

**UNIVERSITY OF KWAZULU-NATAL**



**Access to Justice: The Role of Community-based Paralegals in  
Community Restorative Justice in Rural KwaZulu-Natal**

**By**

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## Declaration

I, Busiwana Winnie Martins, declare that

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Signature:

## Dedication

This thesis is dedicated to my husband, Benedict Martins, the finest man I know. He has been my foundation, my rock and my tower of strength. Without him I do not believe I would be where I am today. Although he is a poet and an artist at heart, he was prepared to sacrifice all for the struggle for freedom in South Africa. In doing this he has kept his deep humanity and compassion. He has compassion, humour, integrity and boundless love. I have been mentored, cherished and nurtured by him. But most of all he has loved me unconditionally. I am proud to dedicate this thesis to him. He fully supported the countless hours and tremendous energy that I spent while earning my doctorate degree. My dear husband is the type of man secure enough for me to develop myself to my fullest potential; never complaining about my time away from him and our children. Instead, he encouraged me every step of the way in so many ways, especially when I found it difficult to encourage myself.

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## **Access to Justice: The Role of Community-based Paralegals in Community Restorative Justice in Rural KwaZulu-Natal**

**B. Winnie Martins**

### **Abstract**

Access to justice in rural KwaZulu-Natal is wholly inadequate, particularly where domestic violence is concerned. Despite the enactment of post-1994 criminal justice statutory frameworks, the majority of women living in rural areas experience barriers to justice. Yet the fight against injustice cannot be left solely to the police, lawyers and courts. Rather, there is a need to involve other stakeholders, such as ordinary people, non-governmental organizations (NGOs) and traditional authorities.

This research study investigates whether and how community-based paralegals (CBPs) facilitate access to justice. It explores the role of paralegals in community restorative justice through four rural community-based advice offices under the umbrella of the Centre for Community Justice and Development (CCJD), an NGO in Pietermaritzburg. The four community advice offices under study in rural KwaZulu-Natal are Bulwer, Ixopo, Madadeni and New Hanover. The study examines the interrelationship between restorative justice, community-based paralegals and domestic violence with specific reference to the Domestic Violence Act (No. 116 of 1998). Underlying the domestic violence lens adopted to explore the role of CBPs in community restorative justice are philosophical worldviews of pragmatism to determine what works under the circumstances and advocacy-participation to give voice to the study participants.

The study employs a socio-legal, qualitative research design supported by statistical case intake and outcome data. A meta-conceptual framework allowed a multiple-case study strategy that applies several units of analysis and draws upon multiple sources of evidence. The research findings reveal the connection between the engagement of paralegals by rural community members and the role of paralegals in handling domestic violence cases in an environment of legal pluralism. Furthermore, findings show that while paralegals straddle criminal, traditional and informal justice systems to address the legal needs of rural women, contrary to mainstream literature, domestic violence cases can be resolved through community restorative justice. Findings demonstrate that the Domestic Violence Act fails to meet the needs of victims of domestic violence who seek family sustainability.

The community restorative justice practices of CBPs directed toward domestic violence fill a justice gap created by contradictions between rule of law orthodoxy and customary law. Based upon the role of CBPs in advancing access to justice through community restorative justice, the study concludes

with process theory-building for forum shopping and communication pragmatism and suggests a private-based conceptual model for community-based paralegals addressing domestic violence cases through community restorative justice. Practical implications for law and policy and a way forward for community restorative justice in rural areas are also presented along with visions of future research.

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## Abbreviations

ACAOSA	Association of Community Advice Offices of South Africa
ADR	Alternative Dispute Resolution
BAA	Black Administration Act
AULAI	Association of University Legal Aid Institutions
AJC	Access to Justice Cluster
CAO	Community Advice Office
CBJS	Community Based Justice System
CBP	Community-Based Paralegal
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CLASI	Constitutional Literacy and Service Initiative
CCJ	Centre for Criminal Justice
CCJD	Centre for Community Justice and Development
CJS	Criminal Justice System
CLRDC	Community Law and Rural Development Centre
CRJ	Community Restorative Justice
CP	Community Panels
CPA	Criminal Procedure Act
CMAF	Community Monitoring and Advocacy Programme
DoJ&CD	Department of Justice and Constitutional Development
DSD	Department of Social Development
DVA	Domestic Violence Act
ICD	Independent Complaints Directorate
IPA	Interpretive Phenomenological Analysis
IPO	Interim Protection Order
KZN	KwaZulu-Natal
LASA	Legal Aid South Africa
LPB	Legal Practice Bill
LRC	Legal Resources Centre
NADCAO	National Alliance for the Development of Community Advice Offices
NCBPA	National Community Based Paralegal Association
NCPS	National Crime Prevention Strategy
NCPI	The National Paralegal Institute

NGO	Non-Governmental Organization
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
PAS	Paralegal Advisory Service
RCMA	Recognition of Customary Marriages Act
RSA	Republic of South Africa
SAQA	South African Qualifications Authority
SCAT	Social Change and Assistance Trust
SALRC	The South African Law Reform Commission
TLGF	Traditional Leadership and Governance Framework
TRC	Truth and Reconciliation Commission
TCB	Traditional Courts Bill
UKZN	University of KwaZulu-Natal
UWC	University of the Western Cape
VOC	Victim Offender Conferencing
VOM	Victim Offender Mediation

# **Chapter 1: Introduction to the Study**

## **1.1 Why This Study?**

There is a paucity of research on the role played by community-based paralegal work in advancing access to justice for the rural poor in KwaZulu-Natal (KZN). While community-based paralegals (CBPs) have vast experience of how rural people perceive the law, its value and how to respond to it, little is known about the work of CBPs. Fernandez, Hctor and Lund's (2009: 47) evaluation of the work of CBPs reveals that "community-based paralegals in their day-to-day interactions with members of the community incorporate both restorative justice and victim care theories". There is therefore a need to bring CBPs' experiences into the open through knowledge production and dissemination.

According to Robb-Jackson (2012:1), despite the growth of community-based paralegal programmes in Africa and other parts of the world, "they have received scant attention within the literature and insufficient research exists on the linkages between these programs and women's access to justice". In much the same vein, Moulton (2005:19) notes that "little attention has been paid to the issue of gender based violence in relation to informal justice mechanisms in South Africa".

Franco, Soliman, and Cisneros, (2014:29) observe that, despite the long history of paralegal services "there has been little effort to measure the impact of such services on access to justice". Empirical research is needed to enquire into the actual role of CBPs and measure the impact of the services they render for people who are unable to access justice. Similarly, Dugard and Drage (2013:1) state that, "considering the prevalence and importance of paralegals in the South African justice sector, their role remains largely under-formalized and understudied".

This study seeks to contribute knowledge to help fill this gap through a critical appraisal of the interactive nexus between the role of CBPs and access to justice through community restorative justice in cases of domestic violence in the rural areas of KZN. As a socio-legal study, it aims to determine how rural women experience the application of the South African Domestic Violence Act (DVA) (116 of 1998) (RSA, 1970) as well as other means of accessing justice. The locus and focus of the study is the functioning of CBPs that work in community-based advice offices (CAOs) under the supervision of the Centre for Community Justice and Development (CCJD), a non-governmental organisation (NGO) based in the South African province of KZN. In problematizing and discussing these issues, a number of concepts and definitions will receive attention, including community restorative justice, CBPs and domestic violence.



## 1.2 **The South African Context: A History of Community Advice Offices and Community-based Paralegals in South Africa**

According to Pigou (2000:1), the first organisation to provide paralegal services in South Africa was the Legal Aid Bureau that was established in 1937. Berggren (2000:6) contends that paralegal practitioners and legal advice offices started practicing in response to repression and resistance during the apartheid era. Dugard and Drage's (2013:4) study revealed that CAOs and CBPs emerged from the 1960s to 1980s, when black people suffered hardship as a result of apartheid and economic exploitation. Apartheid created political and legal problems such as influx control, low wages, and a lack of housing, as well as racial discrimination in education and job opportunities. There were few lawyers or welfare services that oppressed people could turn to for legal help and advice, which thwarted access to justice.

Community Advice Offices were established with the assistance of local community activists in response to the unjust laws enacted by the apartheid government. According to Dugard and Drage (2013:5), CAOs were formed "out of the need for a space in which to mobilize against the apartheid regime and distrust of a judicial system that endorsed the legal structures that facilitated black subordination". The Black Sash, established in 1955, was one of the anti-apartheid organizations that set up advice offices "in urban areas to assist black people who contravened apartheid laws, in particular those that restricted freedom of movement" (Dugard and Drage, 2013:5).

The 1970s saw the emergence of the progressive trade union movement and the growth of labour advice offices. The 1980s were marked by the emergence of democratic political organizations such as the United Democratic Front (UDF). Issues such as forced removals, evictions, detentions, political trials and harassment led to the growth of a wide range of services aimed at "responding to the needs of black people and their oppressed communities". Examples of such services include advice offices, crisis centres, detainee support committees and legal resources centres (Dugard and Drage, 2013:6).

Community Advice Offices were, and still are, based in and run by the community with the aim of providing advice and support on legal and social welfare problems. People who rendered these services were sometimes employed, while others volunteered as part of their commitment to the struggle. They gave advice on a range of practical and political issues that required knowledge of the law and legal processes. With little formal training, CBPs who operate and manage CAOs offered valuable advice and personal support, based on their rich experience and understanding of the conditions and problems faced by their community. It is from this pool of community workers and volunteers that the activities of CBPs evolved. These are individuals who are invariably from the area which they serve, that assist their community by helping to solve socio-legal problems through advice, referrals and education on human and legal rights. Dugard and Drage (2013:6) note, that, in addition to crisis intervention, during the 1980s, CAOs also focused "on the end-goal of ending the apartheid system".

Dugard and Drage (2013:7) add that the 1990s were a transition period for South Africa and a period of transformation for CAOs. This “was a time of unrest, intense political violence and political brutality. In 1989 the Centre for Criminal Justice (CCJ) was established as part of the Faculty of Law at the former University of Natal”. The CCJ conducted research on the role of criminal justice in response to political violence in KZN (Kubayi, 2011:253). In the run-up to the end of apartheid, much of South Africa, including the greater Pietermaritzburg region where the CCJ had its offices, was wracked by black-on-black violence, leading to the death of more than 20 000 people countrywide. This period also witnessed a “new wave of civil society organisations, including paralegal organisations, which were set up to support the transition process”. The CCJ began working with paralegals through its community outreach programme and shifted its focus to promoting change at grassroots level. It established 15 community-based advice offices between 1997 and 2000. The CCJ programme is collaborative in nature and networks with the police, magistrates’ courts, and traditional courts (Dugard and Drage, 2013:10). However, in 2012 the 15 community-based advice offices obtained independent status as non-profit community-based organisations. They are now supported by the Centre for Community Justice and Development (CCJD), an independent NGO in Pietermaritzburg that replaced the CCJ. The advice offices’ networks currently include other professional groups such as social workers, and health care workers. Fernandez, *et al* (2009:42) explain that the need to maintain excellent working relationships appears to be a major component of CAO operational policy. Community-based paralegals function on the premise that for their work to be successful, they have to cooperate with other service providers and involve members of the community.

The Constitution of the Republic of South Africa, Act 108 of 1996 (RSA, 1996) and Chapter Nine Institutions - state institutions that support constitutional democracy - were established to uphold human rights. According to Fernandez *et al* (2009:43), CAOs give direct effect to the tenets of the Constitution. Dugard and Drage (2013:6) note that after 1994, it was still difficult for many people to access their rights and CAOs “continue to play a role in interpreting and implementing the Bill of Rights” in practical and understandable terms given the new dispensation, questions arose as to what would work under democratic governance, especially in terms of the protection and exercise of the rights of previously marginalized communities in remote rural areas. What shape and form will advocacy for and the participation of these communities take? In examining the observance and exercise of rights, particularly for women that have been slow in materialising, this study adopts the philosophical worldviews of pragmatism and advocacy/participation (Creswell, 2009:10). The worldview of pragmatism uncovers what is occurring and what works under current circumstances in terms of the procedures and processes followed by CBPs. On the other hand, the advocacy/participatory worldview enables the voices of CBPs and the citizens who use their services and experience implementation of the DVA to be heard. These worldviews also allowed the researcher and the study participants to co-create

findings that shed new light on whether and how CBPs facilitate access to justice through community restorative justice when it comes to domestic violence.

### 1.3 **How will New Knowledge from this Study help South Africa and Other Countries?**

Paralegals are not recognised by statute in South Africa; nor does the law regulate their activities. Yet they have been providing legal services to historically marginalised citizens and the rural areas of South Africa for decades (Dugard and Drage, 2013:16 and Pigou, 2000:8). To better understand the role of paralegals, this study highlights the experiences of CBPs in community restorative justice for victims of domestic violence. A comprehensive description is provided of access to justice, the South African DVA, the community restorative justice approach and the work of CBPs in handling domestic violence cases. The question arises as to whether and how the work of paralegals meets the needs of rural women faced with domestic violence as well as the extent to which CBPs' work is valued. The study focuses on the duties and role of CBPs operating in the formal, traditional and informal justice fields.

New knowledge about how the administration of justice and access to justice in rural areas can be improved if the formal, traditional and informal justice systems become more complementary will indicate how access to justice in rural areas and indigenous communities can be expanded by employing citizens to serve the community in which they live in a culturally competent way. Maru (2006b:470) argues that CBPs engage both "formal and customary law in a way that formal legal aid cannot". There is no reason why both lawyer-focused legal aid and paralegal services cannot complement the formal justice system to provide for more effective and meaningful administration of justice for all. Phoya (2007:32) argues that without the informal justice administered by paralegals and the traditional justice systems, the formal justice system "would simply be swamped with petty cases that are easily resolved at a grass root level".

This study aims to identify policy reforms that will result in the recognition of CBPs as a sector in the South African Legal Practice Bill No 20 of 2012 (LPB) (RSA, 2012). The National Alliance for the Development of Community Advice Offices (NADCAO) has organised a petition calling for such regulation and recognition. Dugard and Drage's (2013:33) study on the contribution of CBPs to access to justice in South Africa notes that the LPB "was stalled for many years, apparently due to hostility from the legal profession that is sceptical about the role and standing of CAOs. The LPB was resuscitated at the end of 2012 and public hearings were held in February 2013. It aims to provide affordable legal services and a restructuring of the legal profession". Dugard and Drage (2013:33) point out that the latest LPB "does not encompass the incorporation of paralegals". Hawkey (2013:41) notes that, the Constitutional Literacy and Service Initiative's (CLASI) response to the exclusion of

paralegals from the LPB maintains that this undermines the status of the paralegal sector within the South African legal landscape. The NADCAO submits that such exclusion goes against the intended spirit of the LPB to unite the legal profession (Hawkey, 2013:42). Finding new ways to include citizens in “the justice system through complementary formal and informal systems encourages community participation in the criminal justice system” (Stapleton, 2007:23).

Stapleton (2007:20) observes that CBPs “have a long history in many African countries. All these countries have non-lawyers that offer some kind of legal service”. Community-based paralegals are recognized in Botswana, Democratic Republic of Congo, Ghana, Kenya, Niger, and Rwanda, but only in Botswana, Kenya, Niger and Tanzania are they statutorily regulated. Stapleton (2007:22) notes that paralegals are not officially recognised and regulated in South Africa, Cameroon, Senegal, Uganda, and Zambia. Since 2012 CBPs have gained recognition in Malawi and Sierra Leone replete with relevant statutes and policies to formally involve CBPs in the criminal justice system (Schonteich, 2012:25). Similarly, Asian countries such as Indonesia, the Philippines, Bangladesh and India make use of CBPs. The findings of this study could therefore strengthen the argument for the functionality of CBPs and the use of community restorative justice to facilitate access to justice across the African continent and abroad.

Community restorative justice is a global concern. While it has only recently gained prominence on some continents, many African and Asian countries, including South Africa, have been practicing it for centuries as part of indigenous law. Africa has rich indigenous justice traditions that focus on repairing the harm caused to the community by crime and other human rights violations. The findings of this study will therefore help solve the research problem discussed below in order to narrow the gap between indigenous practices and statutory law and address women’s domestic safety.

#### 1.4 **Research Problem**

As the literature review below attests, access to justice in rural areas remains elusive in democratic South Africa. Although women’s rights are an integral part of human rights, the country’s criminal justice system is struggling to ensure access to justice for victims of domestic violence. As Hanna (1996:1871) points out, the criminal justice system is often unable to protect women against violence because a woman “may not want to send her partner to jail, break up her family, or subject herself to the criminal process. These decisions are her choices”. Hanna adds that it could be assumed that the criminal justice system’s interference in “a woman’s private life can be victimizing rather than liberating” (Hanna, 1996:1871).

