ‘STOP!’⁴⁵

⁴³Ibid.

⁴⁴ It is important to note, however, that family mediation, which provides the focus for the bulk of academic literature on the subject of domestic abuse and alternative processes, is not necessarily restorative in nature.

⁴⁵Cleland Moyer, Kathleen, “Trying to listen” in Interaction, The Network Interaction for Conflict Resolution, Volume 12, Number 2, Summer 2000, p. 3.

As well, the Canadian Association of Sexual Assault Centres released a statement which announced that it is “...strongly opposed to the use of [Alternate Dispute Resolution/Restorative Justice] in cases of violence against women including, but not limited to, women in violent and abusive relationships.”⁴⁶ We know that others concur.

Others, however, support the use of restorative justice. Presser and Gaarder, in their look at restorative justice and women who are battered, admit that the “truth-telling and emotional expression” that are present in restorative initiatives and not available in the current system, are valued activities.⁴⁷

They go on to support the contention that these initiatives are designed to allow healing processes to occur⁴⁸ and even go so far as to note that some are calling restorative justice a ‘feminist vision of justice.’⁴⁹ Kirstin Lund, Chairperson of the Restorative Justice Network of the Conflict Resolution Co-op of PEI and a consultant on conflict resolution and crime prevention, also noted that restorative justice initiatives “can be a helpful part of the healing process for victims of crime if they are done in an appropriate way by trained and experienced facilitators.” And, others agree. Here, support is qualified by the need for proper measures to be taken to ensure that revictimization does not occur. It is within this level of support that the majority of opinions fall.

Throughout this research, I found that women are not necessarily opposed to restorative justice initiatives *per se*. Rather, they are opposed to these initiatives as they are presently developed and applied. Many of the women consulted during this research stated that they had serious concerns with present restorative justice initiatives but that they would like to see them implemented in the future, after careful research and consultation has been carried out. Others share this approach.

Tracy Porteous noted that, “...I think we do recognize that removing cases of crime and violence against women out of the traditional court system into a process that is more conciliatory and seeking of an alternative resolution might sound good, and I think that many women, especially

⁴⁶PAAFV, Making it Safe, op.cit., p. 21.

⁴⁷Presser, Lois and Emily Gaardner, “Can Restorative Justice Reduce Battering? Some Preliminary Considerations”, journal and date unknown, though it appears to be late 1999 or 2000 (photocopy of article received from The Church Council on Justice and Corrections), p. 182.

⁴⁸*Ibid.*, p. 184.

⁴⁹*Ibid.*, p. 176.

women in abusive relationships, have been saying that they are interested in some alternative processes...”⁵⁰ She continues, however, with the realization that missing from the current restorative justice literature is an analysis of the dynamics of gendered violence, an analysis of violence in relationships and sexual assault, as well as an analysis of how the impact of women’s socialization is connected to these issues.⁵¹

Similarly, the B.C. Association of Specialized Victim Assistance and Counselling Programs, in a 1998 paper, identified a provision which allows Crown Counsel to divert certain cases of violence against women in relationships (VAWIR) to alternative measures and restorative justice programs. The Association advised that this provision be “...eliminated in relation to VAWIR, sexual assault, child sexual abuse, criminal harassment, and hate-motivated offences *until there is an opportunity to conduct all of the necessary research, analysis and evaluation of these initiatives and consult with all of the affected parties.*”⁵² [italics mine] It would seem that, apart from a few staunch opponents of restorative justice, the majority of women looking at this issue are not opposed to using these initiatives in the future, but have serious, legitimate concerns that need to be addressed before these programs are implemented in cases of domestic and sexual violence. It is to these concerns that I now turn.

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

A number of concerns regarding current restorative justice initiatives were identified by various people throughout this study. Some of these included: the fear that initiatives would not effectively deal with issues of safety and risk;⁵³ the concern that some initiatives (particularly mediation, which we are not considering to be a restorative initiative) would treat the situation as that of a “problem couple”

⁵⁰PATHS Conference, tape two, April 15, 2000.

⁵¹Ibid.

