

ARTICLE

Adjournment for Restorative Justice Process in Certain Cases: Is Domestic Violence an Appropriate Case?

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Domestic violence (DV) is one of the most challenging offences for restorative justice (RJ) processes. Proponents of RJ argue that victims will benefit from these processes because RJ addresses the failures of the conventional criminal justice system. Critics argue that RJ is predicated on an idealised victim and works to exclude victims of DV. In New Zealand, these debates are no longer theoretical. In 2014, Parliament inserted a new s 24A into the Sentencing Act 2002, which provides that cases appearing before the District Court must be adjourned for RJ assessment if it is appropriate to do so. The Ministry of Justice has also published RJ guidelines pertaining to the specific issues in DV cases. This article argues that current RJ practices are not appropriate for DV cases. This is because merely placing RJ before sentencing with specialised guidelines that do not effectively address policy issues of DV in RJ conferences is not the appropriate solution. This article concludes that unless the current model can be improved, and guidelines implemented that directly address relevant policy issues, Parliament should add a proviso to s 24A excluding the use of RJ for DV cases.

I Introduction

The use of restorative justice (RJ) in domestic violence (DV) cases has been argued profusely in criminal justice literature. Proponents of RJ argue that victims will benefit significantly from RJ processed because RJ addresses the failures of the conventional

* The author wrote this article in part fulfilment of the requirements of her BA, LLB(Hons) conjoint degree at the University of Auckland. She wishes to thank Professor Julia Tolmie and Associate Professor Scott Optican for their valuable support and supervision in the writing of this article.

criminal justice system (CJS).¹ It is claimed that the communicative function of RJ encourages victims to speak up about the impacts of the offending, rather than be passive actors in the conventional courts.² However, critics argue that RJ is predicated on an idealised victim and works to exclude victims of DV.³ Bringing two parties together to engage in a dialogue may work for parties on equal footing, but it cannot cater to victims “from a structurally less powerful position” as it can reinforce existing inequalities present in an abusive relationship between intimate partners.⁴ In New Zealand, these debates are no longer theoretical. In 2014, Parliament inserted a new s 24A into the Sentencing Act 2002, which provides that cases appearing before the District Court must be adjourned for RJ assessment if it is appropriate to do so in the circumstances of the case.⁵ The Ministry of Justice (MOJ) has also published RJ guidelines pertaining to the specific issues in DV cases.⁶ The legislative changes mean there has been an increased number of DV cases that have been adjourned for RJ assessment. Focusing on s 24A-mandated RJ processes, this article argues that the current practice is not appropriate for DV cases. This is because merely placing RJ before sentencing with specialised guidelines that do not effectively address policy issues of DV in RJ conferences is not the appropriate solution to protecting victims.

Part II of this article defines DV and RJ and examines recurring policy issues that arise in using RJ for DV cases. Gendered language is used throughout the article to acknowledge the gendered nature of DV. The term “domestic violence” is used to clarify that this article focuses on offences that come under the definition provided in s 3 of the Domestic Violence Act 1995, but the interchangeable “family violence” is used where this article cites literature that employs this term. Part III provides a detailed analysis of the MOJ’s RJ guidelines for DV, and examines whether policy issues are effectively addressed in practice. Part IV outlines how our current model can be improved. Looking at overseas jurisdictions, it presents three options going forward for RJ in DV cases, before suggesting the one New Zealand should adopt. This article concludes that unless the current model can be improved, and guidelines implemented that directly address relevant policy issues, Parliament should add a proviso to s 24A excluding the use of RJ for DV cases.

II Definitions and Policy Issues

A *Domestic violence*

It is paramount that the definition of DV be defined as accurately as possible to allow victims to identify their victimisation, to ensure there is consensus in the justice system as to what actions constitute DV, and to educate the general public. The Domestic Violence Act defines domestic violence as “violence against [a] person by any other person with whom that person is, or has been, in a domestic relationship”.⁷ Persons in domestic relationships include heterosexual and homosexual partners, family members, flatmates

1 Julie Stubbs “Relations of Domination and Subordination: Challenges for Restorative Justice in Responding to Domestic Violence” (2010) 33 UNSWLJ 970 at 971.

2 At 972.

3 At 973.

4 At 973.

5 Sentencing Act 2002, s 24A(1)–(2).

6 Ministry of Justice *Restorative justice standards for family violence cases* (July 2013).

7 Domestic Violence Act 1995, s 3(1).

and anyone with a close personal relationship with the other person.⁸ Violence refers to physical, sexual and psychological abuse, and is not limited to intimidation, harassment, damage to property, threats and financial abuse.⁹ The abuse can be a one-off incident, or a number of acts over time that form a pattern of abuse.¹⁰

DV is often argued to be a heavily gendered crime, with victims of abuse being predominantly women.¹¹ Between 2000 and 2010, New Zealand women experienced the highest rate of interpersonal violence from intimate partners of any women in OECD countries.¹² Between 2009 and 2012, 47 per cent of all homicides in New Zealand were the result of family violence.¹³ Among the females that died as a result of DV, 96 per cent were killed by their male partners.¹⁴ Many studies suggest that men experience DV at the hands of their female partners equally as frequent as women do by men.¹⁵ However, these claims ignore the contextual underpinnings of the occurrence of violence perpetuated by women. Michael P Johnson and Janel M Leone's study shows that DV does not fit into a single category.¹⁶ Instead, it can be divided into the following three categories: intimate terrorism, which is violence used to gain control over the target; violent resistance, which is the use of violence to respond to violence;¹⁷ and situational couple violence, which is common couple violence.¹⁸ The study concludes that women subject to intimate terrorism violence are attacked more frequently than women subject to situational couple violence.¹⁹ Johnson and Leone's study is significant as it acknowledges the differing gender balances within each case of abuse. This is an important consideration because a fundamental characteristic of DV that distinguishes it from other crimes is the imbalance of power and control between the offender and the victim.²⁰ One partner is controlling, establishing his or her dominance over the other through physical, psychological, sexual or financial abuse.²¹ This dominance is often ongoing, with threats of future harm, and escalates over time.²² The abuse may be supported by the cultural and personal beliefs of the offender and the victim and their family and communities. These beliefs may prevent

8 Section 4(1).

9 Section 3(2).

10 Section 3(4).

11 Julia Tolmie "Women and the criminal justice system" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 295 at 317.

12 Denise Wilson and others "Becoming Better Helpers: rethinking language to move beyond simplistic responses to women experiencing intimate partner violence" (2015) 11 *Policy Quarterly* 25 at 26.

13 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission, June 2014) at 16.

