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**TOWARD A MORE EFFECTIVE  
CRIMINAL JUSTICE RESPONSE  
TO WIFE ASSAULT:  
EXPLORING THE LIMITS  
AND POTENTIAL  
OF EFFECTIVE INTERVENTION**

**Linda Macleod  
and  
Cheryl Picard**

**NCJRS**

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## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	1
PURPOSE OF THE PROJECT .....	3
OBJECTIVES OF THE RESEARCH .....	3
HOW THE INFORMATION WAS GATHERED .....	4
STRATEGIC CONSIDERATIONS .....	5
WHAT HAVE WE LEARNED FROM PAST RESEARCH ABOUT THE EFFECTIVENESS OF CURRENT CRIMINAL JUSTICE INTERVENTIONS? .....	6
What Do We Know About the Needs and Wants of Women Who Have Been Battered? .....	6
What Do We Know About the Effectiveness of Current Criminal Justice Intervention? .....	7
ARE THERE DIFFERENT WAYS THE CRIMINAL JUSTICE SYSTEM COULD INTERVENE MORE EFFECTIVELY IN WIFE ASSAULT CASES? .....	7
(a) United States Models of Legislative Change .....	8
(b) Related Community Intervention Projects .....	8
(c) Sentence Adjournment Model .....	8
(d) Alternate Dispositions Court .....	10
(e) Multi-Door Courthouse Model .....	10
(f) Pre-Trial Model .....	11
(g) Mediation .....	12

	<u>Page</u>
<b>WHAT DOES PAST RESEARCH TELL US ABOUT THE EFFECTIVENESS OF THESE APPROACHES TO WIFE ASSAULT CASES? .....</b>	13
Is Mediation an Appropriate Tool to Use in Wife Assault Cases? .....	13
Can Effective Guidelines be Developed for the Use of Mediation in Wife Battering Cases? .....	17
<b>TOWARD MORE EFFECTIVE INTERVENTION: INSIGHTS FROM THE CURRENT RESEARCH .....</b>	19
Principles for Building Change .....	19
Perspectives on Changing Criminal Justice Intervention of Women Who Have Been Battered: Their Needs and Concerns .....	25
Women's Expectations of the Justice System .....	25
What do Women Who Come into Contact with the Justice System Need? .....	26
1. Protection .....	26
2. Validation .....	27
3. Information .....	27
4. Empowerment .....	28
5. Financial Independence .....	28
6. Justice .....	29
What Do Women Who are Battered Want? .....	29
<b>PERSPECTIVES ON CHANGING CRIMINAL JUSTICE INTERVENTION OF MEN WHO BATTER: THEIR NEEDS AND CONCERNS .....</b>	30
<b>PERSPECTIVES ON CHANGING CRIMINAL JUSTICE INTERVENTION OF CRIMINAL JUSTICE SYSTEM REPRESENTATIVES: THEIR NEEDS AND CONCERNS .....</b>	31
<b>PERSPECTIVES ON CHANGING CRIMINAL JUSTICE INTERVENTION OF FRONTLINE WORKERS OUTSIDE THE CRIMINAL JUSTICE SYSTEM THEIR NEEDS AND CONCERNS .....</b>	32
<b>KEY ISSUES IN CHANGE .....</b>	32

	<u>Page</u>
1. Should the Criminal Justice System be Applied in Wife Battering Cases Whether or not the Woman Wants Criminal Justice System Involvement? .....	33
2. Is the current criminal justice response to wife assault eroding discretion? .....	34
3. Has the Charging Policy Worked? .....	34
4. Should the Man Be Removed From the Home? .....	35
5. Is Pre-Charge Diversion a Positive Option in Wife Assault Cases? ...	35
 OTHER QUESTIONS SURROUNDING CHANGE .....	 36
 A SUGGESTED DIRECTION FOR CHANGE .....	 37
Characteristics of More Positive Criminal Justice Based Intervention .....	37
Building a Model for Intervention .....	38
 SUGGESTIONS FOR FURTHER ACTION .....	 40
 SUGGESTIONS FOR FURTHER RESEARCH .....	 40
 CONCLUSION .....	 41
 BIBLIOGRAPHY .....	 43

## INTRODUCTION

For more than a decade, the criminal justice system has been a key player, and some would say the leader, in developing policies and programs to reduce the impact and incidence of wife battering. Although the criminal justice system has been generally lauded, domestically and internationally, for the very prominent role it has played, this role has been the subject of intense debate and considerable change over the years.

During the 1970s, a few innovative police departments began to experiment with domestic assault crisis teams. These teams were usually made up of police officers and social workers. They had a mandate to intervene in wife abuse cases in ways that would be sensitive to the victim's concerns and needs.

In the late 1970s and the early 1980s, women's groups pressed government to emphasize the criminal nature of wife assault, to encourage police officers to treat wife assault "like any other crime", and to charge men who batter their wives with assault, rather than relying on attempts to mediate the dispute.<sup>1</sup>

To the surprise and pleasure of these lobby groups, the federal Solicitor General wrote a letter in 1982 which urged Canadian police chiefs to encourage their officers to adopt more aggressive charging policies in wife assault cases. Since then, all provinces and territories have applied such policies. Across Canada, many public education campaigns have stressed that wife assault is a crime.

Nevertheless, debate concerning the most effective role of the criminal justice system in wife assault cases has not decreased as a result of these dramatic changes. In fact, in recent years, some representatives of concerned groups and those involved in the criminal justice system itself have expressed concern about the implementation and impact of this emphasis charging and criminality. They fear that, despite considerable efforts to make the criminal justice system more responsive to wife battering, some battered women find it coercive and unresponsive to their needs and hopes.

Furthermore, some criminal justice agents express frustration with their attempts to apply current policies. This is because many women who are battered do not seem to want to have the case proceed through court to conviction and sentencing. Commitment to more aggressive charging policies seems uneven within the justice system itself. Also, sentencing in wife battering cases varies considerably within and across jurisdictions.

Policymakers are also beginning to question existing policies and programs within the criminal justice system which are related to wife assault. Recent research reveals

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<sup>1</sup>For example, the Canadian Advisory Council on the Status of Women in recommendations released in 1980 and 1981 pressed for a more aggressive charging policy.

that the application of charging policies is still very uneven across provinces. In no province do police consistently support the policy toward more aggressive charging in wife battering cases.<sup>2</sup>

Uncertainty has fuelled a creative search for ways in which the criminal justice system could respond more effectively, sensitively and efficiently to wife battering. It has also raised some difficult questions. For example, concern is growing that the justice system has become overzealous in its attempts to emphasize the criminal nature of wife assault. Some speculate that instead of treating wife assault "like any other crime", the justice system, in practice, treats it like a special crime in which the rights of the victims and the offenders are potentially eroded by the justice system's espousal of aggressive prosecution of these cases. These people fear that in our attempt to give a strong public message that wife assault is a crime, we are doubly victimizing women who are battered by giving them little or chance to decide not to proceed with the case, even though this choice is available to other assault victims.

At the same time, some people who work with battered women within the justice system are asking if, through attempts to ensure that the justice system is reacting sensitively to the needs and concerns of the victims, we are expecting it to intervene in wife assault cases in ways that are outside its mandate, purpose and capabilities.

The difficulty of grappling with these and other questions, currently raised by people working to reduce wife battering, is compounded by the growing realization that the impact of criminal justice intervention in wife assault cases must be assessed within a fluid, changing environment. There is increasing and specific awareness among criminal justice personnel that the increased involvement of the criminal justice system in wife assault cases has itself changed the environment. Some police, victim advocates, and crown attorneys are beginning to report that public education campaigns stressing the criminal nature of wife assault, as well as more aggressive prosecution, are increasing the reporting rate of wife assault cases. This, in turn, causes an overload of such cases throughout the criminal justice system. Consequently, at a time when criminal justice personnel are under pressure to respond more sensitively and effectively to wife assault, their ability to do so is eroded by time and resource constraints.

To help deal with such concerns, women's advocates, policymakers and criminal justice personnel have begun anew to look for creative ways in which the criminal justice system can intervene in wife assault cases within a changing environment. This research project explores these efforts and takes another step in this search.

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<sup>2</sup>Collin Meredith, Study to Review and Analyze RCMP Data on Spousal Assault of 1985 and 1986 (Ottawa, Ontario: RCMP, Solicitor General Canada, June 1988).



## PURPOSE OF THE PROJECT

This research project was designed to help clarify and focus the questions, concerns and ideas being expressed by persons within and outside the criminal justice system concerning the system's involvement with wife assault. This information was collected to help policymakers and people working within or with the criminal justice system develop programs that could enhance access to justice for women living with wife battering. It is also intended to help them address some of the problems experienced in attempts to use the justice system to reduce the impacts and incidence of wife assault.

## OBJECTIVES OF THE RESEARCH

The following operational objectives guided the research process.

1. To help clarify the experiences battered women have had with the criminal justice system.
2. To identify the needs of these women when they come in contact with the system and throughout their experience with the justice system.
3. To identify the experiences and concerns of police, crown attorneys, defence lawyers, lawyers specializing in family and civil law, judges as well as workers in court and police-based victim units involved with current wife assault cases.
4. To identify the experiences and concerns about current justice system approaches to wife assault among transition house workers and other front-line health and social service workers who deal with women who are battered, their children and/or their husbands.
5. To start identifying a broad range of ways that the justice system could intervene in wife assault cases and help address the concerns and needs of women who have been battered, their children, their husbands, as well as the needs and concerns of people working within and with the justice system.
6. To identify the questions and issues that may impede change in justice system response.
7. To suggest future directions for research and program development that could be sponsored by the Department of Justice Canada to increase the effectiveness, sensitivity and efficiency of justice system reactions to wife battering.