⁵²PAAFV, Making it Safe, op.cit., p. 21.

⁵³Dorothy Barg Neufeld, Staff Coordinator/Mediator, Winnipeg Mediation Services, in personal interview, November 14, 2000.

and focus, therefore, on the relationship and not the harm done;⁵⁴ the fear that participating in restorative justice while still entangled in an abusive relationship can foster an inappropriate feeling of responsibility for “changing” her partner and contributing to his healing;⁵⁵ a concern regarding lack of legal support, particularly when the initiative involves a binding agreement;⁵⁶ the fear that appropriately trained and culturally appropriate support persons may not be available to women participating in these programs;⁵⁷ and, a concern that restorative justice initiatives focus primarily on offenders and not victims.⁵⁸ These concerns were identified by only one or two people. Therefore, although important, I will only list them here and hope that others will examine them in detail at a later date.

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

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

⁵⁴Kilke, Marke, op.cit., p. 33.

⁵⁵Paper by Judy White (alias), presented by Virginia Fisher, PATHS Conference, tape two, April 15, 2000.

⁵⁶Transition House Association of Nova Scotia, op.cit., p. 19. This report focused only on mediation and not restorative initiatives. However, this concern has been expressed by others in the field in regards to restorative justice programs.

⁵⁷Ibid., p. 20. Again, although this report deals with mediation, the concern is still valid regarding restorative justice initiatives.

⁵⁸Irene Smith, Executive Director, Avalon Sexual Assault Centre, Halifax, Nova Scotia, October 27, 2000, by telephone, and also stated again in the PATHS Conference transcript, tape three, April 15, 2000.

6) a concern with a lack of training and evaluation standards.

I will consider each concern in turn.

1) Consultation:

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

Irene Smith, in discussing the government-initiated restorative justice program in Nova Scotia, reported that there had been no consultation with women victims in order to assess their feelings on being involved in restorative justice processes. She then linked this lack of consultation with an approach that "displaces the survivor to a position in the peripheral, not central to the process" and identified the issue as a significant concern.⁵⁹

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

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

In an example pertaining to the Inuit community, Pauktuutit, in its report, Setting Standards

⁵⁹Irene Smith, op.cit.

⁶⁰Bonnie Diamond, Executive Director, National Association of Women and the Law, November 8, 2000, in person, Ottawa, Ontario.

⁶¹PAAFV, Making it Safe, op.cit., p. 12.

⁶²Ibid.

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

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

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

⁶³Pauktuutit, Setting Standards First, op.cit., p. 8.

⁶⁴Ibid.

⁶⁵Crnkovich, Mary, “The Role of the Victim in the Criminal Justice System — Circle Sentencing in Inuit Communities”, for the Canadian Institute for the Administration of Justice Conference in Banff, Alberta, October 11-14, 1995, p. 10.

⁶⁶McLean, Michelle, “Circle Sentencing,” in Jurisfemme: News from the National Association of Women and the Law, Volume 18, No. 1, Fall 1998, p. 4.

developing a consensus document.⁶⁷ It would seem that consultation has taken place in at least one case.

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

2) **Denunciation**

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

⁶⁷PATHS, tape four, April 15, 2000.

⁶⁸Presser and Gaarder, *op.cit.*, p. 186.

⁶⁹Paper by Judy White (alias), presented by Virginia Fisher, PATHS conference, tape two, April 15, 2000.

⁷⁰For instance, Irene Smith, in referring to the new restorative justice policy in Nova Scotia, raised this issues as a concern. It was raised by others throughout the research and at the PATHS conference, as well.

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

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

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

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

Voices can be heard on both sides of the issue.

In listening to and reading the arguments that support or negate the denunciatory effect of restorative justice, I couldn't help but wonder if part of the answer doesn't lay in obtaining a clearer understanding of restorative justice. Issues around the definition and around the practice of restorative initiatives seem to have an impact on women's views about these processes. How women understand

⁷¹PATHS conference, tape one, April 14, 2000.

⁷²Norma Green, PATHS conference, tape two, April 15, 2000.