14 At 16.

15 John Archer "Sex Differences in Aggression Between Heterosexual Partners: A Meta-Analytic Review" (2000) 126 *Psychol Bull* 651 at 664.

16 Michael P Johnson and Janel M Leone "The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings From the National Violence Against Women Survey" (2005) 26 *J Fam Issues* 322.

17 See Lisa R Muftić, Jeffrey A Bouffard and Leana Allen Bouffard "An Exploratory Study of Women Arrested for Intimate Partner Violence: Violent Women or Violent Resistance?" (2007) 22 *J Interpers Violence* 753 at 757.

18 Johnson and Leone, above n 16, at 323–324.

19 At 344.

20 Vivienne Elizabeth "Separating From Violent Male Partners: A Resistant Act in the Midst of Power Relations" (2003) 4(3) *Journal of International Women's Studies* 62 at 68–69.

21 At 69.

22 At 67.

the victim from leaving the relationship. For example, Rashmi Goel argues that for South Asian women the sanctity of marriage and family means that abuse is often an accepted feature of intimate relationships.²³ On the other hand, situational violence and violent resistance used by women often do not come from a place of power and control.²⁴ They are triggered by a certain situation and are not intended to gain control over the victim.²⁵ The implementation of s 24A heightened the debates surrounding the gendered nature of DV. It is important to examine the provision in light of the gendered nature of DV as it can have direct ramifications for the protection of women.

B *Restorative justice*

There is no clear consensus on the definition of RJ. The MOJ has stated it is a process for resolving crime that focuses on redressing the harm experienced by victims while holding the offender to account for what they have done.²⁶ This statement can be further unpacked: restorative justice is a way of thinking about crime, but also a process of responding to crime.²⁷ It aims to be both process-focused and outcome-focused.²⁸ The process aspect of RJ views the meeting of all stakeholders involved—the offender, victim, family and community—as flexible and value-driven. In the New Zealand context, tikanga Māori principles are prevalent. Prior to colonisation, Māori took a collectivist approach to wrongdoing, focusing on the hapū (subtribe) and iwi (tribe) rather than the individual.²⁹ When wrongdoing occurred, a meeting would take place to restore the utu (balance) of the mana (authority) of all social groups involved.³⁰ Consensus would be reached through this restorative process. If restoration failed to take place, personal and family vendettas, death or exile could occur.³¹

In upholding the principles of the Treaty of Waitangi, the MOJ has incorporated tikanga values into the practice of RJ. For example, tika (the right way of doing things) aims to engage the people who have the problem and solve the problem *with* them, rather than *for* them.³² Whanaungatanga recognises there is a sense of interconnectedness with communal bonds that tie together the victim, offender and community.³³ The concept of empowerment is addressed through mana motuhake: RJ “seeks to re-empower victims by giving them an active role” during conferences and “[empower] offenders to take personal

23 Rashmi Goel “Sita’s Trousseau: Restorative Justice, Domestic Violence, and South Asian Culture” (2005) 11 *Violence Against Women* 639.

24 Melissa L Garber “An Analysis of Restorative Justice and Intimate Partner Violence Policy and Practice: Professionals’ Perspectives and Perceptions” (PhD Thesis, Victoria University of Wellington, 2016) at 32.

25 Johnson and Leone, above n 16.

26 Ministry of Justice *Restorative Justice: Best Practice in New Zealand* (2004) at 6.

27 See Julie Stubbs “Restorative Justice, Gendered Violence and Indigenous Women” in James Ptacek (ed) *Restorative Justice and Violence Against Women* (Oxford University Press, New York, 2010) 103.

28 See Garber, above n 24, at 37.

29 James H Liu “Social and Historical Contexts for Restorative and Retributive Justice: Te Ao Pō — Te Ao Mārama (Worlds of Dark and Light)” in Gabrielle Maxwell and James H Liu (eds) *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (Institute of Policy Studies, Wellington, 2007) 29 at 38.

30 At 30.

31 At 30.

32 Ministry of Justice *Restorative justice: Best Practice Framework* (August 2017) at 8.

33 At 8.

responsibility for their offending”.³⁴ Taken together, these values reflect those mentioned in RJ literature: interconnectedness, empowerment, accountability and mutuality.³⁵ A key element of RJ is that flexibility of connected values drives its practice, rather than a core set of rules and regulations. Tikanga Māori principles are also reinforced in practice. In 1989, family group conferences (FGC) were introduced through the passing of the Children, Young Persons, and Their Families Act 1989 (now the Oranga Tamariki Act 1989).³⁶ FGCs are a culturally sensitive practice and they were introduced to solve the overrepresentation of Māori youth in the CJS. Howard Zehr notes that FGCs echo tikanga Māori values in that the inclusion of offenders, victims, whānau and community in the process is needed to identify and address the harms caused by the crime collectively.³⁷

RJ practices were legitimated through the passing of the Sentencing Act, s 7(2)(d) of the Parole Act 2002 and s 9 of the Victims Rights Act 2002. These three Acts encourage the consideration of RJ conferences during sentencing. In particular, s 8(j) of the Sentencing Act provides that in sentencing an offender the court must take into account any outcomes of RJ processes.³⁸

The outcome aspect of RJ is based on reparation through conferencing.³⁹ The righting of the wrong can be done through material restitution, such as compensation, or can be symbolic, such as an apology that addresses the offender’s awareness of his or her wrongdoing.⁴⁰ We see, then, that RJ is not a static form of justice chained by precedent: its implementation reflects its core values.

C The appeal of restorative justice for victims of domestic violence

Debates about the appropriateness of applying RJ to DV cases started as early as 1995 when RJ protocols were being drafted by Waikato Mediation Services.⁴¹ Proponents of its application to DV cases argued that mediation was more empowering for DV victims to go through than the traditional court process.⁴² Battered women advocates, on the other hand, argued that mediation was only effective for parties on equal footing and was thus unsafe for DV victims due to inherent power imbalances.⁴³

Proponents view RJ as addressing the harm the traditional adversarial nature has on battered women seeking legal intervention for domestic violence, for several reasons. First, the conventional CJS is based on the idea of the social contract and a breach against

34 At 9.

35 Howard Zehr and Barb Toews (eds) *Critical Issues in Restorative Justice* (Criminal Justice Press, Monsey (NY), 2004).

36 Oranga Tamariki Act 1989, ss 20–38.

37 Howard Zehr “Doing Justice, Healing Trauma: The Role of Restorative Justice in Peacebuilding” (2008) 1 *Peace Prints: South Asian Journal of Peacebuilding* 1 at 4.

