Gender bias, fathers' rights, domestic violence and the Family Court

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Introduction

Gender bias in judicial decision-making in the Family Court obscures a proper consideration of the best interests of the child, whose welfare is the first and paramount consideration in cases involving children. It is also unfair to individual adult users of Family Court services and contributes to gender inequalities in society.

Gender bias by Judges was first examined in terms of processes and practices that discriminated against women.[1] The body of research done in the 1990s by Ruth Busch and Neville Robertson and others refers to gender bias against women in domestic violence cases.[2] In the mid to late 1990s, however, the fathers' rights movement in New Zealand, as well as some politicians and sections of the media, have claimed that the New Zealand Family Court is biased against men and in favour of women. The issue of gender bias in the Family Court was reviewed in the Law Commission's 2003 report *Dispute Resolution in the Family Court* ("*Dispute Resolution*").[3] The Commission did not accept claims of actual gender bias against men, but was concerned by perceptions that the Court demonstrates a "pro-feminist, anti-male bias which undermines Court integrity".[4]

Claims of gender bias against men have focused in particular on laws relating to domestic violence, custody and access and the way in which those laws are applied in the Family Court. These claims include:

- It is too easy for women to get without-notice protection orders[5] and the law and the way it is applied by the Family Court are fundamentally unfair to fathers.[6]
- Protection orders are being misused by women for "tactical advantage" in custody and access disputes.[7]
- Large numbers of fathers are being deprived of contact with their children because of s16B of the Guardianship Act 1968.[8]

Claims of bias against men have achieved some credibility, both in New Zealand and in other common law jurisdictions, despite the absence of empirical or qualitative data to support them.[9] This article examines the validity of some of these claims and comments on perceived changes in the judicial treatment of domestic violence cases between 1998 and 2003. This period is considered both because it was a period of intense activity by and publicity for the fathers' rights movement and because some statistics and research that inform the debate are available for that period.

Over the period 1998–2003 there has been little public consideration of the perspectives of women.[10] In August 2004, however, the National Collective of Independent Women's Refuges published a report[11] ("the Women's Refuge report") suggesting that effective implementation of the Domestic Violence Act 1995 ("DVA") may have declined over the past few years. The report expresses concern that women who are victims of domestic violence are reporting that they are losing confidence in the legal and justice system.

If we are to avoid "social experimentation" in family law, as one Family Court Judge has publicly cautioned,[12] our practice of family law must be founded on a proper application of the law and reliable empirical data. The Women's Refuge report provides an opportunity to further consider gender bias in the Family Court and, for those who work in the Family Court system, to re-examine our prejudices and practices, particularly in cases involving domestic violence.

Gender bias[13]

Gender issues come into very sharp focus in many areas of family law. As Professor Kathleen Mahoney has pointed out, family law disputes usually involve "intensely gender-specific, value-laden

questions ...".[14] Family lawyers need to be aware of gender issues, including gender inequalities in society and societal myths about gender which perpetuate discrimination, and the way these can affect our work in cases involving children and adults.

Gender bias includes overt sexism and discrimination, but it is also often invisible, inadvertent and unintentional. Gender bias includes the improper use of stereotypes, the use of double standards, the use of gender-defined norms, the failure to incorporate or be sensitive to gender perspectives, not recognising harms because they are done only or mainly to women or to men, and being blind to gender-specific realities.

In the past decade important debates about gender bias in family law have occurred in common law jurisdictions. In New Zealand there has been little academic writing on the topic, but there is a significant body of scholarship, notably in Australia and Canada, about the "gender wars", particularly in the context of proposals for legislative reform of family law.[15]

Gender bias can prejudice both women and men, but it is not symmetrical. Unlike gender bias against men, gender bias against women occurs in the context of women's generally disadvantaged position in society and, historically, under the law: "[u]nfortunately for women, gender bias and sex discrimination are a large part of legal history".[16] Reg Graycar says that the debate over gender bias in family law requires an appreciation of the "'heritage of inequality' — the underlying gendered power imbalance that is so rarely talked about explicitly yet is so central to the way in which laws dealing with relationships between women and men are constructed".[17]

The gendered nature of domestic violence

Domestic violence is a gender issue, but not only a gender issue. Ninety-five percent of applicants for protection orders under the DVA are women and most respondents are men.[18] As the Law Commission found in its report *Some Criminal Defences with Particular Reference to Battered Defendants*:[19]

> It is incontestable ... that the large majority of adult victims of serious domestic violence have been women and their abusers have been men ... Our findings ... in the main justify our treatment of the topic as being concerned essentially with men's abuse of women.

Claims that women are just as violent as men in domestic relationships are not supported by the literature.[20] Some women are perpetrators of domestic violence, but there are differences in the type and degree of violence inflicted by men and by women. A recent research review has concluded:[21]

> It is certainly possible and politically necessary to acknowledge that some women use violence as a tactic in family conflict while also understanding that men tend to use violence more instrumentally to control women's lives. Further, these two types of aggression must also be embedded within the larger framework of gender inequality. Women's violence to male partners certainly does exist, but it tends to be very different from that of men towards their female partners: it is far less injurious and less likely to be motivated by attempts to dominate or terrorise the partner.

The Law Commission has referred to one study which was significant in its account of what women did not do (but which constituted tactics frequently employed by violent men):[22]

> ... No husband was threatened with a gun, or chased with knives, axes, broken bottles or by a car. Husbands were not kicked or stamped on with steel-capped boots or heavy work boots ... Strangling and choking were not used.

Gender bias can prejudice both women and men, but it is not symmetrical. Unlike gender bias against men, gender bias against women occurs in the context of women's generally disadvantaged position in society and, historically, under the law.

> No wife attempted suffocation with a pillow. Husbands were not locked out, confined to particular areas of the house, or isolated from friends ...

To this list might be added:[23]

> No wife has ever killed her husband inside Family Court premises or immediately following a Family Court-ordered counselling session.

And:

> Security is not routinely required to ensure that wives do not behave violently inside Family Court premises.

The Domestic Violence Act 1995 and s 16B of the Guardianship Act 1968

The object of the DVA is to reduce and prevent domestic violence by recognising that domestic violence in all its forms is unacceptable behaviour and by providing effective legal protection for its victims. The requirement for the perpetrators of violence to complete Living Without Violence programmes is designed to stop violent behaviour and cycles of family violence. The DVA is about protection, change and effective sanctions.

Limiting judicial discretion

Before 1996 some Family Court Judges approached domestic violence cases in a way similar to that now required by the DVA,[24] but others did not. Specific provisions were included in the DVA to prioritise safety, limit judicial discretion and prevent Judges deciding cases on the basis of assumptions, analyses and approaches which were not supported by reliable research.[25] These included what Robertson refers to as "the prevailing philosophy of the Family Court" in applying "a no-blame orientation to the resolution of family disputes";[26] adopting a "two to tango" analysis of domestic violence; treating the safety of women as secondary to placating abusers in the interests of seeking a negotiated resolution; the continuing requirement imposed by some Judges for mediation in domestic violence cases; trivialising some abusive behaviour by failing to put it into context; and failing to address the effects on children of domestic violence in custody and access cases.

As well as the clear definition of the object of the Act in s 5, these specific provisions include:

- Recognising psychological abuse as domestic violence, including allowing children to see or hear abuse and confirming that abuse can be a single act or a number of acts "that form part of a pattern of behaviour ..., even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial (s 3).
- Requiring Judges to consider patterns of behaviour in exercising their discretion about making a protection order (s 14(3)).
- Requiring Judges to have regard to the perceptions of applicants and children about the nature and seriousness of abusive behaviour and the effect of such behaviour (s 14(4)).
- Precluding Judges from declining to make protection orders just because of other Court proceedings (eg criminal proceedings or custody and access proceedings) (s 15).
- Prohibiting Judges from making mutual protection orders unless both parties have made applications and orders against both parties are necessary (s 18).
- Limiting special conditions to those which are reasonably necessary to protect protected persons from further domestic violence (s 27).
- Providing that protected persons and respondents cannot be required to attend programme sessions where the other party is present (s 31).
- Making attendance at programmes compulsory for respondents if a protection order is made, unless there is good reason not to (s 32(1)).