⁷³Leonard Bush, PATHS conference, tape two, April 15, 2000.

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

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

⁷⁴PAAFV, Making it Safe, op.cit., pp. 16-17.

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

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

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

3) Choice

⁷⁵PATHS conference, tape one, April 14, 2000.

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

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

Irene Smith, in referring to the new Nova Scotia policy on restorative justice, noted that under these new measures the case can be referred to a restorative process regardless of the victim’s wishes. The victim is not permitted to veto the process.⁷⁹ In this case, the victim will obviously not be forced

⁷⁶PATHS conference, tape two, April 15, 2000.

⁷⁷TRANS, op.cit., p. 10.

⁷⁸Dorothy Barg Neufeld, op.cit.

⁷⁹PATHS conference, tape three, April 15, 2000. This allegation has not been clarified

to meet with the offender. However, in a process that seeks to empower victims, it would seem that the victim's needs are dismissed.

Others assert that real choice in the case of domestic violence is impossible. Some submit that a woman cannot truly choose due to the power dynamics that are inherent in these situations. They contend that it is difficult for a woman to choose not to enter into mediation without suffering consequences from her partner.⁸⁰ Some, such as Kelly Rowe and Barbara Hart, identify a period of healing and empowerment which takes place after a women separates from an abusive spouse and which can last for several years. They contend that until this period is complete, women cannot enter into processes such as mediation or restorative justice voluntarily or participate freely — a situation often described as “learned helplessness”.⁸¹ Therefore, they claim that crimes involving domestic abuse should be excluded from these processes.⁸² Others, however, assert that true choice is possible and should not be undermined by a blanket exclusion of all domestic and sexual crimes.

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

Victims voices have also been clear in this. Inspector Leonard Bush shared with the PATHS

by this author. However, if it is not the case, then the fact remains that this perception is an issue and needs to be addressed.

⁸⁰Bonnie Diamond, *op.cit.*, and Marke Kilkie, *op.cit.*, p. 32.

⁸¹Kilke, Marke, *op.cit.*, p. 32.

⁸²*Ibid.*

⁸³Presser and Gaarder, *op.cit.*, p. 178.

⁸⁴*Ibid.*

⁸⁵Presser and Gaarder, quoting a 1990 report by Yellott, *op.cit.*, p. 183.

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

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

It would appear that flexibility and precaution is in order.

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

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

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

Furthermore, restorative processes should allow enough flexibility to meet the differing needs

⁸⁶Leonard Bush, PATHS conference, tape two, April 15, 2000.

⁸⁷Atlantic Community Justice Project, op.cit., p. 17.

⁸⁸TRANS, op.cit., pp. 18-19.

⁸⁹Tracy Porteous, PATHS conference, tape two, April 15, 2000.

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

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

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

4) Power Dynamics Within Restorative Justice Initiatives

Another concern that continually resurfaced revolves around power imbalances that arise in cases of domestic and sexual violence. These issues are particularly important within the context of restorative justice initiatives as these programs are meant to facilitate solutions that meet the needs of

⁹⁰Kilke, Marke, *op.cit.*, p. 35, quoting C.A. Bethel and L.R. Singer, “Mediation: A New Remedy for Cases of Domestic Violence”, 1982, *Vermont Law Review*, Vol. 7:15 at 20.

⁹¹Kilke, Mark, *op.cit.*, pp. 36-37.

all the parties involved, and particularly those of the victim. With power imbalances present, it may be very difficult to reach an equitable level of victim input into these solutions.⁹² As well, it is important to note that these power imbalances may not be overt to the facilitator or mediator as often, in violent and abusive relationships, manipulation and intimidation are extremely subtle.⁹³ Often, the consequence is the revictimization of women rather than her empowerment.

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

I had a very hard time saying “no” to him. I agreed to things I regret. I was too scared to stand up for myself. (Dartmouth, NS)⁹⁵

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

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

⁹²PFAAV, Keeping an Open Mind, op.cit., p. 22.

⁹³PFAAV, Making it Safe, op.cit., p. 18.