The fact that women choose not to make “use of the criminal justice system to solve their domestic problems is a global issue. It is internationally recognised that the traditional criminal justice system is struggling to meet the needs of victims of domestic violence” (Nancarrow,2006:89). According to Van Wormer (2009:114), the United States and Canada provide for mandatory arrest and prosecution of perpetrators of domestic violence. However, this does not encourage women to call the police when they have been abused. The victim’s right to choose is not part of this mandatory policy; the state uses its powers to compel women to cooperate in the prosecution of their abusers (Van Wormer, 2009:114). Chopra and Isser (2012:345) observe that formal justice systems “that are effective in upholding human rights of women may produce adverse and unwanted, if unintended consequences for women”.

Grauwliler and Mills (2004:51) note that “as many as 50% of women choose to remain in abusive relationships for emotional, cultural or religious reasons. They cite one reason why women are reluctant to engage the criminal justice system: two decades ago, women were not consulted on whether the offender should be arrested.” Even today, women’s viewpoints are still considered irrelevant. Grauwliler and Mills (2004:51) point out that “women in abusive relationships are placed in the untenable position of choosing between protecting their lovers or husbands from incarceration, or protecting themselves by relying on a criminal justice system that is unresponsive to their individual needs.” Zehr (2002:3) contends that restorative justice could overcome such limitations.

In 1998 the South African government passed the DVA (116 of 1998) that aimed to address domestic violence and increase access to justice. The DVA provides judicial measures to give victims swift and effective protection. However, some women choose not to use the remedies provided for in the DVA, and seek alternative remedies such as restorative justice from community-based advice offices. Community-based paralegals have been assisting women who choose not to follow the criminal justice route for years. Van Wormer (2009:114) suggests that, “the widespread dissatisfaction by battered women with the criminal justice systems opens doors for consideration of alternative forms of dealing with domestic violence”. She adds that “restorative justice programmes offer several major advantages”.

The question of whether domestic violence is effective or even appropriate for domestic violence has been the subject of increasing scholarly debate. “New Zealand has been a pioneer in the development and expansion of restorative justice in the adult and youth criminal justice systems, but has taken a cautious approach to using restorative justice in adult cases of domestic violence” (Nancarrow, 2006:90). Nancarrow (2006:90) explains that there are fears that conferencing “cannot convey the seriousness of these crimes, nor cope with the particular dynamics and general community stance on violence against women”. This study contributes to this debate by examining the concepts of access

to justice in a democratic society, restorative justice and its role in African society and the role of CBPs in access to justice through restorative justice with specific reference to domestic violence. There is scant scholarly literature on the role of CBPs as a whole; this study examines the lack of access to justice for women who may shy away from the formal criminal justice system when confronted with domestic violence; whether or not community restorative justice (CRJ) can be used in cases of domestic violence and the need for knowledge production on these matters. The research problem gave rise to the research questions and objectives set out below.

### 1.5 **Research Questions**

Women are choosing alternative approaches to deal with their domestic situations. The fact that women, especially rural women, do not always have access to their full panoply of rights and entitlements is a problem. The research questions that address the problem regarding the role of CBPs in using Restorative Justice (RJ) in domestic violence cases are:

- What is the role of CBPs in restorative justice in KZN?
- Do CBPs use restorative justice initiatives in domestic violence cases? If so, how? If not, why not?
- Is restorative justice intervention by CBPs appropriate for cases of domestic violence? If so, how? If not, why not?
- Do restorative justice initiatives by CBPs increase access to justice for victims of domestic violence? If so, how?
- What factors contribute to the success or failure of restorative justice initiatives for domestic violence cases handled by CBPs?

### 1.6 **Research Objectives**

The research questions led to the following objectives in relation to both the role of CBPs in restorative justice and the need for knowledge production on the use of restorative justice in domestic violence cases:

- Explore experiences of CBPs' approaches to restorative justice.
- Examine whether community restorative justice has a role to play in response to domestic violence.
- Help narrow the gap in the literature regarding CBPs' use of community restorative justice to handle cases of domestic violence.

- Contribute to the debate on the question of whether the DVA (116 of 1998) meets the needs of rural women.

Having established the research problem, research questions, and research objectives in light of a brief overview of relevant literature, the structure of the thesis follows. Chapters 2-4 provide a more in-depth discussion on access to justice, community restorative justice and the role of CBPs in these phenomena.

## 1.7 Structure of the Thesis

### **Chapter 1: Introduction to the study**

This chapter introduces the study by highlighting the reasons for the study, its context, research problems, research questions, research objectives and the structure of the thesis.

### **Chapter 2: Access to Justice**

The chapter comprises part one of the literature review and focuses on access to justice. Given legal pluralism in the Republic of South Africa, the response of the different justice systems in the context of domestic violence is discussed. The South African DVA is critically reviewed.

### **Chapter 3: Community Restorative Justice: An Informal Justice System**

This chapter constitutes part two of the literature review and includes a survey of prior research on community restorative justice including the definitions and theories of community restorative justice; the process and practice of community restorative justice and the interaction between domestic violence and community restorative justice. The social science conceptual framework regarding community restorative justice emerging from the literature review along with the law guiding the study is fully explained.

### **Chapter 4: Community-Based Paralegals**

The chapter forms part three of the literature review and covers previous research on paralegals in general including different categories of paralegals; the history of paralegals in South Africa; community-based paralegals and their role in access to justice. It examines various roles of CBPs as well as the interaction of CBPs with the formal, traditional and informal justice systems in the context of domestic violence. This chapter also presents the conceptual framework of this study with reference to CBPs. The chapter concludes with an explanation of the meta-conceptual socio-legal framework guiding the study as a whole.

## **Chapter 5: Research Design and Methods**

This chapter describes the research design, strategy, data collection methods and data analysis as well as the sampling procedures used in the study and how these methodological techniques were applied. The reliability and validity of mixed methods studies are discussed. Ethical considerations and the limitations of the study are highlighted.

## **Chapter 6: The Case of Bulwer Community Advice Office**

Case Study 1: The case of Bulwer community advice office. This chapter provides background information on the demographics of the area and the CAO. It presents and analyses the research results gathered through interviews and focus group discussions after reviewing the secondary data comprised of descriptive statistics drawn from the CCJD office database.

## **Chapter 7: The Case of Ixopo Community Advice Office**

Case Study 2: The case of Ixopo community advice office. This chapter provides background information on the community advice office. It presents and analyses research results gathered through interviews and focus group discussions after reviewing the secondary data comprised of descriptive statistics drawn from the CCJD office database.

## **Chapter 8: The Case of Madadeni Community Advice Office**

Case Study 3: The case of Madadeni community advice office. This chapter provides background information on the support centre. It presents and analyses the research results gathered through interviews and focus group discussions after reviewing the secondary data comprised of descriptive statistics drawn from the CCJD office database.

## **Chapter 9: The Case of New Hanover Community Advice Office**

Case Study 4: The case of New Hanover community advice office. This chapter provides background information on the support centre. It presents and analyses the research results gathered through interviews and focus group discussions after reviewing the secondary data comprised of descriptive statistics drawn from the CCJD office database.

## **Chapter 10: Comparative Findings and Analysis across Community Advice Offices**

This chapter provides a comparative analysis of narrative from paralegals and service recipients across all four outreach support centres. It also presents cross-case comparisons of community advice centres and what the paralegals and service recipients said about the interaction between CBPs, community restorative justice and domestic violence as it pertains to access to justice. It also



highlights a cross-case comparison of CBP views on whether traditional courts should handle cases of domestic violence. The chapter includes the application of data to the social science meta-conceptual framework, which yields non-doctrinal analysis. This is followed by doctrinal analysis of the DVA and domestic violence related case precedents pertaining to the qualitative data results; hence the socio-legal framework.

## **Chapter 11: Conclusions, Policy Implications and Recommendations**

The final chapter highlights the study's conclusions, policy implications, lessons learned, new knowledge produced and recommendations based on the findings of this research study.

### **1.8 Chapter Summary**

This chapter presented an introduction to the study. The need for the study was discussed after which the historical context of community advice offices and community-based paralegals in South Africa was delineated. In this chapter it was suggested that, on the one hand there is a paucity of empirical research on community-based paralegals generally and with regard to CBPs role in community restorative justice in particular. On the other hand, this chapter noted how new knowledge from this study about the role of CBPs in restorative justice could benefit South Africa and other countries. The research problem, research questions and research objectives were introduced. There was an indication that the research questions and research objectives were conceived in light of the research problem and that findings from the study are expected to help solve the research problem, answer the research questions and achieve the research objectives. The chapter concluded with a description of the structure of the thesis which includes this introductory chapter, three literature review chapters, a chapter on research design and methods, four case study chapters, a chapter that encompasses cross-case comparisons of case study chapters and a final chapter that presents conclusions, policy implications and recommendations drawn from this study.

## **Chapter 2: Access to Justice**

### **2.1 Introduction**

This chapter reviews access to justice from a variety of vantage points. The literature on access to justice is first presented in a general context. Barriers to access to justice are then discussed with special emphasis on gender-based barriers. Geographically, access to justice is reviewed from an African continental perspective followed by a South African perspective. A number of justice systems that comprise South Africa's plural legal system are discussed, namely, the formal justice system, the traditional justice system, African living law and the informal justice system. Greater detail is provided on the traditional justice system. African living law is not the subject of this study and is noted in acknowledgement of its existence. The informal justice system is the most relevant for this study on the role of community-based paralegals (CBPs) in community restorative justice, which is an informal justice system. The informal justice system is briefly discussed in this chapter and further discussed in chapter 3. This chapter proceeds to consider women, empowerment and legal pluralism in a theoretical context and then with reference to the formal, traditional and informal justice systems. After a discussion of the interactive nexus between access to justice and plural legal systems, the chapter concludes with a summary.

### **2.2 Access to Justice, General Context**

While the rule of law is an integral component of public governance in a democratic society, its efficacy depends on citizens' ability to access justice. Dias (2009:4-5) acknowledges that like most general legal concepts, there is no specific definition of access to justice. Dias (2009:4) adds that the term 'access to justice' describes a variety of provisions, which protect and promote equality and "the right to a fair trial". For most people, access to justice refers to access to courts, and to legal representation in a court of law. With reference to historically marginalised populations, Cappelletti (1992:28) describes access to justice as poor people's access to legal experts both to obtain legal advice out of court and legal representation in court. The fact that people have the right of access to the justice system does not mean that they "have access to justice in reality. Access to justice is a broad concept that refers to a variety of issues that have an impact on people or communities' ability to seek and obtain redress when their human rights are violated". These issues are not exclusive to the formal legal system; they include access to the informal justice system. Dias (2009:4-5) maintains that access to justice includes the following:

- Access to a fair set of laws;
- Protection from harm (policing);
- Legal representation, including the services provided by the paralegal sector;
- An appropriate set of institutions to settle problems and disputes;
- Appropriate remedies and solutions to problems;
- Popular education about law, institutions, and procedures; and
- Affordable access.

Robb-Jackson (2012:10) supports Dias' observation that there is no uniform definition "the definitions of access to justice vary widely within the literature and recently, there has been a shift from a one-dimensional focus on the procedural aspects of access to justice, to a more inclusive assessment of the legal system". Robb-Jackson (2012:10) suggests that a definition of access to justice has three main aspects: "(1) knowledge, as people must have information and knowledge about their rights and how to access them; this extends to service providers as they are required to have appropriate knowledge and expertise in order to offer effective services; (2) the environment, as state systems and infrastructure for service provision must be effective and easily accessible; and (3) the quality of services". For the purposes of this study, Dias and Robb-Jackson's definitions, which are similar, are adopted.

The Community-based Paralegals: Practitioner's Guide (2010:13) states that, based on the "human rights framework, access to justice means that individuals and their communities need to be educated and informed about their rights; however they also need to develop the capacity to demand such rights". Stapleton (2007:5) points out that, officials think of "access to justice as the sole province of the justice system, while some rural and urban people distrust and avoid 'the western-style justice system'". For this reason Penal Reform International (PRI) recommended a definition of access to justice that includes a "dispute resolution forum based on the restorative justice approach" (Stapleton, 2007:5). Van Rooij (2012:289) submits that the "United Nations Development Programme's (UNDP) approach to access to justice explicitly recognises that the justice system can be found both in the formal state institutions, as well as in informal non-state normative systems".

## **2.3 Barriers to Access to Justice**

### **2.3.1 General context**

No discussion on access to justice can be complete without discussing the barriers that limit access to justice. A significant number of people around the world encounter barriers in accessing justice, particularly the

formal justice system. Economic, political, social and geographic factors play a role in the lack of access. According to Robb-Jackson (2012:10), three central categories of barriers can limit individuals' ability to access justice: (1) "inadequate legal protection, including gaps in the legal framework, and institutional barriers; (2) a lack of capacity to provide justice remedies, barriers within the court and informal justice systems, and lack of enforcement; and (3) a lack of capacity to demand justice remedies, which includes external and internal obstacles". Van Rooij (2012:292) advances a fourth obstacle experienced by the poor in accessing justice, "limited legal awareness and lack of knowledge of the law and their rights". While these barriers are generally applicable, gender-based barriers also exist.

### **2.3.2 Gender-based barriers to access to justice**

This study focuses on rural women's access to justice when they are victims of domestic violence; it is therefore important to briefly discuss the barriers faced by women in accessing justice. Generally women face discrimination on the basis of their "gender, ethnicity, and class, which hinder their access to justice" (Robb-Jackson, 2012: 11). Robb-Jackson (2012: 11) submits that, it is "these gender specific barriers that contribute to the continued violence and violations committed against women. Furthermore, women's fear of reprisal or social ostracism, lack of economic independence, and limited participation in judicial systems and decision-making forums are some of the barriers that limit their access to justice".

Based upon case study research of CBPs in Sierra Leone, Robb-Jackson (2012:17) notes that legal pluralism is "particularly challenging for women, and this structure can entail multiple strands of law, based on customs and identity, and a plethora of non-state justice systems that operate outside the purview of the state system". South Africa also has plural legal systems which must be taken into account to facilitate access to justice and legal empowerment.

Robb-Jackson (2012:17) identified four barriers to accessing justice. The first is the cost of legal services, fines and transportation, while the second is structural barriers in the form of a shortage of trained justice personnel. This also relates to court procedures, lengthy prosecution times, and continual adjournments, and poor witness protection mechanisms, "which hinder people from providing statements or testifying". The customary legal system also has its limitations; the "primary barrier is that the laws are often not written or codified, which makes the system subject to potential biases and discrimination". The third barrier is the lack of legal representation and legal awareness; citizens appear in court with no legal representation and "there is limited legal rights education, especially in rural areas. Women are not fully aware of their rights under both domestic law and international law". Finally, gender-based discrimination; "is characterized by a patriarchal society, where institutionalized gender inequalities are exacerbated by discriminatory customs, particularly

in regards to property rights, marriage, and sexual offences impede access to justice. In addition social, cultural, economic, and legal inequalities have entrenched women's dependence on men" Robb-Jackson (2012:17). Therefore social norms could be a barrier to female's access to justice.

Taken as whole, Robb-Jackson's (2012:18) view is that shame and stigma are barriers that push women towards "reconciliation and mediation, as opposed to judicial legal processes". Furthermore, Robb-Jackson's (2012:18) study revealed that women's "relatives often interfere in the justice process and push for out-of-court settlement, which further compromises women's ability to seek justice. The potential for retaliatory violence and post-traumatic stress also impede access to justice for women who suffer threats, harassment, and physical violence. These gender-based barriers are particularly problematic, as women's reluctance to pursue justice, combined with a lack of economic independence perpetuates a cycle of violence and a culture of impunity for violence against women" (Robb-Jackson, 2012:18).

Van De Meene and Van Rooij (2008:10-11) identify further, gender-specific barriers to justice institutions and to individuals who seek justice either through the formal or informal justice system. Those related to justice institutions are legislation that could be anti-poor and gender-biased, norms expressed in alien, foreign or formalistic language; and lack of enforcement of judgements and decisions. Those related to the individual are negative perceptions of legal institutions and litigation and the social stigma incurred from turning to the law to seek justice. Wojkowska (2006:13) found that formal justice systems could be culturally uncomfortable for rural women and that "going through the formal justice system may lead to more problems for women".

