

# **Making it Safe**

**Women, Restorative Justice and  
Alternative Dispute Resolution**

**Provincial Association Against Family Violence**

**This project was funded by Status of Women Canada.  
This handbook was printed by the Department of Justice, Government of  
Newfoundland and Labrador.**

Published by: Provincial Association Against Family Violence  
P.O. Box 221, Station C,  
St. John's, Newfoundland A1C 5J9  
Tel: 709-739-6759  
Fax 709-739-6860  
paafv@nfld.com

July, 2000

Permission is granted for non-commercial reproduction. Please acknowledge the source and send us a copy if used in another document.

## Acknowledgments

*Making it Safe: Women, Restorative Justice and Alternative Dispute Resolution* was generated through Phase 2 of the project *ADR: How exactly will it work for women and children?*, sponsored by the Provincial Association Against Family Violence and funded by Status of Women Canada.

The research and writing of the handbook was completed by Elaine Wychreschuk and Bobbie Boland. Sub-committee members, Mary Anne Murphy and Helen Murphy (not related) provided invaluable insight and guidance. The Project Reference Group supported the project and gave immeasurable feedback on draft copies of the handbook.

The analysis and viewpoints expressed in other publications have been of benefit. Particularly, we credit: *Keeping an Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice and Alternative Dispute Resolution*, B. Boland and E. Wychreschuk, Provincial Association Against Family Violence, 1999; *Family Mediation in Canada: Implications for Women's Equality*, S.A. Goundry et al, funded by Status of Women Canada, 1998; *From Restorative Justice to Transformative Justice: Discussion Paper*, Law Commission of Canada, 1999; *Guidelines for Gender Inclusive Analysis: An Integrated Approach to Policy/Program Development*, C. Hebert, Women's Policy Office, Government of Newfoundland and Labrador 1998; *Restorative Justice and Criminal Justice Reform in British Columbia - Identifying Some Preliminary Questions, Issues and Concerns*, S. A. Goundry, BC Association of Specialized Victim Assistance and Counselling Programs, 1998; and *Abused Women in Family Mediation: A Nova Scotia Snapshot*, Transition House Association of Nova Scotia, 2000.

Our thanks to the Project Reference Group: Christine Care, *Provincial Court*; Terry Carlson and Randy Penney, *John Howard Society*; Faye Gear, *Urban Aboriginal Women's Association*; Joyce Hancock, *Provincial Advisory Council on the Status of Women*; Jackie Kavanagh, *Victim Services*; John Kennedy, *Youth Diversion*; Art Leonard, *Community Mediation Services*; Dan McGettigan, *Correctional Services of Canada and Circles of Support*; Wanda Lundrigan, *Corrections and Community Services*; Susan MacLeod, *Health and Community Services*; June McDonald, *Native Friendship Centre*; Jennifer Mercer and Beth Lacey, *Provincial Strategy against Violence*; Helen Murphy, *Provincial Association Against Family Violence*; Mary Anne Murphy, *Department of Fisheries and Oceans*; Ron Roberts, *RCMP*; Michelle Smith, *NF & Lab Sexual Assault Crisis & Prevention Centre Inc.*; Insp. Connie Snow, *RNC*.



## Table of Contents

<b>Introduction</b> .....	5
<b>Section I: Guiding Principles and Assumptions</b> .....	9
<b>Section II: Why Apply a Gender Inclusive Analysis?</b> .....	11
<b>Section III: Violence Against Women</b> .....	15
Participation: Voluntary or Coercive? .....	17
Power Imbalance .....	18
Should ADR and RJ Based Programs Deal with Situations Involving Abuse or Violence? .....	20
<b>Section IV: Questions for Discussion and Analysis</b> .....	23
Community Involvement. ....	24
Screening for Abuse and Violence .....	25
Participation: Voluntary or Coercive? .....	26
Safety .....	27
Power Imbalance .....	28
Legal Representation .....	29
Standardization of Training, Certification and Continuing Professional Development .....	29
Facilitator/Mediator Accountability .....	30
The System to Register a Complaint about the Program ...	30
Confidentiality .....	31
Record-Keeping System .....	32
Research, Evaluation and Monitoring .....	33
<b>Bibliography</b> .....	35



## Introduction

This document is written to increase awareness about the dynamics of abuse and violence, and the ways these realities impact women participating in programs based on Alternative Dispute Resolution and Restorative Justice. The information and analysis will help inform policy makers' choices in developing and implementing programs and policies that appropriately respond to women's diverse needs. We suggest guiding principles, introduce Gender Inclusive Analysis, provide discussion, and pose questions that will deepen program and policy analysis.

