Human Rights, Natural Justice and Safety in the Family Court: Do psychologists need to be concerned?

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Introduction

About three years ago I was approached by Hazel Scott of the Inner City Groups for Women and asked to develop a research project in order to answer two research questions: (1) Why was there a drop in the number of temporary protection orders issued to women and (2) Why were protection orders difficult to get for psychological abuse? This paper examines the implications for psychologists of our research on protection orders, victims of domestic violence and the family court.

Protection orders are issued under the Domestic Violence Act 1995 through the Family Court – that is seeking the orders involves a Family Court process rather than a criminal proceeding. Protection orders offer protection against physical, psychological and sexual violence by someone in a relationship. The intention of the DVA 1995 was to lower the criteria for the provision of protection orders in order to make women and children safer after some horrific deaths of children at the hands of their fathers[1]. Most applicants for protection orders are women and most respondents are men (90-95%)[2]. For this reason I will be referring to the applicant as a woman and the respondent as a man throughout this paper.

The orders place conditions on the offender including that they not engage in physical, psychological or sexual violence, and that they must complete a stopping violence programme. Any failure to comply with the condition of the orders is considered a breach of the orders. The orders can apply whether or not the woman is living with the man. (The most dangerous time for a woman in a relationship with a violent man is at the point of separation.) And the orders apply automatically to both the woman and her children unless stipulated otherwise, although the primary legislation for the protection of children is the CYF Act.[3]

If the man violates the protection orders he is considered to be in breach of the orders. When a breach occurs the registrar of the court is notified and must, under law, notify the family court judge who then makes a decision about what action to follow. For example, stopping violence programme providers are legally required to notify the courts of any failure to attend the programme, which is considered to be a breach of the order. Breaches are considered to be a serious infringement of administrative law. The judge can pass any breach to the criminal court and the criminal court judge who will sentence the man.

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[1] Robertson, N., & Busch, R. (1997). Seen But Not Heard? How Battered Women and Their Children Fare Under the Guardianship Amendment Act 1995. *Butterworths Family Law Journal*(December), 177-188.

[2] Law Commission *Dispute Resolution in the Family Court* (NZLC R82, Wellington, 2003), 114, para 540 states that 95 per cent of applicants under the Domestic Violence Act 1995 are women. E Bartlett in *Family Court Statistics* (Ministry of Justice, Wellington, February 2006) at page 36 found that in 2004 91 per cent of applicants under the Domestic Violence Act 1995 are women.

[3] Atkin, B. (1998). The Domestic Violence Act. *New Zealand Law Journal, January*, 24-31.

There are two processes in seeking a protection order: the first involves the application and the second the granting of the order.To apply for protection orders a woman will go to her lawyer, usually after a violent episode, and request protection. The lawyer will write up an application and this application will be put before a judge in the Family Court.

If the woman wants immediate protection her application will occur without notifying the man. This is called a without-notice application. Applications to courts without notice are not the usual process in law and are applied only in exceptional circumstances. Safety is considered to be such an exceptional circumstance. This delay in notification allows any woman who is in a dangerous situation to ensure that she is safe prior to notification.The judge will consider this application and determine whether she is in a relationship, is experiencing domestic violence and is facing undue hardship or harm and therefore should be granted a temporary protection order (TPO). This order lasts for 3 months. If a temporary protection order is granted, this order will not come into effect until the papers are served on the man. At the point that the man receives notification he can ask that the orders are varied or he can challenge the orders.

Most TPOs are not challenged and become final after 3 months. If the temporary protection orders are challenged the hearing must be heard within 42 days.

Applications can be heard with notice when urgency is not considered necessary. Under these circumstances, the man is notified of the application. One of the main reasons for women dropping the application is the move to put the application on notice[4].