38 Sentencing Act, s 8(j).

39 Margarita Zernova and Martin Wright “Alternative visions of restorative justice” in Gerry Johnstone and Daniel W Van Ness (eds) *Handbook of Restorative Justice* (Routledge, London, 2006) 91 at 92–93.

40 Susan Sharpe “The idea of reparation” in Gerry Johnstone and Daniel W Van Ness (eds) *Handbook of Restorative Justice* (Routledge, London, 2006) 24 at 28.

41 Stephen Hooper and Ruth Busch “Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea” (1996) 4(1) *Wai L Rev* 101 at 101.

42 At 101. Note that early restorative justice literature referred to “conferencing” as “mediation”.

43 At 101.

the state.⁴⁴ This severely undermines the focus on the victim. Rather than being given control and choice in proceedings and outcomes, victims are passive actors of the CJS, often subjected to feelings of marginalisation and humiliation throughout criminal proceedings.⁴⁵ On the other hand, RJ is victim-focused; it gives victims more control over proceedings by making sure their side of the story is heard.⁴⁶ Secondly, the adversarial nature of the CJS assumes the two parties are in contest with each other with the goal of retribution in mind.⁴⁷ Retribution justifies punishment as a response to crime in order to restore balance in society and right the wrong that has been done.⁴⁸ Punishment is a form of “just deserts” that holds offenders accountable for their violation of social norms.⁴⁹ However, retribution undermines rehabilitation and reintegration. Melissa L Garber notes that a frequent theme in her research with RJ facilitators is that most women are not after retribution; they do not want their partners convicted or imprisoned—they just want the abuse to stop.⁵⁰ RJ, on the other hand, aims to hold the offender accountable through moral authority, inspiring long-term changes in the offender.⁵¹ This moral authority is argued to be stronger than legal authority because the conventional CJS does not embody a sense of mutuality essential for moral values.⁵² Thirdly, arguments put forward by defence counsel in the conventional CJS that reinforce male batterer ideologies can re-victimise the victim. Feminist theorists argue that the adversarial nature of the CJS is embedded within a patriarchal structure that is unable to deal with the power imbalances existent within a violent relationship.⁵³ Defence counsel can also undermine the victim’s credibility by questioning the state of her mental health, and portray her as a manipulative person.⁵⁴ However, respectful and inclusive dialogue between all stakeholders is demanded during RJ conferencing.⁵⁵ The focus is shifted away from defence counsel by giving victims the power to speak their own narrative,⁵⁶ and allowing them to take back control lost in the courtrooms. Finally, court cases isolate one particular “incident” the victim has reported to the police. This is problematic because DV is often a pattern of violent behaviour characterised by power and control from one party.⁵⁷ RJ aims to repair the harm done holistically to the relationship between the offender and the victim, rather than focus solely on the offending that has occurred.⁵⁸

44 Arrick L Jackson “The Impact of Restorative Justice on the Development of Guilt, Shame, and Empathy Among Participants in a Victim Impact Training Program” (2009) 4 *Victims and Offenders* 1 at 2.

45 Garber, above n 24, at 26.

46 Ministry of Justice, above n 26, at 33.

47 Edna Erez “Domestic violence and the criminal justice system: an Overview” (2002) 7 *Online J Issues Nurs* at 7.

48 Monica M Gerber and Jonathan Jackson “Retribution and Revenge and Retribution as Just Deserts” (2013) 26 *Soc Just Res* 61 at 62.

49 At 63.

50 Garber, above n 24, at 83.

51 Kay Pranis “Restorative Values and Confronting Family Violence” in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (Cambridge University Press, Cambridge, 2002) 23 at 28.

52 At 27.

53 Ruth Lewis and others “Protection, Prevention, Rehabilitation or Justice? Women’s Use of the Law to Challenge Domestic Violence” (2000) 7 *IRV* 179 at 182.

54 Erez, above n 47, at 12.

55 Ministry of Justice, above n 6, at 15.

56 At 21.

57 Elizabeth, above n 20, at 68.

58 Garber, above n 24, at 91.

Critics of RJ's application to DV cases argue that RJ literature fails to address adequately the theorisation of crime, which can work to exclude DV.⁵⁹ For example, Joe Hudson and Burt Galaway note that crime is fundamentally a conflict between individuals that harms the victim, the offender and their communities.⁶⁰ The authors go on to say that victims would benefit from meeting the offender, and would realise the offender is not someone they should still fear.⁶¹ However, this is inappropriate for DV as DV is not akin to stranger crime; the victim and offender are in an intimate relationship and typically live together. Further, theorising crime as a conflict between individuals fails to take into account the multi-faceted issues of DV, such as race, class and gender.⁶² It also assumes crime is an isolated, past incident for which reparation can be made easily. An adequate theorisation of crime should take into account that DV often is ongoing, escalates over time, has impact beyond the primary victim—such as on children, family and friends—and, importantly, is a gendered form of crime.⁶³

D Recurring policy issues in restorative justice and domestic violence

The debates surrounding the appropriateness of RJ in DV cases demonstrate the complexity of issues involved and the need for effective policies to be put in place for the protection of victims. As Zehr warns, DV is perhaps the most problematic area of RJ application.⁶⁴ This is due to the recurring policy issues that arise when assessing whether RJ is appropriate in DV cases. The MOJ has importantly acknowledged the issues surrounding the debates, stating in its 2004 RJ best practice guidelines that “the use of restorative justice processes in cases of family violence ... will not always be appropriate” and “must be very carefully considered”.⁶⁵ DV cases present different issues for the RJ process than other cases. In the case of stranger crimes, support people for the victim and offender are brought together to provide assistance. However, in DV cases, due to the intimate nature of the relationship between the offender and victim, their support people are often shared or may be connected through marriage. This means there may already be a certain power dynamic embedded within the family that the conference only works to reinforce.⁶⁶ In the case of stranger crimes, conferences teach victims that the harm done was not personal and that they are safe from future threat. This is not true for DV cases, where the potential for future threat exists in the intimate relationship, particularly if the relationship is ongoing or if there are children involved.⁶⁷ Further, issues highlighted in the traditional CJS, such as sexist narratives painted by defence counsel and the undermining of victims' injuries, can still happen in a RJ conference.

59 Julie Stubbs “Beyond apology? Domestic violence and critical questions for restorative justice” (2007) 7 *Criminol Crim Justice* 169 at 171.

60 Joe Hudson and Burt Galaway “Introduction” in Burt Galaway and Joe Hudson (eds) *Restorative Justice: International Perspectives* (Criminal Justice Press, New York, 1996) 1 at 2.