This work builds on *Keeping an Open Mind: A look at Gender Inclusive Analysis, Restorative Justice and Alternative Dispute Resolution* published in June 1999 by the Provincial Association Against Family Violence (PAAFV). The PAAFV is the umbrella organization for shelters and transition houses in Newfoundland and Labrador and as such, works on promoting and protecting the interests of women and children. The PAAFV is concerned about the justice system, courts, and alternatives to court because these systems impact the lives of women and children in or leaving abusive or violent relationships. Women and their service providers' concerns about alternatives to court are specifically based on:

- development of policy and programs without consulting community and women's advocacy groups, and without a gender inclusive analysis
- C development and implementation of programs which minimize the context of abusive and violent relationships
- C introduction of programs in haste and for cost-saving purposes with the result that women and children are put in dangerous positions and abuse and violence are decriminalized

In this document we address both processes that are considered alternatives to court and the thinking that greatly influence these processes. Our understanding of Alternative Dispute Resolution and Restorative Justice is as follows:

**Alternative Dispute Resolution (ADR)** is a term used to describe a number of different processes for resolving disputes. "Alternative" refers to resolving disputes without bringing them before the court. In ADR, the people with the problem name the issues that need to be discussed and work at creating a resolution. They have more control over matters than if a lawyer was negotiating for them or if a judge was

making a decision about their problem. These programs are usually associated with non-criminal types of disputes. The processes include Interest Based Negotiation, Conciliation, Mediation, Facilitation, Arbitration and Court Annexed ADR.

**Restorative Justice (RJ)** is most commonly associated with the criminal justice system. It is not a distinct model or system – it is sometimes described as a philosophy and other times as a vision. In many respects it is like choosing to look at conflict, crime and community through a particular lens - a lens that keeps in mind the needs of the victim, the community and the offender. RJ encourages dialogue and responsibility for past behaviour while focusing on future problem solving and an understanding of the obligations created by the offence. Restorative justice views crime as a violation of one person by another, not simply a breaking of the law. Programs based on RJ principles can include Community Justice Forums, Sentencing Circles, Healing Circles, Victim Offender Mediation and Family Group Conferencing. A restorative justice way of thinking can influence the way any alternative conflict resolution program operates – whether the program is dealing with a dispute over money or property, the misbehaviour of a young person which falls short of being reported to the police, a parent/child relationship which draws the attention of Child Welfare, or adult criminal behaviour.

In Newfoundland and Labrador programs of this type have been in existence for many years:

- Youth Diversion
- Unified Family Court Mediation Services
- Community Mediation Services.

More recent programs include:

- Small Claims Court Mediation
- Sentencing Circles in Conne River and
- Community Justice Forums in Happy Valley–Goose Bay

Alternatives to the courts are being explored partly because of complaints about cost and time delays. Many feel the justice system simply does not help them with their problems, and sometimes does more harm than good. More and more people are rejecting the “win-lose” approach of the courts and want to solve their problems without the formality, expense and unintelligible rules of the justice system. In criminal law, victims want a process which pays more attention to their needs and the harm that has been done to them, the community wants an end to unacceptable behaviour and governments are concerned about escalating costs. There is a growing interest in exploring new ways to deal with conflict.



However, we must also recognize that government does not have a regulatory framework for these programs, and there are no common standards for training, implementation or monitoring. In this unregulated climate, someone with one day of training can set themselves up as a mediator or facilitator. If a person is not satisfied with the service received, avenues for making a complaint are even fewer than those available in the justice system. Alternatives such as criminal adult diversion and the promotion of mandatory family mediation for resolving child custody and access, generate fear and concern that the impact of abuse and violence as a crime and as a factor in family disputes is diminished.

This document hopes to stimulate thinking, discussion and understanding. While written for policy makers and those implementing programs, we hope it is useful for those considering using an ADR or RJ based program.

- Section I outlines the guiding principles and assumptions which inform our thinking on the appropriate response to abuse and violence in programs based on Alternative Dispute Resolution and Restorative Justice.
- Section II briefly describes gender inclusive analysis (GIA) and the benefits of applying GIA to these programs.
- Section III highlights concerns regarding women in abusive and violent relationships, and raises questions that inform good policy and program development.
- Section IV offers questions that encourage analysis of the design and operation of ADR and RJ based programs in relation to the needs of women. Some of these questions appear in text boxes in prior sections and others are new. This section can be used as a workbook in policy and program development.



## Section I: Guiding Principles and Assumptions

The following guiding principles and assumptions reflect the values which inform our thinking on the appropriate response to abuse and violence in programs based on Alternative Dispute Resolution and Restorative Justice. We recommend these principles inform all policy development and program implementation.

### Recognition of Systemic Inequality:

- Women in our society have not yet reached equality with men and women are not all the same. Women can be further disadvantaged by age, the colour of their skin, religion, sexual orientation, race, ethnic background, disability and income. These differences must be understood and integrated into public policy.

### Features of ADR and RJ Based Programs

- C Any intervention by ADR and RJ based programs dealing with abuse and violence against women and children must ensure **protection from further abuse and violence**.
- C ADR and RJ based programs must work towards empowerment of women, children and other victims. Participation must be **voluntary**; overt or subtle pressure to participate must not be tolerated.
- C Programs dealing with criminal behaviour must respond to the victim's needs as she defines them. High priority must be given to the **safety** of the victim and the community. It is not the victim's responsibility to create an opportunity for the offender to restore the harm done.