Background

A first note on Background

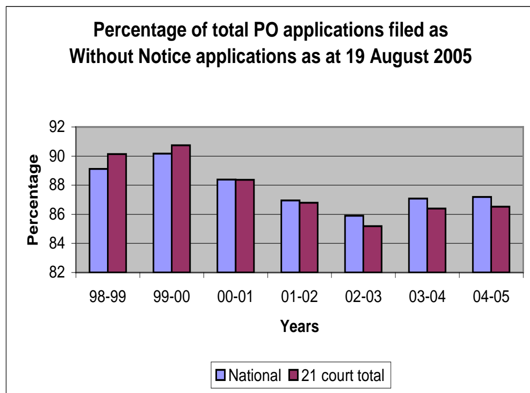
In order to answer the research question our first task was to determine just what were the trends in statistics in relation to protection orders. We found that temporary protection applications were the primary form of applications sought and while there was a small variation in the number applications for temporary protection orders relative to all applications the main issue appeared to be that applications overall for protection orders had dropped significantly.

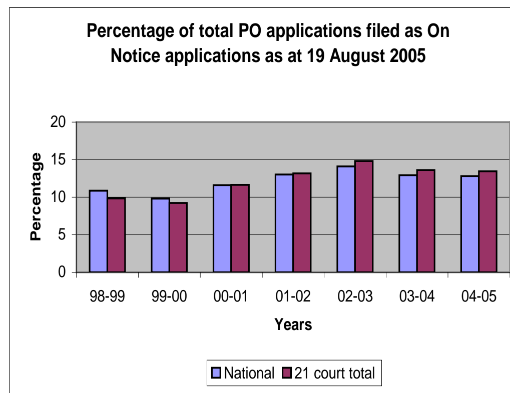
[4] Perry, C. (2000). An empirical study of applications for protection orders made to the Christchurch Family Court. *Butterworths Familiy Law Journal, June*, 139-145.

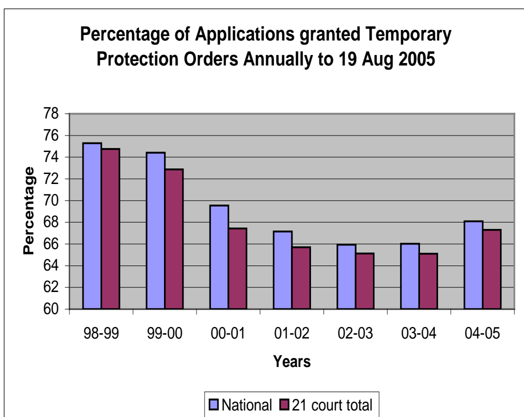
In 1997 when the DVA was first implemented there were 7395 applications. In 2004/2005 there were 4560 applications. (This number has continued to drop to 4534 in 2005/2006)[5].

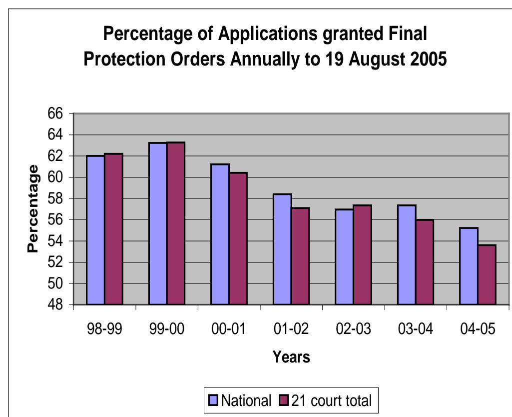
The police received 51,000 call-outs to family violence incidents in 2005. That is, the number of applications for PO is not great in terms of FV police call outs. More than half of all murders were "family violence" related. Between 2000 and 2004 there were 54 women murdered by men in domestic violence related incidents and 3 men murdered by women.

If we take a look at the graphed Family Court statistics we can see that Without Notice applications are around 85-90% of all Protection Order (PO) applications. The percentage of without-notice applications varies with the on-notice ones.









[5] Boshier, J. P. (2006). *Achieving an effective response to domestic violence* (Speech). Christchurch: Te Awatea Violence Research Centre.

If you look at the two bottom graphs there has been a drop in the percentage of Temporary Protection Orders (TPOs) granted. Although in 04-05 there appears to be a bit of a recovery in the trend, more recent data from 05-06 again show a return to lower levels.

There has been a drop in the percentage of final orders granted, (and the past years data shows a continuing downwards trend). It is noteworthy that overseas research indicates that final orders offer greater protection than do temporary protection orders. Note that although there was, during the period, 03-04 an increase in the number of without notice applications (see the first graph) this increased demand was not met with an increase in the number of orders granted. This outcome suggests that there was something going on in the Court's response to the applications. Lawyers will be affected by whether their applications are likely to be successful; they act as gatekeepers to the Court advising their clients on whether or not to proceed.