By 1995 the Family Court itself had recognised the need for some change in judicial attitudes to domestic violence. The July 1995 Department of Justice report to the Justice and Electoral Law Reform Select Committee on the Domestic Violence Bill noted that "[o]ne consequence of increased public awareness of domestic violence issues has been pressure on Family Court Judges to undertake training to ensure they are aware of current thinking on the issues" and referred to several initiatives by the Principal Family Court Judge and other Judges in this area.[27]

Other aspects of the DVA

The provisions of the DVA recognise that many violent relationships are characterised by the desire of the perpetrator of violence to control his partner.[28] The DVA recognises a "power and control" analysis of domestic violence, where psychological abuse may be part of "an oppressive and intimidatory pattern of coercion and control",[29] but does not mandate use of this analysis or limit the DVA to providing protection in a power and control model. The DVA also applies where protection is needed in other situations, for example because of the pathology of the abuser or where violence is an expression of anger which is not intended to coerce. Nor is the application of the DVA limited to marriages and heterosexual relationships. The DVA was intended to apply to and "reduce and prevent" violence in a wide range of family and domestic relationships.

Under the DVA protection orders can be made urgently and without notice to the respondent. Without-notice orders, called non-molestation and non-violence orders, were also available under previous legislation, the Domestic Protection Act 1982. The threshold for without-notice orders under that Act was whether the delay that would be caused by proceeding on notice would or might entail "risk to the personal safety of the applicant or a child of the family ... or ... serious injury or undue hardship".[30]

The threshold for without-notice orders was deliberately and significantly lowered by the DVA. The test under s 13(1) is now simply whether the delay that would be caused by proceeding on notice would or might entail "a risk of harm ... or ... undue hardship". The Department of Justice report to the Justice and Law Reform Select Committee noted that an increase in the numbers of without-notice protection orders might result from this lowering of the threshold:[31]

> Under the [Domestic Violence] Bill the threshold is reduced to either a risk of harm or undue hardship because in this context it was thought necessary to err on the side of providing more, rather than less, protection from as early a point in the process as possible. We acknowledge however that a consequence of this is a likely increase in the number of protection orders that can be made without notice first being given to the respondent.

Section 16B of the Guardianship Act 1968

Section 16B of the Guardianship Act 1968 ("s 16B") came into force at the same time as the DVA and reflects not only the recommendations of Sir Ronald Davison in his report on the killing of the Bristol children by their father in Wanganui in February 1994 but also earlier criticisms of the Family Court's approach by Busch, Robertson and Lapsley and others.

Section 16B makes the safety of children the paramount consideration in cases of domestic violence where children are involved. It recognises that children are harmed and placed at risk of further harm not only if they are the direct victims of violence, but also if they are exposed to violence by one parent to the other. The effect of s 16B is that an order for unsupervised access with an allegedly violent parent, or the granting of custody to that parent, can be made only if the Court is satisfied that the children will be safe in the unsupervised care of that parent. The Court's inquiry into the safety of the children may be by way of defended hearing or by consideration of affidavit evidence if both parents agree to custody or unsupervised access by the allegedly violent parent.[32]

Are the gender bias claims of the fathers' rights movement valid?

Is it too easy to get a protection order without notice? Is the law and the way it is applied by the Family Court fundamentally unfair to fathers?

Fathers' rights groups have said that without-notice protection orders have been "one of the biggest causes of anger among separated fathers, and one of the main drivers behind protests about New Zealand Family Courts, which have been widespread since the end of 2000".[33] This concern is recognised in the *Dispute Resolution* report, where the Law Commission notes that "much recent, negative Family Court publicity is a result of the way without-notice applications are handled".[34]

Whether it is too easy or too difficult to get a temporary protection order without notice depends of course on the views of the person asking the question. What is clear, however, is that over the period 1998–2003 it has become significantly more difficult to get a protection order without notice, despite the deliberate lowering of the statutory threshold.

Higher proportion of applications being put "on notice"

The Women's Refuge report refers to "a dramatic increase in without-notice applications being put on notice by Judges" between 1998 and 2003, a period when domestic violence-related crime increased as did the number of women and children accessing Women's Refuge services.[35] In the year ending June 1999, 12 per cent of without-notice applications were put on notice; by 2002 this had more than doubled to 25 per cent, decreasing slightly to 22 per cent in 2003. Similar figures are given in the Law Society Seminar booklet *Without Notice Applications* (judicial thinking revisited)[36] for the period 1998–2004 which indicate an increase from 15.5 per cent to 24.3 per cent. The authors of *Without Notice Applications* say that this 8.8 per cent increase (as opposed to the 10 per cent increase noted in the Women's Refuge report) is "arguably not large",[37] but in 2003/2004 this represented an additional 375 without-notice applications placed on notice, or 7.7 per cent of all applications for protection orders in that year.

The Women's Refuge report says that placing without-notice applications on notice discourages women from proceeding with their applications:[38]

> Advocates claim that many women do not proceed with applications when lawyers suggest on-notice application. The Ministry of Justice have noted that more than half of the applicants whose applications are put on notice withdraw. [Women's Refuge] [a]dvocates say that women who do not withdraw can live in a constant state of fear until the hearing to decide whether they get a protection order. Women often want to get an order straight away, but due to advice from lawyers or decisions made by Judges, they are forced to wait for weeks or months for a protection order.

This concern was also noted in the Ministry of Justice report published in 2000, *The Domestic Violence Act 1995: Process Evaluation* ("*Process Evaluation*"):[39]

> There is a much higher rate of withdrawal of those applications placed on notice. The research suggests that one of the reasons for withdrawing in these circumstances is the applicant's fear of further violence when the respondent is notified of the application ... That means, in order for there to be immediate protection where there is any question of safety, the application should remain "without notice".

Christopher Perry, in an empirical study of 208 protection order applications made to the Christchurch Family Court in 1997, expressed concern that 61 per cent of the without-notice applications that were directed to proceed on notice involved

severe abuse.[40] Perry called for further research about the exercise of judicial discretion in directing applications to proceed on notice as well as further training for Judges on the dynamics of domestic violence.

Is a lifting of the bar justified?

Despite these concerns, comment by some Judges suggests a deliberate lifting of the bar for without-notice protection orders. Principal Family Court Judge Boshier, in the foreword to *Without Notice Applications*, says that it is crucial to get the "correct balance" between the interests of "a desperate battered party who needs security and safety instantly" and a respondent who perceives unfairness and injustice leading to enduring bitterness.[41] The authors of *Without Notice Applications* emphasise the exceptional nature of ex parte orders in the general civil law, the right to natural justice, and "the importance of ensuring a fair process for the respondent as well as the applicant".[42] This reflects the approach of the Law Commission in the *Dispute Resolution* report, which conceptualised the issue as one of competing interests[43] (safety on one hand and natural justice on the other). One High Court decision, *D v D*,[44] also refers to a "clear line of authority over the past decade ... of High Court decisions which caution the Family Court against granting ex parte relief too readily".

On closer examination these sources do not provide any compelling justification for a judicial raising of the bar for making without-notice protection orders, in the face of Parliament's deliberate decision in 1995 to lower the threshold.

The *Dispute Resolution* report overall is clear and properly reasoned, but its treatment of without-notice orders is uncharacteristically confused and its recommendations in this area are not supported by reference to empirical data or other research. The Commission asks whether the tests for obtaining an order without notice are "stringent enough" and whether "the respondent's rights and interests [are] acknowledged sufficiently". Without answering its own questions or explaining the basis for its conclusions, the Commission goes on to recommend that "orders must be made on without-notice applications when requiring notice would be likely to cause substantial harm. Specific evidence of the need should be provided."[45] The report also recommends, again without proper discussion, justification or reference to the text and purpose of the legislation, that wherever possible, applications should be put on notice with time abridged.