### Appropriate Use of ADR and RJ Based programs

- C ADR processes and RJ based programs are sometimes appropriate alternatives to the court system, not because they are cheaper justice, but because they suit the particular circumstances of the people involved.
- C ADR and RJ based programs must be fully funded and supported by appropriate complementary services. If the community, through establishment of programs, is empowered to respond to crime and

wrongdoing, it needs resources to accomplish this goal. Government must remain accountable for protecting society and providing services.

- C Alternative programs cannot replace the court system nor diminish the need to improve the current system. The court is the appropriate intervention in situations when there is no cooperation between the parties, where a court ruling on a case may result in the law being changed, where the control offered by the justice system is required or where punishment by jail is required to show disfavour for criminal actions. Concerns about the court system and the demands for improvements must be addressed.

## Section II: Why Apply a Gender Inclusive Analysis?

Gender inclusive analysis offers a mechanism by which to recognize and identify assumptions made about women and their place in society. Many of these assumptions are not accurate and must be corrected because they put women at a disadvantage economically and socially. Gender inclusive analysis ensures that the perspective of all women are incorporated into policy and programs with the aim of achieving equitable results for both men and women. Very simply, a gender inclusive analysis asks that women's needs and perspectives be taken into account, including the ways that race, age, religion, sexual orientation, colour, ethnicity, ability/disability and economic status affect these needs and perspectives.

**Gender Inclusive Analysis:** a tool and approach that can be used to correct biases that impact on women. It recognizes that to the extent that a policy has an impact on people, it will very likely have different impacts on women and men because they have different roles, expectations and life experiences. It identifies differences arising out of the gender division of labour, and out of unequal access to power and resources, and assumes that these differences can be changed.

(Adapted from Boland and Wychreschuk, 1999 and Hebert, 1998)

Women's lives are marked by inequality. Major differences between women and men persist in many areas of life including occupational status, employment, income levels, family responsibilities, education, social status, political influence and vulnerability to violence. Differences exist among women based on their age, religion, sexual orientation, colour, race, ethnicity, ability/disability and socio-economic status. Women's needs, perspectives and values are shaped by their experiences and differ from men's. Unfairly, men's reality and understanding dominate public policy and are taken to be "the" human reality and understanding. Correcting this imbalance is the goal of gender inclusive analysis.

Women continue to encounter discrimination in the justice system - in the laws themselves, the procedures used and in accessing the system. They frequently see their experience disregarded. An illustration of this is found in court judgements on sexual assault cases, particularly with regards to whether consent was given or not. The law operates by legal categories and if our experiences do not fit into those categories, the protection of the law is limited. Often important factors about women's situations are not allowed to be stated in court. For example, in decisions about custody of children, some judges will not listen to evidence about the father's

abusive behaviour towards the mother. Women also report that factors like race and disability and how these affect their circumstances are not always considered by the courts.

These same dangers also affect alternative programs. Some fear these programs present even greater possibilities for injustice and harm to vulnerable groups because they are less open to the public and have fewer accountability structures.

As an example, Restorative Justice envisions the community taking significant responsibility for conducting programs. The creation of new positions of authority creates concern about the participation of diverse community members and how their views are included. The dynamics of communities involve relationships of power - the existence of dominant groups based on age, religion, colour, ability/disability, gender, race, socio-economic status, ethnicity, and sexual orientation; those that lead and those that are led. We cannot assume communities are healthy or safe, or are concerned with creating an equitable status for all their residents. Safeguards must be developed to prevent possible misuse of power created by the alternative programs.

Most Restorative Justice based programs claim a victim-centred approach. However, closer examination may reveal the offender's needs are primary. Victim centred means the views and experiences of victims must be evident in the design, implementation and evaluation of programs. Consultation with victims and their advocacy groups at the program planning stage will identify how best to serve them.

**Has the Process for Developing the Program been Inclusive?**

1. Who is involved in articulating the values, principles and goals of the program? Who is missing?
2. What processes ensure women from diverse community groups are represented?

**How Are Referrals Made to the Program?**

1. Who has a part in recommending a case be dealt with by the program? Who does not?
2. Who has power to veto a case referral? How is it done?
3. In criminal conflict, who defines what behaviour is considered inappropriate and subject to the program? Is it limited to actions defined by the law as criminal?

Much of the hope surrounding Alternate Dispute Resolution and Restorative Justice

concepts is based on reorienting our thinking about conflict resolution, truly listening and creating an opportunity for mutual understanding. ADR and RJ based programs share some of the same values promoted in gender inclusive analysis. For instance, ADR promotes the notion that people in dispute should control the definition and the resolution of their problem, the assumption being that participants are more likely to honor a resolution they generate than one imposed from the outside.