## HOW THE INFORMATION WAS GATHERED

1. A preliminary assessment of issues was made through:
  - (a) discussions with 25 key informants within and outside government
  - (b) a review of literature dealing with
    - \* needs of women who have been battered,
    - \* their experiences with the criminal justice system and the effectiveness of the justice system in wife battering cases,
    - \* perceptions and concerns of criminal justice system representatives about the system's intervention in wife battering cases,
    - \* a broad range of actual and proposed models for justice system intervention in wife assault cases and
    - \* mediation as it could apply or is applied in wife abuse cases.
  - (c) A synthesis of pertinent insights from four conferences attended by the researchers which were relevant to the report.
2. On the basis of this preliminary assessment, an interview schedule was designed and in-depth interviews were conducted in person and by telephone with 55 people within and outside the criminal justice system. Although it was impossible to create a proper sample with such small numbers, an attempt was made to ensure equal representation from various sectors of the justice system and from people working outside it. Furthermore, some attention was paid to regional representation.
3. Also, responses relevant to this study were used from 40 interviews which were conducted recently by the principal researcher with women who had been battered and who had contact with the justice system. Because these interviews were confidential, no list of informants can be provided. The interviews were unstructured, in-depth interviews probing women's experiences with a variety of helping agencies, so no interview schedule was used.
4. A letter was sent to 18 experts and services in the United States which were concerned with nonadversarial approaches to wife battering. It asked for

information on their program(s) and on any other nonadversarial options of which they were aware.

5. Three full-day focus groups were held. The first was with eight women who had been battered and who had used the justice system. The other two involved 19 and 20 people respectively. These participants were a diverse mix of people from different sectors of the justice system: people working in transition houses and counselling groups for battered women; people working in groups for men who batter; advocates for justice issues; mediators and academics.
6. Finally, after the focus groups were held, the researchers took part in seminars where issues related to this project were discussed. The researchers, therefore, brought these insights to the project as well.

## STRATEGIC CONSIDERATIONS

An attempt was made throughout to focus the study on issues that would be of maximum use and interest to Department of Justice Canada officials, as well as the broader justice community. After preliminary discussions with Justice officials, the researchers, in interviews and in their literature search, stressed issues surrounding charging policy, mediation and other nonadversarial methods. This approach was taken because the department was doing an evaluation of the charging policy, because some provincial governments were beginning to show interest in the use of mediation in wife abuse cases and because interest in nonadversarial options is growing within and outside the justice community. At this early stage, an attempt was made to explore a broad range of pre-charge and post-charge alternatives. This was also a response to preliminary discussions.

As the study progressed, however, an attempt was made to make it more manageable. Given the breadth of the study and in order to produce findings more directly relevant to a Department of Justice Canada mandate, the researchers were asked:

- To focus the study on post-charge options only.
- To stress potential changes within the adversarial system to improve access to justice for women who have been battered.

Consequently, all information gathered from the focus groups looks at post-charge approaches which could be introduced as supplements to the existing adversarial system.

## WHAT HAVE WE LEARNED FROM PAST RESEARCH ABOUT THE EFFECTIVENESS OF CURRENT CRIMINAL JUSTICE INTERVENTIONS?

### What Do We Know About the Needs and Wants of Women Who Have Been Battered?

The literature on this is not extensive. It tends to further confuse the debate around the most appropriate criminal justice response to wife assault. The general literature emphasizes their need for social support, for reassurance that they are not alone, for information on their choices, for reassurances that the violence will stop, and for safety.<sup>3</sup> The literature stresses that women need programs that will help them find their own solutions that support and encourage them in this endeavour, and that provide them with information regarding options on which to build their solutions.

When the focus is specifically on women's needs from the criminal justice system, however, the message becomes less clear. For example, research on women's needs regarding police intervention is concerned indicates that although women want and need police protection, as a group, they are not clear about whether they want police to press charges.<sup>4</sup> Women seem uncertain about how the justice system should intervene.<sup>5</sup> "Calling the police and arrests by the police remain rarely occurring strategies of the last resort."<sup>6</sup> Existing research repeatedly shows that most women who are battered do not want criminal justice involvement in their lives, and have little faith in its ability to stop the violence. For example, in one study, when women were asked what they considered was the best way to stop a man from being violent, only 6 per cent suggested calling police and pressing charges.<sup>7</sup>

These findings suggest that women's ambivalence toward the justice system may be, at least in part, a function of the fact that although justice services may offer one of

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<sup>3</sup>See for example Linda MacLeod, Battered But Not Beaten (Ottawa: Canadian Advisory Council on the Status of Women, 1987), p. 117.

<sup>4</sup>Summary of unreleased Ministry of the Solicitor General study, reported in the Toronto Sunday Star (February 7, 1988).

<sup>5</sup>Don Dutton, "The Criminal Justice Response to Wife Assault", in The Domestic Assault of Women: Psychological and Criminal Justice Perspectives (Boston: Allyn Bea-Con, 1988), p. 125.

<sup>6</sup>Glenda Kaufman Kantor and Murray A. Straus, Stopping Violence: Battered Women, Police Utilization and Police Response (July 1987), p. 18.

<sup>7</sup>Pamela Smith, Breaking the Silence: Descriptive Report of Follow-up Study of Abused Women Using a Shelter (Regina, Saskatchewan: University of Regina, 1984), p. 80.

the few opportunities for protection available to women, they also reduce the ability to devise their own solutions, thus, contradicting one of their other strong needs.

### **What Do We Know About the Effectiveness of Current Criminal Justice Intervention?**

The literature on current criminal justice responses to wife assault (responses in place since the adoption of more aggressive charging policies), reinforces the uncertainty and lack of direction reflected in the literature on the needs of women.

There is some evidence that "arrest can reduce recidivism not only through generating short term deterrence, but also by altering a power dynamic in the family, making the wife appear to have more sanctioning power, increasing disclosure and serving a didactic function."<sup>8</sup> In addition, findings show that lawyer support is associated with a decrease in post-separation violence and harassment by ex-husbands against women who have been battered.<sup>9</sup>

In other words, the research indicates that since more aggressive charging and prosecutorial policies came into effect, criminal justice intervention is reducing violence. By this standard, at least, there is some indication that criminal justice intervention has become more effective. And yet police, like women, seem uncertain about how the justice system should intervene.<sup>10</sup>

### **ARE THERE DIFFERENT WAYS THE CRIMINAL JUSTICE SYSTEM COULD INTERVENE MORE EFFECTIVELY IN WIFE ASSAULT CASES?**

A number of different approaches have been tried or proposed in Canada and the United States to address the ambivalence of women who are battered and of criminal justice personnel towards using the criminal justice system in wife assault cases. No attempt will be made to provide an exhaustive overview of such approaches. Instead, a very brief, somewhat oversimplified summary will be provided to indicate possible directions for future action. The last three models proposed: the multi-door courthouse model, the pre-trial model and mediation were presented to focus group participants as

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<sup>8</sup>Donald G. Dutton and Stephen G. Hart, Arrest and the Reduction of Recidivist Wife Assault: An Exploratory Study of Alternative Mechanisms to Deterrence (draft document) (British Columbia: University of B.C., 1988), p. 10.

<sup>9</sup>Desmond Ellis, Judy Ryan and Alfred Choi, Lawyers, Mediators and the Quality of Life Among Separated and Divorced Women, Report #25, La Marsh Research Program Reports on Violence and Conflict Resolution, (Toronto, Ontario: York University, 1988).

<sup>10</sup>Dutton, "The Criminal Justice Response to Wife Assault", op cit.

possible directions we might take in order to stimulate discussion. The other models summarized below were also raised, albeit less formally throughout the focus group discussions.

**(a) United States Models of Legislative Change**

In the United States, in an attempt to increase the flexibility and sensitivity of the justice system in wife assault cases, several states have passed legislation to enable it to give priority to these cases and to handle wife assault incidents more expeditiously and effectively. While there are subtle differences between these statutes, one of the best known is The Minnesota Domestic Abuse Statute, passed in 1979.

This statute is "a hybrid ... the conduct it addresses is clearly, historically criminal, but it addresses it in a civil court".<sup>11</sup> This hybrid was created to enable the system to deal forcefully with wife assault but, at the same time, to be capable of providing the community support and flexibility more characteristic of the civil than the criminal court. Thus, the criminal system is still available and can order the man held in jail overnight. But the court also has the power to order treatment, to require chemical dependency and psychological testing, to provide the victim with referrals and to order the payment of child support.

**(b) Related Community Intervention Projects**

In Minnesota and many other states that have passed domestic abuse legislation, community intervention projects have been established to help coordinate the community support which has become a credible part of the justice system through domestic abuse legislation. These programs work closely with the justice system. Generally, once an arrest has been made, police call program staff and a male advocate visits the man in jail, while a female advocate provides support and assistance to the woman. In some locations, where jail visits are not permitted, only the woman is provided with an advocate at this early stage. These advocates offer continual support to the woman throughout the legal process, providing her with information and referrals. Furthermore, the program staff work with prosecutors and attorneys to encourage a victim-oriented disposition and to discourage plea bargaining. Generally, the overall goal of community intervention projects is to obtain outcomes that will help end the violence and increase the victim's satisfaction with the criminal justice system's response.

**(c) Sentence Adjournment Model**

In Canada, there has traditionally been less interest in seeking legislative solutions to close the gaps between wife assault and how the criminal justice system deals with it.

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<sup>11</sup>Quote taken from p. 1 of material provided to the Provincial Association of Transition Houses in Saskatchewan by the Domestic Abuse Unit, Ramsey County Court, January 7, 1987.

There have been some attempts, however, to increase the system's flexibility and its potential for better integration with a wide range of community services.

One such approach was first developed and used by Judge Porter in Hinton, Alberta and has now been adopted in Vancouver, B.C. While this model has been used primarily for child sexual abuse cases up to now, Judge Porter thinks that it could be used with equal effectiveness in wife assault cases. This approach is an elaborate, highly integrated program of professional training, advocacy, support and treatment that is applied between sentencing adjournments.