#### **2.4 Access to Justice on the African Continent**

Many African countries exhibit legal pluralism. Access to justice in Africa includes access to traditional justice systems as well as formal and informal systems (Stapleton, 2007:4). Wojkowska (2006:9) describes the formal justice system as one that involves civil and criminal justice driven by the rule of law. It is a state-based, statutory system that includes "institutions and procedures such as the police, prosecution, lawyers, courts and custodial measures". The formal justice system is also called rule of law orthodoxy (Golub, 2003:5). Stapleton (2007:4) explains that the formal justice systems described by Wojkowska (2006:9) were inherited from Africa's colonial past. East and Central African countries inherited English common law and southern African countries such as Zambia and South Africa inherited Roman Dutch law or the codified civil law of westernised nations. According to Van Rooij (2012:293), poor people are believed to distrust formal justice institutions and the law; this often coincides with the perception that achieving justice through this

legal system is difficult or impossible. Stapleton (2007:4) argues that the “lawyer-driven litigation model is simply not a viable option to provide assistance” to impoverished and historically marginalised individuals and communities, either due to the cost or the non-availability of services. Wojkowska (2006:16) observes that, despite formal legal institutions’ efforts to assist the poor accompanied by massive funding, the poor still have difficulty accessing this system, because it is remote, slow, and is still costly, biased, and unreliable. This suggests that indigenous populations in rural communities may avoid Eurocentric justice systems. Kahn-Fogel (2012: 776) notes that “the formal justice system cannot meet all the legal needs of rural people; similarly, informal and traditional justice systems cannot perform the kind of sophisticated work or analysis many clients require from a lawyer, especially in criminal cases”.

Turning to the viability of the formal justice system, Van Ness (2008:102) argues that “it plays an important role in societies” and that it contributes to access to justice and offers a “more efficient process by having professional police, public prosecutors, and a government prison system; at its best, the formal justice system aspires to overall fairness working towards consistency of punishment for similar crimes”. The strength of the formal justice system is its recognition of the need for safeguards to protect those accused of crime (Zehr, 2002:21). Garwe (2007:35) suggests that “in order for the formal justice system to function effectively and to address its limitations, it must be inclusive and involve other actors such as ordinary people, non-governmental organisations (NGOs), and traditional authorities”.

However, the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2007:43) declares that the formal justice system should support “traditional and community-based alternatives to formal criminal processes, because the latter reduce reliance on the police to enforce the law and on incarceration as a means of resolving conflict based on alleged criminal activity and enable disputes to be resolved without acrimony, thereby restoring social cohesion”. Nonetheless, on the one hand, Tamanaha (2011:8) cautions that informal and traditional systems cannot act as substitutes for the formal justice system, as they do not address or enforce state legal norms, and their coercive power is limited. On the other hand, rule of law orthodoxy is designed to inculcate statutory norms, and wield broad and deep power.

Unlike rule of law orthodoxy, traditional justice systems vary widely across local communities in a single nation. According to Stapleton (2007:4), African traditional justice systems are mostly unwritten and are linked to traditional customs and “values passed down from generation to generation as the (customary) law regulating life in traditional communities”. Ndima (2003:334) goes a step further to distinguish customary

law from 'African living law'. Customary law and African living law existed in pre-colonial times although customary law and traditional leaders are said to have been co-opted by colonial and apartheid administrations, with 'official' customary law taken out of its socio-cultural context and traditional leadership shaped to the benefit of colonial and apartheid regimes (Ndima, 2003:334). Without distinguishing African living law from customary law, Nyamu-Musembi (2003:12) concurs with Stapleton that customary laws are largely unwritten, and that customary legal systems vary across African local communities. Nyamu-Musembi (2003:12) refers to the traditional justice system as a community-based justice system (CBJS). Such systems involve a response to "tangible needs that are interwoven with people's livelihood and therefore are grounded and of immediate relevance. They have more room than the rule of law systems to be innovative because while CBJSs draw from community norms (tradition), they can adapt to community needs in response to which they were formed".

Makec (2007:134) is of the view that adaptation (flexibility) and simplicity are the most remarkable features of the traditional justice system. Ubink and Van Rooij (2010:7) concur that flexibility and negotiability facilitate access to justice for members of historically marginalised communities. They refer to such a system as living customary law that governs daily life in a local community and is inherently dynamic. However, unlike Ndima (2003:334) Ubink and Van Rooij do not distinguish between 'official' customary law subject to European influence and African living law experienced prior to, during and post colonialism. At any rate, traditional justice systems have their own shortcomings. Stapleton (2007:4) cautions that traditional justice systems are not a panacea, and that "one should be cautious of romanticizing the picture and harking back to some pre-colonial golden age as has been attempted in some countries, and that they are susceptible to a tendency to maintain a status quo particularly where women and younger persons are concerned". Makec further (2007:133) observes that while the application of "customary law as a justice system parallel to the statutory rule of law is not a new phenomenon in many African states, in some countries it has been treated with contempt as an inferior or subordinate justice system, which serves the needs of backward communities".

The informal justice system is the cornerstone for "accessing justice for the majority of the population in many countries, and recourse to the formal system is only contemplated, if at all, as a last resort". Wojkowska (2006:8) found that the "majority of disputes are resolved at local level; any strategy to extend access to justice needs to take greater account of informal justice systems and actors". A review of the literature reveals that scholars differ on what constitutes an informal justice system and that the context in which such systems are used also differs. Wojkowska (2006:9) argues that some people do not distinguish

between informal and traditional justice systems. In much the same vein, Ntlama and Ndima (2009:12) point out that the informal justice system could be described as traditional, indigenous, customary, restorative or popular justice. Stapleton (2007:4) describes the informal justice system as a non-state system that promotes “access to justice for the poor and rural and disadvantaged people”. Skelton and Sekhonyane (2011:586) describe informal justice systems or non-state justice systems as those that do not rely on or are not linked to the formal justice system.

Wojkowska (2006:9) contends that, the reason for the lack of a uniform description of informal justice systems is that in many countries customary law is recognised and “regulated by the state either by law, regulation or by jurisprudence, and is therefore semi-formal”. Phoya (2007:32) regards customary law that is recognised and regulated and formally applied at village or community level as state law, which is the case in Malawi. The recognition of customary law as state law therefore collapses the distinction between the two systems. Weilenman (2007:88) observes that the systems are distinct even “though legal pluralism is a common feature within the structures of official state law. As such, questions of informality are often merely questions of perspective”. Weilenman adds that oral traditions do not always imply informality and that for those living in rural areas it is the informal law that may have the “smell of formality”. Weilenman (2007:89) concludes that “instead of advancing one set of laws over another”, all justice systems should be recognised for the unique role they play in different communities.

Informal justice systems are not without problems. Kane, Oloka-Onyango and Tejan-Cole (2005:11) point out that the danger of both informal justice systems and traditional justice systems is unsupervised work and inconsistency in dispensing justice. Wojkowska and Cunningham (2010:98) add that the outcomes of informal or traditional justice cases “may be decided in contravention of human rights standards. Another problem is limited funding for informal justice systems since most assistance and resources are channelled to what is referred to as the ‘rule of law’ approach” (Wojkowska 2006:12).

Stapleton (2007:6) observes that, in reality, formal, traditional and informal justice systems operate side by side in many African countries and people in rural areas can choose which to use. Stapleton’s (2007:6) view is “that traditional and informal justice systems should be given greater recognition” especially in Africa’s rural areas because the Eurocentric justice system is not meeting the justice needs of all. It is worth noting that legal pluralism is not limited to African countries. Traditional and informal justice systems that pre-date colonialism continue to exist in countries with indigenous rural populations like India and the Philippines (Asia), Brazil and Argentina (South America), and Australia and New Zealand. An example is the ancient Indian practice of *panchayats* that is used as a form of dispute resolution in local communities. Continued



use of *panchayats* in pursuit of democracy, de-centralisation and gender empowerment is well documented (Bryld, 2001:149; Buch, 2012:1; Dutam, 2014:32).

## **2.5 Access to Justice in the Republic of South Africa**

In common with African and other countries with indigenous rural populations, legal pluralism exists in South Africa. McQuoid-Mason (2011:171) explains that access to justice in the South African context is two-pronged. The first is access to the socio-economic rights guaranteed in the Constitution (RSA, 1996), such as property, housing, health care, water, food, welfare, education, and social security. The second is access to legal advice and legal services. The application of multiple justice systems and the way in which each system works in South Africa is discussed in sections 2.6 to 2.9. For rule of law orthodoxy, emphasis is placed on the Domestic Violence Act (DVA) (No. 116 of 1998) since this study is concerned with the role of CBPs in handling domestic violence cases. Given CBPs' interaction with the traditional justice system, this system is discussed in detail. Less emphasis is placed on the informal justice system as the following chapter is devoted to community restorative justice as an informal justice system. As noted earlier, brief mention is made of African living law in order to acknowledge its continued existence in locales such as mountainous hinterlands in rural KwaZulu-Natal (KZN).

## **2.6 The Formal Justice System in South Africa**

In common with other southern African countries, South Africa inherited Roman Dutch law or codified civil law from the west. Access to justice in South Africa post-1994 has its foundation in the Constitution of the Republic of South Africa, Act 108 of 1996 (RSA, 1996) and Chapter Nine Institutions - state institutions that support constitutional democracy that were established to uphold human rights in the country. South Africa has also signed and ratified several international and regional treaties that promote access to justice, including the United Nations Convention on the Elimination of all Forms of Discrimination against Women (UN, 1979) and is therefore committed to putting measures in place to eliminate violence against women.

Poverty and negative perceptions may be barriers to poor people accessing the formal justice system. According to South African Deputy Minister of Justice, John Jeffrey, "poverty continues to hamper people from exercising their right to access to justice and courts remain a very hostile, traumatic experience for many people; this discourages many from using these forums to advance their rights or settle disputes. This is not healthy in a democratic society" (*New Age*, Wednesday 16 October 2013. Edition: S1-National (01)). Jeffrey notes elsewhere that litigation is out of the reach of most poor and middle class South Africans; "it

will cost a domestic worker two days wages for just 15 minutes of lawyer's time" (*Sunday Times Newspaper* 20 October 2013).

Accessing justice in South Africa presents problems due to "gross socio-economic inequalities and the remoteness of the law from most people's lives" (Dugard, 2006:266), this includes physical access to lawyers and the courts. The apartheid system created challenges for poor people in remote areas to access lawyers as well as courts, since they are located in towns and cities; transport costs and road infrastructure are still a challenge for people living in these areas (SA Justice Sector and the Rule of Law, 2005:115).

To facilitate access to the formal justice system by the poor, the South African government, with the support of the legal profession, implements *Judi care* and *pro bono* programmes. McQuoid-Mason (2007:97-116) explains that, through "*Judi care*, cases that qualify for state assistance are referred to private practitioners who are paid by the state. This worked well when there were few cases and the "Legal Aid Board had sufficient resources to handle them administratively". However, Cappelletti (1992:29) cites examples from France and Italy to show that such legal aid programmes fall short of efficiency and are not a positive step in solving the "problem of poor people's access to justice". Cappelletti (1992:29) further argues that, "the charity of the legal profession in a free-market society, implied forced labour for those burdened with it and in France with only the young and inexperienced lawyers expected to fulfil the honorific duty as a part of their training" it is ineffective. In Italy, legal aid was disliked, and "only one percent of the parties was able to enjoy such service" (Cappelletti, 1992:29). Jeffrey notes that, in South Africa, lawyers are more interested in making money than providing quality services to the rural poor (*Sunday Times Newspaper* 20 October 2013).

The *pro bono* scheme may result in poor quality representation, as lawyers do not regard these cases as important (McQuoid-Mason 2007:101; Walsh 2010:16). Furthermore, Cappelletti (1992:29) observes that, "quite often the legal problems of the poor present special features of which the private lawyer might have no experience at all. Special courses on poverty law had to be introduced in the curricula of many law schools in the US".

Recognising that the *Judi care* and *pro bono* models are having limited impact and are therefore unsuccessful in delivering justice to the poor, the South African government established Justice Centres through the South African Legal Aid Board, which incorporate public defenders and legal aid officers. McQuoid-Mason (2007:103) point out that paralegals are also employed at these centres to "assist with the initial screening of

clients and private lawyers are used if the justice centre cannot handle a case and that the justice centres model works well in larger cities and towns, but not in rural areas where there is insufficient work to justify lawyers expenses". State-funded public defenders are not public servants; the Legal Aid Board pays them as full-time lawyers. Cappelletti (1992:30) notes that, limited legal services are offered by private lawyers and they are often unable to offer counselling and education, which is necessary if they are to reach the poor. Some public interest law firms in South Africa receive funding from foreign donors to provide services to poor people.

Finally, Cappelletti (1992:38) contends that it is important to pay attention to the problems, needs, and aspirations of the poor as well as the economic, cultural, psychological, linguistic and racial obstacles which so often make it difficult or impossible for the poor to access the formal justice system. In South Africa, a visit to court is expensive and transport is a problem. In some rural areas there is one bus in the morning to town and it returns in the afternoon. The language barrier is also a problem as English and Afrikaans are usually used in court. Crucial information is frequently lost in translation. Cultural barriers, especially for rural poor people, are a major impediment in accessing justice through the courts of law; remedies do not meet their needs and further alienate them from accessing justice (Hargovan, 2010:29). The apartheid legacy has not been eradicated; much remains to be done.

The discussion now turns to this rule of law.

## **2.6.1 Domestic violence and the rule of law orthodoxy in South Africa**

As noted above, access to justice is affected by various factors, including poverty, the remoteness of some rural areas, non-affordability of legal services and support and language and cultural barriers (Hargovan, 2010:29). This section considers various provision of the DVA (No. 116 of 1998).

### **2.6.1.1 Legal provisions relating to domestic violence**

Domestic violence affects women around the world regardless of race, religion, tradition, or status. Many programmes and approaches have been developed to address this problem and the cost of managing this scourge is astronomical. Domestic violence is discussed below, in subsequent chapters on community restorative justice and community-based paralegals, in case study chapters 6 – 9, in cross-case data analysis in Chapter 10, and in Chapter 11.

South Africa's democratic government promulgated several new laws and adopted new policies to address domestic violence after recognising that the Prevention of Family Violence Act No133 of 1993 (RSA, 1993)

was an ineffective remedy for victims of domestic violence. The National Crime Prevention Strategy (NCPS) of 1996 was the “first key document to guide the state’s initial response to violence against women” (Abrahams, Martin and Vetten, 2004:54). It identified domestic violence as a national priority and recognised “that gender inequality is one of a cluster of factors giving rise to this crime. The National Rape Prevention Strategy was initiated in March 2000 after Cabinet directed the Ministers of Health and Safety and Security to develop a strategy to reduce rape”. According to Abrahams, *et al* (2004:56) the five-year “National Strategy for Transforming the Administration of Justice and State Legal Affairs of 1997 (RSA, 1977), also known as Justice Vision 2000 aimed to achieve a justice system that is responsive to the needs of victims of crime, including vulnerable groups such as women and children”.

#### **2.6.1.2 Domestic Violence Act (No. 116 of 1998)**

The DVA (or the Act) (No 116 of 1998) (RSA, 1998a) has been in operation for more than fifteen years. It came about as a result of lobbying by women’s rights activists and anti-violence advocates who succeeded in putting violence against women on the government’s political agenda. The Prevention of Family Violence Act 133 of 1993 (RSA, 1933) was the first attempt by the South African legislature to deal specifically with domestic violence. The National Party, that hoped to lure women voters in the first democratic elections, passed this Act. According to Hunter (2006:59), the protection this Act offered to women and its scope were considered insufficient by many women’s groups. It was restricted to people who were married or in common law marriages and thus excluded dating couples, same sex partners, etc. (Parenzee, Artz, & Moul, 2001:2). The DVA was implemented on 15 December 1999. It was the first piece of legislation to provide a definition of domestic violence in South African law. The legislature recognised the seriousness and high prevalence of domestic violence in South African society and noted that domestic violence takes many forms and that acts of violence are committed in a wide range of domestic relationships.

South Africa’s Constitution (RSA, 1996a), especially the right to equality and to freedom and security of the person, has been used to frame domestic violence as an abuse of human rights (Hunter, 2006:66). The DVA No 116 of 1998 (RSA, 1998a) was therefore framed to provide the maximum protection to those most vulnerable to this form of abuse. It introduced obligations on the part of relevant government institutions to effectively implement the provisions of the DVA.

#### **2.6.1.3 Part One Sections 1 and 2 of the Domestic Violence Act**

The DVA defines a ‘domestic relationship’ as a relationship between a victim and an offender who are married to each other according to any law, custom or religion; same-sex relationships; persons who live or

have lived together but not in marriage; those who are (or were) in an engagement, dating or customary relationship, including an actual or perceived romantic relationship, a sexual relationship, parents of a child, and people who share or have recently shared the same residence.