To be effective, all programs must strive to be inclusive. The consideration of gender and diversity issues is essential to sound policy and program development. We have an opportunity to avoid repeating past mistakes and to create policy and programs sensitive to marginalized groups. A critical step in this process is to listen to and act on the views of all members of our society.

**How User Friendly is the Program?**

1. Have program materials been printed in languages which reflect the community composition?
2. How is program information made accessible to those with low literacy?
3. How is the quality of interpretation services ensured? Are they professionally trained to deliver this service?





## Section III: Violence Against Women

Not all abusive or violent behaviour is defined as a crime by our criminal justice system. Whether it is a crime or not, violence and abuse have a profound impact and are much too prevalent. *“One half of all Canadian women have experienced at least one incident of physical or sexual violence since the age of 16.”* (Statistics Canada)

ADR and RJ based programs are being introduced in the context of a long history of insensitivity and lack of understanding in the courts about the dynamics of abuse and violence and power imbalances in relationships. Women and other victims of violent crimes have been marginalized by a system that does not meet their needs. Women dealing with family disputes have felt that they and their children have been put into danger by insensitive lawyers and judges. By way of example, if the abuse or violence in a relationship is not believed or understood and shared custody or visiting rights is ordered by the court, further abuse or violence can result from this contact. Many men become much more aggressive after the women have broken free from the relationship.

Careful planning will ensure the same insensitivity and mistakes are not repeated in alternative programs.

A recent report stated that family mediation with an abuser can result in re-victimization if proper safeguards are not present:

*“Abused women reported intimidation and re-victimization in mediation regardless of the form of abuse: physical, sexual, emotional, psychological or financial. Women reported that their mediator or conciliator minimized*

### Definitions of Violence

Violent behaviour is characterized by verbal or written threats; physical, emotional or sexual abuse/harassment or racial harassment by an individual or group which has the effect of impairing the health and welfare of another. (Conception Bay South School Board, Newfoundland and Labrador, 1996)

Violence is the threat or use of force that injures or intimidates a person (makes them feel afraid) or damages property. (BC Teachers Federation, 1994)

### Definitions of Abuse

Abuse can include criminal acts such as assault and sexual assault or negligence (not washing, feeding or toileting an individual); human rights violations (such as sexual harassment); verbal taunting; degrading, humiliating behaviour; rough handling; or isolation through silence. Abuse can take place once, or it can happen on an on-going basis. (Advocacy Resource Centre for the Handicapped, 1990)

*emotional, psychological or financial abuse, or simply did not recognize certain behaviours as abusive. When women brought up the fact that their ex-partner was harassing, stalking, or otherwise continuing to abuse them during the mediation, their mediators did not terminate mediation.”*

*(Abused Women in Family Mediation: A Nova Scotia Snapshot, prepared in January, 2000 by the Transition House Association of Nova Scotia (THANS Report) 8)*

In criminal law, women’s fears about restorative justice in part stem from recent sentence reform, particularly the use of conditional sentences for a wide range of offences including sexual offences, harassment, stalking and hate crimes. Women’s advocacy groups lobbied unsuccessfully for the exclusion of “violent” offences from the reach of these sentences. The Federal government did not impose restrictions, and in 1999 the Supreme Court of Canada upheld the use of conditional sentences for sexual assaults.

Conditional sentences mean offenders avoid jail by serving time at home under court imposed conditions – usually seen as easy punishment or no punishment at all. Although conditional sentences are not based on restorative justice principles (they were probably introduced to reduce reliance on incarceration and for cost saving reasons), their use for the above offences represents the decriminalization of abusive and violent behaviour against women. Consequently, women are very

### **Screening for Abuse and Violence The Mediator/Facilitator**

1. Are the mediators or facilitators professionals who are knowledgeable about and have experience working with family violence?
2. What training regarding the dynamics of abusive and violent relationships and power imbalances has been completed? How much training? Hours, Days? Is this subject integrated throughout training? Is it given the same priority as other aspects of the training (procedure, ethics, etc)?
3. What are the requirements for continuing education and ongoing professional development? How is this monitored?

### **The Screening Tools**

1. How effective are the screening tools? Do they incorporate indicators for emotional, financial, psychological abuse and physical violence? Do they elicit information about the degree of intimidation and control in the relationship and not only the actual incidents of abuse? Adapted from Goundry et al 72-73
2. How much time is spent on screening or case selection? Is this limited by time? funds or other resources?
3. How are screening tools evaluated? When was this last done? How often is it done?

cautious about programs introduced to reduce demands on the criminal justice system. The need for vigilance when it comes to identifying the needs of women who have been subject to abuse and violence cannot be overemphasized. This issue is discussed in greater detail throughout the document.

## **Participation: Voluntary or Coercive?**

Although family mediation is not mandatory by law, women are often told it is best to try mediation before going to court. This happens even when they have recently left an abusive or violent relationship and are living in a shelter for women. Women will likely hear this from legal aid lawyers and court staff. Even if women get to the courtroom there is a strong likelihood some judges, before proceeding further, will adjourn the matter and “suggest” trying mediation.