61 At 2.

62 Stubbs, above n 59, at 171.

63 At 171.

64 Howard Zehr and Ali Gohar *The Little Book of Restorative Justice* (Good Books, Intercourse (PA), 2002) at 9.

65 Ministry of Justice, above n 26, at 25.

66 Gordon Bazemore and Twila Hugley Earle “Balance in Response to Family Violence: Challenging Restorative Principles” in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (Cambridge University Press, Cambridge, 2002) 153 at 157.

67 Stubbs, above n 59, at 172.

The role of RJ within the traditional CJS is another issue that policy needs to consider. It is argued DV is often a chronic pattern of abuse characterised by power and control and a single RJ conference is unlikely to bring significant change to this pattern of abuse.⁶⁸ For example, RJ emphasises that apology is a powerful restitution that provides meaning to the victim and is a key to healing.⁶⁹ However, Julie Stubbs questions the value placed on apology, arguing it is a common strategy in abusive relationships the offender uses to attempt to win back the victim's affection.⁷⁰ Importantly, an apology is not synonymous with an admission of guilt, as remorse is often part and parcel of the abuse, and the two should not be confused with one another.⁷¹ Effective policy needs to consider whether criminal sanction is only part of a broader framework to address DV. Should RJ merely be a single fragment in an integrated system involving multiple agencies, each working to tackle a different part of the problem of DV?⁷² These recurring issues will be discussed further upon close examination of the MOJ's guidelines on dealing with DV cases in RJ.

III Analysis

A *Enactment of s 24A*

In New Zealand, these issues are now more than theoretical. Section 24A of the Sentencing Act, inserted in 2014, provides that when an offender appears before the District Court before sentencing and has pleaded guilty to an offence that involves at least one victim, the Court *must* adjourn proceedings for the following purposes:

- (a) to enable inquiries to be made by a suitable person to determine whether a RJ process is appropriate in the circumstances, taking into account the victims' wishes; and
- (b) to enable a RJ process to occur if the inquiries reveal that a RJ process is appropriate in the circumstances.

DV offending is not expressly excluded under this section. The legislative intent behind the provision was to enhance victims' rights in the sentencing process by allowing their meaningful participation.⁷³ During the Second Reading of the Victims of Crime Reform Bill,⁷⁴ the Hon Judith Collins MP emphasised the importance of acknowledging the victim's wishes when considering the use of RJ, as some victims will not want to undergo conferencing.⁷⁵ During the Select Committee debates regarding the role of s 24A in the Sentencing Act, the Hon Phil Goff MP emphasised that victims should not be under any pressure from the courts to participate in the RJ process.⁷⁶ Section 24A was intended, then,

68 Bazemore and Hugley Earle, above n 66, at 157.

69 See Christopher Bennett *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge University Press, Cambridge, 2008).

70 Stubbs, above n 59, at 177.

71 Nick Smith *Justice through Apologies: Remorse, Reform and Punishment* (Cambridge University Press, New York, 2014) at 11.

72 Ruth Herbert and Deborah Mackenzie *The Way Forward: An Integrated System for Intimate Partner Violence and Child Abuse and Neglect in New Zealand* (The Impact Collective, July 2014) at 4.

73 Kerrin Eckersley "Restorative Justice: An unwanted invitation for tea and biscuits?" (LLM Research Paper, Victoria University of Wellington, 2015) at 16.

74 Victims of Crime Reform Bill 2011 (319-2).

75 (5 March 2014) 696 NZPD 16393.

76 (16 April 2014) 698 NZPD 17369.

to give paramount consideration to the victim's wishes in deciding whether RJ is appropriate in any particular case.

B An analysis of the Ministry of Justice's guidelines on restorative justice practices in domestic violence cases

In 2004, the MOJ published best practice guidelines for RJ conferences.⁷⁷ The guidelines were produced after consultation with RJ facilitators in order to ensure collaboration and consistency between the government and the community regarding RJ values, practices and quality.⁷⁸ In acknowledging the unique risks to victims that DV has, the MOJ published a 2013 report that complemented the 2004 guide.⁷⁹ Due to an increased demand for RJ after amendment to s 24A in 2016, the MOJ updated these guidelines in August 2017.⁸⁰ This article turns to analyse critically the relevant principles in the 2017 guidelines and two additional principles in the 2013 report pertaining to DV cases, and to examine the implications these principles have in practice.

(1) Principle one

The first principle is that participation is voluntary: the informed consent of both the offender and the victim is obtained before starting any RJ process, and all outcomes are arrived at voluntarily.⁸¹ This principle acknowledges that RJ is not a mandatory form of justice imposed on the offender and victim by the court. It gives victims a choice in deciding whether to proceed, and if so, to what extent. Straight away, this principle assumes the victim is a free agent.⁸² However, it is debatable whether victims of DV are able to give informed consent due to the power imbalance in their relationship. Evan Stark notes the complication surrounding the notion of victims' "free choice" if their abusers are exercising dominance and control over their lives.⁸³ This is not to say that all battered women are too victimised to exercise any choice. Rather, the effects of men's violence on women's negotiations effectively limit their choices in significant ways.⁸⁴ Further, the insertion of s 24A means the process is now initially offender-driven, as it is the offender's court case that attracts the attention of RJ, and this can exacerbate coercion by the offender. The victim may feel coerced to consent to the process, especially if her relationship with the offender is ongoing. In actual practice, while both the victim's and offender's consent are considered, it is the RJ facilitator that has the final say as to whether a conference can go ahead.⁸⁵ The RJ facilitator's denial of a conference could potentially anger the offender, who might wrongly accuse the victim of refusing RJ, and this could subject the victim to further abuse.⁸⁶

77 Ministry of Justice, above n 26.

78 Ministry of Justice, above n 32, at 5.

79 Ministry of Justice, above n 6.

80 Ministry of Justice, above n 32, at 5.

81 At 10.

82 Julie Stubbs "Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice" in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (Cambridge University Press, Cambridge, 2002) 42 at 44.

83 Evan Stark "Do Mandated State Interventions Contribute to Woman Battering?" (2000) 5 *Domestic Violence Report* 65 at 76.

84 Stubbs, above n 82, at 44.

85 Garber, above n 24, at 94.

86 At 169.

(2) Principle three

The third principle provides that RJ providers need to ensure participants are fully informed for there to be effective participation in the RJ process.⁸⁷ Critical to this is using high-quality facilitators who have expertise in family violence, including the social and cultural contexts in which it occurs.⁸⁸ The role of RJ facilitators is important as they ensure victims feel like they are being listened to and helped.⁸⁹ RJ facilitators are monitored to ensure performance standards are consistent throughout the country and to provide facilitators with ongoing training.⁹⁰ This principle requires either that facilitators be trained in both RJ and family violence, or that there be two facilitators present at the conference, one with RJ accreditation and one with family violence accreditation, as it is harmful to assume all RJ facilitators are adequately trained to deal with DV cases.⁹¹ Of note, however, there is no mention in either the 2017 guidelines or the 2013 report as to how a facilitator becomes accredited or what accreditation is required for DV cases.