In summation, there is therefore validity in the concerns expressed by women's organizations[6]. Despite increasing police call outs there is a decline in applications, in TPOs granted and in final orders made. This finding, along with increased male assaults female figures, suggests that there are ramifications for women who have experienced violence and their right to protection under the law.

A second note on background.

The Court operates under the umbrella of the larger judicial system, which is concerned with balancing the scales of justice, and fairness in judicial proceedings. The culture of the Family Court is described in the Family Law Association website. The Court operates under a no-blame culture, that is that despite separation or other family issues the Court tries to avoid blame wherever possible.

As you will see, we will conclude that these no-blame discourses provides obvious difficulties when considering domestic violence which involves a victim and a perpetrator and where there are issues to do with safety and accountability.

[6] Hann, S. (2004). *The implementation of the Domestic Violence Act 1995: A report from the National Collective of Independent Women's Refuges Inc.* Wellington: National Collective of Independent Women's Refuges Inc.

Methods

We used a qualitative methodology, informed by critical psychology, Margaret Wetherell's work on interpretative repertoires and by our previous discourse analytic work on language and power.[7] Using semi-structured interviews we interviewed 10 key workers involved with the provision of protection orders and the implementation of the DVA, two from each of the key professional groups: two judges, two senior family lawyers, one family court coordinator, 1 police family violence coordinator, two men's programme providers and two women's advocates. These workers were senior professionals in the area with substantial experience in their fields. Interviews were taped and transcribed and analysed for interpretative repertoires. We looked for themes used to explain the provision of protection orders, why their might be a reduction in the number of protection orders issued, and issues to do with applications involving psychological abuse.

Findings

We found two dominant interpretative repertoires that were used to explain the judicial reaction to applications for temporary protection orders and for psychological abuse – Accountability and Human Rights. Unfortunately we don't have enough time to address the issue of accountability here but we refer you to our report and too our paper published in the New Zealand Family Law Journal in September 2006[8]. The report is available from Hazel Scott.

We want to focus this discussion on the Human rights issue, particularly that surrounding natural justice and the implications for women's and children's safety.

Natural Justice

Human Rights are protected in NZ by two main pieces of law: the Human Rights Act 1993 which promotes human rights and harmonious relations in NZ and the New Zealand Bill of Rights Act which details a range of rights arising from the United Nations International Covenant on Civil and Political Rights. NZ has also ratified the International Convention on the Elimination of All Forms of Discrimination Against Women.

[7] The study was funded by CYF through the Network of Women's Support Agencies. The study was placed before the Northern Regional Ethics Committee who determined that ethical approval was not needed but that the researchers should be cautious about the use of comments concerning particular clients. For this reason a decision was made not to include client cases from participants in the discourse analysis.

[8] Towns, A., & Scott, H. (2006). Accountability, natural justice and safety: The protection order pilot study (POPS) of the Domestic Violence Act 1995. *New Zealand Family Law Journal, 7*(7), 157-168.

Judges and lawyers pointed to the difficulties, when considering applications for protection orders because of the tension between two human rights: that of natural justice for the man and that of safety for the woman and her children. Judge 2 described this tension as a dilemma, which suggests equivalency of consideration and weighing up of issues of both sides. This judge considered that natural justice is the "starting point" of any justice process. Temporary protection orders were considered to "short circuit" normal legal processes.
That is, they interrupted the usual practice of justice and the Courts.

Judge 2 nicely summarised the legal understanding of natural justice.

> ".. people are entitled to be *heard* in a *Court* before orders are made against them,
> they're entitled to copies of documents filed in Court by one party which are the basis of applications and orders issued against them. They're entitled to know and be involved in the process. It's a fundamental tenet .. courts give both parties or all parties to a dispute, the opportunity to participate in the legal process before there is an adjudication and orders are made." [Judge 2 Emphasis in original.]

The seriousness of this shift in practice was emphasised by both Lawyer 1 and Lawyer 2. They described over-riding natural justice as going completely counter to the foundations of the legal system and notions of fairness. Lawyer 1, for example said that issuing of TPOs potentially involved a "tremendous infringement" of human rights.