The DVA sets out a broad range of actions that constitute acts of domestic violence including:

- Physical abuse – any act of physical violence, and any threatened act of physical violence.
- Sexual abuse – any conduct that abuses, humiliates, degrades or violates the sexual integrity of the complainant.
- Verbal, emotional and psychological abuse – repeated insults, ridicule or name calling, and obsessive, possessive or jealous behaviour that is a serious invasion of the victim’s privacy, freedom or security.
- Economic abuse – unreasonably depriving a victim of economic or financial resources that the victim has a right to in law, needs and must have, and depriving a victim of household necessities, mortgage bond repayments or payment of rent if the parties are living together. According to Bonthuys (2014:111) the DVA is a step in the right direction in going beyond physical violence to include economic abuse in its definition of domestic violence.
- Stalking, intimidation, harassment, damage to property, and entry into the complainant’s residence without consent, as well as other forms of controlling behaviour which may cause harm to the safety, health or wellbeing of the complainant.

The DVA imposes obligations on law enforcement agencies whose duty it is to uphold the law and administer justice in accordance with the law. Police officers must assist a victim of domestic violence in any way that the victim requires. This includes helping to make arrangements to find a safe place to stay; and obtaining medical treatment. They must assist, while domestic violence is happening, or as soon as possible after the domestic violence occurred or when it is reported. They must provide a notice that sets out the rights of a victim in the official language of the victim’s choice. The explanation must include the remedies available to the victim in terms of the DVA, including laying a criminal charge if applicable.

#### 2.6.1.4 **Part Two Sections 3, 4, 5, 6, 7, 8 of the Domestic Violence Act**

In terms of the Criminal Procedure Act No 51 of 1977 (RSA,1977) Sec 40 (1) (q) (as amended by Sec 41 of Act 129 of 1993 and Sec 4 of Act 18 of 1996) (as added by Sec 20 of the DVA No 116 of 1998), a police officer may arrest an offender without a warrant at the place where an act of domestic violence has been

committed if he or she reasonably suspects that an offence has been committed which has an element of violence against the victim. The DVA provides for Protection Orders (PO) to be issued. This is a judicial measure to protect victims (mainly women) from harm. The judicial measures provided by the Act are intended to give victims swift and effective protection. Protection Orders should be obtainable and readily available from magistrates' courts. Notwithstanding the provisions of any other law, any person may apply for a PO on behalf of the victim with the victim's written consent if the person has a material interest in the victim's wellbeing. Persons who may bring an application include a counsellor, a health service provider, member of the South African Police Service (SAPS), a social worker or a teacher. The application may be made outside working hours, if the court is satisfied that the victim may suffer hardship if the application is not dealt with immediately.

A victim only needs to submit an affidavit, along with medical evidence in the case of physical violence, to the clerk of the court. Based on the affidavit, the magistrate will then issue an Interim Protection Order (IPO) to the victim. An IPO has no effect until it has been served on the offender. The alleged offender is given a court date to state his/her case and show cause why the IPO should not be made final. If the offender does not respond and the court is satisfied that proper service of the IPO or the prescribed notice was given to the respondent, the court must issue a PO.

When the court issues a PO, it remains in force until the court sets it aside. The court may include a prohibition on the offender committing acts of domestic violence, entering a residence (home) shared by the victim and the offender; order the offender to pay rent or make mortgage payments owed; seize any arms or dangerous weapons in the possession, or under the control of the offender, or pay emergency monetary relief to the victim. The order of monetary relief has the effect of a civil judgment of a magistrate's court. In the case of other remedies available to the victim, in the interests of justice, the court will make any provision part of the PO in order for the person concerned to be able to seek relief/enforce rights in terms of the relevant law; this includes the Maintenance Act No 99 of 1998 (RSA,1998b).

#### **2.6.1.5 Part Three Sections 9 and 11 of the Domestic Violence Act**

In terms of the DVA, the court must order the police to seize any dangerous weapons in the possession of the offender, if it is satisfied that the offender has threatened to kill or injure him or herself or threatened to injure any person in a domestic relationship with the offender; or remove a dangerous weapon as a result of

the offender's state of mind, inclination to violence, or use of or dependence on liquor or drugs. The SAPS National Commissioner may declare the offender unfit to possess any firearms.

Those allowed to attend the proceedings include officers of the court, the parties to the proceedings, the person making the application for a PO on behalf of the victim, witnesses, persons providing support to both the victim and the offender (relatives, friends, counsellors) and any persons the law allows to be present. The court has the power to exclude any person as well as hold the proceedings in camera.

#### **2.6.1.6 Part Four Section 10 of the Domestic Violence Act**

A victim and an offender may apply in writing to have a PO set aside. If the court is satisfied that the victim has shown good reason for setting aside the PO and that the application has been made freely, such an order may be granted.

#### **2.6.1.7 Part Five Section 18 of the Domestic Violence Act**

The prosecutor is not permitted to refuse to institute a prosecution, unless authorised by the Director of Public Prosecutions (the legislature used the imperative word "shall"; this means that it must be done; there is no choice).

In terms of the DVA, the SAPS National Commissioner must issue instructions to all SAPS members to carry out their duties in terms of the Act. Failure to do so constitutes misconduct in terms of the Police Service Act No 68 of 1995 (RSA, 1995). The Independent Complaints Directorate (ICD) must be informed of any misconduct by any member of the SAPS, and disciplinary proceedings must be instituted. In terms of Section 18 (5) (c), the ICD must submit a six-monthly report to parliament reporting the number and nature of complaints of misconduct by SAPS reported to the ICD, and their recommendations regarding such misconduct. Section 18(5) (d) states that, the SAPS National Commissioner is required to submit six-monthly reports to parliament detailing the number and nature of complaints against the police for failing to adhere to their statutory obligations, the disciplinary proceedings instituted, and the steps taken as a result of the ICD's recommendations.

#### **2.6.1.8 Part Six Sections 12, 13, 14, 15, and 16, 17, 19, 21**

Any magistrate's court throughout the Republic of South Africa has jurisdiction to enforce a PO. The clerk of the court, the sheriff or a police officer serve documents in terms of the DVA. A legal representative may represent any party to the proceedings. The court may make an order as to costs, if it is satisfied that that one

party has not given the action serious attention, or for bringing an action in court without sufficient reason, in order to cause trouble for the offender. When a civil case, such as an application for a PO, is heard for the first time in a magistrate's court, any party to the proceedings may take the case on appeal to a provincial division of the High Court, in the area of jurisdiction of the magistrate's court. The appeal is governed by the provisions of the Magistrate's Court Act No 32 of 1944 (RSA, 1944) and the Supreme Court Act No 59 of 1959 (RSA, 1959). However the initial proceedings do not necessarily require a legal representative, and they are never heard in the High Court.

According to the DVA a warrant of arrest is issued simultaneously with the PO, and it is implemented if the victim reports that the offender has breached any provision of the order. "If the offender is found guilty of such contravention, the court may sentence him or her to a fine or a term of imprisonment. The DVA criminalizes the breach of an order; it does not create an offence of domestic violence. Where the offender commits an act that is recognised by the law as a criminal offence, a victim can report the case to the police, and it may proceed to criminal trial".

The DVA was framed to provide the maximum protection to those most vulnerable to this form of abuse. The issue is whether the Act is providing access to justice for victims of domestic violence, and whether women use it for protection against such violence (Pareeze et al, 2001:110). Van Wormer (2009:114) points out that there is "widespread dissatisfaction by battered women with the criminal justice system" and that this offers an opportunity to consider alternatives in the form of other justice systems operating in South Africa, and other approaches to deal with domestic violence such as restorative justice. The following section examines the traditional justice system in South Africa.

## **2.7 The Traditional Justice System in South Africa**

In the traditional justice system, customary law is applied by traditional leaders who adjudicate matters brought before traditional courts. The traditional justice system is defined in the proposed Traditional Courts Bill [B1-2012] (TCB) as a system of law that is based on customary law and customs. As described in the Recognition of Customary Marriages Act, 120 of 1998, (RSA, 1998c) customary law refers to the "customs and usages traditionally observed among the indigenous African peoples of South Africa" (Vorster, 2001:54). According to Williams and Klusener (2013:276), the traditional justice system has played an important role in providing accessible and affordable dispute resolution and justice to rural people in South Africa.



### **2.7.1 The historical background: The application of the traditional justice system in South Africa**

In discussing the traditional justice system applicable in South Africa today, it is important to briefly examine the history of this system and customary law.

Ntlama and Ndima (2009:10) observe that, in order to advance their agenda, the colonialists manufactured the traditional justice system that is applied today in South Africa. According to Ntlama and Ndima, during the colonial and apartheid eras, African *Inkosi* or headman applied indigenous traditional laws and customs, subject to revision by colonial officials in their tribal courts. Ndima (2003:333) submits that the colonists mixed acceptable portions of customary law with common law to create a traditional justice system that complied with western notions of justice and morality. Ndima (2003:334) adds that the African traditional justice system that existed prior to colonial times was “pruned of its essence in an official bid to rid it of those aspects of indigenous tradition that were viewed as repugnant to Christian and Western values”. In 1927 the colonial authority formalised this by introducing the Black Administration Act, 38 of 1927 (BAA) (RSA 1927) that enabled ‘official’ customary law to be applied in a separate “system of courts for African people”. The Act stated that where western and indigenous law clashed, the former would prevail, thus eroding traditional law (Ndima, 2003:332; Skelton, 2011:476).

This distortion of the traditional justice system led to various versions of the system. According to Curran and Bonthuys (2004:4), there are three versions of traditional law. The first is applied in courts, while the second appears in academic textbooks, and the third is “living traditional law, which is fluid and reflects the actual practices of traditional communities”. Ndima (2003:344) speaks of two versions pre-1994, the official version and the unofficial one known as the living African traditional justice system. Ndima (2003:334) argues that the official version has been historically restricted to the legal fraternity and a few individuals who have been affected by litigation. Ndima explains that this version never reached the actual people who lived and continue to live according to custom that evolved over centuries. Herbst and Du Plessis (2008:4) point out that this official version was applicable only if it was not in conflict with so-called natural justice or public policy while Williams and Klusener (2013:278) maintain that the official version of traditional justice “has been tainted by its interaction with the colonial and apartheid legal systems”.

Kahn-Fogel (2012: 767) concurs with Ndima’s historical account and adds that this did not only happen in South Africa but in other African countries such as Zambia where the formal justice system is pluralistic with statutory, authorised local courts administering traditional law, subject to review by courts using western legal principles that will only overturn traditional law if it is repugnant to so-called natural justice,

equity or good conscience. Ndulo (2011:97) notes that subjecting traditional courts to review by formal courts led “to what is termed the bastardization of the African traditional courts”. As Skelton (2011:476) explains, traditional justice systems have been contaminated as modern African states grapple with how to harmonise these systems with the statutory and common law legal framework. Komane (2013:68) concurs that African countries are struggling to preserve the value of traditional courts; this is evident in Tanzania, Zambia, Zimbabwe, Mozambique and Ghana. Kahn-Fogel (2012: 772) observes that Zambia is struggling to strike a balance between traditional norms that preserve cultural heritage and social harmony and western legal principles that often conflict with those norms. Ndima (2003:341) concludes that no amount of purification can leave traditional justice completely free of the influences of the apartheid and colonial past; neither is it “desirable to undertake such a task as the impact of these influences reveals our historical reality. What can and should be removed, are the numerous discriminatory and degrading instruments permeating the official version of traditional justice”.

#### 2.7.1.1 **The codification of the traditional justice system post-1994**

Post-1994 the Constitution of the Republic of South Africa included the African traditional justice system as an integral part of the general body of South African law (Ndima, 2003:340). Traditional justice is recognised in terms of section 211(1) of the Constitution of the Republic of South Africa, Act 108 of 1996 (RSA, 1996) (Vorster, 2001:53). The Constitution “has played a major role in the development of traditional justice post-1994” (Herbst and Du Plessis, 2008:12). For some scholars, this development amounts to interference with the cultural heritage of indigenous people, as it alters traditional justice in line with constitutional precepts (Sloth-Nielson and Mwambene, 2010:43). Sloth-Nielson and Mwambene (2010:32, 38) complain that the development of traditional justice in terms of the Constitution is ambiguous at best and reduces the status of the traditional justice system. They add that, “such development of the traditional justice system should have been left to communities who clearly have a right to adjust their customary law practice”.

In contrast, Ntlama and Ndima (2009:14) regard constitutional development as a positive step aimed at recognising the traditional justice system and imposing increased responsibility on traditional leadership “to take due care and diligence in the application and development of customary law, in line with the prescripts of the Bill of Rights”. In addition, the authors continue, “the Traditional Leadership and Governance Framework Act, 41 of 2003 (TLGFA) requires the state to respect, protect, and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa and in line with section (7) of the Constitution”.

As early as 1998 discussions ensued in the National Assembly about drafting a bill to address traditional courts in replacement of sections 12 and 20 of the BAA 38 of 1927 and to bring traditional courts in line with the provisions of the Constitution (Komane, 2013:67, Buthelezi and Thipe, 2014:197). The TCB recognised chiefs appointed before 1994 as senior traditional leaders and aimed to integrate traditional courts into the formal justice system and provide a framework for the effective operation of the traditional justice system (Buthelezi and Thipe, 2014:197, Ntlama and Ndima, 2009:17).

According to Buthelezi and Thipe (2014:196), the TCB has been described as an unconstitutional piece of legislation that perpetuates colonial and apartheid distortions of the traditional justice system and undermines the rights and increases the vulnerability of those governed by this system. Gasa (2011:23) accuses the TCB of failing to address the complex area of traditional justice and of falling “into the same trap as colonial and apartheid sensibilities, boundaries and definitions”. In contrast, Ntlama and Ndima (2009:16) were of the view that the TCB could potentially advance access to justice in South Africa. The recognition of the valuable role played by the traditional courts is an important step towards this goal. Simojoki (2011:47) warns that the “codification and harmonisation of the legal system present particular challenges, especially in revising customary law to align it with formal legislation or international standards”.

The TCB has since been shelved and the courts continue to operate as before (Bennett (2011:1053). According to Buthelezi and Thipe (2014:204), allowing the TCB to lapse “rather than withdrawing it from Parliament politically allows for protection against the admission of the outright defeat of the TCB”. The unofficial or informal justice system administered by CBPs, which is the subject of this study, and the African living justice system operate in South Africa. This demonstrates the existence of multiple legal orders in the country. Chopra and Isser (2012:353) suggest that multiple legal orders potentially promote access to justice as they can be used to contest one another. The discussion that follows centres on the official version of the traditional justice system as discussed in the literature. However, Keevey (2009: 23) notes that the fact “that African law is unwritten does not mean that it is unknown or no longer practiced”. African living law is briefly discussed but it is not a focus of this study.

#### **2.7.1.2 Features of the traditional justice system**

Curran and Bonthuys (2004:4) note that it is difficult to trace the ideals and principles of the traditional justice system and traditional law in particular because it is unwritten. Curran and Bonthuys argue that the “main source of information on indigenous African law before colonisation is oral tradition”. Simojoki (2011:47) adds that, unwritten law is more flexible and dynamic and allows for local variations, “whereas

legislation is based on static, written codes that are universally applicable". Curran and Bonthuys (2004:4) observe that this could be taken to mean that oral customs "have a remarkable ability to allow forgotten rules to sink into oblivion, while simultaneously accepting new rules to take their place".

Ntlama and Ndima (2009:8) identify five features of the traditional justice system. Firstly, traditional law rests "not on the will of sovereign or supreme legislature for its validity but rather on its acceptance by the community whose affairs it regulated". Secondly, "in order to be valid and enforceable [traditional law] must be in existence at the relevant time it is sought to be enforced". Thirdly, traditional law is flexible. Fourth, sanctions and punishment are not "strictly institutionalised". Finally, the rules of traditional law are unwritten. Kane, Oloka-Onyango, and Tejan-Cole (2005:3) note that traditional justice "systems have many valuable features. They are flexible; they evolve as communities evolve and provide communities with a sense of ownership; and their proceedings are easily understood by users". Speaking the same language as the presiding officer is an advantage of traditional courts; this empowers the parties to present their stories in their own language (Kane *et al*, 2005:10). According to Ntlama and Ndima (2009:18), language is a critical feature of the traditional justice system; "the language used in customary courts is the language of all the parties and officers involved in the matter, as opposed to the proceedings in formal courts where English is used when it is not necessarily understood by the majority of South Africans".