In practice, the MOJ's requirement is very hard to meet. Although the facilitators in Garber's study acknowledged the importance of skilled and knowledgeable facilitators for an effective process, there is a lack of confidence that New Zealand has enough of these skilled facilitators.⁹² Because s 24A(2)(a) provides that a "suitable person" is to determine whether a RJ process is appropriate,⁹³ the lack of a suitable person with the required accreditation and skill may mean cases assessed as appropriate in some parts of the country are assessed as inappropriate in other parts despite factual similarities.

(3) Principle four

The fourth principle provides that a key focus of RJ is offender accountability, and the offender "must acknowledge responsibility for the offence before the case can be accepted for a restorative justice process".⁹⁴ One of the factors that demonstrates "an offender's acknowledgement of responsibility" is a guilty plea accompanied by a statement of facts.⁹⁵ But a guilty plea is an unreliable way to prove the offender's acknowledgment of accountability because offenders often contest the statement of facts presented in court. In *Yasir Mohib v New Zealand Police*, the sentencing judge refused to give too much weight to RJ participation as evidence of remorse because of the offender's unwillingness to accept responsibility for using a hammer to attack his partner, despite his guilty plea based on the summary of facts.⁹⁶ This case shows that, in practice, a guilty plea may not equate to an acknowledgement of accountability. A guilty plea can be entered into for many reasons, such as the obtainment of a plea bargain or a reduced sentence; it does not necessarily mean the offender feels he is accountable or at fault for the offence. Section 24A provides that the offender must plead guilty to the offence in order for RJ to

87 Ministry of Justice, above n 32, at 10.

88 Ministry of Justice, above n 6, at 18.

89 Jac Armstrong "Factors Contributing to Victims' Satisfaction with Restorative Justice Practice: A Qualitative Examination" (2012) 10(2) British Journal of Community Justice 39 at 46.

90 Ministry of Justice, above n 6.

91 Garber, above n 24, at 74.

92 At 171.

93 Sentencing Act, s 24(2)(a).

94 Ministry of Justice, above n 32, at 11.

95 Ministry of Justice, above n 6, 14.

96 *Yasir Mohib v New Zealand Police* [2017] NZHC 123 at [45].

be considered. Thus, in many court-referred RJ conferences, the offender would have already pleaded guilty. But it is unlikely that every offender will actually feel accountable for his actions.⁹⁷

Principle four also states that the conference should address the offence that is the subject of the original referral.⁹⁸ Again, this principle cannot work adequately for DV cases because the “incident” reported to the court may fail to take into account the broader offence history. Information needs to be examined carefully in order to give context to the offending and facilitate a deeper understanding of the violence, its effects and its origins.⁹⁹ Perhaps the offending should be thought of as an “episode” rather than as an “incident”.¹⁰⁰ Smith argues that thinking in this way takes into account the cumulative pattern of behaviour that has led to the court case.¹⁰¹ However, an issue to consider is whether past offending brought up by the offender during the conference should be legally privileged or admissible as evidence in trial. If it is admissible, the offender may be reluctant to open up about his past offending. The RJ conference, in addressing only the incident that is the subject of the court’s referral, counterintuitively shifts back into the incident-focused CJS.

(4) Principle six

The sixth principle provides that every decision made by facilitators needs to be underpinned by the notion of safety.¹⁰² The assessment of safety requires looking at several factors during the pre-conference assessment. These include the offender’s capacity and readiness to give a meaningful apology, the offender’s attitude towards his behaviour, the offender’s ongoing psychological needs, and any risks to the safety of the offender and others.¹⁰³ A concern that arises here, though, is *how* these factors are assessed and, in particular, to what degree an offender is capable and ready in order to be suitable for RJ. The fact that the pre-conference assessment requires that offenders have the capacity to feel genuine remorse shows a presumption of offender empathy and altruism.¹⁰⁴ The problem with this is that the offence of DV intrinsically shows a lack of altruism and disregard for the welfare of the victim.¹⁰⁵ This means policy cannot blur the line between readiness to change on one hand and having the altruism to change on the other, because it is likely the offender is ready to change but not altruistic—that is, he wants to change for his own gain, not for the victim’s gain.¹⁰⁶ In DV cases, where the abusive relationship may be ongoing, there are high chances of reoffending if the offender lacks altruism to change. This is not necessarily the case for stranger offences.

97 Garber, above n 24, at 169.

98 Ministry of Justice, above n 6, at 15. The updated 2017 guidelines do not include this.

99 Anne Hayden “Reflections on Family Violence and Restorative Justice: Addressing the Critique” in Anne Hayden and others (eds) *A Restorative Approach to Family Violence: Changing Tack* (Ashgate, Farnham (UK), 2014) 211 at 214.

100 Smith, above n 71, at 11.

101 At 11.

102 Ministry of Justice, above n 32, at 11.

103 Ministry of Justice, above n 6, at 23.

104 Garber, above n 24, at 66.

105 At 67.

106 At 68.

(5) Principle A

Principle A “respects the right of the victim to hold the offender accountable” and “recognises the re-balancing of power between the victim and the offender as key to victim healing”.¹⁰⁷ The victim’s ability to re-balance power between herself and the offender is predicated on the presumption that the victim is autonomous—a presumption applied to victims of stranger crime.¹⁰⁸ But this is fundamentally idealistic; battered women in abusive relationships often lack a certain level of autonomy due to a perceived shortage of options.¹⁰⁹ The severity of the power imbalance means the victim’s voice is heavily constrained, even if principle A gives her priority in participation. The emphasis on victim involvement in RJ assumes victim healing can occur independent of the formal justice system. However, the complexity of other legal matters involved in DV cases, such as child custody and divorce proceedings, may make RJ simply another legal hurdle for an already worn-out victim.¹¹⁰

Giving victims control and a voice throughout the proceedings can also work to exploit rather than to liberate women in subservient cultural positions. Goel argues that for South Asian women, who are already controlled by forces of cultural tradition, RJ that is predicated on victim autonomy ignores the fact that the victim has her own cultural understanding of what being a wife means.¹¹¹ The presumption of autonomy may work well for parties who are self-interested, adversarial and disconnected. But notions of marriage for South Asian women centre on interdependence. South Asian DV victims may be unable to speak up for themselves, deprioritising their own needs in favour of their husband and community.¹¹²