Confusingly, the report also does not make it clear that some of its recommendations are about *changing* the substantive law rather than Family Court processes. As a result the report can be read to suggest that the "substantial harm" test is already applicable, which, of course, is not the case. In addition, given that the Law Commission's terms of reference were to consider changes to Family Court administration, management and procedure, these recommendations for changes to the substantive law appear to be well outside the Commission's brief.

Academic writing does not support the view that the law about without-notice protection orders is fundamentally unfair to respondents. In a recent and very thorough analysis of the DVA provisions *Ex parte orders in the Family Court and the New Zealand Bill of Rights Act 1990*,[46] Edward Clark concluded that the without-notice provisions in the DVA appear to be consistent with the right to the observance of the principles of natural justice required by s 27(1) of the New Zealand Bill of Rights Act. Clark says that a delayed right to be heard is not inconsistent with natural justice requirements, given the very high standard of evidence required to support a without-notice protection order application and the certification requirements for counsel, which "would seem to significantly reduce the risk of respondents being disadvantaged by protection orders which are later found to be totally without merit".[47] More problematic, according to Clark, is the Family Court's failure to comply with the rule that defences and other challenges to temporary protection orders must be heard within 42 days, but that requires reducing or eliminating delay in Court processes and is not a basis for declining without-notice applications in the first place.

Nor does the line of High Court authority about ex parte orders in the Family Court suggest that the Family Court has been too ready to grant without-notice protection orders. The cases[48] have dealt with a range of situations, but without-notice protection orders do not feature significantly. The leading case, *Martin v Ryan*,[49] involved the quashing of an ex parte order authorising a Court Registrar to sign transfer documents for matrimonial property. Other significant cases include an interim custody order made under the Children, Young Persons, and Their Families Act 1989 which effectively removed a child from the care of its mother (*C v K*);[50] an order removing a mother's joint guardianship rights (*R v R*);[51] a temporary protection order made against the mother of a child on an ex parte oral application made by the mother's brother and sister-in-law (*Y v X*);[52] and an order discharging an order preventing removal of a child from New Zealand and permitting relocation of children with their mother to Australia (*K v C*).[53] Busch and Robertson also remind us that in the Bristol case the Family Court granted interim custody of the children to their father on an ex parte basis, three months before he killed them.[54]

In *Martin v Ryan*, Fisher J said there were normally five requirements before ex parte orders could be made, including (without being inflexible or exhaustive) requirements that the delay that would be caused by proceeding on notice might entail irreparable injury and that there must be strong grounds for overriding conventional requirements for natural justice. However domestic violence cases involve different considerations to matrimonial property cases, and the "irreparable injury" requirement was not a general statement of legal principle, but a reference to the specific tests in the District Court Rules for ex parte orders. The threshold and tests in the DVA are different. *D v D*[55] was an appeal to the High Court by an applicant who had been

refused a without-notice protection order by the Family Court. Priestley J affirmed the Family Court decision, which does not suggest that it is "too easy to get a protection order".

Is it too hard to get a protection order without notice?

Requirements for "balance" and the weighing of "competing interests" are a gloss on the legislation and involve a reading down of the clear wording of the DVA. The only "balance" required is that set out in the legislation. The raising of the threshold through the importation of a "balance" requirement is an exercise of judicial discretion which signals a possible return to the very judicial attitudes which prompted the extensive reforms brought in by the DVA. The "balance" requirement also imports gender bias against women applicants by failing to acknowledge the disadvantaged position of women in violent relationships. The Women's Refuge report makes the important point that the parties in domestic violence proceedings do not start out from positions of equality of power:[56]

> The ability to apply for a protection order without notice is also designed to balance the power in a relationship of unequal and abusive use of power. The protection order is one tool or tactic, provided by the state, that women can use to assert their right to safety and respect, when all their other avenues to autonomy and peace have been exhausted.

When parties start from unequal positions, giving special consideration, over and above that required by statute, to the rights of respondents will compound the disadvantage to the abused party.

Ritchie v Department for Courts[57] suggests that some Judges may be imposing far too high a threshold for without-notice protection orders. In that case the High Court quashed a decision of a Family Court Judge requiring that a without-notice application for a protection order be put on notice. Laurensen J referred to the applicant's allegations of physical, sexual and psychological violence and said: "Taking these matters into account I do not see how one could reasonably conclude that the behaviour relied on by the applicant could not be said to be behaviour which would, or might, entail a risk of harm or undue hardship." Laurensen J added that "interpreting the word 'delay' I do so on the basis that this is not simply a temporal consideration, but that it must also include anything that goes with the delay and the consequences of that. In my view if the delay carries with it the requirement to serve notice of the proceedings on the respondent, that is an element of the delay which would, or might, entail a risk of harm or undue hardship."[58]

What has been largely overlooked in the debate so far is the rather obvious point that the angry reaction of some male respondents to the making of temporary protection orders may have more to do with loss of control over their perceived right to behave as they see fit towards their partners and children than a legitimate grievance based on an unfair denial of rights. Changing practices and processes to placate unsubstantiated claims by some male respondents is unlikely to contribute to safer outcomes for women and children, which the DVA requires.

In *Without Notice Applications* the authors warn that unless practice is improved under the DVA "there is a risk that this ground-breaking legislation will be undermined with the consequence of less protection in dealing with family violence."[59] However there is no compelling evidence of significant problems with practice under the Act. The authors suggest that we should go "back to the future" by returning to the principles of natural justice and say that "sometimes it is necessary to go back in order to move forward".[60]

The Women's Refuge report, however, suggests that the legislation is already being undermined, not because it is too easy to get a protection order, but by increased judicial reluctance to make temporary protection orders without notice.[61] Sometimes in order to move forward, all we need to do is move forward.

Are protection orders being misused by women for strategic advantage in custody and access disputes?

The Fathers' Rights movement has claimed that protection orders have become the "new weapon of choice for women prepared to abuse the system to exclude fathers from their children's lives".[62] Family Court Judge Jan Doogue makes a similar criticism in her April 2004 paper *The Domestic Violence Act 1995 and s16B of the Guardianship Act 1968—The Effect on Children's Relationships With Their Non-Custodial Parent*.[63] Judge Doogue says that there is "no doubt in [her] mind ... that there are a good number of cases where delay means that women are the arbiters of access that men have to their children and that in some cases the Temporary Protection Order is in fact used as a 'weapon' against the father".[64]

The Women's Refuge report suggests that these claims may be affecting the way in which the DVA is being applied: "Women have reported that some Judges have refused protection orders, questioning women's motivations for applying when they had already been putting up with the violence for so long. Women said they were told that if the violence were actually serious, she (sic) would have applied for protection before this."[65]

Claims of abuse of the system by women are founded on the premises that many women make false or exaggerated allegations of violence, and that their motives in applying for protection orders are not to get protection from domestic violence and safe care arrangements, but to unjustifiably and maliciously prevent contact between their ex-partners and their children. If there was substance to these claims, one would expect a significant number of cases in which adverse credibility findings are made against applicants who are put to proof. In fact there are very few such cases reported.[66] The Law Commission found "no empirical or qualitative evidence to substantiate ... allegations" that "women were making strategic use of protection orders to prejudice fathers' positions in custody

disputes".[67] The Ministry of Justice *Process Evaluation* research also suggested that "strategic use of [protection] orders is not widespread".[68]

This reflects my own experience. In the period 1996–2004 I have acted for applicants for protection orders in over 230 cases. In 27 of those cases a "findings of fact" hearing was necessary (either because the respondent was opposing the making of a protection order or was seeking unsupervised access where the applicant opposed this or both). In two of those 27 cases adverse credibility findings were made against the female applicants. In those two cases the Judge's findings were based on his or her perceptions of the seriousness and dynamics of incidents which both parties agreed had occurred and on overall patterns of behaviour. That was also true in some of the 25 cases where adverse credibility findings were made against the male respondents, but more often in those cases the respondent simply denied using any violence and the Court did not accept his denials.