The distortion of the traditional justice system also resulted in confusion regarding the correct terminology and categorisation of traditional justice systems. Some refer to traditional justice systems as customary justice systems; while others term them informal justice systems, or non-state justice systems (Wojkowska and Cunningham, 2010:95). The same applies to the laws applied by traditional justice systems. These are referred to as Bantu law, native's law, African law, customary law, living customary law, and indigenous law (Keevey, 2009:25). In South Africa it was suggested in the TCB that courts be called traditional courts and not customary courts. However, the TCB did not specifically indicate which terminology the traditional court would use to describe the law that would be applied. Again, Wojkowska (2006:20) cautions that traditional "justice systems are no panacea. She states that despite such systems being widely viewed by many communities as the most likely way of achieving an outcome that satisfies their sense of justice, there are situations in which it falls well short of realising that ideal".

The discussion now shifts from the historical background to the implementation of the traditional justice system.

## **2.7.2 The structure and functioning of the traditional justice system in South Africa**

### **2.7.2.1 Traditional courts**

A traditional court is defined in the TCB “as a court established as part of the traditional justice system, which functions in terms of customary law and custom”. Mnisi-Weeks (2012:142) points out that the TCB proposes moving away from referring to indigenous courts as customary courts and calling them traditional courts. Ntlama and Ndima (2009:20) argue that traditional courts derive their legitimacy from South African culture and tradition. People in rural areas refer to these court as “*ikantolo ye Inkosi*” meaning the chief’s court. The TCB proposes that that the court will be referred to in isiZulu as “*inKantolo yeNdabuko*”. Tamanaha (2011:7) explains that traditional courts are of the community, and are closer in both derivation and proximity and hence more accessible to community members. Ubink and Van Rooij (2010:3) and Makec (2007: 134) observe that traditional courts are accessible as community members “do not have to travel long distances to court”.

Vorster (2001:53) notes that traditional courts are open to all adults when the community at large is involved. Skelton (2007:238) points out that, children are not encouraged to attend traditional court processes. Makec (2007:135) explains that the purpose of open courts is to ensure that justice is seen to be done. According to Moulton (2005:21), not everyone is comfortable with the public nature of the traditional court. Some people are uncomfortable talking about their issues in public. However, Moulton (2005:21) notes that the traditional justice system is flexible and some *Induna* are sensitive to the need for privacy; in some cases the court is cleared of all but the parties and presiding officers. Such flexibility enables *Izinduna* to accommodate requests for privacy on a case-by-case basis. Tamanaha (2011:7) similarly observes that the fact that traditional courts are of the community does not mean that they are for the entire community; nor is it always the case that everyone in the community is comfortable and respects the court. Taking cases to the traditional court is not expensive. Ubink and Van Rooij (2010:3) contend that this is the strength of these traditional courts.

According to Curran and Bonthuys (2004:2), 1 500 traditional courts currently operate in South Africa. Ntlama and Ndima (2009:20) note that the TCB did not provide for a hierarchical structure but created single level courts, to be presided over by either the Headman, or the senior traditional leader or queen/king. Ndima and Ntlama further argue that the TCB contradicted itself in that one of its objectives was to strengthen the institution of traditional leadership. Yet it failed to “acknowledge levels of seniority – an integral part of the traditional leadership system. This is a structural defect because of the flow of cases from the court of the headman, through to the *Inkosi*’s court or ultimately to the court of the King” (Ntlama and Ndima, 2009:20) .

The University of Cape Town's Race and Gender Research Unit (2011:2) raised a similar concern that only the *Inkosi's* courts were recognised by the TCB, "yet it is well known that the traditional courts that do the bulk of the work are the headman's courts".

Gasa (2011:28) questions the rationale behind the proposal for a single layer of courts and asks: "does restoring the dignity of traditional justice system and affirmation of African cultural system mean that South Africa must introduce traditional courts with such sweeping powers? Does having a single layer of traditional courts actually make justice more accessible to the poor?" Despite these shortcomings, Ntlama and Ndima (2009:17) welcome the "TCB's recognition of the valuable role played by traditional courts rooted in traditional communities and argue that this is an important step in promoting access to justice".

#### 2.7.2.2 Presiding officers of the traditional court

Bennett (2011:1053) notes that, traditional leaders continue to cater for people from rural areas as the formal courts are beyond the reach of most litigants, due to their alien procedures and language and high costs. The TCB refers to traditional leaders as the traditional council which is recognised "under section 3 of the Traditional Leadership and Governance Framework Act" (TLGF), 2003 (Act, 41 of 2003). The traditional court councils established in accordance with this Act (6) s 3 (2)(b), include women as elected representatives.

##### 2.7.2.2.1 Composition of the traditional council

Mnisi-Weeks (2012:142) explains that the TCB identifies traditional courts to be "presided over by a king, or queen, senior traditional leader, headman or headwoman or a member of a royal family, who has been designated as a presiding officer of a traditional court by the minister in terms of section 4 of the TCB". This includes a forum of community elders who are knowledgeable in customary law and meet to resolve disputes in ten different languages. Mnisi-Weeks (2012:142) argues that the TCB's failure to address the composition of this council means that power is centred on one person; the TCB gives an individual the power to single-handedly make customary law "on a case-by-case basis". The TCB leaves it to the presiding officer to determine his/her role, excluding others from the process. Section 3(2)(b) of the TLGF Act "requires that at least a third of members of the traditional council be women" (Williams and Klusener, 2013:281). The TCB "does not provide for members of the traditional council to be appointed presiding officers". In addition, the TCB does not guarantee women's participation in traditional courts, either through self-representation or as decision-making council members (University of Cape Town's Race and Gender Research Unit, 2011:1). These factors potentially exclude women (Mnisi-Weeks 2012:142).

Yet it is noteworthy that queens and headwomen may be presiding officers of traditional courts according to the proposed TCB. While the TCB is said to downplay rights of women, there is evidence of women leaders in traditional justice systems and political arenas of ancient Africa (Becker, 2006:34; Nzegwu, 2012:15). Both Becker's (2006:34) study in Namibia and Nzegwu's (2012:15) study in Nigeria reveal that pre-colonial African societies were organised differently than western societies. Unlike western societies where women were perceived as inferior to men, which gave rise to the feminist movement in the west, ancient African societies revolved around complementarity of male and female roles in society. In pre-colonial Namibia men and women were seen as "inhabitants of different spheres in a complementary social duality" (Becker, 2006:34). This feature carried over to the original traditional justice system. Similarly, Nzegwu (2012:15) found that among Ibo men and women, a "dual-sex political system was underpinned by egalitarian ideas on which citizenship rested". Based upon her study of Owambo polities in Namibia, Ubink (2011:55) found that colonisation and western missionaries contributed to the demise of the complementarity of male and female social, political and economic roles in pre-colonial Namibia so as normalise exclusion of women's rights from traditional rule. Respondents in Ubink's (2011:65) study perceived a difference in traditional courts presided over by headmen and headwomen. On the one hand women "were significantly more positive about traditional court proceedings in female-headed villages" and perceived "equal division of powers among the sexes". On the other hand, men "were slightly more positive about traditional courts in male-headed villages, but indicated that they spoke up more easily in courts in female-headed villages" (p. 65).

There are a number of distinctions between western courts and traditional courts. McQuoid-Mason (2013:573) argues that, while presiding officers of traditional courts "are required to operate within the constraints of the Constitution, the western concept of judicial independence and impartiality does not apply because there is no separation of powers between the judicial, executive and legislative powers of chiefs". Ndima (2003:330) explains that the reason why traditional judicial matters in South Africa do not have similar boundaries as western systems, is because the "pursuit of communal collective and social solidarity was central to their existence". Ndima adds that, in African societies, traditional leaders' participation in all three organs of state never raised concerns about a possible lack of judicial independence and impartiality; this was done in the interests of the common good. The concern around judicial impartiality is due to the elitist nature of the western adjudicatory system in which members of the public do not participate in judicial proceedings (Ndima, 2003:330). In contrast, Mnisi-Weeks (2012:142) believes, that allowing a person who makes the law to also apply it judicially, in addition to potentially administering or executing it, is controversial and is likely in breach of the separation of powers required by the Constitution. To Gasa (2011:28) the TCB is only "concerned with affirming the power, status and standing of traditional leaders".

The TCB requires the presiding officer to swear an oath of office before a magistrate. Section 15 states that “a traditional leader who has been designated as a presiding officer of a traditional court must, subject to section 23(3)(a)(ii) or 23(3)(b)(ii) take the prescribed oath or make the prescribed affirmation that he or she will uphold and protect the Constitution before the magistrate’s court before he or she may perform any of the functions contemplated by the TCB”. Ntlama and Ndima (2009:20) argue that this provision diminishes the authority of traditional leadership. They add that it “impedes the autonomous development of customary law and makes it subject to validation by the prescripts of an outside system. It also appears to affirm the perception of the superiority of common law over customary law”.

#### 2.7.2.2.2 Similarities with other African countries

Sudan and Burundi provide further examples of countries with plural legal systems. Makec (2007:136) notes that in Sudan, the council of elders “is an informal body that assists the chief in public and judicial matters. It sits as a form of court or as arbitrators to hear the parties and their witnesses and ultimately make a decision. They render their services free in the public interest”. Makec (2007:136) observes that, due to the unrest in Sudan many people moved from the rural areas and “settled in the suburbs of Khartoum and other cities”. They experienced “many legal disputes or offences affecting their family relations. However, they have no courts of their own to try these cases according to customary law. The provincial courts were given jurisdiction to settle such cases, but the presiding officers did not always have knowledge of customary law; therefore they made use of the services of the council of the elders. Makec is of the view that recognition of the council will result in fair administration of justice under circumstances where the parties are not represented by lawyers”. Similar to South Africa and in contrast to the “adversarial system, where a judge is a mere referee and therefore does not take part in the judicial contest between the parties, a traditional court applying customary law plays a dual role” (Makec, 2007:134). The council of elders “plays the role of investigator to elicit the necessary evidence based on true facts. The desire to bring about conciliation or reach a compromise between the parties brings the court more in line with a mediation or arbitration system”.

Dexter and Ntahombaye (2005:13) note that in Burundi the council is called “Bashingantahe”. While in principle its services are free, once “the case had been settled, the parties offer bananas or sorghum beer to the council and everyone shares the drink. This is done as a sign of gratitude towards the council” and to celebrate and seal a newly-restored relationship. The role of *Bashingantahe* is “multidimensional, having a role in judicial, moral and cultural, as well as social and political affairs” and its decisions are based on customary law. Dexter and Ntahombaye (2005:11) explain that in Burundi the “king, the chief and the sub-



chief all hold political, legislative and judicial powers. Each of these authorities has the council to advise them and to provide checks and balances. The king's judgement is not subject to appeal". Young people are encouraged to be members of the council: "the candidate will be observed by members of his community over a period of years, and his character would be tested. His use of the language and overall self-control are outward signs of his worthiness. He would undergo a gradual integration into the judicial functions of *bashingantahe*" (Dexter and Ntahombaye, 2005:12). Not unlike the situation in South Africa, women in Burundi are "excluded from being invested in their own right; they are invested with their husbands as '*bapfasoni*', meaning a person of wisdom and integrity, but women do not have the right to deliberate with men nor render judgement" (Dexter and Ntahombaye, 2005:10).

### 2.7.2.3 Weaknesses of the traditional court and the traditional council

Tamanaha (2011:7) cautions that traditional courts should not be overly idealized. The norms enforced by these courts may be objectionable, "their process may be skewed, and decision makers may have warped motivations or be self-interested or corrupt". Makec (2007:134) warns that the traditional court and the council members may find it hard to remain impartial during court deliberations, especially when the parties are not represented by a lawyer. Wojkowska (2006:21-22) adds that traditional courts "are often dominated by men, and tend to exclude women. Traditional councils are generally not elected, but are appointed or take office based on descent. Thus the checks or balances that generally exist in the formal system for the selection and appointment of judges are absent".

Makec (2007:134) believes that, some scholars disregard the importance of the traditional justice system and are of the view that the system will disappear as modernisation increases. Makec argues that this "conception misunderstands the potential of traditional law to make a valuable contribution towards a state's justice system".

The lack of participation of women is a weakness of the traditional justice system. Williams and Klusener (2013:280) argue that it is important to have women as presiding officers, because "Women may recognise current social practices and articulate their interest and shape their culture from within. Additionally they are likely to point to changing social circumstances in order to argue against that which is no longer relevant". Hence, women should be given a voice as members of the traditional councils. However, Curran and Bonthuys (2004:21) argue that while "the inclusion of women in some customary courts is a necessary and welcome change, which should lead to the development of customary rules that benefit women, questions remain regarding the extent and pace of these changes". Wojkowska and Cunningham (2010:98) observe that the traditional justice system is often "commanded by older men; this may reinforce power imbalances.

Women and children are often highly discriminated against in customary proceedings”. Johnstone (2011:18) notes that the traditional justice system is accused of having departed from past practices by failing to protect women and that protective norms were eroded by colonization.

### **2.7.3 The procedures, processes and jurisdiction of the traditional justice system**

#### **2.7.3.1 Procedures of the traditional justice system**

Most scholars agree that procedures of the traditional justice system are evolutionary, affordable, accessible and uncomplicated (Ntlama and Ndima, 2009:18; Skelton, 2007:243; Ndulo, 2011:97). Ntlama and Ndima (2009:18) note that customary law is constantly evolving with communities and “is not rigid like written law, where some rules are applied simply because it is the law”. Customary law gives communities a sense of ownership because the procedures are familiar. Bennett (2011:1053) contends that traditional leaders offer an affordable means of resolving disputes according to familiar procedures and the law. Unlike “the formal justice system where procedures tend to be complex and archaic, customary law are straightforward”.

Skelton (2007:243) explains that the flexibility of procedures allows for improvisation, so that the best solution can be found to the problem. Skelton adds that the lack of strict rules of evidence means that people can tell their stories in ways that make sense to them. Community members understand traditional court procedures (Skelton, 2007:229); thus they are accessible and acceptable. The presiding officers have roots in the community and are “familiar with local customs; they consequently resolve disputes in a manner that is culturally acceptable to both parties”. Bennett (2011:1055) notes that rural people respect customary law and that people are unlikely to obey laws that depart too far from their traditional norms.

Wojkowska and Cunningham (2010:98) observe that the lack of rules of evidence and procedures and the fact that similar cases may not be treated in a similar manner is due to the fact that a traditional court’s main concern is the relationship between the parties to the dispute. Wojkowska and Cunningham (2010:97) add that traditional court procedures are not intimidating or confusing. Harper, Wojkowska and Cunningham (2011:172) explain that these “procedures usually involve mediation or arbitration, and sometimes a mix of both”. They are simple, flexible and comprehensible to every litigant or accused and to the members of the court. Ndulo (2011:97) acknowledges that many aspects of customary law are desirable and should be preserved; one is that the traditional justice system does not have institutionalised or complicated procedures.

Makec (2007:134) observes that “one of the most remarkable features of customary law in Sudan is the simplicity of its procedures. Since the rules of procedure regulate how the rules of substantive law are

defended and enforced, they should not be complicated”. Makec (2007:135) argues that simple procedures facilitate the speedy administration of justice, saving both time and money. The court may “revise its own decision where it believes the decision was erroneous”. It may also allow “experienced persons among the audience to give evidence. In this way the public assists the courts in the administration of justice”.

### 2.7.3.2 Processes of the traditional justice system

Customary court processes “are generally more concerned with finding solutions that will restore peace and harmony to the community than their adversarial counterparts” (Curran and Bonthuys, 2004:19). Curran and Bonthuys (2004:19) note that customary courts resemble mediation services. Wojkowska and Cunningham (2010:97) point out that the “process of obtaining a remedy is usually voluntary with a high degree of public participation”. If the dispute involves individuals, the customary court process adopts a face-to-face approach to address disputes and wrongdoings (Vorster, 2001:53). This restorative nature of the traditional justice system “is of great value to those that need to get on with the daily business of living and working in close knit communities” (Wojkowska and Cunningham, 2010:98).

Skelton (2011:476) concurs that traditional African justice systems have many features that can be characterised as restorative. Skelton (2007:236) observes that traditional proceedings are carried out while the participants are sitting in a circle. “This formation is common to many indigenous tribunals in other parts of the world”. Skelton points out that “this arrangement is also frequently used in modern restorative justice processes”.

#### *Sanctions and outcomes of cases heard by traditional courts*

Sanctions and outcomes of cases are generally geared toward restoration of relationships. Ntlama and Ndima (2009:18) note that fines and compensation are “awarded to the aggrieved party rather than to the state, and that traditional courts have more discretion in selecting remedies that will enhance the parties’ psychological and physical wellbeing. This form of restorative justice goes further in repairing community relations damaged by the underlying dispute”. Kane *et al* (2005:11) also note that fines or compensation are paid to the aggrieved party, even in criminal cases. “This type of restorative justice is very appropriate to the needs of poor people and tends to rebuild community relations as opposed to the formal judiciary, which is largely adversarial.”.