Before the program was established, professionals within and outside the justice system, who were in touch with women who had been battered, their husbands and/or their children, were involved in integrated training and awareness programs that emphasized the importance of coordinated community-based responses and cooperation of professionals around specific cases.

Using the Porter model, every attempt is made to bring the man before the judge as quickly as possible after the arrest. As soon as the charge is laid, a male advocate meets with the man. A female advocate meets with the woman. Where possible, the children are also assigned an advocate. When the man is brought before the judge, if he pleads guilty, (and a guilty plea is encouraged through the positive attitudes of the police and other referral agents towards the acceptance of responsibility by the man), the judge then suggests that he can adjourn sentencing for a month. As a condition of adjournment, the man must agree to attend a treatment program and not to live with the family or have any contact with them during that time. If the man agrees, each member of the family is then asked to participate in their own counselling and support program and not to have any contact with the man.

Each month afterwards, the man is brought before the judge again. If he is attending treatment, appears to be benefitting from counselling and is not violating the condition that he refrain from any contact with his family, the judge then offers to adjourn sentencing for a further one-month period under the same conditions. Permission is not granted to the man to return to his home until at least a nine-month period has passed since the offence. And he is only allowed to return, if all members of the family agree. If he is allowed to return to his home, his behaviour is closely monitored. Counselling and support for each family member continues after this point, usually for eighteen months to two years. Where possible, and where the woman, man and children agree, members of the extended family are made aware of the situation and are also included in counselling.

At the end of this period, the man is then sentenced. An effort is made to communicate that participation in counselling cannot be used as a means to deny responsibility or to receive a light sentence. Usually, the sentence handed down under

this program has been two or three years probation with some requirement for public education or providing volunteer support to a men's treatment program.<sup>12</sup>

**(d) Alternate Dispositions Court**

The chief crown attorney for Ottawa has suggested that one possible way to increase the criminal justice system's flexibility in wife assault cases would be to establish an alternate dispositions court. Legislation would be required to establish the court. It is not intended for use in wife assault cases, or any other crime of serious violence. The proposed court would hear cases considered minor, such as small property offences. The crown attorney could elect for trial in this court, if the accused consented. The proposed court would be used when:

- the accused wishes to plead guilty.
- the crown attorney is of the view that the nature of the offence is minor and that, in a given case, there would be no advantage to proceeding on the assumption that a jail sentence is likely.

The proposed court would emphasise innovative, community-based sentences, solid links to community services, and community program input to help determine the most appropriate sentence. The presiding judge might not be a lawyer, although there would be legal counsel present.

This proposal would reduce the heavy criminal court workload, allowing crown attorneys and judges to spend more time dealing with serious cases of violence, including wife assault.

**(e) Multi-Door Courthouse Model**

The multi-door courthouse, a model introduced in the United States, is a centre offering sophisticated and sensitive intake, support and referral services along with an array of dispute-resolution services under one roof. It serves women who are battered and their husbands, but is not intended solely or even primarily for them. Instead, it provides an assortment of coordinated services to assist crime victims and others involved in a variety of criminal, neighbourhood, business and private disputes at many stages of the violence or of the dispute. Nonetheless, because it can provide the social support, information and referral that women who are battered need and want, it is presented as a model which could help make criminal justice intervention more effective.

A screening unit at such centres "assesses" crimes and other types of disputes, and then refers the victim, offender or disputants to the appropriate "door" for handling the

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<sup>12</sup>I was unable to obtain any literature on this program, and therefore wrote this description following two extensive discussions with Judge Porter.



case. Agencies such as the police, prosecuting attorney's office, courts, legal services, health and social services and other community-based front-line services refer citizens to the Multi-Door Centre. Intake officers attempt to resolve citizens' complaints or needs during initial contact by giving additional information, referring them to an appropriate community service, or through telephone or personal conciliation.

In the United States, this model has been used to make mediation, arbitration, conciliation and adjudication an adjunct to the criminal justice system.

(f) **Pre-Trial Model**

Another model has been proposed by Ottawa's chief crown attorney to ensure that the views of the victims of wife assault are taken into account early on in the court process, and to expedite the processing of wife assault cases. In this model -- in certain cases and with the consent of the crown attorney and the defence counsel -- a pre-trial hearing could be scheduled within several weeks of the first court appearance date. Both accused and victim would be in attendance.

The crown attorney screening the incoming charges would identify those cases suitable for this form of pre-trial and the request to set a pre-trial would be made on the accused's first or second appearance in remand court.

At the pre-trial hearing, the crown attorney would be able to interview the victim and discuss the case with the accused's counsel. In appropriate circumstances, the investigating police officer may also be asked to attend. If there is a victim/witness program attached to the court, the victim/witness program coordinator could assist the crown attorney by interviewing victims. It may also be possible to include advocates for the victim and offender, and/or such relevant community service providers as transition house workers or counsellors for men who batter.

At the pre-trial, the case would be dealt with in one of the following ways:

- A plea of guilty could be made and sentence passed.
- A trial date could be set.
- The charge could be withdrawn.
- The accused could enter into an undertaking to keep the peace, or a recognizance pursuant to Section 810 of the Criminal Code.
- The case could be adjourned to a later date without a plea to allow the accused to make restitution to the victim, attend counselling or participate in mediation.

(g) **Mediation**

While mediation is not used extensively either in the United States or Canada in wife assault cases, there is increased interest in its potential use in Canada. It should also be noted that while wife assault is rarely mediated, mediation is currently used in family disputes where wife abuse exists. The type of abuse in such cases is either not identified as the primary problem or is not acknowledged to the mediator by either the man or woman involved.

Mediation programs can bring the victim, offender and community together to resolve their disputes and to make restitution for offences committed. Mediation, as an alternative to prosecution, came into vogue in Canada around the mid-1970s. It was a response to perceptions of undue judicial congestion, high costs of litigation and concern that the courts were not effective in dealing with interpersonal disputes. The Law Reform Commission of Canada in its report entitled "Studies on Diversion", published in 1975, found that adjudication is not always an appropriate means of dealing with disputes; that the very nature of the adversarial process creates a "winner" and "loser"; that the problems at the root of a dispute are not addressed and that most crimes against persons involve people who are known to each other.

Reports on the use of mediation in a variety of interpersonal disputes indicate high levels of satisfaction. For example, an evaluation done by the Manitoba Attorney General's Department on a victim-offender mediation program in Winnipeg,<sup>13</sup> reported high levels of victim and offender satisfaction with the process and high rates of agreements between the parties who complied. Representatives of the judiciary, crown attorneys, police and defence lawyers who were interviewed for the study supported mediation. They suggested that for some types of cases the process benefits the complainant and the offender by resolving their dispute, and by allowing their relationship to continue. In addition, mediation reduces costs in the criminal justice system by removing inappropriate cases from the courts.

There has been increased support for and use of family mediation in separation and divorce cases, partly as a result of such evaluations. Family mediation is generally defined as a process where, with the help of a neutral third party, separating couples are encouraged to resolve their differences on such issues as custody, access, financial support, division of property and post-separation parenting relationships. Family mediation experts suggest that one of mediation's main advantages is that parties reach their own agreement, rather than having one imposed. Consequently, they are more inclined to honour an agreement that they reached themselves.<sup>14</sup>

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<sup>13</sup>Perry, Lajeunesse and Woods, Mediation Services (Winnipeg, Manitoba: Manitoba Attorney General's Department, 1987).

<sup>14</sup>For example, Daniel Fines, "Divorce Mediation Services", in Protect Yourself (1988).

According to a recent study on divorce and family mediation, sponsored by the Department of Justice Canada,<sup>15</sup> mediation usually results in more flexible solutions than those reached in court -- because both parties established the terms of the agreement. Thus, both parties tend to have a greater interest in compliance.

In addition to these seven models, there are many examples of integrated community approaches to training, advocacy and program delivery linked to the justice system across Canada. The programs in London, Ontario are perhaps the best known.

## **WHAT DOES PAST RESEARCH TELL US ABOUT THE EFFECTIVENESS OF THESE APPROACHES TO WIFE ASSAULT CASES?**

Of the seven models summarized above, the first two are based on legislative change for which there is little interest in Canada. The other models, with the exception of mediation, are either only proposals or, to date, have not been used in wife assault cases. Therefore, a report on evaluations of the United States models of legislative change, of the related community intervention projects, of the multi-door courthouse model, or of the sentencing adjournment model was deemed to be of little relevance to this project. Naturally, no research has been done on the proposed models.

However, even though mediation is not extensively used (at least knowingly) in wife abuse cases in Canada, the potential and actual use of mediation in wife battering cases has generated a great deal of controversy. Consequently, the literature dealing with this issue will be summarized below.

### **Is Mediation an Appropriate Tool to Use in Wife Assault Cases?**

Advocates for the use of mediation in wife assault cases argue that it can help prevent subsequent abuse. They believe that mediation can be structured to equalize the power of the abuser and victim. They also believe that stopping the violence can be set as a primary objective. They encourage mediators to study the problem of domestic abuse and to adjust their techniques in order to contribute to the protection of battered women. Those supportive of using mediation in assault cases hold that the court system does little to remedy the complex problems associated with wife assault. They argue that mediation allows couples to prepare for the future, try to resolve underlying problems and focus on the maintenance of the relationship. Maintaining the relationship is often a key goal for women who are battered and their partners. In addition, proponents argue

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<sup>15</sup>Department of Justice, Family Law Research, Divorce and Family Mediation Research Study in Three Canadian Cities (Ottawa: Department of Justice, April 1988).

that mediation generally is quicker than using legal sanctions and does not require the time of judges, prosecutors and defence lawyers.