RJ has political importance for Māori as it is rooted in tikanga values and practices. Māori have wide visions of justice, which includes self-determination, and RJ may work to silence Māori women’s desires for personal justice.¹¹³ However, Māori women may not want to speak up about the failures of RJ out of fear of jeopardising the legal recognition of tikanga practices in the criminal justice system. Further, the political importance of RJ may work to pit the interests of the Māori community against the interests of the battered Māori woman.¹¹⁴

(6) Principle B

Principle B emphasises that a “genuine apology” forms part of the healing and justice for the victim.¹¹⁵ An apology made during the conference must demonstrate clear acceptance of responsibility and acknowledgment of the harm the offending has caused to the victim.¹¹⁶ This demonstrates an underlying presumption of the power of a genuine apology. As mentioned previously, however, apology as a form of reparation in DV relationships can be a means of controlling the victim. Abusive men use apology to

107 Ministry of Justice, above n 6, at 21.

108 Goel, above n 23, at 657.

109 At 657.

110 Stubbs, above n 82, at 46.

111 See Goel, above n 23, at 649.

112 At 649.

113 Kerensa Johnston “Maori Women Confront Discrimination: Using International Human Rights Law to Challenge Discriminatory Practices” (2005) 4 Indigenous Law Journal 19 at 62–63.

114 At 62.

115 Ministry of Justice, above n 6, at 24.

116 At 26.

foreclose ongoing tension, expecting it to be enough for the victim to move on and forget about an abusive incident.¹¹⁷ Moreover, society has taught women to be forgiving from a young age in order to resolve conflict and repair relationships.¹¹⁸ This places women at risk of valuing apologies from abusive partners at the expense of their own satisfaction.¹¹⁹ The MOJ's guidelines do not specify how a genuine apology is to be assessed, but they do acknowledge that apology is neither expected nor required during the conference.¹²⁰ This is important as facilitators need to remember that emphasising apology and forgiveness as the focus of reparation risks exerting pressure on the offender to give an apology he is not ready to give, or on the victim to accept an apology she feels is not genuine.

Principle B also states that victims should “negotiate for actions or behaviours they would find restorative”.¹²¹ The agreed outcome needs to be achievable, monitored and mediated, but no mention is made in the guidelines as to who is responsible for monitoring the outcome.¹²² Section 10 of the Sentencing Act provides that any agreements made, provided they are “genuine and capable of fulfilment”, must be taken into account in sentencing. The negotiations surrounding an agreed outcome may be powerful if both the victim and the offender have the capacity to negotiate with each other on an equal footing. However, victims in abusive relationships cannot negotiate freely with their abusers or speak without constraint from outside forces.¹²³ This is because their relationships are not based on mutuality, and there is no willingness to be honest or to reach a consensus through compromise.¹²⁴ The decisions DV victims make may be familiar to them, but not the safest for their wellbeing.¹²⁵ Further, there are no legal consequences for non-compliance with agreements, which allows them to be easily breached.

The opportunity to be held publicly accountable and to “commit to actions to prevent any further abuse” seeks to provide healing for offenders.¹²⁶ This again assumes offenders have the ability to be empathetic. It also assumes healing is the offender's motivation to consent to RJ, which is problematic. In Garber's study, most facilitators reported that the main motivation for many DV offenders for participating in RJ was reduction in sentence, as opposed to therapeutic change.¹²⁷ Reduction in sentence for RJ participation can be significant. The sentencing judge in a recent Court of Appeal case in which the offender broke his partner's ribs in 13 places, causing her death, gave a six-month sentence reduction for the offender's genuine remorse, as exemplified in a RJ meeting with the deceased's parents.¹²⁸ In *Dickerson v New Zealand Police* the District Court awarded a reduction for the offender's willingness to participate in RJ after strangling his partner, even though the RJ process never actually took place.¹²⁹

117 Lewis and others, above n 53, at 183.

118 Sharon Lamb “Women, Abuse and Forgiveness: A Special Case” in Sharon Lamb and Jeffrie G Murphy (eds) *Before Forgiving: Cautionary Views of Forgiveness in Psychotherapy* (Oxford University Press, Oxford, 2002) 155 at 162.

119 At 162.

120 Ministry of Justice, above n 6, at 25.

121 At 21.

122 At 26.

123 Goel, above n 23, at 660.

124 Hooper and Busch, above n 41, at 105–106.

125 Goel, above n 23, at 661.

126 Ministry of Justice, above n 6, at 24.

127 Garber, above n 24, at 189.

128 *Ferris-Bromley v R* [2017] NZCA 115 at [5].

129 *Dickerson v New Zealand Police* [2016] NZHC 801.

Another issue with being held publicly accountable is that support people present at the conference may not properly condemn the offender's actions. The MOJ requires at least one support person be present at a conference who has been screened to assess whether they support the offender's beliefs and actions.¹³⁰ However, screening the support person on their own is not sufficient as their behaviour can change once they are present with the offender and the victim. Further, some support people may not agree about the criminality of DV, or they may hold deep-rooted beliefs that legitimate or support the use of violence in intimate relationships.¹³¹ Intersectionality issues between gender and race are also not addressed in the guidelines. Placing too much emphasis on community and community practices may reinforce power imbalances within cultural groups, prioritising culture over gender.¹³²

C The role of restorative justice in the criminal justice system

Section 24A, coupled with the MOJ's practice guidelines, calls into question the role of RJ and where it sits in terms of the CJS. There is tension between seeing RJ as a component of the CJS and seeing it as a whole new approach to justice. A further issue to consider is whether, if the role of RJ does not align with the aims of the victim—to seek protection from the CJS—the advantages of RJ are worth the risks it can pose to the victim. It might be argued that RJ is now a part of the court process, rather than an alternative mechanism to the court process.¹³³ This would mean it is not focused on punishment, as punishment occurs during sentencing regardless of whether a RJ conference goes forward. What is unclear is whether RJ is focused on reducing recidivism—a goal of the traditional CJS—or whether it is focused on healing and repairing harm. Section 24A(1)(d) provides that no RJ process can have previously taken place “in relation to the offending”.¹³⁴ This implies that RJ can only be used as a one-off intervention, and that the success of RJ is measured through recidivism. For DV cases, it would be problematic to rule out RJ just because it has been used previously in relation to the offending, as the offending is unlikely to be an isolated incident.¹³⁵ It is also unclear whether “in relation to the offending” refers only to the offence at issue or to any related acts of DV by the offender. It is contradictory that legislation states RJ can only be used once when RJ is described in the MOJ's guidelines as being a process of rehabilitation.