It is the lack of the man's knowledge of the application that is the problem for this judiciary. As Men's Programme Provider 2 noted, sometimes the first the man may understand that he has an application issued against him is through the men's stopping violence programme facilitator, when contacted and informed that he must attend a compulsory assessment interview for a stopping violence group. The lack of immediate opportunity to contest the application has been documented as a source of embitterment to some men.[9]

Because of concern about men's rights, the legal professionals said that TPOs should be issued with caution. Lawyer 1 said that orders that do away with usual provisions of natural justice should be "used sparingly", and that there must be a "serious reason" for circumventing natural justice principles.
Lawyer 2 said that in practice action that waives natural justice provisions should have a "high threshold" before enactment.

[9] Law Commission, above, n 2, 205.

Concern about natural justice means applications without notice have been interpreted as requiring a high threshold of evidence of harm before they are accepted, although the DVA deliberately lowered the threshold of harm.

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This attention to a high threshold was given as a reason for the greater difficulty in getting protection orders for psychological abuse. Lawyer 1, Judge 1 and Police Family Violence Co-ordinator said that obtaining evidence of such violence may be difficult. Proof of subtle emotional tactics requires knowledge of such abuse and experience in ways to gather evidence of it. Both lawyers noted that eliciting the subtle emotional tactics requires skill on the part of the lawyer. But Lawyer 1 said firms delegate junior often inexperienced lawyers to applications because of the low level of legal aid provided. Judge 1 said that those who expected protection orders for fear only appeared to be ignoring the rights of others including their children's rights; a statement that appears to ignore the possibility that some mothers will be concerned about their children witnessing emotional abuse.

Lawyer 2 said that because of concerns about natural justice there is greater weight given to considering the real need for protection orders "Necessity". If temporary orders are not considered necessary, the orders will be put on notice, but this change has been found to be a reason that some women withdraw their applications. Women's Advocate 2 stated that the Courts' cautious approach to the provision of temporary protection orders had a major impact on women's safety at a time when women had placed themselves at risk by applying. On-going harassment by the respondent during the period of appeal was given as an explanation for why some women withdraw their applications by Women's Advocate 2.

In these accounts, withdrawal of applications does not necessarily indicate lack of necessity, but is for some women a further attempt to keep safe. Changing applications from applications without notice to applications on-notice may place such women at further risk.

Men's Programme Provider 1 suggested that certain men's groups influenced the more cautious approach to the provision of protection orders. He said that some men's groups appeared to have influenced the judicial response to the provision of orders. This participant argued that the men's rights movement is driven by a manipulative body. These groups use single exceptional cases as the norm to argue that respondents in applications for temporary protection orders are not treated fairly. This participant considered that natural justice provided a convenient platform to convert a Family Court process from one set up to reduce the adversarial approach to one that positions the man and the woman in strongly opposing camps. Lawyer 1's

comment that the adversarial system is "a ton of fun" for lawyers although it was "no fun at all for participants" suggests that lawyers might have been complicit in this shift.

What are other effects of considering natural justice more fully during applications for orders without notice? One concern is that judges and lawyers are forced by such considerations to treat the seeking of protection orders with suspicion. Wendy Davis (2004)[10] argued that questions that are raised are: Does the woman have an ulterior motive to seeking protection orders? Is she attempting to gain an unfair advantage in relation to care of the children? She argued that these considerations cast the woman as potentially manipulative and vindictive.[11] The law commission found that there is no evidence that the orders are used vindictively.[12] Unfortunately, as Lawyer 2 noted the idea that the woman is vindictive "sits as a possibility". The idea of vindictiveness successfully moves the grounds for consideration of the protection orders away from issues to do with the safety of the women and children and on to those involving the women's ulterior motivation.

Right to Safety

The woman's right to safety as a fundamental human right was not given the same level of emphasis as the man's right to natural justice. High Court appeal cases, for example, were not used to emphasise the importance of the woman's right to safety but they were used in discussions of the man's right to natural justice. We will come back to this point a little later. Judge 2 stated that appeal cases had found in favour sometimes of the applicant and sometimes of the respondent.