Most supporters of mediation view the severity of physical injury as a standard by which to determine the appropriate legal approach. Most agree that cases involving "serious" repeated physical abuse should not be mediated. They acknowledge that mediation is only likely to be effective when both parties are on a relatively equal footing, i.e., the complainant is not too fearful of the respondent to make her own decisions.<sup>16</sup>

According to Bethel and Singer, abusers and victims should not all be treated as one homogeneous group when determining if mediation can be an effective tool in wife abuse cases. They argue that in some cases, violence may not be repetitive, or may be a "relatively minor component" in a complex set of problems. In such cases, mediation may be very useful. Bethel and Singer also state that absolute power equality is not a prerequisite for mediation, and that if one party wished to be accompanied by a friend or relative, this support should sufficiently balance the power inequality. They believe that in many instances violence will flare between a couple when it has not occurred before, or has occurred only rarely, and that in such instances, neither party may wish to punish the other. In such cases, mediation may be a more appropriate dispute resolution mechanism than adjudication.<sup>17</sup> Other proponents suggest that while mediation may not be helpful in the early stages of abuse, it may be useful if all violence or threat of violence has ended, if the victim has experienced some sense of justice and if the abuser has acknowledged responsibility. At this stage they argue, mediation has the potential to bring healing and closure for both parties. These proponents warn, however, that it is essential to recognize that domestic violence is rooted in unequal power relationships and the first concern in all cases is to ensure the safety of the women and children. Women must be given information and assistance to help them face reality and to stand up to her abuser.<sup>18</sup>

Opponents counter that mediation only perpetuates the abuser's opportunity to dominate the victim and minimizes the criminal nature of violence in the home. They argue that the mediation process is based on false notions about the cause of violence

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<sup>16</sup>Charles Bethel and Linda Singer, "Mediation: A New Remedy for Cases of Domestic Violence", (1982) 7:15 Vermont Law Review.

<sup>17</sup>Ibid.

<sup>18</sup>For example, see Melita Rempel, "Mediation in Domestic Violence: An Effective and Limited Tool", (1986) 5:2 Community Justice Report Supplement.

against women and incorporates the very myths and biases that have rendered the criminal justice system ineffective in battering cases.<sup>19</sup>

Feminists and advocates for battered women are opposed to mediation in wife assault cases, since they believe mediation cannot adequately protect the victim or stop the violence.<sup>20</sup> Representatives of the woman's movement object to the use of mediation, basing their analysis on the sexism of society, of the criminal justice system and of the institution of the family. They believe mediation reflects a commitment to perpetuate the relationship (regardless of the costs to the women and children in these relationships) and, thus, to promote the subordination of women.<sup>21</sup>

To clarify this debate, and to provide guidance concerning the practical application of mediation in wife assault cases, the major problems inherent in the mediation approach identified in the literature are summarized below.

- \* Nothing in mediation forces the abuser to accept responsibility for his violent behaviour. Therefore, mediation neither punishes the offender, nor acts as a deterrent. Many opponents believe that when used as a substitute for criminal proceedings, mediation implies that spouse abuse does not constitute serious criminal behaviour, deserving of full criminal sanctions.<sup>22</sup> The abuser is not required to admit his guilt, or to take responsibility for his own behaviour. Instead, his victim is asked to change her own behaviour in return for his promise to commit no further crimes. This effectively implies that the woman is at least partly to blame for her abuse, a tenet that opponents to mediation argue is totally unacceptable.
- \* Mediation assumes an equality of power between both parties. The issue of power lies at the very heart of domestic violence. The violence itself serves as a mechanism to exert power over the victim to maintain a sense of control. Over time, this behaviour can create an enormous power differential. Mediation assumes that the disputants have equal power, equal bargaining chips and equal ability to bargain. Hart strongly refutes this assumption as "patently incorrect ... women in this culture do not have equal power with

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<sup>19</sup>Dianna R. Stallone, "Decriminalization of Violence in the Home: Mediation in Wife Battering Cases", (1984) II:2 Law and Inequality: A Journal of Theory and Practice.

<sup>20</sup>Joanne Schulman and Laurie Woods, Legal Advocacy vs. Mediation in Family Law (1983).

<sup>21</sup>Schettino-Casale, Battering Battered Women: The Use of Mediation (1984), p. 27.

<sup>22</sup>For example, see National Institute of Justice Report, Confronting Domestic Violence: The Use of Mediation (May, 1986).

men".<sup>23</sup> Although mediators can compensate for power imbalances in some kinds of cases, they cannot compensate for a long term pattern in which one party has consistently manipulated and controlled the other. In most cases, particularly where long-term abuse is concerned, it is impossible for a woman who has been physically beaten and mentally abused to act effectively as her own advocate. Mediation is not possible, regardless of the duration of the abuse, if the woman is too fearful to make her own decisions.<sup>24</sup>

- \* Mediation is an ineffective tool in stopping the violence. The mediator has no power to remove the abuser from the home to protect the victim.
- \* Because the mediator has no power to require complete disclosure of all the facts necessary to help the parties reach a fair solution, he or she must rely on the trust and good will of the parties. These are often rare commodities in wife assault cases. Moreover, because of their lack of power, mediators have no power of discovery. For example, they cannot insist on full disclosure of financial information. Not only may the man not feel it is in his interest to act in "good faith", but, in some situations, the victim may be so afraid of retaliation that divorce mediation may be completed with no mention at all of any violence.
- \* Mediation is also criticized for its lack of confidentiality and accountability. In mediation, the victim is encouraged to talk openly, yet things said in mediation sessions may later be used against her in court. If mediation fails litigation ensues.
- \* At present, there is no system of accountability by which dishonest, unethical or naive mediators can be removed or penalized. There are no guidelines setting forth reasonable and appropriate outcomes.<sup>25</sup> Currently, there are no standards for mediation practice, no licensing and no training requirements for mediators who set up shop. Under these conditions, there is a considerable risk that the mediator will not be sufficiently aware of the concerns, needs and experiences of women who are battered or of the characteristics of the violence and may be unable to identify battering situations.<sup>26</sup>

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<sup>23</sup>Barbara Hart, Esq., Mediation for Battered Women: Same Song, Second Verse ... Little Bit Louder, Little Bit Worse (Pennsylvania Coalition Against Domestic Violence, 1984).

<sup>24</sup>Bethel and Singer, op cit.

<sup>25</sup>Hart, op cit.

<sup>26</sup>Ibid.

- \* Finally, mediation is criticized because agreements, once reached, cannot be enforced. There is no recourse for non-compliance with the mediation contract.

### **Can Effective Guidelines be Developed for the Use of Mediation in Wife Battering Cases?**

While there is still no consensus on this issue, there is a more challenging question for those who believe mediation can be generally applied to help parties resolve outstanding issues and help build relationships that allow parties to communicate more constructively. The question is not whether to mediate domestic violence cases, but how to mediate them. Lisa Lerman has proposed some guidelines for mediating cases of domestic violence that take into consideration the complexity and seriousness of domestic violence. Her guidelines are summarized below.

- \* Mediation should focus on preventing subsequent abuse. A primary goal of the mediator is to make clear to the abuser that violence will not be tolerated and to inculcate the notion in the victim that she has the right not to be beaten.
- \* Mediation of domestic violence cases should be structured to equalize the balance of power between the parties. Some techniques for taking the power imbalance into account and correcting for it is to require each party to go through several weeks of counselling before attempting mediation; to begin with separate meetings with both parties to allow the victim an opportunity to discuss the battering and other problems confidentially, and to use advocates to represent each party. Giving the speaker's role to someone else who does not fear the abuser may result in a clearer articulation of the victim's needs. Even if the advocate does not speak during the session, simply having an advocate there with whom she may consult, may help the victim better express her needs.
- \* All cases should be screened for a history of abuse. If abuse is discovered, the issue should be addressed directly in mediation. Failure to do so will likely be read by both parties as tacit approval of the situation. Most importantly, the victim should be made aware of her options through the court system.
- \* Mediation of wife assault cases should be structured to maximize opportunities for enforcement. Mediation should only take place after an arrest has been made and a charge laid. The offender must be made responsible and accountable for his criminal actions. Once this is done, compliance with a mediation agreement may be made a condition of his sentence. Individual follow-up interviews should be conducted and if violence has recurred, a prison term may result.

- \* The mediation agreement should focus on the safety of the victim. If there are weapons in the parties' home, the agreement might provide that they be removed. Where violence has been frequent and serious, parties may agree to avoid any contact with each other. In these cases, an agreement on visiting rights with children might include third-party supervision. Most importantly, under no circumstances should the abuser's promise to stop the violence be conditional on the victim's agreement to do or not do anything.
- \* Mediation should not preclude other actions, but should, if necessary, encourage the victim to seek more formal remedies, if necessary, concurrent with the mediation. Civil or criminal complaints to obtain protection from abuse should be supported and not treated as conflicting with the goals of mediation. Mediation agreements should never include an agreement to request dismissal of criminal charges, or to drop other legal actions.
- \* Mediators should not be too zealous in their need to reach an agreement and must accept that perhaps no agreement will be reached. At the end of the mediation, they should identify those terms in the agreement that are most likely to break down and discuss what the parties will do if there is noncompliance.
- \* Mediators must be trained in the nature and dynamics of domestic violence. They should be aware of why women are abused and why they stay. They should know practical techniques for protection of battered women, legal recourse to abuse and which groups in the community work with women who are battered and/or with men who batter.<sup>27</sup>

The debate on the use of mediation in wife assault cases is passionate and active. However, when practical action is its focus, it becomes apparent that opponents and proponents of mediation share similar concerns and the differences are ones of emphasis on concerns.

The summary of the literature regarding the use of mediation in wife assault cases raises issues of power, protection, autonomy and credibility that surface throughout the debates reported in the following sections of this paper.

Thus, even if, in the final analysis, people working to reduce wife battering in our society deem that mediation is an unacceptable form of intervention in wife assault cases, consideration of this form of intervention can help inform and direct other proposals for change in the ways the criminal justice system responds to wife assault.