Commenting on the criticism that women use the DVA and s16B legislation as "weapons", former Commissioner for Children Dr Hassall asks:[69]

> Why is it not considered appropriate for the Temporary Protection Order to be used as a (defensive) weapon against the father and for the protected person to assume control of access "to a considerable degree"? Is that not the point of the legislation if it is done to make the child safe? What the non-custodial parent regards as unwarranted denial of access may well be regarded by the custodial parent as warranted and the onlooker may have difficulty deciding between the two.

The Women's Refuge report notes that what motivates almost all women who apply for protection orders is fear and a desire to make themselves and their children safe.[70] This is reflected in Australian research about women's attitudes to access where "one of [the] most striking findings was that most women who had experienced violence in their relationships still wanted their children to have some contact with their other parent, but what they sought (and often did not get) was an arrangement that ensured the safety of the children and themselves".[71]

It is not suggested that women never make unfounded allegations of domestic violence, but there is nothing to suggest that this is common, that women are more likely to make unfounded allegations than men, that there is significant misuse of the Act, or that unfounded allegations occur more often in domestic violence and s16B cases than in other cases dealt with by the Family Court. Yet despite the lack of empirical evidence of widespread tactical use of protection orders by women, the Women's Refuge report says that women are now being required to show that they are "deserving" victims and are not manipulating, vindictive women using the system to punish men.[72] The report claims that "[v]ictim-blaming discourses, a minimisation of violence, and the idea that women are manipulating the Domestic Violence Act have once again permeated the whole justice system, making it confusing to women who do not know which Judges, lawyers and police they can rely on to be focused on the safety of victims". The report also raises an interesting point about the gender politics of the "weapon" terminology:[73]

> The "sword and shield" is in itself interesting phraseology — it refers to the idea that women should not fight back or try to equalise the power (meet the sword of violence with the sword of justice) but should only be cowering under a shield, unable to move, advance or act autonomously in the world. Under a shield women will always be on the defensive and passive.

There also appears to be a double standard apparent in the failure to ask whether men act strategically or make unfounded allegations in Family Court proceedings in general and in DVA cases in particular. Information available on fathers' rights websites indicates that those groups advise fathers to approach Family Court proceedings in a highly strategic way.[74] Research showing that abusive men sometimes use access arrangements to harass, abuse and control their ex-partners is not described in the debate as the use of a weapon or analysed in terms of tactics.[75] The Women's Refuge report also refers to strategic use of Court processes by some male respondents, such as unjustified cross-applications for protection orders against their ex-partners and use of the legal process to further harass and abuse the applicant:[76]

> Within the small space of a Family Court mediation or hearing, the abuser can use intimidation tactics, the signals or cues that a woman has come to learn mean "back down now or else". Women are often very afraid and can be distracted by the fear of violence. ... [W]omen can feel unable to stand up for themselves and sometimes their lawyers are equally intimidated or unsure and so also do not defend (sic) women adequately.

The stories that women act from bad motives and are prone to lying because of their gender are old, old myths in society and in the law. For example the judicial practice which required juries in rape and other sexual assault cases to be warned that it was not safe to convict on the uncorroborated evidence of the complainant was based on this myth.[77] The continued promotion of these myths by the fathers' rights movement is not surprising. What is surprising and of concern is the way in which these myths appear to continue to influence discussion about the law on domestic violence and custody and about gender bias in the Family Court.

Is s 16B "destroying child-parent relationships"?

Domestic violence is harmful to children. It may "fragment" or even "destroy" children's relationships with their parents. Children are affected as much by exposure to violence as being involved in it and their ongoing fear and dread of it recurring is emotionally very damaging.[78]

Contact between children and their violent parents can bring both risks of harm and potential benefits to children. Contact between a parent and child is

likely to be beneficial if the relationship is significant for the child, if the quality of attachment is good, if there is an absence of conflict in the relationship, if opportunities for reality testing of distortions are good, and if the experience of contact is good. Contact is likely to be detrimental if the converse of each of these dimensions is true and in particular if the child is subjected to physical, sexual or emotional abuse during contact and if there is significant conflict. Contact is also likely to be detrimental if it involves a continuation of unhealthy relationships such as bullying relationships, controlling relationships through subtly or blatantly maintaining (or initiating) fear or through other means such as bribes and emotional blackmail.[79]

Positive views of the legislation

In the early years of the DVA and s16B, judicial attitudes to the legislation appeared to be largely positive. The Ministry of Justice *Process Evaluation* reported, on the basis of research done in 1998 and 1999, that "[o]verwhelmingly the people who were interviewed as key informants [these included ten Family Court Judges] ... consider the Domestic Violence Act 1995 to be a good piece of legislation that achieves its objectives" and "almost without exception, Judges, lawyers and Court staff believe the 1995 Act is an improvement on the previous legislation".[80] Many Family Court Judges took care to apply the law in a way that prioritised safety, in cases such as *Fielder v Hubbard*[81] where the Court said that it could take into account psychological abuse as well as physical violence in evaluating whether unsupervised access would be safe.[82]

The Women's Refuge report describes the legislation as "a thorough and progressive piece of legislation" which is overwhelmingly supported by Women's Refuge and others working in the family/domestic violence sector. The view of the Family Law Section Domestic Violence Standing Committee is that the "legislation is, on the whole, working well and is contributing towards safer outcomes for children".[83] The Committee said that the data available did not support the view that the legislation had deprived significant numbers of children of contact with their fathers and that problems were with implementation of the legislation rather than the legislation itself.

Negative views of the legislation

Father's rights groups, however, have been highly critical of the legislation and the way in which it has been applied. This criticism has received a lot of media attention since 2000[84] and has been acknowledged by the Law Commission and by Judge Doogue, who says that it is "incumbent on the legal community not to dismiss the views of critics of the legislation because they appear in some instances to be so extreme".[85]

Media reports of judicial criticism of the legislation have used strong language, with the *Weekend Herald* headlining its report of Judge Doogue's paper "Judge attacks Family Court laws", with a sub-heading "ten-year-old access rules 'destroying child-parent relationships'".[86] The *Herald* reported Judge Doogue's view that the legislation is "social experimentation" and her criticism of the supervised access provisions, which she said sometimes result in "either inappropriate outcomes for children or unacceptable disenfranchisement for parents".[87] The *Dominion Post* of 18 March 2004 reported former Principal Family Court Judge Mahoney as calling for "law changes to make life fairer for fathers blocked from seeing their children following allegations of domestic violence".[88] In an unreported judgment another Family Court Judge has described the legislation as "draconian" and having "quite horrendous consequences".[89]

Despite these sometimes strongly worded reports and criticisms, there is no data or research which suggests that the legislation is depriving significant numbers of children of contact with their fathers. The Ministry of Justice research study *The Domestic Violence Legislation and Child Access in New Zealand*[90] found that suspension of access following the making of a protection or interim custody order was generally temporary only. In only a very small number of cases was access completely suspended and, in these cases, it was unclear whether the non-custodial parent would have pursued access anyway even if a protection order had not been made. A small number of children suffered direct physical and sexual abuse during access despite being protected persons under a protection order and 34 per cent were reported to have suffered some form of psychological harm during access.

The companion Ministry of Justice *Process Evaluation* reported "disquiet about the unintended effects orders can have on the relationship between fathers and their children".[91] This disquiet was expressed by male respondents and some Judges, rather than female applicants.