Throughout the guidelines, the concept of risk is repeated. For example, the MOJ notes “the quality of the assessment and intervention in pre-conferencing will mitigate risk for all parties”.¹³⁶ This points to the fact that the minimisation of harm and the reduction of risk are emphasised more than the healing of stakeholders. Further, pre-conference assessment criteria set out in the guidelines show that facilitators need to look for reasons *not* to proceed with the conference, again demonstrating the prioritisation of risk management. In Garber's study into RJ facilitators dealing with DV cases, responses to the question “Is the focus of restorative justice on the readiness to heal or is it a readiness not

130 Ministry of Justice, above n 6, at 25 and 29.

131 Kathleen Daly and Julie Stubbs “Feminist Engagement with Restorative Justice” (2006) 10 *Theor Criminol* 9 at 17.

132 Stubbs, above n 82, at 49.

133 Garber, above n 24, at 181.

134 Sentencing Act, s 24A(1)(d).

135 Garber, above n 24, at 170.

136 Ministry of Justice, above n 6, at 25.

to cause further harm?” indicated the focus of RJ is more on recidivism reduction.¹³⁷ The facilitators’ assessment of the likelihood of recidivism was focused mainly on the offender, and it was the first cut-off point or threshold for facilitators in determining the suitability of the case for RJ.¹³⁸ The assessment of readiness to heal was focused more on the victim.¹³⁹ This study supports the idea, then, that RJ as it stands currently in the CJS is mostly outcome-focused. Whether RJ is successful also has consequences for funding. If the success of RJ is measured in the perspective of the CJS—through recidivism rates—but the aim of RJ is to facilitate the healing of stakeholders, it will be difficult for RJ to gain funding.¹⁴⁰ Therefore, it is imperative that the role of RJ be clearly defined in the CJS framework, as the current positioning of RJ between trial and sentencing creates confusion as to how its success is measured.

IV Improving the Current Model

A Improving practices

This article now critically discusses how improvements can be made to address the main issues that arise from the application of RJ to DV cases. Practices in overseas jurisdictions will be examined in determining where RJ should ultimately fit within our CJS.

As discussed above, one of the main issues with the current approach is the lack of confidence surrounding the accreditation, skill and knowledge of RJ facilitators in DV cases. Project Restore, a RJ provider for sexual violence, is a leader in the field, having specialised facilitators who are present throughout all stages of the RJ process.¹⁴¹ Pre-conferences assessments are undertaken by a multidisciplinary team consisting of one psychologist and two sexual violence specialists, who operate from both the offender’s and the victim’s perspectives.¹⁴² This multidisciplinary approach seeks to minimise the risks of the offender’s coercing the victim to participate, and of allowing an offender to participate who poses a danger of subjecting the victim to secondary victimisation.¹⁴³ At least one RJ agency in New Zealand dealing with DV uses a model whereby a team comprising one RJ facilitator with both DV and RJ accreditation, one offender specialist, one victim specialist and one clinical psychologist meets between three and ten times before conferencing to assess suitability and prepare stakeholders for the conference.¹⁴⁴ However, this practice is not consistent across the country. This agency has four times as much funding as other RJ providers, which means this model is unrealistic in the absence of sufficient funding. At the very least, it is recommended that facilitators be accredited both generally in RJ and specifically in DV.

Another issue discussed above is the ambiguity regarding responsibility for monitoring agreed outcome plans post-conference. A reduced sentence for remorse shown during the RJ process would be inappropriate if the offender has breached the agreed outcome plan. A suggested improvement in this area is to pair protective authorities with the victim

137 Garber, above n 24, at 173.

138 At 173.

139 At 173.

140 At 183.

141 Shirley Julich and others “Yes, There is Another Way!” (2011) 17 *Canta LR* 222 at 223.

142 At 223.

143 At 223.

144 Garber, above n 24, at 157.

to heighten legal leverage over the offender, especially post-conferencing.¹⁴⁵ After an outcome plan is agreed, the protective authorities would have the role of monitoring the plan to ensure breaches of it had legal consequences. Again, this would require sufficient funding and resources being made available to police to provide ongoing support and protection to victims.

As discussed, the current RJ model's aim to give control to the victim during the proceedings cannot be achieved if she is not self-interested, if she is oppressed by the offender or if she is unwilling to speak. There is also criticism that the discursive nature of RJ makes the process coercive, because certain cultural, social or class imbalances put pressure on victims to act in a certain way or to be compliant.¹⁴⁶ The MOJ currently requires DV facilitators to have a deep understanding of DV, but Project Restore goes a step further; it requires facilitators to identify any manipulation of participants and to challenge defensive victim-blaming by support people.¹⁴⁷ In this way, the facilitator controls the dialogue of the conference so the victim is not left vulnerable to criticism from the offender and support people.

Finally, there is the issue of consent. Currently, the guidelines provide no guidance on how consent is to be assessed. Facilitators need to make sure that the victim's consent is free and informed and that she is not under coercion to participate. It is recommended that "consent" be defined as "having full legal capacity", free from any disability or coercion and having had the opportunity to receive independent legal advice.¹⁴⁸ However, the issue with risk assessments is that they are inherently subjective, they are subject to human error and they are inconsistent across cases.

B *Possible ways forward*

This article turns now to discuss three options going forward for RJ in DV cases: first, excluding DV from RJ; secondly, bringing RJ into sentencing; and thirdly, establishing a new justice system that is RJ-based and DV-specific.

The first option is to exclude DV cases from RJ processes. The United Kingdom provides the best example of this option in practice. The United Kingdom's equivalent of s 24A of the Sentencing Act is s 1ZA of the Powers of Criminal Courts (Sentencing Act) 2000 (UK),¹⁴⁹ inserted by pt 2 of sch 16 of the Crime and Courts Act 2013 (UK).¹⁵⁰ Section 1ZA provides that the courts have power to defer sentencing after an offender pleads guilty to allow for RJ activities to take place. However, a point of difference between New Zealand and United Kingdom practice is that the United Kingdom MOJ (UKMOJ) strongly advises against using RJ for DV cases.¹⁵¹ The UKMOJ uses similar reasoning to that espoused in this article: RJ's assumption of equal bargaining power is not applicable to DV, which is characterised by power imbalance, and the discursive nature of RJ carries the risk of ongoing harm to the

145 See Joan Pennell and Gale Burford "Feminist Praxis, Making Family Group Conferencing Work" in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (Cambridge University Press, Cambridge, 2002) 108.

146 See Bennett, above n 69.

147 Julich and others, above n 141, at 227.

148 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [9.90].