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<sup>27</sup>These points were derived from Lisa Lerman, Stopping Domestic Violence: A Guide for Mediators (Women's Rights Clinic, Antioch School of Law).



## **TOWARD MORE EFFECTIVE INTERVENTION: INSIGHTS FROM THE CURRENT RESEARCH**

The current study reinforces many of the findings of past research and helps contextualize them within a fluid, very changeable environment. The current study produced intense interest and debate on a variety of issues surrounding the use of criminal justice intervention in wife assault cases. The questions raised through these debates and the significant uncertainty expressed by those within and outside the justice system concerning the system's role in wife assault cases reveal that many people working to reduce the impact and incidence of wife battering think, to quote one of the lawyers interviewed, that "things are not the same as they were ten years ago." Those women and men who answered our questions and participated in the focus groups for this project – through their words, hopes, level of frustration and questions – made it clear that changes in reporting and charging levels, as well as growth in our understanding of the dynamics of wife battering and the experiences of those affected by wife battering, have changed the reality and the perception of the problem. As a result, these changes have also brought into question our view of what constitutes appropriate and effective responses.

The findings that follow reflect this uncertain and fluid situation. Accordingly, many will be in the form of questions or issues for debate, not facts. Wherever possible, the authors of this report have made an attempt to present these findings in a way that will suggest directions for program and policy initiatives related to criminal justice intervention in wife assault cases. Where this was not possible, we have tried to formulate these issues in ways that may help to inform the policy planning process.

### **Principles for Building Change**

It would certainly be misleading, in view of the intense debate that characterized this project, to suggest that those working in the field of wife assault have reached consensus on a group of guiding principles on which to base change. Nonetheless, there was a surprising amount of agreement on a number of basic assumptions and principles among people with disparate experiences and opinions.

It was the perception of the researchers that many of the disagreements on appropriate responses to wife assault among different groups, working within and outside the criminal justice system, were about language, program detail and who should be in control. These disagreements, while important, tend to hide growing consensus on a number of very significant issues. This growing base for agreement, derived from the in-depth interviews and focus groups conducted for this study, will be summarized below to situate the differing viewpoints which are discussed later in this report within a framework that could be used to guide future action.

1. Principle

It is essential that all members and agencies of society convey a strong and consistent message that wife assault is a criminal act that is repugnant to our society.

Discussion

All people who participated in this study as respondents to our questionnaire, or as participants in one of the focus groups, agreed that a strong, consistent message that wife assault is wrong must be conveyed through the justice system's actions, as well as by other systems, agencies and individuals. Even those who think that the justice system should have a less prominent role generally and that the criminal justice system should be used only as a last resort say a very clear message should be conveyed that wife assault is a crime and could, ultimately, be dealt with using criminal justice sanctions.

2. Principle

To help convey this message forcefully, the criminal justice system, through its representatives' attitudes and statements, as well as through programs and sentences, must communicate clearly that wife assault is a crime.

Discussion

This principle emerged from frequently repeated observations made by those interviewed. They suggested that representatives of the justice system too often inadvertently erode the message sent by more aggressive charging policies, improved training programs, etc. They do this by conveying through body language, offhand remarks, as well as through remarks made in the course of their professional roles, that they consider wife assault "deserved", "justified" or "not really important".

3. Principle

Immediate, significant action must take place when wife assault cases are brought to the attention of the police.

Discussion

Not all respondents thought this action necessarily meant charging the man. All agreed, however, that shortly after the police were called, some type of action, which strongly conveys the message that wife assault is wrong and men who batter will be held accountable, should be taken.

4. Principle

The man should be removed from the home, rather than the woman and children. Nonetheless, the woman should have access to a place outside the home that she considers safe.

Discussion

This principle represents, in the opinion of the authors, a significant change of view among those working to reduce the impact and incidence of wife battering, compared to five years ago. While there was some fear that attempts to remove the man, rather than the women and children, could jeopardize funding for transition houses, widespread concern was expressed that we have been penalizing women and children for too long by expecting them, rather than the men who battered them, to relocate. Also, while five years ago, people tended to feel that this could never be done, (even if it was a good idea), now people seem to be saying that a way must be found to remove the man.

5. Principle

The protection of women who are battered cannot be viewed as the sole responsibility of the police, or even of the criminal justice system as a whole. Effective protection, that helps prevent violence, must be seen as a broad-based community responsibility.

Discussion

This principle was part of the body of opinion that public expectations of the justice system have been unrealistic, that the justice system has taken too prominent a role in intervening in wife assault cases without sufficient coordination with other agencies and that reliance on criminal justice intervention has contributed to the tendency among other agencies and individuals to abdicate their own responsibility for action.

6. Principle

Every effort should be made to provide programs that increase the flexibility, efficiency and sensitivity of the criminal justice system's ability to support the woman who is battered and help break the cycle of violence. However, these programs will only be highly effective if:

- (a) they do not interfere with the woman's access to the full criminal justice process;

- (b) these programs continue to emphasize the accountability of men who assault their wives;
- (c) consequences for men who batter are attached to these programs; (such consequences could aim at prevention, support of the woman and her children, and need not be primarily punitive);
- (d) the programs help convey the message that wife battering is a social problem, not just a legal problem; and
- (e) shared community responsibility for support, follow-up, protection and prevention is stressed through program design and implementation.

#### Discussion

There was significant support for change in the justice system and trying a variety of alternatives, but only if the women's options and the strength of the message that wife assault is wrong is not eroded.

#### 7. Principle

Even though a woman has called the police for protection, she should NOT be forced to use the criminal justice system, unless her life or the lives of her children are in danger. But if the woman chooses not to use the criminal justice system, some significant action, including referral, emotional and information support should be taken.

#### Discussion

This principle was perhaps the most widely debated and the one on which the least consensus was reached. It was also the point that revealed confusion and inconsistency most people working within and outside the justice system feel when faced with wife assault. The question of whether individual rights and choice should predominate in our concerns, or whether a strong public message that wife assault is a crime and, therefore, will always be dealt with through the criminal justice system should be our major concern in planning future action was central to many debates. Nonetheless, the majority of respondents did feel that the justice system should not further victimize the woman by taking away her ability to determine action. A full discussion of this point is included in this report under the section entitled "Key Issues in Change".

#### 8. Principle

The wishes of the victim should be a strong influence in decisions made by the criminal justice system in cases where, to the best knowledge of all concerned, the degree of violence is not life-threatening to the woman or to her children, where all

parties attest that this is the first incident of violence against the woman by the man, and where the accused has not been charged for other acts of violence in the past.

#### Discussion

This is a subset of Principle 7 and reinforces the assertion that the woman's concerns should not only be taken into account around the charging decision, but should be given credibility and influence throughout the judicial process.

#### 9. Principle

Intervention to provide support, counselling and community input is generally most effective early in the criminal justice process.

#### Discussion

This principle was established around the concern expressed by many involved in this project that if the man is to take responsibility for his action and, if the woman is to be given the strength derived from community support, to make positive decisions about her future, a variety of responses must be put in place as soon as possible after identification of the problem. Even though respondents were split on whether or not pre-charge diversion was an option, most people believed that some form of community advocacy and referral for the woman and her children should take place before a charge if possible.

#### 10. Principle

More resources are needed to enable the woman to make informed decisions.

#### Discussion

Respondents informed us that women do not always feel that they are given information about their full range of options and that what information that is given is not readily provided. Instead, women have to know the right questions to ask and be persistent in seeking information. More specifically, women who have been battered complained that they had not been told of their options under civil law, and felt that police and crown attorneys should inform them of these possibilities. They were of the view that their information was limited solely to that which intended primarily to help expedite the criminal justice process.

#### 11. Principle

While the criminal justice system is an important player in meeting the needs of women and, ultimately, in helping to prevent wife battering, it is only one of many

necessary partners. To reflect this partnership, the criminal justice system should be linked to other community resources at different stages of the criminal justice process.

#### Discussion

This idea was communicated by most respondents, although their views on how strong that link should be varied considerably throughout our sample. For example, some respondents thought that a formal link should be established and that representatives of community agencies should potentially be present at pre-trials, etc. Others were adamantly opposed to such ideas. At the very least, however, respondents agreed that those involved in the justice system should have adequate knowledge of available community resources. Many people suggested that these links could be established and managed through victim/witness coordinators working within the court house.

#### 12. Principle

Many of the reforms needed to make the criminal justice system more sensitive, fair and accessible in wife assault cases would also be beneficial in other types of cases.

#### Discussion

This was a common theme throughout the project. Many people contacted expressed the idea that the problems with criminal justice intervention identified through wife assault cases also apply to other types of cases, but may not be quite as problematic or as obvious. There was widespread feeling that we should really see wife assault as a kind of "test case" to expose the insensitivity, inefficiency and unfairness in the criminal justice system. In the view of most respondents, however, solutions should be sought that not only improve the system for women who are battered and their children, but help make the entire criminal justice system fairer and more sensitive.

#### 13. Principle

In recognition of the widespread agreement that wife battering is a social problem and not only a legal problem, society must begin to move away from so much reliance on criminal justice solutions to wife battering – without weakening the message that wife assault is a crime.

#### Discussion

Many respondents – and judges also widely held this opinion – were convinced that as a society we have unrealistic expectations of what the criminal justice system can accomplish in terms of helping to prevent, or significantly reduce wife battering. There was total agreement that the full force of the criminal justice system must be available to

women who are battered, but that the criminal justice system should not be seen as the dominant or necessarily the first recourse to wife assault.

#### 14. Principle

There is a pronounced need for public education, education of professionals within and outside the justice system, and education of children, to inculcate the idea that violence is wrong and that women, men and children should be treated with equal respect.