So how did participants make sense of the human right to safety of the woman and children? Well some participants clearly defined the woman's safety as a human rights issue. Both the Women's Advocates and Lawyer 2 considered the whole process of getting orders was an appalling process for abused women:

- They had to take an adversarial position to their violent partners, clearly placing them at further risk. This was very frightening for the women concerned.
- They were expected while still traumatised from abuse to clearly state the circumstances of the violence

(a failure to adequately recall detail at the time was might impact on her ability to get temporary orders, and may be quite damaging in any later defended hearing).

- They were expected to deal with the risks around the orders eventually being served

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[10] Davis, W. (2004). Gender bias, fathers' rights, domestic violence and the Family Court. *Butterworths Family Law Journal, December*, 299-312.

[11] Davis (2004) above. For a case study account of a construction of a "vindictive woman" see R Busch, N Robertson and H Lapsley "Domestic Violence and the Justice System: A Study of Breaches of Protection Orders" *Community Mental Health in New Zealand*, 1993 (7), 28.

[12] Law Commission, above, n 2, 205 at para 985.

(The Women's Advocates estimated that refuges were not available to around 50 per cent of women including those with children over 12, women from gangs, women with alcohol and drug problems and women with mental health problems).

- They were expected to attend the Court and face the abuser if the orders were defended and in some cases submit to the man's questioning of her in Court if he chose to defend his own case.[13]

The two Judges represented the process of seeking protection orders as rational in law. They said the process required essentially a tick box approach to the provision of orders. If certain requirements were met under the Act and represented in the documentation received by the judge, orders would be granted. If the requirements were not met the judge might turn down the request for orders, send the documentation back to the lawyer for further information, or put the request for orders on notice.

But Lawyer 1 said there was variability among Judges. He referred to one Judge who he said never gave temporary orders, and advised against going to that Court for such orders. He considered the Courts to be influenced by prevailing beliefs. Judge 2 noted that reading documentation and making important decisions about issuing of temporary orders often occurred during a 15 minute tea break. Both judges referred to a lack of information and research in the area about the outcomes of their decisions.

Discussion

The discourses around natural justice and safety evident in our findings require some unpicking, and the best place to start this discussion is with the NZBORA which is designed to protect civil and political rights in NZ. Every psychologist should make themselves familiar with it as they are obliged to ensure that their actions comply with this Act due to their registration. This Act addresses agencies and individuals responsibilities when working under NZ law to ensure the right to safety, and to life and the right to natural justice including the right to appeal and to bring action against the crown. The Act addresses the right to freedom of movement and association. This is often affected by women who experience violence – even having to use refuge could be considered to violate their right to freedom of movement.

[13] The Evidence Bill which was introduced to the House of Representatives in April 2005 would limit the compellability of spouses, de facto partners and civil union partners in *criminal courts* (cl 71); would make provision for the role of a victim support person (cl 75); would limit unacceptable questions (cl 81 (1)) and would restricts self-litigant cross examination (see cl 91 (1) (a)). There is provision for traumatised witnesses to be directed to give evidence in an alternative way (cl 99(1)).

Clark [14] found that the Domestic Violence Act, if implemented as specified by the Act, protected both the rights of applicants and respondents under the NZBORA. With regard to natural justice for respondents he was more concerned about whether court rules and regulations affected men's/ or respondents' rights. He made the following points: the applications for temporary protection orders do not mean that the respondents cannot apply to have the order varied or discharged.[15] The orders cannot come into effect until served. While the respondent will not be aware that the woman has sought an application for temporary protection orders that name him as the respondent at the time of the application the respondent can elect to have a defended hearing once the orders have been served. He also considered that the provision for a maximum time for the respondent to be heard of 42 days under the Act added weight to compliance with the Natural Justice provisions (sec 27(1)) of NZBORA. He noted that this time period was mandatory under the Act. While participants represented the issue of natural justice as an issue affecting men Clark considered that the DVA actually protects both the man as respondent and woman as applicant.

Despite this finding, in 2003 the Law Commission recommended that orders be heard with notice whenever possible, in order to counter the criticism from father's rights groups that women are using POs to gain advantage in custody and access disputes. It is noteworthy that the Law Commission found that there is no evidence that women were using TPOs vindictively. Remember that the intention of the Act was to lower the bar for protection orders not raise it and the Law Commission's recommendation seems to go counter to the objects of the Act. This recommendation has real implications for the safety of women and children.