Higher Court authority

Two recent High Court decisions have been critical of the Family Court for failing to correctly apply s 16B to ensure the safety of children. In *M v M*[92] the High Court overturned Family Court orders granting interim custody of three children to their father and was critical of the Family Court Judge for failing to make a finding on allegations of the father's violence to the mother. The High Court noted (citing relevant research) that "the probability of parental child abuse is much increased where the parent has already been violent to a partner" and that "children in the custody of a violent partner are more likely to witness further violence".[93]

In *B v M*[94] the High Court overturned a Family Court decision allowing unsupervised access, because the paucity of reasons given by the Family Court Judge led Heath J to doubt that the Judge had correctly applied the standard of proof. Heath J described the nature of the s 16B inquiry in the following terms:[95]

> ... the usual inquiry of a Judge, on an application under the Act, is a predictive assessment of the best interests of the child (the s 23 inquiry). However, when issues of domestic violence arise a logically prior inquiry is undertaken, namely into the safety of the child (the s16B inquiry). Only if the s 16B inquiry is answered favourably to a parent who has been

found to have been violent will the Court be able to consider (on a s 23 inquiry) whether it is in the best interests of the child for unsupervised access or a custodial order to be made in favour of that parent.

The High Court also found that, "in assessing the question of 'safety' of the child for the purposes of s 16B(4), the Court is entitled to have regard to all relevant factors touching on that issue, whether directly or indirectly related to the actual violence proved to have taken place or not".[96] This approach confirms the broader of two approaches taken by Family Court Judges to interpretation of s16B, the narrower approach being that physical or sexual violence only is relevant. The Court said that "only if [the Family Court Judge] could find affirmatively that the child would be safe would he have been entitled to consider whether unsupervised access was in the best interests of the child".[97]

Some support for the fathers' rights group claims is suggested in *D v D*, in which the High Court said that the legislation "can have the effect of fragmenting family relationships and, importantly, severing for several weeks a relationship between a father and his children". However the Court did not refer to any research or data in support of this obiter comment and confirmed that "protection must remain centre stage".[98]

The legal requirement to give safety priority over parental rights to contact with children was also reinforced by the Court of Appeal decision in *ER v FR*,[99] an appeal against a High Court decision (Neazor J) upholding a Family Court decision to refuse a father access to his children because he posed an unacceptable risk to them. One of the grounds for challenge was that s 16B was inconsistent with art 23(1) of the International Covenant on Civil and Political Rights, which provides that:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

The Court of Appeal dismissed the appeal, saying that "[i]t is perfectly clear that art 23 does not require states to provide for access to children in circumstances where such access is not in the best interests of the child concerned".[100]

Another perspective

In her observations about the impact of the DVA and s 16B on parents' relationships with their children, Judge Doogue draws on her experience as a Judge and the experience of other Judges she consulted.[101] From my experience and my discussions with some other family lawyers, there appears to be growing pressure in the Family Court system for women to agree to interim access arrangements which they consider to be unsafe pending "findings of fact" hearings and at other stages in proceedings involving domestic violence. As an example, in one recent case my client, the mother, complained to me following a Judges List review that she felt pressured by the Judge to agree immediately to the father's proposal for week-about shared care, despite recent findings by the Court of repeated physical violence from the father to her in front of one of the children. The Judge implied that the mother was being obstructive in seeking a s 29A report and risk assessment. The Judge with obvious reluctance eventually directed that a report should be obtained, but nevertheless invited the father to pursue his application for week-about shared care on an interim basis prior to receipt of the report which was to address safety issues specifically.

In another case where s 16B findings had to be made, my client felt that the Family Court Judge had prioritised the father's right to contact over the safety of the child and had minimised the violence done to her and the consequent risks for the child. The Judge found that "[o]n the balance of probabilities ... there was physical violence inflicted on [the applicant] by [the respondent] substantially as set out in her application for a temporary protection order".[102] However as he delivered his oral decision with both parties present in Court the Judge went on to say that he did "not consider the physical violence to have been particularly severe relative to other cases where significant injuries have been caused and in the context of a difficult ten-year relationship". The physical violence which the Judge did not consider "particularly severe" included:

- The respondent father kicking the applicant mother in the head while she was kneeling on the floor changing the baby's nappy.
- The respondent throwing the applicant against a wall or door with such force that when her head hit the wall (or door) she lost consciousness. The child did not see the incident but saw his mother unconscious.
- The respondent kneeing the applicant repeatedly in the tail bone causing her such pain that she could not stand. When she fell to the ground the respondent kicked her again in the behind. The applicant said that the child saw this incident; the respondent denied this.

The Judge went on to say that he considered the respondent's psychological abuse of the applicant to be greatly more significant but that did not extend to a real or significant concern for the child's physical safety in the care of his father. The child was in the day-to-day care of other family members, because the applicant mother had felt unable to parent the child properly at that time because of the effect of the violence on her. The Court found that the child would be safe in the care of the respondent father and approved unsupervised access by him.

Comment on s 16B

There is currently no empirical or other reliable evidence to support claims that the legislation is "destroying child-parent relationships", "fragmenting families" or causing large numbers of children to be deprived of safe and positive contact with their non-custodial parent. Concerns about the operation of s 16B should be addressed through proper research. The Ministry of Justice research is now over

five years old and requires updating. Changes should not be made, however, solely as a reaction to the unsupported claims of fathers' rights groups and politicians seeking media attention. It is potentially very harmful to children to change laws designed to make children safe in the absence of reliable research indicating a real and significant problem.

Research must focus on the safety, needs, experiences, perspectives and rights of children, rather than being driven by a parental rights agenda or concerns about "parental disenfranchisement". Australian commentators have noted that reform of Australian custody and access laws in response to political concern for the position of non-custodial fathers resulted in a "new contact culture ... involving increased reluctance on the part of Judges to refuse orders for contact, even when allegations of domestic violence had been made. In turn, this had led to changes in lawyers' behaviour and created pressures on women to provide contact that compromised their safety." [103]

At a time when serious violence against children is increasing and New Zealand is ranked third to worst of the 26 OECD countries for child abuse deaths,[104] when New Zealand's prevalence rate for domestic violence remains much higher than rates in the United States, Canada, Finland, Sweden, Australia and England,[105] and when domestic violence-related crime in general is increasing,[106] a great deal of caution is needed.

Some other items on the fathers' rights agenda

Over the period 1998–2003 there are indications of possible changes in judicial attitudes towards other "intensely gender-specific, value-laden questions" in family law. For example in relocation cases, despite the settled principles of law in this area,[107] it has become significantly more difficult for a custodial parent to obtain an order from the Family Court permitting relocation. In relocation cases the party who wishes to relocate with children is almost always the mother. In 31 relocation cases analysed by Professor Henaghan and decided between 2001 and 2003, the parent who wanted to relocate was the mother in 28 cases and the father in three cases.[108] Henaghan's analysis of 75 relocation cases between 1988 and 1998 revealed an average success rate during that period for the relocating parent of 62 per cent. However in 1999 and 2000 the success rate dropped to 48 per cent and between 2001 and 2003 it dropped still further to 38 per cent (12 cases). Since three of the 12 cases in which parents were allowed to go were High Court appeals where the decision of the Family Court not to allow relocation was overturned, the success rate in the Family Court over that period for the party seeking a relocation order was therefore only 29 per cent.[109]

Although there is no evidence to suggest a connection, it is interesting that over the five year period of intense political activity by fathers' rights groups, relative success rates in relocation cases analysed by gender have been completely reversed.

Enforcement of access orders is another item on the fathers' rights agenda. Recently the highly controversial and gendered theories of Gardner about parental alienation have been referred to[110] in support of a more active approach by the Family Court to enforcement of access orders. This is despite criticism of the parental alienation concept by many highly respected commentators including Sturge and Glaser, and Freckleton, who say that solutions to cases involving implacable hostility should be reached depending on the individual circumstances of each case.[111] The Law Commission's discussion of enforcement is also framed essentially as a problem involving denial of access to the (usually) male access parent by the (usually) female custodial parent.[112] Little attention has been given to enforcement issues raised by mothers about fathers not exercising access or not returning children at the conclusion of access,[113] which are also significant aspects of access enforcement.