#### Discussion

This principle reinforces the belief of many people interviewed that we must change attitudes before we will change behaviour. There was strong emphasis on the notion that public education, the education of children and the education of professionals must go beyond informing people about the realities of wife abuse and the options available to the women in the community. In addition to this type of education, members of society must be taught nonviolent conflict management skills. These skills must be constantly reinforced in the workplace, in schoolyards, during leisure time and in the home.

#### **Perspectives on Changing Criminal Justice Intervention of Women Who Have Been Battered: Their Needs and Concerns**

The preceding principles, to a large extent were built on the concerns of several respondents who thought that the full range of needs of women who have been battered are not being met by the criminal justice system, and in fact can never be met by it alone. Several suggested that it is not enough to look at needs. We also must consider the woman's wants and perceptions to really understand how effectively the justice system is serving her. Through interviews with women who have been battered, and through interviews with advocates for these women, a broad range of expectations and needs were identified. They are summarized below.

#### **Women's Expectations of the Justice System**

One of the most fascinating conclusions reached through interviews with women who have been battered is that to a large extent their dissatisfaction with the justice system's response derives from the fact that their expectations of it cannot be fulfilled by the system in its present state.

Many women expressed the belief that they could use the police for protection. They did not understand, however, that by so doing, they were setting in motion the full force of the criminal justice system with all its safeguards of the rights of the offender, and with all its formality and regulations. Women tended to expect a much more

personal process, a process that would be personally vindicating and that they could turn on and off at will.

Several women revealed that they had expected that the police would come in, would validate them to their husbands and would, through their presence and their words, make their husbands see how misguided that they had been in failing to value to value their wives sufficiently.

As one woman said: "I expected that the police would be on my side, would tell Bill that he had a wonderful woman, and shouldn't treat me this way. But they just came in with forms and uniforms, and were all business."

Other women made it clear that they had never had any intention of going to court, but just felt that the police could be called in to stop the violence and then would go away, until they were needed again. Many women did not even think of the police as part of the whole justice system, but saw them as protectors working for the community.

Many women said that, even though they knew it was unrealistic, when they reached out for help, they had hoped that help would "fix their lives". They had hoped that the police would not only stop the violence, but would also make their husbands love them and become the caring partners that they wished for.

Because these expectations do not mesh with the purpose and structure of our existing criminal justice system, women reported feeling chronically let down by the system, even when their needs for safety and information were met. These women become the "cases" over which crown attorneys shake their heads. As one crown said: "She got a fair sentence. We provided support and information right from the beginning, but she was still angry and dissatisfied. It gets pretty discouraging when we're doing all we can to help."

### **What do Women Who Come into Contact with the Justice System Need?**

Women's expectations cannot be dissociated from their needs and are woven through the needs and wants reported below. Women have six major needs: the need for protection; the need for validation; the need for information; the need for empowerment; the need for financial independence and the need for justice. More specific needs will be discussed under these general needs.

#### **1. Protection**

According to the respondents interviewed for this study, a woman who has been assaulted by her husband needs to know that the police will come promptly if she calls them. She needs to know that the police will provide her with at least temporary safety by removing the man from the home. She needs to know that she has access to the full process of the criminal justice system if she wants to use it. And she needs to have the



choice and information that allow her to go with her children to a safe place, even if her husband has been removed from the home. Furthermore, she needs to know that if she tells the police that she believes she is in a life threatening situation, they will respond to her call, even if no violence has yet taken place on that particular occasion. Many women reported that police do not take women's requests for help seriously when, on the basis of their knowledge of past patterns of violence, they fear that their husbands will be violent. Police generally reply that they can do nothing, until violence or serious threat of violence occurs. But this response denies the fact that women who are battered live constantly with the threat of violence and learn to predict when and under what circumstances violence will occur. Many women reported that they had called the police, explained that their husbands had gone out drinking and always came back violent on Friday nights, after drinking with a particular group of friends. They asked for protection. In almost every instance, it was denied.

## 2. Validation

A woman who has been assaulted by her husband needs to see and hear through the words, attitudes and actions of people in positions of authority that they think wife assault is wrong. Many women said that the entire message behind charging was negated by police or lawyers winking at the man, putting an arm around his shoulder or rolling their eyes when talking about the case.

A woman who has been assaulted needs to be really listened to by those she approaches for help, whether in the justice, the health, the social service or church system. She needs to be told that she is not alone and is not responsible for the violence. She needs to be taken seriously as a person and to have her perceptions respected. She needs to receive support without judgment from police, social workers, lawyers, judges and others in authority. She needs to have her privacy respected, if she requests this right in order to feel respected and supported in the justice system.

## 3. Information

The need for information is often understood in too simple a way by service providers within and outside the justice system, according to our respondents. Just providing information about the working of the court system, or the legal options available, is not enough. Women need honest, realistic, consistent and complete information to help them make informed decisions. To translate this need into operational terms, women said that they need:

- to be told that the court process involves delays, inconsistencies and times when they may feel attacked and treated unfairly;
- to be advised that they can use the civil and family court systems, as well as the criminal justice system;

- to be kept informed of decisions made and schedules set in the criminal justice system and in any other system that they are involved;
- to be told that what they want to happen may not be a potential outcome in the justice process;
- to be told that they are entitled to support and help throughout the process;
- to be told that once the wheels of justice are set in motion, they are not easily stopped, that when they decide to use the criminal justice system, they are may be choosing the full weight of the system and not just part of it; and
- to be told that the criminal justice system has been empowering for many women, when they felt that they were listened to and consulted throughout the process.

In addition, women need basic information on laws, on the court process, on likely sentences, and on the potential or lack of potential for follow-up. But this information alone will not leave the woman feeling that she has been dealt with fairly and honestly.

#### 4. Empowerment

The need for empowerment, like the need for validation is closely linked to the women's expectations of the justice system. Women who used the justice system spoke of the incredible strength of will it took to make the decision to phone the police or go to the courthouse in the first place. They wanted this strength to be recognized, applauded and reinforced, so that they would be empowered to make other difficult life decisions.

Women said that to leave the justice system feeling that they can take charge of their lives, they need to have access to counselling to help grow beyond fear, anger and denial. Women need to have their desire for independence recognized. They need to see that they can act to help stop the violence. They need to be respected and not stereotyped and to have their strength in seeking help, in the first place, recognized and affirmed.

#### 5. Financial Independence

Several women interviewed said that in order for a woman to feel that she has access to the justice system, she needs to be assured of sufficient financial independence to make choices concerning her legal options and live through the delays characteristic of the court process.

Thus, her need for financial independence goes beyond her need for money to cover legal fees. She also needs money to support herself and her children from the

time the man is apprehended to the conclusion of the court process. This means that she will not be forced to make decisions based on financial duress. She also needs freedom from the fear that she will lose her house and other possessions before receiving the financial support that she needs.

#### 6. Justice

Above all, and implicit in all her other needs, the woman needs to feel that she has been treated justly. A woman who has been assaulted by her husband needs to believe that she has access to a justice system that is not driven solely by the goal of winning cases. She also needs access to a justice system that helps integrate her with her community, instead of labelling her as "different" and, thereby, stigmatizing her in a way that subtly withdraws her from long-term community support.

Jurgen Dankwort, one of the participants in the third focus group, has written about the danger of viewing women who are battered as if they were generally "needy" people. He writes:

Even though many family violence studies no longer blame battered women, they continue to interpret wife abuse in ways which tacitly reinforce notions of women's complicity in violence. Traditional notions of 'women's masochism' are being replaced by studies of women's codependency, women's low self-esteem, women's lack of assertiveness, women's histories of sexual abuse and women's coerciveness ... all themes which imply battered women need therapy more than they need support, advocacy and justice.<sup>28</sup>

#### What Do Women Who are Battered Want?

Beyond these specific needs, and closely tied to their expectations, are the intangible, often unattainable things that women who are battered, like all women and men, want. These "wants" cannot be totally fulfilled by the justice system or by any "system". Nonetheless, a reminder of these wants can help all people who try to assist women who are battered and/or their husbands and children to respond more sensitively and creatively. Women who are battered want to be helped in ways that will not compromise their integrity. They want to have their independence and strength and uniqueness recognized and affirmed. Too often women who are battered feel that they are stereotyped as very dependent, weak women. Certainly, they may display indecisive and dependent behaviour shortly after a violent crisis. But many women who are battered feel that they are basically very independent and strong. They want these strengths acknowledged by people in positions of authority.

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<sup>28</sup>Jurgen Dankwort, "The Challenge of Accountability in Treating Wife Abusers: A Critique from Quebec" (1988) 7:2 Canadian Journal of Community Mental Health.

Women who are battered, like most people in our society, want a happy and safe future for themselves and their children. They want to be happy, cherished and loved. And above all, they want others to recognize that they want what most women and men want. They want others to see that they are not different. They do not want to be treated like "victims". They do not want to be defined primarily in terms of their experiences of battering. They want other facets of their lives recognized and respected. They want others to recognize and assert their commonality with them.

## **PERSPECTIVES ON CHANGING CRIMINAL JUSTICE INTERVENTION OF MEN WHO BATTER: THEIR NEEDS AND CONCERNS**

The objectives of this project did not include looking at the perspectives of men who batter. Focus group participants stressed, however, that no attempt to develop innovative criminal justice responses to wife assault could be complete without also considering their outlook.

Accordingly, although no research has been specifically done to address this concern, some of the points raised by focus group participants are reported below. The Department of Justice Canada may wish to undertake a fuller investigation of the needs, wants and expectations of men who batter.

One focus group participant stressed that men who batter, like women who are battered, also need support as individuals. While their violent acts are certainly reprehensible, men who batter do not want to be defined purely in terms of these violent acts. They feel they may be helped to take responsibility for their actions more effectively, if they receive community support and validation for other aspects of their lives.

Men also need to have the violence put in the context of other problems in their lives. Many men report feeling betrayed and puzzled that an act of violence can seemingly erase, in the eyes of people in authority, a host of emotional, chemical dependency, employment and child related problems that the man may see as integrally related to the violence.