According to Skelton (2007:235), in traditional justice, the outcomes of cases are not based on previous decisions made by other courts. Ndulo (2011:97) adds that the objective is reconciliation rather than litigation. Makec (2007:134) observes that, under certain circumstances, a traditional “court may adopt a

persuasive role in order to induce an agreement, compromise, or settlement between the parties”. Both parties to the dispute must be satisfied with the decision taken by the court and emerge as friends after the court process. Makec explain that this is in line with the objective of the traditional justice system, which is to bring about peace and harmony through compromise, conciliation, and compensation. “A legal dispute should not leave the parties or communities to which they belong as enemies” (Makec, 2007:135).

One of the sanctions incorporated in section 10 (d) of the TCB is an order that the offender make an unconditional apology to the victim. Ndima and Ntlama (2009:19) point out that in an effort to conform with features of the formal justice system, the TCB limits the forms of sanctions or punishment that can be imposed by traditional courts (section 10 (a)(b)(c)(d); inhumane, cruel or degrading sanctions; “a fine in excess of the amount determined by the minister; and corporal punishment”). Ndima and Ntlama add that these sections were included in the TCB “to affirm a commitment to upholding the human dignity of all persons subject to the jurisdiction of traditional courts”.

#### *Legal representation and participation in traditional courts*

The traditional justice process does not allow for legal representation. This reduces the parties’ costs and promotes speedy dispute resolution (Wojkowska and Cunningham, 2010:99) . Kane *et al* (2005:11) note that this is of particular benefit to the rural poor. The traditional court process involves unwritten law and is relevant to those involved; therefore there is no need to involve lawyers to interpret the law. Makec (2007:134) contends that the traditional court system is not designed for lawyers; the traditional council plays the dual “role of investigator to elicit the necessary evidence based on the facts and advisor to the *Inkosi* on the decision to be taken.” According to Makec, the “inquisitorial system under customary law is suitable when parties are not represented by a trained lawyer”.

Section (3)(a) of the TCB states that parties to any proceedings before a traditional court cannot have legal representative. The South African Law Reform Commission (SALRC) draft bill (52) also acknowledges that legal representation is not necessary at a traditional court. However it proposes the following clause: “A person who is a party to a matter before the customary court may be represented by any other person of his or her choice in accordance with customary law”.

In terms of section (3)(b) of the TCB, a “party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law”. Similarly, Simojoki (2011:38) notes that in countries such as Somalia, “women can only be represented by male relatives as participants, witnesses or victims at the traditional court”.

Mnisi-Weeks (2012:153) argues that the TCB allows women to be represented by men and that this is a continuation of customary practices. Mnisi-Weeks contends that, as it stands, this would probably do little to help women. This is especially true in situations where “women are required to be represented by adult male relatives and are taken advantage of because they do not have any adult male relatives or have to be represented by the same male relatives with whom they have the dispute at issue”.

Harper, Wojkowska and Cunningham (2011:175) argue that one way to improve women’s “access to justice and legal empowerment is to promote their participation in dispute resolution processes. This might involve vesting women with leadership responsibilities or expanding the dispute resolution forum to include female representatives”. Legislation could be introduced that requires “that community leaders be democratically elected or quotas could be set for women’s participation”.

#### *Reviews of traditional courts’ decisions*

Community members can approach the magistrate’s court to review a traditional court’s decision (McQuoid-Mason, 2011:171). According to Ndimma and Ntlama (2009:12), this marginalises the traditional justice system. A magistrate who is not a member of the relevant community cannot possibly be aware of all the rules observed in a particular area. It is likely that he/she will interpret customary law through the “prism of western jurisprudence” and will be socially detached from the community in question.

Section 16 of the TCB requires those who are not satisfied with the traditional court process to lodge a complaint with the Director-General against the presiding officer on the grounds of incapacity, gross incompetence, or misconduct. Ntlama and Ndimma (2009:24) argue that, since the TCB fails “to consider that litigants in customary courts tend to live in regions with higher rates of illiteracy”, the complaints procedure is not likely to facilitate participation, and can increase the risk of abuse; the process is thus unlikely to be challenged.

#### *Weaknesses of traditional court procedures and processes*

As to procedures, Johnstone (2011:17) argues that, on the one hand, flexible procedures allow presiding officers to “craft pragmatic solutions that suit local conditions and respond to the issues at the crux of a dispute”. On the other hand, traditional systems may lack consistency and predictability. Johnstone adds that “flexible rules and a lack of procedural safeguards pose particular risks for women in the context of generalised gender discrimination”.

In reference to process Wojkowska and Cunningham (2010:98) argue that the restorative justice approach adopted by traditional courts may be inappropriate in matters such as domestic violence, rape and murder. Wojkowska (2006:21) contends that preserving “harmony can take precedence over the protection of individual rights. It can be used to force weaker parties to accept agreements and local norms, which in turn can result in discrimination against women”. Wojkowska cites examples to illustrate this point. “In Somalia, a woman who is raped is often forced to marry her attacker. Wife inheritance and ritual cleansing continue in parts of Kenya”.

Unintended consequences of traditional courts procedures and processes may result in human rights violations. Ndimma and Ntlama (2009:19) note that traditional courts have historically been perceived as insensitive to human rights in terms of the kind of sanctions they impose; they must therefore overcome negative public perceptions which are still prevalent. Simultaneously, Skelton (2007:235) is of the view that any “interference in the procedures of traditional courts in the name of human rights may crush innovation, and could be insulting to traditional justice system and will dismantle the strengths of the traditional justice systems”. Skelton (2007:235) argues that the lack of certainty or predictability of outcomes could pose a threat to the notion of due process that requires that like cases are treated alike”. Wojkowska and Cunningham (2010:98) concur that since there are no rules of evidence, similar cases may not be treated in a similar manner. While presiding officers usually take the nature of the relationship between the parties into account, ordering inhumane forms of punishment contravenes human rights.

Lack of legal representation, the right to appeal and a patriarchal orientation can be construed as weaknesses of traditional courts. Williams and Klusener (2013:288) argue that if, as proposed by the TCB, “traditional courts hear criminal cases, parliament is obliged by the Constitution to allow legal representation”. The right to appeal is an essential element of an “accountable and transparent legal system; this is lacking in” the traditional justice system (Wojkowska, 2006:22). Wojkowska notes that presiding officers “may abuse their power to benefit those who they know or who are able to pay bribes”. The patriarchal nature and composition of a traditional court will render women vulnerable when they tell their stories to the court. This compromises the possibility of a fair hearing and a just outcome (Mnisi-Weeks, 2012:153)

### **2.7.3.3 Jurisdiction of traditional courts**

Williams and Klusener (2013:287) are of the opinion that “traditional courts should not have jurisdiction over domestic violence”, the dissolution of marriages, conjugal rape, incest and statutory rape.

Section 5 (2) of the TCB excludes the following matters from the jurisdiction of customary courts: any constitutional matter [sub-section (a)]; dissolution of any marriage [sub-section (b)]; determination of the custody or guardianship of minors, [sub-section (c)] and determination of the validity, effect or interpretation of a will [sub-section (d)]; and “any matter arising out of customary law and custom relating to any category of property determined by the minister from time to time” [subsections (e) and(f)]. Mnisi-Weeks (2012:153) argues that, in terms of clause (5) of the TCB, only constructional matters are excluded such as divorce, separation, custody, wills and property.

Williams and Klusener (2013:280) contend that the TCB does not expressly exclude maintenance claims from the traditional court. Williams and Klusener (2013:284) suggest that maintenance matters should be expressly excluded and dealt with in the magistrate’s court, because traditional courts are not allowed to impose imprisonment on maintenance defaulters. However, according to Williams and Klusener (2013:285), if “traditional courts were to handle maintenance claims, this could potentially increase access to justice for women in rural areas”. Nonetheless, “this should be balanced against grave concerns about the capacity of traditional courts to administer maintenance claims. The Maintenance Act 99 of 1989 provides for only magistrate courts to be maintenance courts. The offence related to failure to pay maintenance also requires a fine or imprisonment. The traditional courts would not be able to impose these types of sanctions”.

Gasa (2011:27) submits that the schedule in section 5 of the TCB omits crimes committed against women, such as domestic violence, and conjugal rape. According to Gasa, women cannot seek redress elsewhere because they fall under the traditional court in terms of section (20)(c) that compels residents to attend court proceedings on receiving notice to do so. On the one hand, “it is doubtful that including these offences would be desirable for women and some men who may experience domestic violence and discrimination”. On the other hand, “excluding these crimes from the schedule of cases within the scope of the TCB creates a problem if people cannot withdraw from the proceedings of the traditional court and use the magistrate’s court, as they are left without recourse to justice”. Gasa (2011:28) and Williams and Klusener (2013:286) argue that the TCB in its current form will effectively disenfranchise 17 million people living in rural areas, 59% of whom are women.

Domestic violence should be expressly excluded from traditional courts’ jurisdiction for the reason advanced by Curran and Bonthuys (2004:8) that “*lobolo* potentially increases women’s vulnerability to domestic violence and decreases their ability to resist or flee abusive situations. Because men, rather than their families, pay *lobolo* and because payment is in cash, they sometimes justify their abuse of their wives by claiming that they paid for them. Families’ reduced involvement in the payment of *lobolo* limits their ability

and willingness to intervene and put an end to domestic violence”. Because *lobolo* is paid to the wife’s father and is often spent shortly after being received, “the wife’s family may be reluctant to allow them to return home when they suffer domestic violence because of their inability to return the *lobolo*”.

Similarly Williams and Klusener (2013:286) hold the view that traditional courts would not have the authority to sentence an offender for the breach of a protection order, as the DVA No 116 of 1998 provides for sentences of direct imprisonment. Williams and Klusener (2013:287) argue that allowing “traditional courts to hear maintenance and domestic violence matters would create a system parallel to the Maintenance and the Domestic Violence Acts. The different rules and sanctions would amount to unfair discrimination on the basis of culture”.

#### *Weaknesses in the jurisdiction of traditional courts and the TCB*

Mnisi-Weeks (2012:148) argues that the TCB in its current form is unlikely to offer rural people, especially women, the kinds of protection they need. Mnisi-Weeks (2012:148) adds that the exclusion of jurisdiction over domestic violence cases is important for women and children; however the TCB committed an error by not specifically excluding such cases, which opens the door for these matters to be handled by traditional courts.

Ntlama and Ndima (2009:23) identify substantive defects in the jurisdiction of traditional courts. The TCB would limit the jurisdiction of traditional courts when it comes to adjudicating certain disputes involving marriage separation and the custody of minor children (TCB, 2012:section 5(2)(b) and (c)). Yet these matters were formerly within the purview of traditional courts under customary law. For example, traditionally, when a marital dispute causes the woman to leave the marital home she seeks protection from her biological family. If the families of the husband and of the wife determine that the husband is found guilty, the woman remains under the protection of her biological family until an animal sacrifice is made to appease the ancestors. According to Ntlama and Ndima (2009:23) “these traditional practices and the values that underpin them, would be further eroded by this limiting provision of the TCB”). Curran and Bonthuys (2004:11) concur and explain that under customary law, “a wife who has been severely mistreated by her husband is entitled to return to her father’s home (subject to her father’s willingness to accept and support her)”.

The jurisdictional limitations of traditional courts also result from existing rule of law orthodoxy, not just the proposed TCB. For instance, the Recognition of Customary Marriages Act 120 of 1998 (RSA, 1998c) and the Intestate Succession Act 81 of 1987 (RSA, 1987) problematize jurisdiction of the traditional courts.



There is tension between the Intestate Succession Act, the Black Administration Act (BAA) 38 of 1927 and the customary law of succession. The well known case of *Bhe v. The Magistrate, Khayelitsha* brought this tension to bear when the South African constitutional court struck down the male primogeniture clause of the BAA (RSA, 1927) and thereby interfered with customary law since customary intestate success recognises inheritance through male descendants. As Lankhorst and Veldman (2011:95) point out, unlike western jurisprudence which is centred on the “the death of the rights-holder” pursuant to customary intestate succession “sons are entitled to inherit part of their father’s land when they reach the age of marriage”. Hence, the rule of law orthodoxy determination that intestate succession through males is unconstitutional weakened the jurisdiction of the traditional court.

With regard to the Recognition of Customary Marriages Act (RSA, 1998c), Herbst and Du Plessis (2008:14) indicate that customary marriages can no longer be regarded as traditional customary marriages because the Recognition of Customary Marriages Act has developed a hybrid approach to customary marriage. This hybrid approach diminished jurisdiction of traditional courts since the crux of that which legalises a marriage turns on which wife among co-wives first registers the marriage with the shared husband. To Herbst and Du Plessis “parliament should have interfered with how customary marriages should be regulated only” and not with traditional practices and customs and of indigenous communities pertaining to polygamy and other social practices.

While Carfield (2011:41) contends that the customary system is accessible “because it is free of many of the trappings of the formal justice system” Harper, *et al* (2011:172) maintain that traditional justice can “block access to justice and legal empowerment. Ntlama and Ndima (2009:26) conclude that, with reference to the TCB, an opportunity has been lost to provide a “framework for traditional courts to build and develop traditional jurisprudence in a manner that would speak to the aspirations of the African or indigenous people”. Ntlama and Ndima are of the view that the “unjust practices of the past would be perpetuated and subject traditional institutions to western-style courts, leaving traditional leaders no better off than under the Black Administration Act (BAA) 38 of 1927”.

Ndima (2003:334) warns that the official version of the traditional system currently in place did not evolve customarily, but was imposed by legislation and enforced judicially by cultural outsiders and therefore should not have been protected by the Constitution because it is part of past injustices. The official version that is currently applicable has always differed from the African living traditional justice system.

## 2.8 African Living Law Justice System

Keevey (2009:22) notes that African living law is not codified customary law or official African customary law. Rather, African law is uncodified living law, also known as living African customary law. Since pre-colonial times, African law has represented the oral culture, a meticulously preserved tradition which is safeguarded and passed on by word of mouth from generation to generation. Williams and Klusener (2013:278) speak of customary living law as opposed to African living law. These authors describe customary living law as law that grows out of a process of adaptation and change that reflects the voices, views, and struggles of a range of different interests and sectors in rural society. They add that living “customary law takes the social context into account and is in touch with people’s customs”.

Keevey (2009:25) observes that African law is the law for the living and the living dead and that it maintains the inseparable relationship between the living and the living dead. This law consists of moral rules, taboos, principles, values and beliefs, some of which are common to traditional societies throughout sub-Saharan Africa. Vorster (2001:52) concurs and argues that in South African customary law, harmonious relations between people are of the utmost importance. Harmony encompasses the living and the non-living world of humans in relation to their environment. Keevey (2009:26) explains that there is “a clear distinction between indigenous law for indigenous people and the indigenous law of indigenous people. Indigenous law for the people signifies codified customary law as documented since the colonial era, whilst indigenous law of the people represents the African law or living customary law practiced in traditional African societies”.

Scholars agree that current official customary law is compromised by South Africa’s history. Ndima (2003:345) strongly objects to the official version of African customary law with its distortions that is applied in democratic South Africa. Ndima proposes that the living version which retains its values intact, and is used in social practice, is the law that reflects the values and spirit of the Constitution and should be the African indigenous law of South Africa. Other scholars such as Keevey (2009:23) are of the view that the fact that “African living law is unwritten does not mean that it is either unknown or no longer practiced”. Gasa (2011:23) claims that “African “ways of existence, including cultural practices and belief systems were denigrated and almost annihilated under apartheid”. African cultures have always valued individual rights and choices; according to Sloth-Nielsen and Mwambene (2010: 43), “statutory reform seems to have created its own version of the African law”.

## 2.9 Informal Justice System Administered by Community-based Paralegals

This study investigates a restorative justice programme based at community level undertaken by CBPs in KZN. This section briefly discusses paralegals and community advice offices while Chapter 4 covers the issue of CBPs in greater detail.

Paralegal advice offices provide basic legal services to community members. Geraghty, Anderman, Hamsher, Hua, Majid, Sanders, and Shaw (2007:66) found that paralegals “perform many functions, including advising people of their basic rights, assisting lawyers, and providing vital education and training”. CBPs also deliver “services to people outside of the traditional legal system, and to those living in rural and remote areas”. Kigodi (2013:47) notes that paralegals play many different roles within communities and generally adopt a generic role, becoming involved in anything relating to “the rights of women and girls and the community in general”.