"Equal time shared care" is another major goal of the fathers' rights movement. There is no reliable social science research to indicate that fathers are spending more time caring for children now than in the past (pre- or post-separation). Yet some Judges have referred to these claims in judgments about care arrangements for children. In *W v C*,[114] subsequently held by the Court of Appeal to be not "good law", Judge Inglis QC sought to establish a presumption of "equal and shared responsibility for the child's nurturing", referring to "*common knowledge* that the stereotype of the nuclear family and a home-bound mother has become noticeably and significantly eroded".[115] That claim can be supported by statistics relating to women's workforce participation and the composition of families, but it is this material which should be cited, not "common knowledge". What is not established is the leap from there to the assumption that men are spending more time caring for children than they have in the past, a claim which may or may not be correct, but which is not supported at present by time-use survey data or other reliable research.

In *D v S* [116] even the Court of Appeal referred to submissions that, although there was "limited statistical data available", the "considerable experience" of counsel involved indicated "a growth and degree of involvement of both parents in family care". This is a fragile and unacceptable basis on which to base significant changes in family law. Our Courts must take into account changes in society, but only if reliable evidence of these has been put before the Court in a proper way.[117] Relying on "common knowledge", or accepting assertions about social trends in the absence of reliable research or previous judicial findings, to support significant changes in judicial decision making is indeed "social experimentation".

Comment and conclusion

As in Canada, Australia and the UK, New Zealand fathers' rights groups have gained significant political influence. This article suggests that they have also been able to influence law making and law reform processes, Family Court processes, and the way in which the Family Court applies

certain laws. Carol Smart has suggested that in some areas of family law the "legitimate discourse is now in the mouths of the fathers".[118]

A detailed analysis of fathers' rights groups in New Zealand has yet to be done. There are many aspects of the movement which deserve closer scrutiny, as has occurred overseas: these include an objective history and description of the activities of these groups; the methods they have used to gain influence; the validity of their criticisms of the Family Court; the Family Court's response to the criticisms and activities of the groups; and the way in which the government, politicians and the media have responded to them and their criticisms of the Family Court.

One of the most striking aspects of fathers' rights groups internationally is their success in influencing the direction of family law, despite the almost complete absence of empirical data or reliable research to support their family law policies and their claims of Family Court gender bias. In New Zealand a preliminary look at the Law Commission's approach to these claims and the approach of some Judges suggests that even legal institutions are not immune from being influenced despite the absence of reliable supporting material for the claims.

Kaye and Tolmie say that "[w]ithin the rhetoric of fathers' rights groups, men's and women's interests are presented as being necessarily in opposition. If women have rights they must have won these at the cost of men, who are therefore victimised ... Accordingly, if fathers' rights groups can show that mothers have 'special rights' and are overprivileged and powerful, it follows that fathers need rights to provide protection from them, or at least guarantee equal treatment with them."[119] An examination of the Law Commission's approach and the statements of some Judges suggest that this rhetoric has influenced the way in which the law relating to domestic violence is now applied in the New Zealand Family Court. The new "balance" imperative, for example, is consistent with Kaye and Tolmie's analysis.

It is not suggested that all of the criticisms made by or responses to fathers' rights groups are unjustified or negative. For example, complaints about "fragmented families" have resulted, certainly in some Family Courts, in cases of domestic violence being dealt with more quickly. However these issues are too important to be dealt with in a piecemeal way.

One requirement is a more analytical and measured approach. Our legal institutions need to respond to changes in society, but that does not mean that they should make or recommend changes solely as a result of direct political lobbying, unacceptable pressure by interest groups, legal and societal myths about the behaviour of men and of women or adverse media publicity.

Another requirement is a better framework for consideration of these issues. According to many overseas commentators, the development of family law should focus primarily on children's rights or "recognising" children, rather than simplistic notions of equality between parents.[120] Keeping the safety and welfare of children as the touchstone will contribute to better laws and better application of them.

It is also important that we consider the way in which other countries have dealt with these issues, in particular Canada and Australia. There is a wealth of material which could inform the debate in New Zealand, but which is seldom referred to. One of the most important conclusions of the debates in Canada and Australia is a recognition that in custody law reform "no one size fits all families".[121] New Zealand family law requires and recognises that principle, of course, but the recent emphasis on fathers' rights has sometimes obscured the need for decision making to focus on "*this* child, with *this* father, *this* mother, *these* brothers and sisters and *these* particular surrounding circumstances. The result necessarily has to be personalised to meet the welfare of each particular child."[122]

More research about family life in New Zealand is also needed. Rhoades and Boyd refer to the "plethora of empirical studies" on family life in Australia that followed the passing of the 1995 "shared parenting" amendments to the Family Law Act 1975 (Cth) and conclude that "the research appears to have persuaded the policy-makers that there is a variety of different arrangements that can work well for children and families, and that there are various 'innocent' reasons — logistical, emotional, economic — for the failure of shared residence arrangements, rather than inevitably (or at least solely) blaming obstructive mothers and malevolent Judges for its rarity".[123] Another obvious gap is that the research about the effect of separation and divorce on children and the research about the effects of domestic violence on children have developed largely on separate lines.[124] It is vital that this gap is bridged.

Gender bias is, however, a significant aspect of consideration of these issues, both because it obscures a proper focus in decision making on the safety and welfare of children specifically and families generally and, as noted at the beginning of this article, is unfair to adult users of the Family Court and contributes to gender inequalities in society.

The response to claims of Family Court gender bias against men also raises interesting issues about gender bias against women. The following types of gender bias against women might be identified in aspects of the debate over the DVA and s16B: acceptance of gender myths and stereotypes (that women fabricate allegations of domestic violence, use the law to gain tactical advantage and maliciously subvert access arrangements);[125] the use of double standards (suggesting that women use the law for tactical reasons without also examining whether men do the same); failing to incorporate or be sensitive to the perspectives of women;[126] not recognising women's harms because they are done to women (giving priority to men's claims of unfairness over the need for women and children to be safe; examining enforcement of access as a problem affecting non-custodial fathers and not addressing the concerns of custodial mothers); being gender-blind to gender-specific realities (acting as if domestic violence is not a gender issue, when it is).

One of the prerequisites for avoiding gender bias is an awareness of the law's historical approach.[127] Students of legal history or feminist jurisprudence might ask whether the unsupported claims that mothers make strategic use of protection orders to gain custody of children and the criticism of the process for getting without-notice protection orders are not just rehashed versions of the ancient and pervasive legal myths that allegations of domestic violence, like allegations of rape (and more recently sexual harassment), are "easy to make, hard to defend". And whether we still believe, as Blackstone, Coke and Hale did, that women are lying, vindictive creatures who ought to be presumptively disbelieved. And whether the rights of men are, when it comes down to it, more important than the rights and safety of women and children.[128]

Gender bias against women does a grave disservice to men as well, in particular to those men who, having had protection orders made against them, recognise that their violent behaviour is damaging to their family, to themselves, and to society, make an effort to change, and seek assistance from the legal system to do so.

The Women's Refuge report recommends further training about domestic violence for the justice sector, a "whole system" approach to safety, protection and accountability, and consistency of response to domestic violence. The report also provides a timely opportunity for a stocktake of developments in this area over the past five years and a refocusing of the debate.

Footnotes

1 See for example Professor Kathleen Mahoney *Gender Bias in Family Law* (1996) 2 BFLJ 308.

2 See for example Ruth Busch, Neville Robertson & Hilary Lapsley *Protection from family violence: A study of breaches of protection orders* (Victims Task Force, Wellington, 1992); Ruth Busch *Don't throw bouquets at me ... (judges) will say we're in love: An analysis of New Zealand judges' attitudes towards domestic violence* in J Stubbs (ed) *Women, male violence and the law* (Institute of Criminology, Sydney, 1994); Ruth Busch & Neville Robertson *The gap goes on: an analysis of issues under the Domestic Violence Act 1995* (1997) 17 NZULR 337.

3 Law Commission, *Dispute Resolution in the Family Court* (NZLC R82, Wellington, 2003). Hereafter *Dispute Resolution*.

4 *Dispute Resolution*, supra, n 3, para 953, p 197.

5 *Dispute Resolution*, supra, n 3, para 540, p 114.