Men who batter – and men generally – need information on the extent, characteristics and dynamics of wife assault, so that they can begin to see themselves as part of a widespread and serious problem. Through this information, they may begin to work beyond denial that they have a problem, to acceptance of the problem. Only then will they be prepared to work towards ending the violence.

Furthermore, men generally need encouragement to begin to accept wife battering as their own problem. Currently, wife battering in our society tends to be defined as a "women's issue" and women are expected to find the solutions. It is unlikely that men

who batter will be able to change dramatically on an individual level until they see themselves both as part of the Problem and as part of the society-wide solution.

## **PERSPECTIVES ON CHANGING CRIMINAL JUSTICE INTERVENTION OF CRIMINAL JUSTICE SYSTEM REPRESENTATIVES: THEIR NEEDS AND CONCERNS**

People working in the criminal justice system also have concerns that increase the urgency of change needed to make the system more effective in wife assault cases.

Crown attorneys, lawyers, police and judges all feel affected by the trend in our society to look for legislative and/or justice system solutions to social as well as legal problems. Some think that more aggressive charging policies for wife assault have added to a problem that was already well-entrenched before these policies were introduced.

Justice system personnel spoke of a clogged court system that, in some jurisdictions, eighteen months is a minimum wait for a court date, even for a preliminary inquiry. With more cases coming before the courts, the cost of the administration of justice has increased significantly. Crown attorneys and judges are overworked. There is no adequate time for crown attorneys or judges to spend on serious cases. Burnout among these groups is high.

There is a fear that our overloaded jails and prisons are not only the unanticipated consequence of a higher court caseload, but that incarceration may be imposed too often because it is the easiest sentence to hand down. A more innovative sentence, that might involve treatment or work in the community, takes time to investigate and arrange. Some fear that our high incarceration rate is one sign of an overworked, resource strapped and demoralized judiciary.

Moreover, victims are becoming more vocal and placing greater demands on crown attorneys and judges. But despite sympathy for the concerns of victims, crown attorneys in particular find themselves increasingly unable to give victims the time and consideration that they want and deserve.

People involved in the justice system are looking for different ways in which the criminal justice system can intervene that will:

- reduce court backlogs;
- save money;
- maximize the efficient use of judicial resources;

- encourage alternate forms of sentencing that may contribute to crime prevention;
- reduce the need in less serious cases, where incarceration is inappropriate, for many of the safeguards in our court procedures designed to protect the offender from unjust or unnecessary incarceration; and

streamline the system. Currently the same procedures may be used whether the offence is shoplifting or murder.

Certainly among those representatives of the justice system interviewed for this project, openness to change was very pronounced. There was, however, a warning that any change must respect the principles upon which our current justice system is based.

## **PERSPECTIVES ON CHANGING CRIMINAL JUSTICE INTERVENTION OF FRONTLINE WORKERS OUTSIDE THE CRIMINAL JUSTICE SYSTEM THEIR NEEDS AND CONCERNS**

The concerns of these groups of workers are somewhat different from any of the preceding groups discussed. These people are set apart because they fear that it will address the short term problems of justice personnel, rather than helping prevent violence or protect women from violation and injustice over the long term. They fear that the emphasis on reducing court backlogs and saving money could become tools to leave women even more unprotected and badly served by our justice system.

Furthermore, these workers stress that in planning change, we must consider the long-term, preventive implications of this change. These workers recognize that the majority of women who are battered may not want criminal justice involvement in their lives. Still, they think that the long-term benefits for all women of consistent charging and more forceful sentencing in wife assault cases are pronounced. They think that women should be helped to focus on the long-term benefits to encourage them to proceed through the justice system.

## **KEY ISSUES IN CHANGE**

A number of questions were repeatedly raised by those interviewed and by focus group participants that have not been discussed at length in the preceding material. These could prove pivotal in any attempt to introduce changes to criminal justice interventions in wife assault. They will be briefly flagged to ensure that the scope of this

report is complete. But they deserve fuller elaboration and in-depth consideration, if their complexity is to be adequately appreciated.

**1. Should the Criminal Justice System be Applied in Wife Battering Cases Whether or not the Woman Wants Criminal Justice System Involvement?**

This question was central to the interviews conducted and was raised repeatedly in the focus groups, even though the focus groups were organized to emphasize post-charge action. This question exposed the ambiguity in the interview respondents' positions. Many respondents who were adamant that wife assault is a crime, and felt strongly that the involvement of the criminal justice system in wife battering cases is generally positive and essential, had difficulty answering this question. They had difficulty because it exposes the potential human costs and the potential erosion of human rights which may be implicit in a strong ideological stance that favours promoting the perception and treatment of wife assault as a crime.

Respondents were split almost equally on this question. Twenty-six opposed proceeding if the woman does not wish to do so. Twenty-nine favoured proceeding under these circumstances. Respondents were unanimous that if the violence is very severe (usually defined by respondents as life-threatening either to the woman or to her children), then the woman's choice should not be an issue. When violence is severe, respondents felt that the state has an obligation to intervene, regardless of the woman's wishes.

Most respondents, however – including those who felt that the woman should be able to decide whether or not to proceed with the criminal justice system in all cases, except where violence is life-threatening – thought that something significant should still have to be done, if the woman decided not to proceed. For example, the woman should be given information concerning the danger she is in, should be given the option of going to a transition house or another safe place, and/or should be put in contact with an advocate, a counsellor, or someone who can give her support and information.

Even those respondents who generally supported criminal justice intervention in wife assault cases felt that in answering this question, they were obliged to comment on their view that the criminal justice system is a far from perfect solution to the problem, since it cannot deal with the issue's complexity. For many of these people, it is essential to use the criminal justice system – even if the woman does not want it – because they feel that there is currently no other effective way of intervening that offers needed protection.

Out of this difficult question came the even more comprehensive question asked by one of the people interviewed:

"How many women are we willing to sacrifice for a principle?" or to put it in less emotional terms: "Can we jeopardize the individual's right to

freedom of choice for a principle of change that has not been proven to be effective?"

**2. Is the current criminal justice response to wife assault eroding discretion?**

The issue of discretion was a common theme throughout this project. Some police felt that police discretion had been eroded by the introduction of charging policies. Some crown attorneys felt that their discretion and that of judges was being eroded by the glut of cases which resulted from the introduction of the charging policy. Many people were concerned that the discretion of the woman had been eroded through emphasis on wife assault as a crime.

The loss of discretion of the woman was attributed not only to the fact that she could be denied the option of not proceeding with charges because of the strong impetus in the system to treat wife assault cases as highly serious, but also to her potential loss of choice about whether or not to call the police. These respondents felt that public education stressing that wife assault is a crime has resulted in more neighbour reports of wife assault, a development that is potentially very positive in terms of indicating implicit community support for the woman. But it is also a development that denies some women the decision of whether or not to call the police. Moreover, some suggested that the increase in neighbour reporting has resulted in a significant number of cases coming before the courts that are inappropriate for criminal justice intervention. These cases, usually defined as ones where both parties claim that the offence was a first time occurrence, where the violence was minor, where the victim has no interest in proceeding with the case and where there is no history of previous violence, simply were seen as a waste of the court's time and the public's money.

Generally, respondents felt that an increase in police discretion in cases of wife assault would be good, and an increase in the woman's discretion in cases where the violence is not severe would be a positive step.

The comment was also made, however, that there are many police and crown attorneys who are uncomfortable with discretion and abdicate responsibility for making decisions, even when this option is presented. Some suggested that this fear of choice stems from the current over-emphasis in the justice system on "successful" cases, meaning cases where a conviction was obtained and where there were no complaints by the victim. They suggested that if people working in the justice system were not formally or informally penalized for being involved in an "unsuccessful" case, the willingness to make decisions would increase.

**3. Has the Charging Policy Worked?**

Certainly, no respondent had an answer to this question that was raised implicitly in many of the interviews, but it was obvious that there was widespread concern over this issue. Respondents agreed that virtually no women want charges laid, although some did



feel that more women now see and understand the place of charging. There was agreement that women need more information, support and advocacy services to help them make the decision to proceed with the charge, or not to proceed.

In the main, respondents emphasized that the key issue is protection and that, until we have a more effective alternative to provide a strong public message that wife assault is wrong and to provide protection to the woman and her children, it would be very negative to begin to offer the option not to charge.

There was, however, a fairly widespread opinion that charging should not be seen as the major response to wife assault in the long term. Nonetheless, a warning was offered that we should not fall into the trap of attacking and abandoning the charging policy when what we should be doing is changing the justice system.

In fact, in relation to this last point, many who work within the justice system suggested that people who are in favour of charging and criminalization labour under a false conception about the effectiveness of criminal justice intervention. These criminal justice system representatives suggested that the strong message given through aggressive charging policies is eroded by the fact that the man almost always gets a conditional discharge. These same people fear that women who need police protection may now be increasingly hesitant to call the police because they fear the consequences of charging and having to proceed through the court system.

#### **4. Should the Man Be Removed From the Home?**

There was a surprising amount of unanimity on this issue. Even though this question was not posed in the questionnaire, many respondents raised it as a timely issue that should be acted on dramatically. Even three years ago, the general feeling seemed to be that while it was recognized that women and children were penalized by having to leave the home while the man generally continued to enjoy its comfort, it would be impossible to implement policies and programs to remove the man. Today, people seem willing to proceed towards the goal of removing the man from the home, despite property and human rights concerns. Some even suggested legislative change so that the man would always be removed from the home when police intervened. There was, however, a warning tabled that we not create a shelter industry for men that would justify doing away with transition houses for women and children. Many respondents felt that women still need the option of leaving the home, even if the man is removed.