The services offered by paralegals do not necessarily require the services of lawyers. CAOs have continued to play a role in interpreting the South African Constitution’s Bill of Rights (RSA, 1996) into practical and understandable terms. The need for CBPs is increasing rather than diminishing. Dugard and Drage (2013:1) observe that constitutional reforms that guarantee “a broad range of rights and benefits to all South Africans, including the right to legal assistance”, remain paper rights as “accessing many of these benefits is a challenge for those who live in remote areas and those who cannot afford legal representation”. There are few lawyers in many rural towns; even if law firms were to open offices in rural areas people would not use their services because of the cost of legal counsel. According to Dugard and Drage (2013:17), CAOs play an important role in “community development and the legal empowerment of the poor by working to erase the detrimental legacy of apartheid and the poverty currently experienced by many South Africans”. Maru (2010:280) argues that community paralegals are a promising method to deliver frontline legal services that are cost effective, capable of straddling plural legal systems and oriented towards empowerment. Van Ness and Strong (2010:12) contend that “in virtually all societies, justice is pursued using both formal and informal proceedings”. Because the legal system is challenged in terms of the legitimacy of its formal structures, informal alternatives have been proposed that emphasise increased participation, improved access, professionalisation, decentralisation, delegation and reduced stigmatisation and coercion. McQuoid-Mason (2013:573) suggests that Legal Aid South Africa should consider placing paralegals at each chief’s office to advise and educate traditional leaders and their communities on the Constitution and the law.

## 2.10 Theoretical Concepts of Legal Empowerment in Plural Legal Systems

In African and Asian countries for example, legal pluralism is not new and does not always amount to legal empowerment. Not unlike access to justice, legal empowerment is under-theorised, under-conceptualised, and under-researched. The work of the “Commission on Legal Empowerment of the Poor (CLEP), a global team of experts hosted by the United Nations Development Programme (UNDP)”, produced work on legal empowerment that spanned from 2005 to 2008 that appears to apply a top-down rule of law orthodoxy approach (CLEP Report, 2008:2). Some scholars suggest that legal empowerment is better suited for a grassroots bottom-up approach and can be seen as social entrepreneurship (Ruffin and Martins 2015:16 *in press*). This is because legal empowerment, like Santos’ (2012:342, 343, 346) theory of social entrepreneurship addresses neglected problems with positive externalities that benefit and empower a powerless segment of society. Legal pluralism is inherent in both access to justice and legal empowerment – particularly in formerly colonised countries. Wojkowska and Cunningham (2010:97) explain that legal empowerment in the context of legal pluralism for individuals and the community is about access to justice and empowerment.

Many African countries have parallel legal systems (Bond, 2010:430). Pimental (2011:73) argues that there are “different conceptual approaches to legal pluralism in post-colonial Africa, including the colonial approach, the superior state approach and the equal dignity approach. The colonial approach refers efforts of colonisers to shape customary law to serve the interests of the coloniser, thereby controlling the colonised” (p.73). The superior state approach means that the post-colonial state may constitutionally recognise customary law and customary courts but the written rule of law orthodoxy prevails over the orally secured traditional justice system (p.75). Through the equal dignity approach the statutory and customary systems are distinct allowing the latter to be responsive to socio-cultural community needs (p. 81). In South Africa, while disputants have a choice of justice systems, the superior state approach is generally applied.

Carfield (2011:39) notes that there is consensus amongst stakeholders that there are situations where “neither the formal nor the customary system, as they are currently configured, can respond to the justice vacuum in rural areas. This tension could be resolved by integrating the two systems, instead of opening parallel channels for conflict resolution”. The discussion that follows examines whether an integrated system approach is the answer or whether parallel systems of justice are required. Empowerment through forum shopping, community engagement and use of language are considered against the backdrop of legal pluralism.

### **2.10.1 Empowerment through forum shopping across plural justice systems**

Applying a gender perspective, scholars suggest that forum shopping may improve access to justice for women (Chopra and Isser, 2012:353; Sandefur and Siddiq, 2011:113; Harper *et al*, 2011:179; Curran and Bonthuys, 2004:6). Harper, *et al* 2011:178.) believe that “genuine choice only exists when both options, formal and customary, are accessible, efficient and viable”. High usage of “non-formal justice systems in rural areas does not automatically mean that these systems are the best: it could simply mean that they are the only ones available”. Chopra and Isser (2012:353) contend that many factors “need to be taken into consideration when developing approaches to improve women’s access to justice in legally plural environments”. They note that “legal pluralism is not a passing phenomenon”; indeed, it is becoming more complex in a globalised and capitalist world. Chopra and Isser argue that upholding “women’s rights therefore requires engaging with legal pluralism, rather than seeking its demise”. For Harper *et al*, 2011:178 the “capacity to make, and act on free informed choice is a fundamental characteristic of a legally empowered person”.

In terms of choice of forum, according to Chopra and Isser (2012:252), traditional justice “systems are neither essentially bad nor good for women. It depends how they are interpreted and applied by various communities and the power dynamics and general inequalities that informs justice processes. Most discriminatory elements are not engrained in a specific justice system, but in asymmetric power relations in society, including those between men and women”. Curran and Bonthuys (2004:6) observe that southern African women “very rarely live exclusively in terms of either ‘traditional’ or ‘modern’ identities”. According to these authors, legal strategies of women are informed by choice associated with multiple identities (p. 6). Rather than focus on choice of forum, Moul (2005:21) notes that South African women prefer to use multiple structures to curb abusive behaviour by their partners, including mediation and protection orders.

Chopra and Isser (2012:353) argue that talking about dual legal systems does not reflect reality on the ground. The formal and the traditional justice system are not the only justice systems operating in communities; other justice orders include religious legal orders and paralegal movements, to name but a few. While Chopra and Isser (2012:352) acknowledge that these alternative legal orders do not operate in a clear-cut manner, the formal and the traditional justice systems should not be the only entry point. Discussions on justice systems and the theories governing them should therefore include alternative approaches. This study focuses on alternative approaches administered by CBPs.

To Stapleton (2007:15) “domestic violence is a real issue in rural areas”. Yet women in rural areas “face unique challenges in gaining access to the traditional justice system”. These difficulties are “compounded by cultural practices that undermine their status such as the issue of inheritance, owning property, cultural beliefs and taboos, all of which make women even more vulnerable” (p. 15). Harper *et al* (2011:178) point out that “in situations where state justice is inaccessible or otherwise unresponsive to community needs, and where there are impediments to accessing justice through traditional systems, one solution may be the creation of new institutions that offer alternative forms of dispute resolution. Such institutions operate parallel to the traditional justice system, complementing or supplementing it”. The authors suggest that such an institution could be run by trained paralegals. This would increase access to justice for victims discontent with the traditional justice system and the formal justice system (Harper, *et al*, 2011:179).

Legal pluralism provides an environment for justice forum shopping. In their study based in rural Liberia, Sandefur and Siddiqi (2011:113) used game theory to conceptualise a model of forum choice. These authors explain that game theory plays out where a “dispute resolution is conceived as a dispute between a victim and an offender, a forum shopping decision by the plaintiff, and a verdict and corresponding legal remedy offered through the traditional justice system, formal justice system and an alternative (informal justice) system”. Sandefur and Siddiqi observe that the game theory proceeds sequentially in three distinct stages:

1. “The offender chooses whether to inflict harm on the victim and the harm is conceived broadly as encompassing violent crime and economic losses resulting in a dispute.
2. In response to the harm, the victim chooses whether to take the case to the traditional court or formal court, or neither and considers an alternative available.
3. The presiding officer of the selected justice system offers a legal remedy which is essentially an offer to redistribute resources from the offender to the victim to compensate for the harm caused” (Sandefur and Siddiqi, 2011:113).

According to Sandefur and Siddiqi (2011: 114), “equilibrium in the game would involve an optimal level of harm by the offender, a forum shopping decision by the victim, and a remedy from the presiding officer. All parties are assumed to have full information about each other’s utility functions and the structure of payoffs. A fixed cost of reporting to either forum, incurred by the victim, is also assumed”. Sandefur and Siddiqi (2011: 114) contend that the theory is best understood by referring to the similarities and differences between the available justice systems. The first is bias in both systems. In the formal and the traditional justice system the presiding officer may be biased towards the offender or the victim. With the full information assumption, Sandefur and Siddiqi contend that the victim and the offender are aware of each

justice official's bias in advance of making a decision to cause harm or choosing a forum to pursue remedies for the harm caused (Sandefur and Siddiqi, 2011: 114).

The second is the remedy at the presiding officer's disposal. Sandefur and Siddiqi (2011: 114) argue that, "while the differences between the formal system and the traditional justice system in terms of rights are widely acknowledged, differences in remedies are less commonly discussed". It is assumed that there are advantages of compensatory over purely punitive remedies. Sandefur and Siddiqi submit that "pure punishment entails a social loss, relative to compensation. Furthermore, traditional courts' presiding officers have an absolute cost advantage in enforcing redistribution of resources from the offender to the victim through a range of informal remedies that provides compensation to the victim". Such remedies could include material reparation for the victim; cultural cleansing and an apology. The offender receives the full "benefit of committing the harm and suffers the full disutility of being penalized by the remedy of both systems. The victim receives the full benefit of the remedy in the customary system, but only a partial benefit in the formal system. Thus, formal remedies cause the offender to suffer more than they console the victim. Punishments meted out to the offenders in the formal system do not fully benefit the victim".

Sandefur and Siddiqi (2011:116) argue that, by "predicting the remedies that presiding officers or judges will offer, victims choose a forum that maximises their benefits. In turn, offenders predict the victim's choice and the presiding officer's or judge's remedies and choose levels of harm that most benefit them". The victim compares the cost of reporting and the remedies available from either the presiding officer or judge. In turn, "the remedy depends on the bias of the presiding officer of the traditional court and the efficiency of the formal remedy". Sandefur and Siddiqi (2011:116) advance the view that if the presiding officer of the traditional court is pro-offenders, the victims "are more likely to take their case to the formal justice system". Yet, while the game theory model of forum shopping relies heavily on bias of presiding officers of traditional courts, Sandefur and Siddiqi (2011:120) acknowledge that there was no attempt made to observe such biases. Rather, the authors "posited that the chief's bias in a given case will be determined by the characteristics of both the plaintiff and the defendant, reflecting the hegemony of certain social and economic groups".

Scholars suggest that forum shopping is not necessarily unidirectional (Sandefur and Siddiqi, 2011:117; Benda-Beckmann; 1981:117). Sandefur and Siddiqi (2011:117) hypothesise that forum officials may compete with each other for plaintiffs. Although these scholars did not wish to take the logic further, the hypothesis is not far fetched. For example, in his study based in West Sumatra, Indonesia, Benda-Beckmann's (1981:117) study found state and non-state justice officials shopping for disputants in addition

to disputants choosing among multiple forums in the context of legal pluralism. However, forum officials sought to attract plaintiffs for political reasons, some of which were related to the nature of the dispute.

Returning to the issue of gender, Chopra and Isser (2012:353) point out that forum shopping in a plural justice system may “present an opportunity to contest prevailing social norms and to promote women’s rights”. This is especially true of the traditional justice system that is fluid and depends “on the definition and interpretation of norms by community members and can readily adjust to social change”. The existence of alternative fora for dispute resolution creates multiple legal orders, which according to Chopra and Isser (2012:353), offer women “an opportunity to select the institution that is more likely to facilitate access to justice”. To these authors legal pluralism allows the various justice systems to contest each other and can make women and activist groups “more active in shaping and defining legal norms and processes in order to advance access to justice for women”.

Simojoki (2011:47) points out that in a pluralistic context, “access to justice might best be seen as creating a more even playing field where all users have viable and realistic pathways to suitable outcomes. Viewed in this way, a holistic approach to enhancing access to justice that targets all stakeholder groups and components of the justice system is most likely to yield results”.

The discussion now turns to community engagement as well as use of language as components of legal empowerment.

### **2.10.2 Community engagement and language usage towards legal empowerment**

In traditional and informal justice systems, engagement of individuals and communities and language usage can be conceptualised as tools of legal empowerment. Johnstone (2011:18), for example, argues that the dynamic and flexible nature of traditional justice systems can promote legal empowerment. According to Johnstone (2011:18) “While it is often argued that fluidity leads to discrimination, it also renders customary systems capable of change and reform”. Johnstone (2011:18) further notes that, while such reforms “cannot be undertaken by outsiders, a carefully crafted intervention strategy can strengthen the process”. It is well “established that that grafting ideas and processes borrowed from foreign legal cultures onto customary frameworks is unlikely to result in sustainable normative change. If traditional justice systems are to uphold rights, and users are to be empowered to assert them, processes must be locally driven and owned” by various stakeholders including paralegals; “the local will be most powerful in influencing the interpretation and application of the law, as well as moulding attitudes”. This creates an opportunity for legal empowerment and access to justice (Johnstone, 2011:19).



Harper, *et al* (2011:174) argue that “customary justice actors are generally appointed within communities on the basis of status or lineage. Customary justice systems can support and reinforce power imbalances”. However, empowerment cannot be transplanted or imported. Instead, it is likely to be effective when it grows from community engagement that identifies needs and initiatives”. Harper *et al* (2011:174) further argue that the monitoring of customary proceedings by local community members that seek to promote “women’s, children’s and indigenous people’s rights, such as paralegals can challenge unfavourable power dynamics and help prevent the abuse of power”. Likewise, by monitoring customary proceedings, paralegals may help confirm that one’s rights are upheld.

Johnstone’s (2011:27) research revealed that “despite the challenges faced by rural people in accessing justice through the traditional justice system”, they prefer traditional courts and other justice forums over formal courts. The women that participated in the study said that the potential threat of lack of empowerment did not mean they would reject the traditional justice system and its processes. Bond (2010:427) concurs and points out that “women value their cultural identity even as they work to eliminate discrimination within that identity”.

Bond (2010:428) states that by “viewing African women almost exclusively as victims of their culture, the rights groups have historically undervalued the potential for African women to reformulate cultural policies within their communities”. Bond (2010:428) submits that the “Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Charter on Human and Peoples’ Rights (African Charter) are dismissive of culture and gender equality, respectively. The African Charter on the Rights of Women in Africa (the Protocol) attempts to remedy the shortcomings of the CEDAW and the African Charter”. Bond (2010:428) argues that “the Protocol provides for important procedural rights to ensure that women have a voice in the on-going examination and reformulation of cultural practice and traditional law”. According to Bond (2010:441), the CEDAW does not reflect the multidimensional and intersectional role of African women as both members of their cultural communities and advocates for gender equality within these communities. Simojoki (2011:47) concurs and states “there is something that is very captivating and promising about interventions that evolve from the grassroots”.

As to language, Dexter and Ntahombaye (2005: 12) argue that in pre-colonial times, traditional processes involved advice given “through patient and careful use of the language. After listening to the parties, those presiding would repeat the facts, showing that they were listening to each other and inspiring the parties to also listen to each other and have an open mind. Common-sense terms were used to characterise the case and explain their reasoning to the members of the public who attended”. Likewise, Wojkowska and Cunningham

(2010:97) contend that language is very important in traditional justice deliberations. The fact that presiding officers speak the local language makes the traditional justice system more accessible and acceptable to the people it serves. The “emphasis on voice and expressing one’s own story in one’s own words can enhance empowerment, as the parties to the dispute feel confident and capable”.

Harper, *et al* (2011:172) argue that “participatory, deliberative methodologies, where the problem is often regarded as shared by the entire community, represent a double-edged sword. On the one hand, they allow each party to present their story in the language and style with which they are most comfortable, followed by discussion until consensus is reached. On the other hand, such processes raise questions of inclusiveness and can reflect community biases, particularly where certain groups dominate the deliberations”. For example, “when men speak on behalf of their spouses and female relatives, the deliberations may perpetuate communal prejudices. Furthermore, an opportunity to express one’s voice is by no means a guarantee of equality and empowerment, particularly as certain voices may be more powerful than others” (Harper, *et al*, 2011:172) .

Chopra and Isser (2012:355) explain that “creating alternative sources of power such as community-based paralegals will advance dialogue between affected women and community justice providers”. Trained CBPs present legal information in an understandable way. Chopra and Isser (2012:356) describe CBPs as ‘insider’ agents that are legitimate contesters because they are from the same community as the women they serve. They are “familiar with the socio-cultural and political contests in a specific community, and can therefore challenge systems in the right spot. Legal and justice institutions that have been shaped from the inside also allow outcomes that maintain women’s rights to their culture, and their right to change it”.

Literature shows that the question of whether either integration of multiple justice systems or parallel justice systems is suited “for access to justice and legal empowerment remains unclear. However, the availability of multiple legal forums helps women to make informed choices rather than being forced to take a particular legal approach”. The literature notes that access to justice for women will not be promoted by advancing a particular justice system; rather, according to Chopra and Isser (2012:358), it requires an “understanding and engagement with the process of contestation and social change through which power relations and rights are mediated”. This study helps test the theoretical concepts of forum shopping and legal empowerment by exploring the role of CBPs in community restorative justice.