⁹⁴THANS, op.cit., p. 15.

⁹⁵PFAAV, Making it Safe, op.cit., p. 19.

⁹⁶Ibid.

⁹⁷Irene Smith, op.cit.

⁹⁸Kilkie, Marke, referring to author Barbara Hart, op.cit., p. 33.

resolution, is an oxymoron in the context of domestic assault.”⁹⁹

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

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

These are obviously serious concerns which cannot be dismissed. However, there are those who believe that steps can be taken to deal effectively with these dynamics. Judge Huculak, in her address to the PATHS conference, stated that the issue of power dynamics was one that definitely needed addressing.¹⁰⁴ She identified the fact that facilitators needed to be “very well informed and educated about the dynamics of violence and what the issues are around domination and power.”¹⁰⁵ She also articulated the need to ensure that the processes allowed the victims to feel safe enough to speak and suggested that support people such as family and others are an essential component in order

⁹⁹Ibid.

¹⁰⁰PFAAV, *Making it Safe*, op.cit., pp. 18-19.

¹⁰¹Crnkovitch, Mary, op.cit., p. 11.

¹⁰²Ibid., p. 14.

¹⁰³Kelly and Haslip, op.cit., p. 260.

¹⁰⁴Judge Bria Huculak, PATHS Conference, tape one, April 14, 2000.

¹⁰⁵Ibid.

to allow this to happen.¹⁰⁶ Others agree, asserting that once a power imbalance is recognized, the mediators' "skills combined with balancing tools can help balance the unequal power between the parties."¹⁰⁷ These techniques can include the constant presence of legal counsel and support persons during the process, attention to the seating arrangement, the provision of counselling services, the use of caucuses (when mediators/facilitators meet separately with the parties), as well as ensuring that parties maintain the right to terminate the process at any time.¹⁰⁸

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

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

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

5) Training/Standards:

The previous section looked at power dynamics and mediators/facilitators' responses to those dynamics. Some argue, like Bonnie Diamond, that facilitators will never receive enough training to

¹⁰⁶Ibid.

¹⁰⁷PAAFV, Making it Safe, op.cit., p. 19.

¹⁰⁸Ibid.

¹⁰⁹Dorothy Barg Neufeld, op.cit.

¹¹⁰Ibid.

be able to deal with these dynamics.¹¹¹ Others disagree. To be sure, however, the lack of training and program standards is certainly one area that has been identified as a major concern.

Presser and Gaarder assert that, “To help achieve reconciliation...facilitators should be carefully trained and monitored and...must be sensitive to — and capable of interrupting — abusive dynamics that characterize the relationship and that get acted out, however, subtly, in the conference.”¹¹² Others, like Kirstin Lund, Barbara Landau and Niki Landau, concur. They identified training as key to making restorative justice approaches more effective in meeting women’s needs and suggested that such training include: training for restorative justice practitioners on issues pertaining to woman abuse, including physical and psychological abuse and its effect on family members¹¹³; training regarding screening for abuse;¹¹⁴ training for practitioners on how to ensure that processes don’t revictimize, including the implementation of safety measures and safe termination;¹¹⁵ sensitivity to cultural and racial and ethnic differences which may be applicable to situations of domestic violence;¹¹⁶ and, even training for referral agencies, including government and community agencies, on abuse and how to ensure the safety of the victim throughout the process.¹¹⁷

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

¹¹¹Bonnie Diamond, op.cit.

¹¹²Presser and Gaarder, op.cit., p. 187.

¹¹³Landau, Barbara and Niki Landau, “Domestic violence policy: Lessons to be learned” in Interaction, The Network Interaction for Conflict Resolution, Volume 12, Number 2, Summer 2000, p. 5.

¹¹⁴Kirstin Lund, op.cit.

¹¹⁵Landau and Landau, op.cit., p. 5.

¹¹⁶Ibid.

¹¹⁷Kirstin Lund, Settlements, Inc., Prince Edward Island, October 20, 2000, by telephone.