#### **5. Is Pre-Charge Diversion a Positive Option in Wife Assault Cases?**

The majority of those interviewed felt that pre-charge diversion could be a positive option. Thirty were in favour, twenty were opposed and five were undecided. Those in favour of pre-charge diversion emphasized, however, that the program would have to be effective in that it would have to emphasize the man's accountability for the violence and could not be seen as a way to "get off lightly".

Half of the respondents believe that introducing nonadversarial options would erode the public seriousness of the crime of wife assault, and some commented that this erosion would be exaggerated if the man were to be diverted pre-charge.

Others who were in favour of pre-charge diversion believe that it is important to take some strong, immediate action to communicate that violence against women is wrong and will not be tolerated in our society. But they said that this intervention need not be in the form of a charge and that, in fact, intervention outside the justice system may be more effective.

## OTHER QUESTIONS SURROUNDING CHANGE

It was evident throughout this project that many people working to help reduce the impact and incidence of wife assault are currently questioning their assumptions about appropriate intervention, are seriously looking at current responses to wife assault and are exploring the potential for different ways of intervening to stop violence against women in the home. Some of the other questions raised by those interviewed and by focus group participants are listed below.

- Do we need legislative reform to deal more effectively with wife assault? Should we follow the lead of the United States?
- Are nonadversarial programs that support the adversarial system really nonadversarial? Does this distinction matter? How can we use the criminal justice system, that is based on power and control, to convey the message that controlling someone through violence is wrong?
- Are professionals applying the "power of the law" with too heavy a hand? Is this heavy handedness based on the erroneous belief that it is the law to involve police and criminal courts in wife assault, not primarily policy?
- To what extent does criminalization deter women from calling the police in the first place? Has the emphasis on criminal justice become counter-productive?
- Has the increased pressure on men who batter, created by the more aggressive intervention of the criminal justice system, escalated the number of homicides in wife battering cases?
- In what ways does an adversarial approach lock women into positions where any form of reconciliation is unlikely?

- Can we introduce nonadversarial options before we have a credible criminal justice response, without effectively throwing the criminal justice response to wife battering out the window?
- Do we know enough about wife battering, the danger points, the different types of women/couples/men who live with violence to really plan different interventions, either within or outside the criminal justice system?
- How can community groups be mobilized to bring significant parties together for intervention strategies that involve the community?

## **A SUGGESTED DIRECTION FOR CHANGE**

Despite the ambivalence, uncertainty and questioning that many people working with women who are battered, their children or their husbands are currently feeling toward effective interventions in wife assault cases, there is a base for consensus. Principles for change derived from the findings of this project have already been suggested.

Through the focus groups primarily, but also in part through personal and telephone interviews, an embryonic vision of a positive direction for change has emerged. This vision is not yet clear. Its boundaries are still fluid. Nonetheless, this vision may provide the tools to design an innovative intervention strategy that uses the strength of the criminal justice system in conjunction with the flexibility and fluidity of significant community involvement. It should be noted that at the request of the Department of Justice Canada, the researchers asked focus group participants to examine intervention strategies that could be implemented post charge. As a result, the emerging model outlined does not reflect the strong interest of those interviewed in programs involving pre-trial diversion.

### **Characteristics of More Positive Criminal Justice Based Intervention**

A number of operational guidelines for program development were agreed upon by those who participated in this project.

1. The woman should be provided with clear, honest information about her options, including the benefits and potential pitfalls of each.
2. Advocates for victims should be available from the moment the police are called in and during the whole process.
3. Training for police, crown attorneys, defence lawyers and judges should be an integral part of any innovative intervention planned.

4. Programs should be designed, whenever possible, with cost cutting in mind.
5. Programs should be designed, whenever possible, in such a way that they will benefit the victims, but also address the backlog in the justice system.
6. The wishes and experiences of the victims should be heard and respected.
7. The victim's right to have access to justice should be protected by the program.
8. The community should be involved, as much as possible, either directly or by referral.
9. All programs should stress the accountability of men who batter.
10. A consistent message should always be provided that wife assault is a serious crime.
11. The man should be removed from the home, not the woman and children.
12. The woman should be provided with information on safe places where she can go for support and counselling, as well as protection, if she decides to leave home.
13. Delays in court cases should be reduced through the program, if at all possible.

#### **Building a Model for Intervention**

Using these operational characteristics and the principles for change detailed earlier in this report, the researchers began a process of building a model for intervention with focus group participants. Three models for action already in existence or proposed were used to stimulate discussion. These models were chosen because the researchers believed that they reflected many of the principles and characteristics for intervention identified by those interviewed. The models presented were: the multi-door courthouse model, a pre-trial model involving the battered woman, and a mediation model. The models have been described briefly earlier in the report in the same way that they were presented to focus group participants.

Response to these models varied for each focus group. Overall, participants in two of the focus groups were quite positive toward the first two models, but less so towards mediation. In the third focus group, participants tended to reject all three models.

None thought that any one of the models, as presented, could be simply applied to the Canadian criminal justice system. Instead, participants collectively began to fashion a model that incorporated features of all three.

This emerging model would be based most strongly on the pre-trial model. It was seen as a way to act now for change within existing resources, but in a way that would significantly increase the sensitivity of the system to women who are battered. Participants thought that this model would encourage earlier guilty pleas and would be effective and efficient. Some warned, however, that many women could be intimidated at having to face the offender. They suggested that, ironically, pre-trial could occur too early in the process and too early after the crisis to enable the woman to make decisions with which she would be happy in the long term.

Participants felt that this model could be most useful if applied to first offences, if the police were always present, if nonlegal advocates were available in the courthouse so that they could be called in for advice, information and consultation during the pre-trial, and if crown attorneys involved in the pre-trial were highly sensitized to the dynamics of wife assault and the potential intimidation of the woman through the process.

The community referral and information aspects of this model could be strengthened by links to an integrated network of advocacy centres. Focus group participants were not enthusiastic about a multi-door courthouse model since they saw this model as too monolithic, too intimidating and too broad to ensure sensitive treatment of women who are battered. Nevertheless, participants borrowed the importance of referral, support and advocacy from the multi-door courthouse model. The consensus was that these functions would be better achieved through a series of advocacy clinics located in police stations, in the community and in the courts. These clinics would be interconnected and would have common access to a hotline.

Furthermore, a lawyer and a social worker would be available in every courthouse to act as advisors on wife assault cases. These professionals could be volunteers.

At the pre-trial, in addition to the options for action included in the description of this model earlier in the report, the crown attorney might have the option to adjourn cases for a minimum of six months to allow the man to go through treatment. After this period of six months, he could return to court and the case could be adjourned for a further six month period to allow treatment to continue.

A broad range of options could be suggested, as part of the sentence or following sentencing, by community groups involved in referral, advocacy and in the pre-trial process. These options could include mediation, although it is suggested that mediation only be a recommended option if both the parties desire it and have gone through counselling beforehand. Participants did not think that mediation would be beneficial earlier in the justice process. They were concerned that it could place the woman in significant danger.

## SUGGESTIONS FOR FURTHER ACTION

In the course of creating the beginnings of a model for intervention, focus group participants made a number of recommendations for future action that did not fit neatly within the model.

- \* Funds should be provided by government to allow transition houses to hire lawyers to be available to counsel women who come to the shelters.
- \* Judges must be helped to understand the ambiguity of wife assault.
- \* Defence lawyers must be taught to respect justice, instead of just being driven to win cases.
- \* Conflict management training for children should be provided in schools. This training should be reinforced throughout the school day, on the playground as well as the classroom and school halls.
- \* Lawyers could be sensitized to through bar associations to the experience of being battered.
- \* The community must be encouraged to take some responsibility for protection of the woman and her children. Effective protection will never be provided, if it is seen as solely a police matter.
- \* More counselling programs are needed for children living in homes where the woman is battered.
- \* Schools, businesses, governments, as well as those agencies already offering programs to help reduce wife battering and to provide support during the crisis, should be encouraged to help with prevention through concerted campaigns similar to Participaction and anti-smoking campaigns.
- \* Women's economic inequality, as well as women's child care and housing needs, must be addressed, if we are to begin to prevent wife assault.

## SUGGESTIONS FOR FURTHER RESEARCH

Focus group participants and people interviewed for this project also identified several ideas for further research. The majority of those interviewed were in favour of more research on nonadversarial options.

Some of the ideas they suggested follow.

- \* Identify the training needs of police officers.
- \* Identify the training needs of politicians and government policymakers.
- \* Explore the relationship between violence in the home and pornography.
- \* Assess the needs of middle and upper class women who are battered.
- \* Develop and evaluate a model of integrated community support through which women who are battered could be connected to all support networks, regardless of where they enter the system.
- \* Do a longitudinal study of behavioural change in the men, women and children who live in homes where the woman is battered.
- \* Explore the use of victim/offender reconciliation as it might be applied to wife battering cases.
- \* Explore the range of community service orders that are being used or could be used as effective sentences in wife assault cases.
- \* Undertake a project to determine how we can remove the man from the home given existing laws and services.
- \* Fund research to define the socioeconomic variables of women who are battered and of men who batter.
- \* Support research that will build community support and community integration through programs also designed to help women who are battered.
- \* Explore the links between wife assault and recurring variables including, among other things, alcohol use and pregnancy.
- \* Do an in-depth project to identify what women who are battered want and need.

## CONCLUSION

This project has provided rich evidence that people concerned with wife battering, who work within or with the justice system, are open to and anxious for change. The findings of this project have also emphasized the fluidity of the environment within which any change in criminal justice system intervention in wife assault cases would take place.

Our understanding of wife battering is growing rapidly. Intervention approaches are shifting. In some provinces, they are shifting noticeably away from an emphasis on criminal justice intervention. There is real debate across the country concerning the effectiveness of the charging policy. There is a renewed energy to explore how we can truly begin to reduce the incidence and impact of wife assault.

The fluidity of the environment and the enormity of the task creates uncertainty and paradox in the search for better ways to intervene through the criminal justice system. But a direction is emerging. The findings of this study help point the way.



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