149 Powers of Criminal Courts (Sentencing) Act 2000 (UK).

150 Crime and Courts Act 2013 (UK), sch 16, pt 2, para 5.

151 United Kingdom Ministry of Justice *Pre-sentence restorative justice (RJ)* (May 2014) at [2.2].

victim.¹⁵² Given the significant issues and implications that s 24A opens up and the substantial funding that would be needed for improvements, one option for New Zealand is to follow the United Kingdom's suit and revert to the position the MOJ previously held: that DV cases are inappropriate for RJ. This could be done by inserting a new subs (3) to s 24A providing that adjournment for RJ processes is not available for DV cases. A disadvantage of this is that it would remove a choice from the "menu" of choices to which battered woman should be entitled in seeking protection from the CJS. However, given s 24A is initially offender-driven and thereby carries a risk of coercion of the victim to participate, it is questionable whether victims are free to make this choice anyway. Further, implementing this option would not abolish the use of RJ in DV altogether; community-referred RJ, which is more victim-driven, would still be available.

The second option would bring RJ into the actual sentencing process. In Canada, this is known as a sentencing circle: a sentence hearing conducted in a circle, which was adopted by the courts to address the overrepresentation of indigenous peoples in prisons and to promote community healing.¹⁵³ Again, a guilty plea must be entered and there must be consent from all stakeholders.¹⁵⁴ The sentencing circle gives the victim direct input in the offender's sentence and creates dialogue between all stakeholders about how the offender should be treated.¹⁵⁵ However, Goel argues that sentencing circles based on precolonial healing circles are not designed for "colonially induced domestic violence".¹⁵⁶ Criticism about the use of RJ in DV cases also applies to sentencing circles; for example, the sentencing circle can only be effective if all participants are equal, and this is not the case in many DV cases.¹⁵⁷ Giving the victim a voice assumes autonomy when, in fact, the offender's abuse may have already "stolen whatever voice she had".¹⁵⁸ Further, removing sentencing from the traditional courtroom may signal to the offender that DV offences are not as serious as other offences. Therefore, this is not a viable option to take.

The third option sees the prosecution of DV offences placed into the hands of an alternative justice system altogether separate from the CJS. The Law Commission recommended this approach for sexual violence offending in 2015.¹⁵⁹ It would mean the implementation of a system alternative to the CJS that is focused on the victim and helps her achieve her personal aims of justice—whether that is through reparation, apology or the offender's completion of a treatment programme.¹⁶⁰ Notably, under this alternative system, any statements made would be privileged, so the offender could not be prosecuted for past offending, there would be "a statutory bar against the perpetrator being prosecuted in relation to the same incident", and the offence would not go towards the offender's criminal record. The system would not be focused on attributing guilt or holding the offender accountable.¹⁶¹ Again, this option is not a viable one for DV offending. It is crucial that DV offenders be held accountable for their offending so blame is not placed

152 At [2.2].

153 Rashmi Goel "No Women At the Center: The Use of the Canadian Sentencing Circle in Domestic Violence Cases" (2000) 15 *Wis Women's LJ* 293 at 313.

154 At 314.

155 At 313–314.

156 At 295.

157 At 323.

158 At 323.

159 Law Commission, above n 148.

160 At [9.5]–[9.8].

161 At [9.7].

on the victim.¹⁶² Removing DV cases from the CJS would risk making DV a matter between private individuals, and would prevent the CJS from exercising its denunciatory function and condemning DV first and foremost as a crime. Further, this alternative system heavily emphasises victim empowerment, which can be complicated for DV victims. The system's inherent presumption that victims can be empowered to make the right choices undermines the "structural inequities" that DV victims face, and places upon them unreasonable expectations.¹⁶³

The most viable option going forward is to insert a proviso in s 24A and exclude DV cases from RJ processes. In practice, the current guidelines do not resolve the policy issues arising out of the application of RJ in DV cases. The sentencing circle only brings existing issues into the sentencing phase, as Canadian practice exemplifies, and an alternative system separate to the CJS places inappropriate expectations on the victim. Until the MOJ improves RJ guidelines to respond effectively to DV issues and there is sufficient government funding to implement those changes, it is best to exclude DV cases from RJ so as not to further the harm of victims.

V Conclusion

DV is one of the most challenging offences for RJ processes. Although RJ has been praised as a way of making victims feel empowered in the CJS, it has several limitations.¹⁶⁴ The power imbalance that characterises DV relationships means it is problematic to hold a RJ conference on the assumption that all stakeholders are on equal footing. RJ encourages dialogue between the offender, victim, support people and facilitators about the offending and its impacts on the victim, but this dialogue may work to re-victimise the victim. Apology, which is seen as the gold standard for healing in RJ, is a common abuse tactic used by offenders to win back the affection of the victim. It is also unclear how RJ, as it currently stands in the legislative framework, aims to heal offenders with deeply entrenched ideologies.

The MOJ's RJ guidelines pertaining to DV do not provide an answer to recurring policy issues. At the outset, pressure on the victim to participate in RJ processes still exists, especially if the offender is motivated by a reduced sentence. The skill and accreditation of RJ facilitators cannot be assumed to be sufficient for dealing with DV cases, especially due to the risks posed by the discursive nature of RJ conferences on DV victims. The guidelines still emphasise the reparatory value of apology, even though remorse is part and parcel of an abuser's controlling behaviour. Agreed, post-conference outcome plans are not monitored. Finally, the guidelines do not clarify the role of RJ in the CJS and it is unclear whether the focus is on intervention or treatment.

Insufficient funding means it is unrealistic that suggested improvements to the current model can come to fruition. Going forward, out of the three options discussed for RJ in DV cases, the most viable one is excluding DV from RJ by inserting a proviso in s 24A. In criticising the application of RJ to DV, this article does not deny that the more traditional

162 IARS International Institute *Restorative Justice in Cases of Domestic Violence: Best practice examples between increasing mutual understanding and awareness of specific protection needs* (2013) at 4.

163 Wilson and others, above n 12, at 28.

164 Hooper and Busch, above n 41, at 130.

processes of the CJS also have problems.¹⁶⁵ Indeed, RJ processes may benefit some DV victims and adequately address their needs.¹⁶⁶ However, having a blanket RJ process that occurs in the post-conviction pre-sentencing stage of a DV case with guidelines that do not adequately address recurring policy issues is not the right solution. In turning to the CJS for protection, a victim of DV should not be coerced to participate in a process that could compromise her safety and further her victimisation.

165 Angela Cameron "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2006) 18 CJWL 479 at 509.

166 At 510.