The laws on child custody and access create a strong pressure to be “cooperative” with the other parent. Participation in mediation has come to represent cooperation and in many situations is encouraged despite known abuse and violence in the relationship. Some judges and professionals believe unless there is proof of physical abuse to the children they suffer no harm. The implicit assumption – witnessing their mother being abused does not count as harm.

Women also feel internal pressure to avoid court. A woman who has left an abusive relationship and whose partner

### **Is Participation Voluntary?**

1. Is referral to the program mandatory?
2. What ensures prospective parties are not pressured to engage in or continue with the program?
3. What overt and subtle pressures “encourage” participation in the process? What messages come from the court, social agencies, the police, family and the community?
4. What information is given to the woman leaving an abusive relationship about the pros and cons of using the alternative program instead of the court? By Whom? When?
5. What support is provided to assist her to make the decision?
6. Does she have ready access to legal information about her rights and the implications of using the program in relation to these rights? When is this information made available? By whom?
7. What support system is provided throughout the process?
8. What is done to ensure participation remains voluntary? What are the repercussions of choosing to terminate mediation?

is showing remorse for his behaviour (some call it the honeymoon phase), want to believe his intentions will result in change. She may choose “not to take him to court” in order to support this belief. Of course, she may also choose an alternative process in an attempt to defuse his escalating violence.

These influences mean we must be vigilant about whether participation is truly voluntary in family mediation. Women and other victims of crime face similar pressures in criminal matters. Clearly, thorough assessment must be completed prior to participating in alternative programs. Likewise, choosing to terminate participation at any point must be acceptable and without repercussions.

## **Power Imbalance**

As part of day-to-day life, we experience power imbalances in our partner/spousal, family, friend and employment relationships. We are constantly shifting back and forth between having more or less power in relation to those around us, with our immediate community and society as a whole. Many times it is not harmful or problematic.

However, power imbalance is a major concern when power is used to control what another person does – when it is used to intimidate and threaten – and when it results in abuse and violence. Power imbalance is a very important factor when a person has been victimized and feels little control over what is happening to them and around them. In criminal conflict, it is critical that the process intended to correct the wrongdoing does not repeat the degradation and loss of control experienced through the original offence. This is true in circumstances involving strangers or people who know each other well.

### **Is it Safe to Participate?**

1. How does the program make it safe for her to participate? Has the immediate danger to her, the children and all that belongs to her been truly revealed or has it been minimized?
2. What measures are taken for her safety **before, during** and **after** the program? Separate meetings in the case selection process? Elimination of the possibility of accidental meetings? Non-disclosure of her and the children’s whereabouts? Seating arrangements? Contact after completion of the process?
3. What external support and resources are provided? Involvement of support persons - advocate, health advisor? Use of legal advisor? Has adequate time been allowed to ask questions and reach decisions?
4. Are mandatory minimum conditions incorporated into the resolution of criminal type problems?
5. When no apparent physical threats exist, are equally important “safety” concerns considered? For instance, does she have fears about losing custody of her children to him or to Child Welfare?

Unequal power differences may not be readily obvious. In abusive or violent relationships intimidation and manipulation is often subtle. Women who took part in the THANS research report said:

*“I had a very hard time saying “no” to him. I agreed to things I regret. I was too scared to stand up for myself. (Dartmouth)” (7)*

*“No one knows like I do what he’s capable of. And I had never crossed him before. He banged his fingers on the table. That brought back too much...I broke down. (Digby area)” (7)*

*“He can just look at me and scare me; it’s hard for someone who’s had a really good life to understand that.” (10)*

Most women leaving an abusive relationship will have a difficult time negotiating, on their own, a fair deal about children and property sharing. An abuser’s influence is enormous and the power imbalance severe. A woman who has been abused for years may suffer a loss of control and feelings of helplessness. She may be afraid to challenge him on anything. Without an understanding of the dynamics of abuse and violence in relationships, this lack of challenging may be misinterpreted as a willingness to compromise.

When power imbalance is recognized, many mediators claim their skills combined with balancing tools can help balance the unequal power between the parties. Power balancing techniques include ensuring legal counsel and /or a support person is present throughout the process, provision of counselling, arrangement of the seating plan in the mediation, using opportunities to meet separately with the parties, and

**Power Imbalance  
In the Program Structure?**

1. Is the program closely associated with other systems or institutions? Church, RCMP, court ? How might this affect the participants?
2. Is it possible abusers who have not been challenged are involved with program implementation? What kind of screening provides protection against their involvement?
3. How does the facilitator/mediator handle the power imbalance between herself and the parties?

**Between the Parties?**

1. How and when are power imbalances between the parties assessed?
2. How does the program respond to unequal power between the parties?
3. What techniques to balance power are used? Provision of legal counsel? Support person is present during the process? Seating Plan? Separate meetings? Provision of Counseling? Termination of the process when appropriate?

maintaining the ability to terminate the process at any time.