6 *Dispute Resolution*, supra, n 3, para 965, p 199.

7 Masculinist Evolution New Zealand website: www.menz.org.nz/information/dopstats.htm (last accessed 20 July 2004).

8 *Dispute Resolution*, supra, n 3, paras 975-990 pp 202-206.

9 See *Dispute Resolution*, supra n 3, para 1020, p 212: "Many allegations of bias are founded on individual stories, and unreliable or unsubstantiated statistics." See also media releases of the Family Law Section of the New Zealand Law Society at www.familylaw.org.nz/media/media.asp, in particular *Letter to the Editor of North and South, 7 June 2001, Response to article Court of Injustice.* See also Miranda Kaye and Julia Tolmie *Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law* (1998) 12 Australian Journal of Family Law 19; Marie Lang *For the Sake of the Children: Preventing Reckless New Laws* (1999) Canadian Journal of Family Law 229.

10 Wellington Community Law Centre *Domestic violence: the balancing act for judges* (Council Brief, June 2004, at 10): "There is another voice that has not been heard in the national news of late, that which we frequently hear at the Community Law Centre via our free legal advice sessions and from the community groups whom we serve — that voice is of women in situations of domestic violence."

11 Sheryl Hann *The Implementation of the Domestic Violence Act 1995: A Report from the National Collective of Independent Women's Refuges Inc* (August 2004). Hereafter Women's Refuge report.

12 Her Honour Judge Jan Doogue *The Domestic Violence Act 1995 and s 16B of the Guardianship Act 1968 — the effect on children's relationships with their non-custodial parent* (2004) 4 BFLJ 243, first presented at the LexisNexis 3rd Annual Child and Youth Law Conference, Auckland, 1-2 April 2004.

13 Definitions of gender bias are contained in *Dispute Resolution* Chapter 17 and, for example, in Joanne Morris *Women's Experiences of the Justice System* (1997) 27 VUWLR 649, at 662.

14 Supra, n 1, at p 311.

15 Helen Rhoades and Susan B Boyd *Reforming Custody Laws: A Comparative Study* (2004) 18 International Journal of Law, Policy and the Family 119.

16 Supra, n 1, at p 308.

17 *Law Reform by Frozen Chook: Family Law Reform for the New Millenium* (2000) 24 Melbourne University Law Review 737 at pp 753-754.

18 *Dispute Resolution*, supra n 3, para 540, p 114.

19 (NZLC R73, May 2001, Wellington) at p x (the author has edited the quote).

20 See Dobash, Dobash, Wilson and Daly *The myth of sexual symmetry in marital violence* (1992) 39 Social Problems 72 and the treatment of this issue in the 1998 hearings before the Canadian Special Joint Committee on Child Custody and Access described in Rhoades and Boyd (Supra, n 15, at pp 128-129).

21 Michael S Kimmel *"Gender Symmetry" in Domestic Violence: A Substantive and Methodological Research Review* (2002) 8 Violence Against Women 1 at p 17. Kimmel's findings are supported in a New Zealand context by N Christopher R Perry *An Empirical Study of Applications for Protection Orders made to the Christchurch Family Court* (2000) 3 BFLJ 139, at p 143. See also Neville R Robertson *Reforming institutional responses to violence against women* (unpublished PhD thesis, University of Waikato, 1999) at 40.

22 J Scutt *Even in the Best of Homes* (Penguin, Victoria, 1983) cited by Kerri James "Truth or Fiction: Men as Victims of Domestic Violence" in Jan Breckenridge and Lesley Laing (eds) *Challenging Silence* (Allen & Unwin, New South Wales, 1999) 156, and in supra, n 19, at pp x-xi. See also Allison Morris and James Reilly in collaboration with Sheila Berry and Robin Ranson *The New Zealand National*

Survey of Crime Victims 2001 (Ministry of Justice, May 2003).

23 On 9 December 1998 Elizabeth Bennellick was murdered by her former partner John Harold La Roche in the Palmerston North Family Court (supra, n 19, n 48). Kathryn Coughlin was shot dead by her estranged husband David Coughlin outside a counselling centre in Christchurch after a Family Court-referred counselling session: The Press *"Protection" of judges upsets victim's mother* 25 November 1992, 8.

24 See for example Judge Blaikie *Emotional abuse of children: some responses from the Family Court* (1994) 1 BFLJ 77.

25 Ruth Busch & Neville Robertson *The 1995 Domestic Violence Bill: a reform half done?* (1995) 1 BFLJ 216.

26 Neville R Robertson *Reforming institutional responses to violence against women* (PhD thesis, University of Waikato, 1999) at p 171.

27 Department of Justice *Report to the Justice and Electoral Law Reform Select Committee on the Domestic Violence Bill* (Wellington, July 1995) at p 5.

28 In recognition of the gendered nature of serious domestic violence, the author refers generally to male perpetrators of domestic violence and female victims, noting also the practice of the Law Commission in *Dispute Resolution* (p 115, n 159) in referring to female applicants and male respondents.

29 Supra, n 15 para 45 p 16.

30 Sections 5 (for non-violence orders) and 14 (for non-molestation orders).

31 Supra, n 27, at p 35.

32 *W v W* (High Court, Hamilton AP 93/00, 21 June 2001, Chambers J) at para [14]. The practice of individual Family Court Judges varies.

33 Supra, n 8 (last accessed 20 July 2004).

34 *Dispute Resolution*, supra, n 3, at para 540, p 114.

35 Women's Refuge report, supra, n 11, at p 6.

36 New Zealand Law Society Seminar, V Crawshaw and Judge O'Dwyer, October 2004.

37 *Supra, n 36, at p 8.*

38 Women's Refuge report, supra n 11, at p 8.

39 Helena Barwick, Alison Gray, Roger Macky *Domestic Violence Act 1995: Process Evaluation* (Ministry of Justice, April 2000, Chapter 13 *Discussion*, 13.3 Implementation Issues). In Summary 13.2 *Access to the provisions of the Act* the authors say: "The extent of the fear victims of domestic violence have of their abusers, and the extent some perpetrators will go to punish victims who 'tell', should never be underestimated ...". Available from the Ministry website www.justice.govt.nz (publications).

40 Supra, n 21 at pp 141 and 145.

41 Supra, n 36, foreword.

42 Supra, n 36, in particular pp 18 and 49.

43 *Dispute Resolution*, supra, n 3, paras 538-541 at pp 114-115.

44 [2004] NZFLR 320 (Priestley J), at 327.

45 *Dispute Resolution*, p 120 Recommendations.

46 (2003) 4 BFLJ 205, at 208.

47 Supra, n 46, p 208.

48 Some of these are referred to in *D v D* [2004] NZFLR 320 (High Court, Priestley J) at 326 para 34. Priestley J says that *Martin v Ryan* [1990] 2 NZLR 209 (Fisher J) dealt with the fate of an ex parte interim custody order but actually it deals with ex parte orders relating to transfer of matrimonial property. See also the cases referred to in *Without Notice Applications* Supra, n 36 and in Butterworths *Family Law in New Zealand*, (LexisNexis NZ Limited, Wellington, 2003) Eleventh Edition, Vol 1, para 6.136 at pp 566-569.

49 Supra, n 48.

50 *C v K* [1995] NZFLR 139.

51 *R v R* [2003] NZFLR 200.

52 *Y v X* [2003] 3 NZFLR 1126.

53 *K v C* [2002] NZFLR 200.

54 R Busch & N Robertson *Seen but not heard? How battered women and their children fare under the Guardianship Amendment Act 1995* (1997) 2 BFLJ 177.

55 [2004] NZFLR 320.

56 Women's Refuge report, supra, n 11, at p 11.

57 [2004] NZFLR 1072.