There are, however, real concerns about safety and natural justice rights for women as stated under this Act when considering the DVA. First with regard to safety: Are judges keeping women safe as is expected under the NZBORA? In 2000 Christopher Perry published a study of 208 first time applications through the family court in Christchurch in 1997, soon after the Act came into effect when more applications were being processed through the Court. While the majority of applicants received protection orders (71% received temporary protection orders) there were concerns raised about the 35% of applications discharged by the court. He stated that of those discharged **within** a month of the application, 54% of the applicants were subjected to severe abuse, and of those discharged **after** one month from the initial protection order application date, 79% had been subjected to severe abuse. He stated that his finding "raises the question of the ability of judges to predict whether or not applicants whose proceedings are discharged are at risk of being exposed to further violence from respondents."

[14] E Clark "Ex parte orders in the Family Court and the New Zealand Bill of Rights Act 1990" (2003) 4 BFJL 205.

[15] See also Law Commission, above, n 2, 118 at para 564. Domestic Violence Act 1995, ss 36 and 76.

Second there are concerns with regard to natural justice rights for women. In Perry's study, the judges provided reasons for discharging the applications in only 9 out of the 73 discharges. Now we begin to make sense of why so few women appeal the failure of their applications. If judges are taking very little time to consider applications (remember the 15 minute tea break comment) and therefore do not provide reasons for discharging the application then the woman cannot appeal because there are no grounds provided for the judge's decision.

Even when a woman applicant does take a decision to the appeal court there are issues to do with the natural justice for the woman . We will use the case of *D v D* to describe this problem, because it is often referred to as an exemplar for the consideration of applications for psychological abuse. *D v D* was an appeal court case (involving psychological abuse and the applicant's fear of violence at the point of separation). Priestly J dismissed the appeal to over-ride the Family Court decision to put the application for temporary protection orders on notice and ordered that his decision be served to the respondent. This action would have raised serious safety concerns for the woman. But natural justice issues are also raised. The Judge questioned the High Court's authority to hear appeals concerning temporary protection orders without the presence of the respondent.

Concerns about natural justice, then appear not only to raise the bar for the provision of temporary protection orders but also potentially limit the access to High Court appeals by the applicant when temporary protection orders are refused. This decision raises serious concerns about natural justice for applicants, that is, about their right to appeal.

The Appeal Court decision also appears to go counter to the intention of the DVA which was to lower the bar and broaden the scope for the provision of protection orders. This is just one case discussed. We argue, then, like Wendy Davis and Sheryl Hann before us, that the judicial treatment of natural justice for men and safety for women as equivalent considerations is deeply problematic.

Safety must be paramount over natural justice considerations. Indeed the NZBORA says that no person can claim a right the rightfully belongs to another.

Implications for Psychologists working in the Family Court

Psychologists need to be very wary of "vindictive women" discourses in relation to DVA protection applications in the Family Court and should base their response in this area on well interpreted social science. Psychologists should be careful not to be influenced by the no-blame culture of the court in domestic violence cases where there is an offender and there is a victim. Psychologists need to understand their obligations under the NZBORA and the DVA and they need to practice psychology accordingly. In particular, psychologist should consider the safety of women and children to be paramount. I encourage psychologists working in the Family Court to read family case law and to inform the judiciary of the way their decisions are seen by those outside the legal profession. It was certainly an eye-opener for me to read them. If psychologists do not know this area then they must receive training before practicing and they must receive skilled supervision.

Conclusion:

Men's violence towards women sits uncomfortably within the no-blame culture of the Family Court. The priority given to men's natural justice discourses raises concerns over rights: women and children's safety rights; natural justice rights for women; the potential to treat women's legitimate rights to safety as vindictive. Raising of the bar for the provision of protection orders means that Women's advocates lose confidence in protection orders and are less likely to encourage women to apply for them. There is a risk that the Family Courts will be seen to be influenced by father's rights groups. Justice must equally be seen to be done for women. Psychologists have a role to play in ensuring that women and children receive the protection they deserve.