Some are skeptical of this claim:

*It defies the imagination to think of the skill required to empower a depressed wife with low self esteem who believes in traditional sex role ideology, fears confronting her husband, and has no occupation outside the home. Nor can the mediator significantly improve the wife's psychological and emotional state.*" (Goundry et al, footnote 106, 41)

The effects of an abusive and violent relationship on a woman are far reaching. Policies and programs can demonstrate support to her by:

- acknowledging she is the best one to determine her safety
- supporting her right to self-determination
- demonstrating a commitment to her empowerment

## **Should ADR and RJ Based Programs Deal with Situations Involving Abuse or Violence?**

Women's past experiences with courts and other social agencies raise legitimate concerns that the same insensitive and possibly dangerous handling of situations may be repeated in ADR and RJ based programs. The many different kinds of programs do not make it easy to develop one policy and provide simple answers. For example, various programs dealing with criminal matters intervene at pre-charge, post-charge, pre-sentence and post-sentence time frames. The point of entry raises different issues, possibilities and vulnerabilities for women who have been subjected to abuse or violence.

Women's advocacy groups across the country are lobbying for the exclusion of cases involving abuse and violence from family mediation and programs dealing with criminal cases. They point to the re-victimization individuals have experienced in these processes. They have seen these programs introduced without proper resources. They believe long term research is required.

- A principal recommendation of one of the few qualitative research reports on family mediation states "...if any history of physical, sexual, emotional, psychological or financial abuse comes to the attention of a conciliator,

*mediator, lawyer or judge, the parties should not be considered candidates for self-representation in less-formal justice processes such as mediation.”* (THANS Report 8)

- C *The “exceptional circumstances” provision (it allows regional Crown Counsel to divert certain VAWIR (violence against women in relationships) offences to alternative measures and restorative justice programs) should be eliminated in relation to VAWIR, sexual assault, child sexual abuse, criminal harassment, and hate-motivated offences until there is an opportunity to conduct all of the necessary research, analysis and evaluation of these initiatives and consult with all of the affected parties.”*  
(Goundry, BC Assoc iii, 1)
- C *“The Canadian Association of Sexual Assault Centres is strongly opposed to the use of ADR/RJ in cases of violence against women including, but not limited to, women in violent and abusive relationships.”*  
(CASAC Statement on Alternative Dispute Resolution/Restorative Justice)

However, many restorative justice based programs provide services which may complement the criminal justice system and effectively function side by side. The timing of participation in the program is a significant element – as an example, a victim may choose to take part in a “reintegration” circle after the offender has served his jail time and before he returns to their community. Considerable preparation is necessary, and clearly, resources and support are required. For some women, over time and with adequate supports, family mediation may provide a way to resolve difficult disputes. Is it reasonable to eliminate these options totally if they prove to serve her needs? Proponents of alternative programs and restorative justice suggest:

- we need new ways to deal with conflict in personal and community relationships
- programs need not be “instead of court” but an opportunity for participants to make steps toward taking back personal power lost through abuse and violence
- the experience is potentially transformative and empowering
- screening out inappropriate cases can be done with confidence and care

If and when options are made available for those who want a choice, it must be an informed choice and voluntary in the broadest sense. In addition, we must recognize that women in abusive and violent relationships are participants in programs even though they may not identify themselves. The shame, secrecy, intimidation and fear result in highly developed skills for hiding the abuse and violence – no screening tool will be able to pick up on all cases.

Court may be appropriate for several reasons, and programs must not be substituted where that is the more appropriate venue. Once abused women report abuse or violence (statistics suggest that only one in ten do report) they want public acknowledgment of the wrongdoing and the courts provide the strongest disapproval. Sometimes court orders provide the best option for controlling his behaviour – for instance, a court order restricting contact with children may work because the abuser fears the consequences when a court order is not honoured; an added benefit is a more effective and efficient police response when it is not followed. Despite its shortcomings, court remains the first and best choice for many women who have decided to get out of an abusive or violent relationship.



#### **Section IV: Questions for Discussion and Analysis:**

This section provides questions to stimulate discussion about the inclusion of situations involving abusive and violent relationships in ADR and RJ based programs.

Some of these appeared in the preceding sections along with a discussion on the topic. Although of equal importance, other questions do not appear elsewhere in this document because they are self-explanatory.

## **Community Involvement**

### **Inclusive?**

1. Who is involved in articulating the values, principles and goals of the program? Who is missing?
2. What processes ensure women from diverse community groups are represented?

### **How Are Referrals Made?**

1. Who has a part in recommending a case be dealt with by the program? Who does not?
2. Who has power to veto a case referral? How is it done?
3. In criminal conflict, who defines what behaviour is considered inappropriate and subject to the program? Is it limited to actions defined by the law as criminal?