58 Supra, n 57, at paras [11] and [12], p 4.

59 Supra, n 36, at p 1.

60 Supra, n 36, at p 49.

61 Women's Refuge report, supra, n 11, at pp 7-12.

62 Supra, n 8, under the heading "Domestic Protection Orders Declining" (last accessed 21 July 2004).

63 Supra, n 12.

64 Supra, n 12. Comments on the paper by the Domestic Violence Standing Committee of the Family Law Section of the New Zealand Law Society are available to section members at www.familylaw.org.nz. Judge Doogue's language is similar to that of a spokesperson for a community group quoted in the Ministry of Justice *Process Evaluation* who said: "The Domestic Violence Act can mean that women are the final arbiters in the access that men have to their children. They can use this as a weapon against the man" (Chapter 8 *Conditions and variations* 8.1 Conditions placed on orders, respondents' views on custody and access issues).

65 Women's Refuge report, supra, n 11 at p 10.

66 *Brooky v Peters* [1997] NZFLR 204 suggests that the applicant's allegations of violence made in a without-notice application were not able to be substantiated. See also *AS v JM [Costs]* [2004] NZFLR 49, where a temporary protection order had been made against the mother. A gender analysis of the nature and amounts of costs orders in the Family Court would be an interesting exercise.

67 *Dispute Resolution*, supra, n 3, para 985 at p 205.

68 Supra, n 39, Chapter 13 *Discussion*, 13.3 Implementation issues, *Impact of orders on custody and access*.

69 Written comments on the paper by Dr Hassall dated 1 April 2004.

70 Women's Refuge report, supra, n 11, at p 7.

71 Supra, n 17 at p 749. See also Miranda Kaye, Julie Stubbs and Julia Tolmie *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* Research report 1, June 2003, Families, Law and Social Policy Research Unit, Socio-Legal Research Centre, School of Law, Griffith University, Executive Summary vii-viii and Chapter 4.

72 Women's Refuge report, supra, n 11 at pp 10 and 11.

73 Supra, n 11, at p 11.

74 See for example the McKenzie Friend workshop held on 17 May 2003 and other material at www.menz.org.nz.

75 Supra, n 71 (Kaye, Stubbs and Tolmie).

76 Women's Refuge report, supra, n 11 at p 12.

77 This corroboration requirement and a similar legislative requirement in paternity cases were not removed until 1985.

78 Dr Claire Sturge in consultation with Dr Danya Glaser *Contact and Domestic Violence — The Experts' Court Report* [2000] Fam Law 615, at p 619.

79 Supra, n 78, at pp 617-618.

80 Supra, n 39, Chapter 13 Discussion 13.1 Views on the Act. Also included were the views of 19 of 24 Family Court Judges who returned a written survey.

81 [1996] NZFLR 769.

82 Supra, n 54.

83 *Section 16B keeping children safe* Family Advocate Winter 2004, at p 6.

84 North and South magazine *Court of Injustice* June 2001, at p 35.

85 Supra, n 12, at p 243.

86 3-4 April 2004, at A5.

87 Supra, n 86.

88 This approach was criticised by Tania Newman of Wellington Women's Refuge in a letter to the editor of the Dominion Post (3 April 2004 B4) for "putting the safety of women and children secondary to 'men's rights'". She said that a mandatory review would "add to this already complex process and could lead to fewer women applying for much-needed protection for themselves and their children".

89 *D v D* (Family Court, Porirua FP 74/03, 16 October 2003) at pp 2 and 3.

90 Alison Chetwin, Trish Knaggs, Patricia Te Wairere Ahiahi Young, May 1999 available at www.justice.govt.nz (publications). See Chapter 9 Summary and Conclusions.

91 Supra, n 39, Chapter 8, Conditions and Variations, Issues for Respondents.

92 [2002] NZFLR 743.

93 Supra, n 92, at paras [8] and [9], p 745, per Fisher J.

94 High Court, Auckland CIV 2004-404-2006, 21 May 2004, Heath J.

95 Supra, n 94, para 32.

96 Supra, n 94, para 60.

97 Supra, n 94, para 70.

98 Supra, n 48 at p 327.

99 [2004] NZFLR 633.

100 Supra, n 99 at p 640.

101 Supra, n 12 at p 244.

102 *B v B & M* (Family Court, Wellington FAM-2003-085-2184, 17 March 2004) at paras 19(1) and (2).

103 Supra, n 15, p 122.

104 Comments of the Commissioner for Children, Cindy Kiro, reported in the Dominion Post, 10 April 2004, under the headline "Serious child abuse 'getting worse'".

105 Supra, n 19, at xii.

106 Women's Refuge report, supra, n 11 at p 6.

107 See the Court of Appeal decisions in *Stadniczenko v Stadniczenko* [1995] NZFLR 493, *D v S* [2002] NZFLR 116 and *D v S* [2003] NZFLR 81.

108 Mark Henaghan *Relocation — Taking the baby with the bathwater — Relocation Cases* (NZLS Family Law Conference papers) 2003 189 at p 196.

109 Supra, n 108 at pp 193-194.

110 Judge Dale Clarkson and Maureen Southwick QC *Enforcing Access Arrangements. Why and How?* New Zealand Family Law Conference 2003 papers, pp 11-19.

111 Supra, n 78, at pp 622-623. Dr Ian Freckleton *Evaluating parental alienation and child sexual abuse accommodation evidence* (2002) 4 BFLJ 57.

112 *Dispute Resolution*, supra n 3, at paras 525-537, pp 112-114.

113 Supra, n 39, Chapter 8, 8.1 Conditions placed on order.

114 [2000] NZFLR 1057.

115 Supra, n 114 at para 21, p 1065 (emphasis added).

116 [2002] NZFLR 116 at para 36, p 128.

117 For example by reference to authoritative legal texts, social science research or amicus curiae brief, as in *Ruka v DSW* [1996] NZFLR 913.

118 Carol Smart *Losing the Struggle for Another Voice: The Case of Family Law* (1995) 18 Dalhousie Law Journal 173, 178 quoted in Miranda Kaye and Julia Tolmie *Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups* (1998) 22 Melbourne University Law Review 162 at p 163.

119 Supra, n 118, Kay and Tolmie, at p 193.

120 For example Carol Smart *Equal shares: rights for fathers or recognition for children* (2004) 24 Critical Social Policy 484.

121 Supra, n 15, at pp 120 and 137-138.

122 *C v E* (Family Court, Palmerston North 054/53/83, 11 May 1987).

123 Supra, n 15, at pp 131 and 137.

124 P Jaffe, S E Poisson and A Cunningham "Domestic violence and high conflict divorce: developing a new generation of research for children" in *Domestic Violence in the Lives of Children: The Future of Research, Intervention, and Social Policy* in S A Graham-Bermann and L Edleson (eds), American Psychological Association, Washington DC, 2001. Referred to in Lesley Laing *Domestic Violence and Family Law* (Australian Domestic and Family Violence Clearinghouse 2003 at p 8).

125 Angela Melville and Rosemary Hunter *"As Everybody Knows". Countering Myths of Gender Bias in Family Law* (2001) 1 Griffith Law Review 124. Melville and Hunter attribute the term "access bitches" to several family law solicitors who asserted that many women deliberately fabricated allegations of domestic violence in order to deny contact to fathers (at p 127).

126 Supra, n 10.

127 Others include awareness of the facts about women's position in society, awareness of gender myths and stereotypes, understanding of the meaning of equality, being prepared to question your own perspectives and values, and having an empathetic understanding of people from a different background and having different experiences from your own: Morris, supra, n 13, at p 671.

128 Some of the earlier writing about gender bias against women in family law deals with these issues directly: see for example M D A Freeman *Legal ideologies, patriarchal precedents and domestic violence* in M D A Freeman (ed) *The State, the Law and the Family. Critical Perspectives* (Tavistock Publications, Sweet & Maxwell, London and New York, 1984) at 51; Helena Kennedy *Eve Was Framed. Women and British Justice* (Chatto & Windus, London, 1992); A Sachs & J H Wilson *Sexism and the Law. A Study of Male Beliefs and Judicial Bias* (Martin Robinson, Oxford, 1978); K O'Donovan *Sexual Divisions in the Law* (Weidenfeld & Nicholson, London, 1985).