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

There is no government regulatory structure, including certification guidelines, in place in Canada which regulates the practice of mediators throughout the country.¹²¹ As the Provincial Association Against Family Violence in Newfoundland states, “In this unregulated climate, someone with one day of training can set themselves up as a mediator or facilitator.”¹²² Family Mediation Canada (FMC), however, has developed a set of national practice, certification and training standards, in consultation with provincial, territorial and international mediation associations, under which family mediators must complete a certain level of training and practice before they receive certification.¹²³

¹¹⁸THANS, *op.cit.*, p. 15.

¹¹⁹Denise A. Moore and Leigh Holm, Dispute Resolution Centre for Ottawa-Carleton, November 2, 2000, in person, Ottawa, Ontario; Dorothy Barg Neufeld, Mediation Services of Winnipeg, *op.cit.*; and, Kirstin Lund, Settlements, Inc., PEI, phone interview, October 20, 2000.

¹²⁰In these cases, two of the three programs did not generally deal with issues of abuse and one program did only rarely. Unfortunately, I was unsuccessful in contacting the two programs that I knew did carry out mediation or restorative initiatives involving domestic violence.

¹²¹PAAFV, Making it Safe, *op.cit.*, p. 7.

¹²²*Ibid.*

¹²³Neilson, Linda C., Peggy English and The Certification Committee, Practice, Certification and Training Standards, Family Mediation Canada, <http://www.fmc.ca/fmctoc.cfm.htm>, November 26, 2000.

Unfortunately, these standards are not compulsory. In their section on training standards, FMC makes it clear that a formal degree is not a prerequisite to training as a mediator, though it is highly recommended, and that “The FMC certification process will not prevent anyone from practicing family mediation but merely prevent family mediators who are not certified by FMC from claiming FMC certification or accreditation.” These standards do, however, form the basis for higher professional standing within the field. Perhaps they could also serve in the development of national governmental regulatory standards in the future.

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

Within their training standards, a minimum of twenty-one hours of training (out of a total of 180 or 12%) must focus on “abuse and control issues including instruction on power imbalances, the dynamics and effects of abuse on family members, indicators of danger in abuse cases, child protection matters associated with family abuse and violence, safety issues in mediation, the use of tools and techniques to detect and assess family abuse before and during mediation, the use and application of assessment tools to screen inappropriate family abuse cases from mediation, referral techniques, and

¹²⁴FMC Standards, Section 2, Part 4.

¹²⁵Ibid., Section 3.1, Part 3a.

¹²⁶Ibid., Section 3.2, Part 11.

¹²⁷Ibid., Section 2, Part c.

¹²⁸Ibid., Section 4.1.

information about sources of help for abused family members in communities...”¹²⁹ Again, however, these training standards are not compulsory in order for mediators to practice in this field.

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

- Mediators should have ongoing training regarding abuse issues even after certification, to deepen their understanding, and to assimilate new research and professional practices.
- Mediators should be subject to periodic qualitative practice evaluations.
- Mediators’ training should emphasize the safety of women and children, and an understanding of systemic gender discrimination and power imbalance.
- Front line workers serving abuse victims should be directly involved in mediator training.
- Presently planned training hours for conciliators and mediators on abuse issues should be increased.
- There should be legal mechanisms put in place to assure mediator accountability, including an accessible grievance process, and a discipline process with consequences. Work should begin immediately to develop and implement these mechanisms.¹³¹

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

Beyond the issue of training, women’s groups are also calling for accountability structures for the actual programs being implemented, including better evaluation. PAAFV question, in their report Keeping an Open Mind, whether or not adequate assessment of alternate dispute cases takes place in order to ensure that the standards or the program are met.¹³² Having undertaken further research on this question, they assert, in Making it Safe, that some people fear that restorative justice programs

¹²⁹Ibid., Section 5.3, Part 2c.

¹³⁰THANS, op.cit., p. 17.

¹³¹THANS, op.cit., p. 17.

¹³²PAAFV, Keeping an Open Mind, op.cit., p. 34.