### **User Friendly?**

1. Have program materials been printed in languages which reflect the community composition?
  2. How is program information made accessible to those with low literacy?
  3. How is the quality of interpretation services ensured? Are they professionally trained to deliver this service?
-

## **Screening for Abuse and Violence**

### **The Mediator/Facilitator**

1. Are the mediators or facilitators professionals who are knowledgeable about and have experience working with family violence?
2. What training regarding the dynamics of abusive and violent relationships and power imbalances has been completed? How much training? Hours, Days? Is this subject integrated throughout training? Is it given the same priority as other aspects of the training (procedure, ethics, etc)?
3. What are the requirements for continuing education and ongoing professional development? How is this monitored?

### **The Screening Tools**

1. How effective are the screening tools? Do they incorporate indicators for emotional, financial, psychological abuse and physical violence? Do they elicit information about the degree of intimidation and control in the relationship and not only the actual incidents of abuse?(Adapted from Goundry et al 72-73)
  2. How much time is spent on screening or case selection? Is this limited by time? Funds or other resources?
  3. How are screening tools evaluated? When was this last done? How often is it done?
-

## Participation: Voluntary or Coercive?

1. Is referral to the program mandatory?
  2. What ensures prospective parties are not pressured to engage in or continue with the program?
  3. What overt and subtle pressures “encourage” participation in the process? What messages come from the court, social agencies, the police, family and the community?
  4. What information is given to the woman leaving an abusive relationship about the pros and cons of using the alternative program instead of the court? By Whom? When?
  5. What support is provided to assist her to make the decision?
  6. Does she have ready access to legal information about her rights and the implications of using the program in relation to these rights? When is this information made available? By whom?
  7. What support system is provided throughout the process?
  8. What is done to ensure participation remains voluntary? What are the repercussions for choosing to terminate mediation?
-

## Safety

1. How does the program make it safe for her to participate? Has the immediate danger to her, the children and all that belongs to her been truly revealed or has it been minimized?

2. What measures are taken for her safety **before, during** and **after** the program? Separate meetings in the case selection process? Elimination of the possibility of accidental meetings? Non-disclosure of her and the children's whereabouts? Seating arrangements? Contact after completion of the process?

3. What external support and resources are provided? Involvement of support persons - advocate, health advisor? Use of legal advisor? Has adequate time been allowed to ask questions and reach decisions?

4 Are mandatory minimum conditions incorporated into the resolution of criminal-type problems?

5. When no apparent physical threats exist, are other equally important "safety" concerns considered? For instance, does she have fears about losing custody of her children to him or to Child Welfare?

---

## **Power Imbalance**

### **In the Program Structure?**

1. Is the program closely associated with other systems or institutions? Church, RCMP, court? How might this affect the participants?
2. Is it possible abusers who have not been challenged are involved with program implementation? What kind of screening provides protection against their involvement?
3. How does the facilitator/mediator handle the power imbalance between herself and the parties?

### **Between the Parties?**

1. How and when are power imbalances between the parties assessed?
  2. How does the program respond to unequal power between the parties?
  3. What techniques to balance power are used? Provision of legal counsel? Ensure support person is present during the process? Seating Plan? Separate Meetings? Provision of Counseling? Termination of the process when appropriate?
-

## **Legal Representation**

### **For Family Mediation**

1. Do parties have access to legal counsel? Who pays for it?
2. Is independent legal advice available prior to, during and after the mediated agreement has been finalized?
3. Are legal and accounting /financial professionals available for consultation? To whom and on what terms?

### **For Victims of Criminal-Type Behaviour**

1. How does the program ensure victims have access to adequate legal advice regarding the implications of using the program instead of the criminal justice system?

## **Standardization of Training, Certification and Continuing Professional Development**

- 
1. Are the mediators or facilitators professionals who are knowledgeable about and have experience working with family violence?
  2. What training have the mediators or facilitators received regarding the dynamics of violent relationships and power imbalances? How much training? Hours, Days? Was this subject integrated throughout the mediation or facilitation training? Was it given the same priority as other aspects of the training (procedure, ethics, etc.)?
  3. What are the requirements for continuing education and ongoing professional development? How is this monitored?
-

## **Facilitator/Mediator Accountability**

### **Family Disputes**

1. Is the mediator associated with the criminal justice system? The church? How might the association affect people who are using the program?
2. What is the personal and employment history of the mediator? How might this influence the handling of the case?
3. What mechanisms are in place to allow challenges to mediator bias?
4. Does the program have an audit/review on an annual basis to determine the fairness of agreements?
5. Does the mediator assume responsibility for the safety of women and children once abuse is disclosed?

### **Criminal-Type Conflict:**

1. Is the mediator/facilitator associated with the criminal justice system? The church? How might the association affect people who are using the program?
  2. What is the personal and employment history of the mediator/facilitator? How might this influence the handling of the case?
  3. What mechanisms are in place to allow challenges to mediator/facilitator bias?
- 

## **The System to Register a Complaint about the Program**

1. What formal complaint mechanisms allow parties to register difficulties encountered with the program or its staff during the process?
-



## **Confidentiality**

### **Family Disputes**

1. What are parties told about the limits of confidentiality? When are they informed about this?
2. What information is given to parties about possible consequences of disclosure of facts in the mediation process? Who gives this information? When?
3. What information is given to parties about how information revealed in mediation might be used if the mediation terminates without an agreement? In subsequent court proceedings?
4. How is full disclosure of financial statements ensured?

### **Criminal-Type Conflict**

1. What are both the victim and offender told about the limits of confidentiality? When are they informed about this?
  2. Are the limits of confidentiality discussed with all participants involved (eg. all those in a sentence circle)?
  3. What information is given to the victim about the possible consequences of disclosure of facts to the offender and others involved? Who gives her this information?
  4. What information about the implications of disclosure of facts and admissions of responsibility are given to the offender?
-

## Record-Keeping System

What information should be included in the record-keeping system?

1. issues in dispute?
2. length of time to conclude the process?
3. number of meetings?
4. cost to the parties?
5. substance of the agreements?
6. number of clients screened out of process, and why?
7. number of unsuccessful attempts at process, and why?
8. return rate to the process?
9. number of parties who ultimately end up in court?
10. whether lawyers were involved, and if provided by legal aid?
11. who uses the process?
12. other information relevant to particular program?

(Adapted from Goundry et al, 71)

---

## **Research, Evaluation and Monitoring**

1. How is the program monitored and evaluated?
  2. What is the measure of success? Are both process and outcomes considered?
  3. Will records kept add to our understanding of the issues of concern to women?
-



## **Bibliography**

Boland, Bobbie and Wychreschuk, Elaine 1999. Keeping an Open Mind A Look at Gender Inclusive Analysis, Restorative Justice and Alternative Dispute Resolution. Provincial Association Against Family Violence.

Bonta, J., Wallace-Capretta, S. and, Rooney, J. 1998. Restorative Justice: An Evaluation of the Restorative Resolutions Project. Solicitor General Canada.

Canadian International Development Agency 1999. CIDA's Policy on Gender Equality.

CASAC Regional Representatives Committee 2000. CASAC Statement on Alternative Dispute Resolution/Restorative Justice. Canadian Association of Sexual Assault Centres.

Correctional Service of Canada 1999. Restorative Justice Begins with You and Me Restorative Justice Week November 14-21, 1999 Resource Guide.

Department of Justice Canada 1998. Diversity and Justice: Gender Perspectives. A guide to gender equality analysis. Ottawa.

Department of Justice Canada 1998. Resolving Disputes: Think About Your Options. Ottawa.

Law Commission of Canada 1999. From Restorative Justice to Transformative Justice: Discussion Paper.

Goundry, S. A. 1998. Restorative Justice and Criminal Justice Reform in British Columbia - Identifying Some Preliminary Questions, Issues and Concerns. BC Association of Specialized Victim Assistance and Counselling Programs.

Goundry, S.A. et al 1998. Family Mediation in Canada: Implications for Women's Equality. Status of Women Canada.

Hebert, Cheryl 1998. guidelines for gender inclusive analysis an integrated approach to policy/program development. Women's Policy Office, Government of Newfoundland and Labrador.

Lakeman, Lee 1999. Why the Law and Order/Restorative Justice Approach Won't Reduce Violence Against Women. Workshop Background Paper, National Forum on Equality Rights Presented by West Coast Leaf.

Levis, Charlene C. 1998. THE SILENCE SPEAKS LOUDLY: CONSIDERING WHETHER THE VICTIM'S NEEDS CAN BE MET THROUGH CIRCLE SENTENCING. Master's Thesis, University of Northern British Columbia.

Llewellyn, Jennifer J. and Howse, Robert 1998. Restorative Justice: A Conceptual Framework. Law Commission of Canada.

Mahon, Peggy 1999. Sharing the Talk Sharing the Work Coordinating Community Action on Violence Against Women. Women Leading Action, NS.

McGillivray, Anne, and Comaskey, Brenda 1999 . Black Eyes All of the Time Intimate Violence, Aboriginal Women, and the Justice System. University of Toronto Press.

Neilson, Linda C. 2000. "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice". Windsor Yearbook on Access to Justice.

Nova Scotia Department of Justice 1998. Restorative Justice: A Program for Nova Scotia.

Provincial Strategy Against Violence 1998. Understanding Violence Against Women: A Peer Education Manual for Preventing Violence Against Women in Newfoundland and Labrador. Women's Policy Office, Government of Newfoundland and Labrador.

Status of Women Canada March 1996. Gender Based Analysis: A Guide for Policy Making. Ottawa: Status of Women Canada.

Transition House Association of Nova Scotia 2000. Abused Women in Family Mediation: A Nova Scotia Snapshot.

Victim-Offender Mediation Association. Recommended Ethical Guidelines.  
www.voma.org.

Women in Public Policy Project (Nova Scotia) 1999. Guidelines for a Credible and Inclusive Process for Public Policy Development, Implementation and Reform.