“present even greater possibilities for injustice and harm to vulnerable groups because they are less open to the public and have fewer accountability structures.”¹³³ Throughout the PATHS conference in Saskatchewan, the issue of evaluation was raised on several occasions, citing concern that little evaluation of restorative programs seemed to be taking place.¹³⁴ Indeed, my experience undertaking this research pointed to a lack of evaluative reports within the field, with some programs (particularly mediation) informally evaluating their services through feedback from participants.¹³⁵

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

Although Pauktuutit is referring to programs taking place within a certain cultural environment, many of their concerns can also apply to programs delivered throughout the rest of Canada. They call for discussions which focus on: who can participate in the delivery of these services; what conduct guidelines should apply to those who are administering and facilitating these programs; the

¹³³PAAFV, Making it Safe, op.cit., p. 12.

¹³⁴Tracy Porteous, Irene Smith, Faye Blaney, and other speakers who were not identified.

¹³⁵Dorothy Barg Neufeld with Mediation Services of Winnipeg, which does few domestic violence cases and Denise Moore and Leigh Holm, with the Dispute Resolution Centre of Ottawa-Carleton, which does not presently take on domestic violence cases, both shared that evaluation processes were informal at present. In the many phone calls made to programs throughout this research, I could not secure one evaluative report. Unfortunately, I was unable to secure interviews with many of these programs, either, in order to follow-up with these questions.

¹³⁶Crnkovitch, Mary, op.cit., p. 5.

¹³⁷Pauktuutit, Setting Standards First, op.cit., p. 7.

¹³⁸Ibid., p. 12.

relationship between community politics and the delivery of such community services; and, the restrictions that must be put in place in order to guarantee that these initiatives do not perpetuate the inequality of Inuit women [or any women].¹³⁹

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

6) Resources

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

I think it's important to say that given the history of [Nova Scotia] when it comes to allocating resources to the community to respond to the various public policies and programs that they've implemented, it's very unrealistic that sufficient resources will be allocated for groups like Avalon Centre to provide the kind of support and counselling that women need. We've not seen and we certainly do not believe that sufficient resources will be allocated to ensure that there's money there to assist the offender in

¹³⁹Ibid., p. 12.

¹⁴⁰Lisa Addario, Executive Director, National Associations Active in Criminal Justice, July 26, 2000, in person, Ottawa, Ontario.

¹⁴¹Ibid.

¹⁴²Ibid.

reintegrating into the community.¹⁴³

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

Community resources should consist of the necessary means to provide continual support to both the victim and the offender, prior, during and following any process. To Judge Bria Huculak, this

¹⁴³Irene Smith, PATHS Conference, tape three, April 15, 2000.

¹⁴⁴Pauktuutit, Setting Standards First, op.cit., p. 8.

¹⁴⁵Ibid., p. 9.

¹⁴⁶Ibid.

¹⁴⁷Ibid.

¹⁴⁸McLean, Michelle, op.cit., p. 4.

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

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

The onus to provide sufficient financial and human resources to support these programs adequately must remain with government and should not be devolved to the community. However, that doesn't necessarily mean that volunteers should never be used. Many volunteers may already come to the program with extensive training in these issues. For those who do not, funds must be made available to undertake sufficient training, in keeping with the standards and guidelines that will hopefully be developed in the future. As well, though it is true that these programs must maintain a

¹⁴⁹Judge Bria Huculak, PATHS Conference, tape one, April 14, 2000.

¹⁵⁰Crnkovitch, Mary, op.cit., p. 24.

¹⁵¹Irene Smith, PATHS Conference, tape three, April 15, 2000.

¹⁵²Ibid.

¹⁵³PAAFV, Keeping an Open Mind, op.cit., p. 41.

certain standard and must include professional support, restorative initiatives are meant to take place within community. Therefore, as Bev Poitras pointed out at the Saskatchewan conference, it is important to not underestimate the resources available in one's own community,¹⁵⁴ both paid and volunteer.

Part IV A Way Forward?

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

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

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

¹⁵⁴Bev Poitras, PATHS Conference, tape three, April 15, 2000.

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

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