### 2.11 **Interactive Nexus between Access to Justice and Plural Legal Systems**

Although it is unclear as to whether an integrated legal system would improve access to justice in rural areas, it seems that access to justice is interactive with each of the three justice systems here discussed. Scholars differ on how such interaction between access to justice and various justice systems should exist. Garwe (2007:33) advocates for the inclusion of all stakeholders in promoting access to justice and fighting crime, including ordinary people, NGOs, traditional authorities, and other justice “agencies set up by the government in the criminal justice system. The author notes that crime affects us all and should therefore never be left solely to the police, the courts and prison authorities”. Garwe reiterates that, “a well functioning criminal justice system is all-inclusive, and each actor involved in criminal justice plays an important role”.

Chopra and Isser (2012:354) argue that a formal law framework facilitates access to justice through a set of mechanisms that assist in addressing gender equality and discrimination and contest problematic practices. On the one hand, the formal justice legal framework can hold government accountable to meet its international law and human rights obligations. On the other hand, it offers community members tools “to contest norms and practices that are not compliant with human rights or gender equity, such as through advocacy and strategic litigation. A human rights-based legal framework can also influence justice processes at local level. While they do not necessarily impact behaviour or lead to increased adherence to the law, formal judgements can be a powerful tool for women’s rights advocates to increase awareness of women’s rights”. The fact that formal law exists and the threat to use it brings about change in some people. As to the traditional justice system, Johnstone contends that processes must be locally driven and the fluidity of customary systems makes them capable of change as warranted (Johnstone, 2011:19). From the perspective of informal justice systems, Chopra and Isser (2012:354) see CBPs as a promising model for “injecting women’s rights at the community level, where they are not just acting as agents that take cases to the formal courts”. Chopra and Isser (2012:354) caution that “while there is plenty of evidence that CBPs have helped women to navigate systems, there is still a lack of empirical evidence on their impact on local power structures”. The findings from this study may help fill that empirical vacuum through, for example, data on interaction between CBPs and the traditional justice system.

### 2.12 **Chapter Summary**

This chapter examined access to justice in a variety of ways. A definition of access to justice was adopted that revolves around knowledge and exercise of rights, awareness of such knowledge and ways of exercising rights by service providers, effective and easily accessible infrastructure to access justice, and rendering quality services. Barriers to access to justice were discussed, especially those that affect women as this study

focuses on rural women's access to justice. Plural legal systems were delineated including the formal, traditional, and informal justice systems. In terms of the formal justice system, South Africa's DVA which is the rule of law orthodoxy relevant to this study was examined. This Act is further discussed in relation to community restorative justice and CBPs in subsequent chapters. Turning to the traditional justice system, its historical evolution, and structure and functioning as well as its procedures, processes and jurisdiction were described and the strengths and weaknesses of traditional courts' procedures, processes and jurisdiction were discussed. African living law was mentioned but not fully discussed as it is beyond the scope of this study. The informal justice system was identified as the justice system that forms the basis of CBP practice through the use of community restorative justice; however, CBPs generally straddle plural legal systems. The informal justice system is further discussed in Chapter 3 in relation to community restorative justice and in Chapter 4 in relation to CBPs. This chapter concluded with a discussion of the interactive nexus between access to justice on the one hand and distinct, co-existing justice systems on the other. The following chapter reviews the literature on community restorative justice.

## **Chapter 3: Community Restorative Justice: An Informal Justice System**

### **3.1 Introduction**

There is increasing academic debate on the use of restorative justice in domestic violence cases. A critical issue is whether restorative justice as an alternative to criminal justice is effective or even appropriate for such cases. This chapter discusses this issue as well as the definitions, theories and concepts relating to restorative justice. It highlights the debates in the literature on the use of community restorative justice (CRJ) in cases of domestic violence, use of the traditional justice system in cases of domestic violence as well as arguments for the simultaneous use of plural justice systems for such cases. There is considerable debate on whether domestic violence is a private or public matter as well as whether the traditional justice system is a private or public forum. While the debates and issues raised here remain largely unsettled and are the subject of continued empirical inquiry, this chapter provides a foundation to understand CRJ, with special reference to cases of domestic violence. A conceptual framework for exploring the problems and benefits associated with CRJ is presented being for the chapter concludes with a brief discussion of what appears to be an interactive nexus between access to justice, plural justice systems and domestic violence.

### **3.2 Community Restorative Justice, General context**

Community restorative justice is a community-based restorative justice initiative that seeks access to justice using an informal (non-state) justice system, and is responsive to people's immediate need for justice (Stapleton, 2007:4). It has developed through practice; CRJ procedures and processes "are tied to traditions and values passed down from generation to generation". Indigenous communities have been practicing restorative justice at community level for many centuries. Before discussing the manner in which restorative justice can be characterised as CRJ it is important to examine the definitions and theories related to restorative justice.

#### **3.2.1 Definitions**

Scholars acknowledge that "there is no agreed definition of restorative justice" (Edwards and Sharpe, 2004:2; Latimer *et al*, 2005:131; Daly, 2006:135; Van Ness, 2008:96). Edwards and Sharpe (2004:2) argue that "restorative justice is both a philosophy and a practice", and therefore a definition needs to capture both. Daly (2006:135) contends that "restorative justice has not one but many identities and referents; this can create theoretical, empirical and policy confusion". The literature notes that restorative justice may or may

not include a focus on community involvement beyond the victim and offender. On the one hand, restorative justice is defined as a process that involves “those who have a stake in a specific offence that collectively identify and address harm, needs, and obligations, in order to heal and put things right as soon as possible. Offenders become accountable through understanding the harm caused by their offences, accepting responsibility and taking action to repair the harm they have caused” (Zehr, 2002:37).

On the other hand, some scholars (Braithwaite, 2003:56; Latimer *et al*, 2005:131; Edwards and Sharpe, 2004:2) emphasise “the role of the community in restorative justice”. Braithwaite and Latimer’s respective definitions of restorative justice are thus expanded to embrace not just a victim-centred approach and offender accountability, but restoration of the affected community. For instance, Latimer highlights the importance of a community-based response to criminal behaviour (Latimer *et al*, 2005:131). This includes: “(1) identifying and taking steps to repair harm, (2) involving all stakeholders, and (3) transforming the traditional relationship between communities and their governments in responding to crime” (Van Ness, 2008:96). For Edwards and Sharpe (2004:2), “restorative justice encompasses a set of values that guides decisions on policy, programmes and practice that restore communities, not just individuals”.

Smith (2010:258) argues that “restorative justice is an umbrella term that describes a wide range of programmes that seek to address crimes from a restorative and reconciliatory rather than a punitive framework”. Van Ness and Strong (1997:25) contend that “the term ‘restorative community justice’ stresses both the importance of community involvement and the value and potency of community action in crime prevention”.

Building on these definitions, this study investigates a restorative justice programme based at community level undertaken by community-based paralegals (CBPs) in KwaZulu-Natal (KZN). Therefore, the emphasis is on CRJ, beyond community involvement and community-based responses as explained by Latimer *et al* (2005:13); Van Ness (2008:96) and Van Ness and Strong (1997:25). This study is concerned with the community-based restorative justice approach applied by CBPs in response to domestic violence. Community-based paralegals are an integral part of the communities they service. As discussed in Chapter 4, they co-create policies, practices and procedures with the community that reflect the local language and culture and the rural areas under traditional leadership where the CBPs and service recipients reside (Edwards and Sharpe, 2004:2). For the purposes of this study, the term ‘community restorative justice’ means a grassroots process driven by the community and implemented by local people from the same community.

## **3.2.2 Description of restorative justice**

### **3.2.2.1 The origins of the terms and practices of restorative justice and victim offender mediation**

Scholars disagree on the origins of the terms and practices of restorative justice and victim offender mediation. Some contend that restorative justice originated in indigenous communities (Braithwaite, 2003:58; Skelton and Bailey, 2006:8; Louw, 2006:161; Alarid and Montemayor, 2012:451), while others (Sawin and Zehr, 2011:41); Van Ness and Strong, 1997:24, Ptacek, 2010:8) note that these terms are of western origin. Braithwaite (2003:58) maintains that all indigenous cultures have some deep-seated restorative tradition. Skelton (2011:469) and Louw (2006:161) contend that restorative justice is evident in the ancient African concept of *ubuntu*. In contrast, Sawin and Zehr (2011:41) and Ptacek (2010:8) argue that the field of restorative justice began in Ontario, Canada in 1974 when probation officer, Mark Yantzi requested the court's permission for offenders and victims to confer. This, the authors claim, led to victim offender mediation (VOM). Van Ness and Strong (1997:24) contend that the term 'restorative' was coined in 1977 when scholar, Albert Eglash identified three types of criminal justice: restorative (restitution), retributive (punishment) and distribution (therapeutic treatment of offenders).

Skelton and Batley (2006:8) point out that the African traditional system of restorative justice was in place before the Eurocentric justice system was imposed on the indigenous people of South Africa. However, this is not well documented. Understanding the role of paralegals in indigenous communities may shed light on African traditional systems of restorative justice before European intervention.

### **3.2.2.2 The link between restorative justice and traditional justice system**

Most scholars agree that there are links 'between restorative justice and the traditional justice' systems administered by various indigenous people all over the world (Zellerer and Cunneen, 2001:248; Tshela, 2004:13; Zehr, 2005:268; Skelton, 2011:475; Cunneen, 2011:113; Alarid and Montemayor, 2012:451). For example, Cunneen (2011:113) notes that early developments in "restorative justice in Australia, New Zealand and Canada were based on indigenous cultures". Latha and Thilagaraj (2013:2) point to the resonance of restorative justice with dispute resolution mechanisms created by ancient Hindus in Indian villages. Similarly, Skelton and Batley (2006:8) observe that the modern restorative justice system, which became popular in the West during the 1970s, is closely linked to African traditional justice systems. Zellerer and Cunneen (2001: 248) find it ironic that "after ignoring and more often trying to destroy indigenous legal systems, the criminal justice system is now exploring restorative approaches that have certain commonalities with indigenous justice systems". More than a decade ago, Zellerer and Cunneen

(2001: 248) pointed to a gap in the literature on the similarities and differences between restorative justice models and traditional justice systems, and noted that they are not one and the same thing. As far as present-day traditional justice systems are concerned, cognisance should be taken of the impact of European colonial lawmakers on customary law and traditional justice systems in Africa (Ndima and Ntlama, 2009:10) and on other continents.

Zellerer and Cunneen (2001: 250) submit that the sanctions used by indigenous people may go beyond what are considered restorative justice models such as temporary exile and withdrawal. Skelton (2007:231-238) notes that African traditional justice systems and modern restorative justice processes have both similarities and differences. In terms of similarities, both aim for reconciliation and to restore peace and harmony (p. 231) and both encourage party participation and ownership in decision-making (p. 236). In both systems, a rights-based orientation is tempered by group duties as a community (p. 231). Dignity and respect are very highly valued, consistent with the philosophy of *ubuntu* (p. 231). Neither process sharply distinguishes between civil and criminal justice (p. 233). The simplicity and informality of procedures enables both systems to allow improvisation and story-telling that makes sense to a party to the dispute. On the one hand the outcomes of the two systems are not based on case precedents by other courts (p. 234). On the other hand, both processes produce outcomes beyond the payment of money or goods; symbolic forms of restitution or compensation are also applied (p. 235). The main difference between the two systems revolves around the fact that while modern restorative justice processes tend to be progressive and dynamic, traditional courts are conservative as they seek to preserve culture. Traditional courts are dominated by men and elders, and have thus been criticised for being sexist.

In conclusion, Mills and Grauwiller (2006:365) suggest that restorative justice approaches are adaptable to suit all cultures and that one size does not fit all. Hence, rather than applying an externally-generated restorative justice model to indigenous individuals and communities, a more practical approach is to develop community-based restorative justice programmes in the context of indigenous people's culture (Zellerer and Cunneen (2001: 249, 259). Toward that end, Louw (2006:162) observes that "African traditional culture seems to have an almost infinite capacity for the pursuit of consensus and reconciliation".

Ptacek (2010:7-8) argues that a number of different models are housed within the concept of restorative justice. These promote dialogue to meet the "needs of victims, offenders and communities affected by crime". The three most commonly identified restorative justice practices are VOM, family group



conferencing, and peace making circles. The models are further discussed in section 3.6 following a review of the philosophy, theories and key elements and principles and the practice of restorative justice.

However, the question remains “as to whether restorative justice is appropriate for processing domestic violence cases”. There has been much scholarly debate on this issue; this is considered in section 3.8.

### **3.3 The Philosophy Underlying Restorative Justice**

It is important to understand the philosophical context of restorative justice. According to Pranis (2004:136), restorative justice is a remarkably successful “philosophy and guiding vision; it sets out a clear set of values to shape people’s actions. As a philosophy, it assists in understanding the concrete, personal harm caused by crime and its effect on relationships and the community. It helps people to design pathways for repair and healing”. As the philosophy of a new paradigm, restorative justice resolves the prevailing paradigm’s serious dilemmas. The “criminal justice system is under severe pressure to demonstrate its effectiveness. Both the public and professionals within the system register high levels of dissatisfaction”. Informal restorative justice is regarded as an alternative to confront these challenges.

#### **3.3.1 Informal restorative justice and criminal justice philosophies**

The strengths and weaknesses of the informal restorative justice philosophy and the criminal justice philosophy in addressing crime and human rights abuse have been the subject of much debate (Roche, 2011:75; Zehr, 2005:184; and Liebmann, 2007:30). Roche (2011:75) argues that, “In more recent times, the contrast has become the subject of extensive critique. Both halves of the contrast are susceptible to criticism”. Roche critiques the notion of contrasting these two models of justice on the basis that the retributive part misrepresents the theory of retributive justice and the diversity of criminal justice practice; while the restorative justice part fails to capture the complexity of punishment processes outside the formal court room. Roche (2011:77) is of the view that the distinctions or contrasts run the risk of oversimplifying and distorting the concepts they purport to explain. The real meaning of retributive justice and our understanding of the workings of modern criminal systems, as well as the meaning of restorative justice is distorted. Zehr (2002:12) acknowledges that “restorative justice is by no means an answer to all situations. Nor should it replace the formal legal system, even in an ideal world. Even if restorative justice were to be widely implemented, some form of the westernised legal system would still be required as a backup and guardian of basic human rights”. Zehr (2002:13) also concedes that, despite his earlier writing, he no longer regards restorative justice as the polar opposite of retribution. While Zehr (2005:275) believes that contrast can be a helpful tool, he accepts the criticism that painting retribution and restoration as mutually exclusive

removes the possibility of exploring commonalities and mutual interest between those who hold these positions. In contrast, Liebmann (2007:30) states that comparing the philosophies of formal and restorative justice systems is useful in defining restorative values, but notes that the 'hard-and-fast' division into either retributive or restorative does not demonstrate the values of the restorative justice model or represent real life.

Roche (2001:88) concurs that such a comparison has possibly contributed to the tendency to regard restorative justice in fixed terms and suggests that the debate should instead be about different models and theories of restorative justice. According to Barton (2000:1), the differences between the two philosophies are most usefully articulated not in terms of contrasting them, "but in terms of the paradigms of empowerment and disempowerment of the primary stakeholders, the victim, offender and immediate community". Barton (2000:11) adds that instead of contrasting retributive and restorative justice theories, the debate should be about "how and why restorative justice interventions work the way they do and why conventional responses to crime have little chance of doing any better than they have already done to this point". Nonetheless, Shapland (2003:195) points out that restorative justice will always be compared with the criminal justice system.

#### **3.4 Theories of Restorative Justice**

Generally, according to Sutton and Shaw (1995:378) theory is "about the connections among phenomena, a story of why acts, events, structure and thoughts occur". Sutton and Shaw (1995:372-376) further indicate what theory is not. References alone "are not theory (p.372), data are not theory (p. 373), lists of variables and constructs are not theory" (p. 375), and neither diagrams nor hypotheses alone are theories (p. 376). To DiMaggio (1995:391) theories should consist of generalizable covering laws, facilitate enlightenment, and provide a plausible account of a social process or a combination of the strengths of each of the three categories. For example, empirically tested narrativity can yield a theoretical account of a social process. Process theory builds from description to explanation which can be accomplished through narratives (Pentland, 1999:711).

Pentland (1999:717) contends that narrative is suited to the development of theory since narrative encompasses sequence, time, voice of actors and content and context of phenomena. While the descriptive sequence of events represents surface structure of process, deep structure that yields explanation of process requires knowledge of how and why process is enabled or constrained (Pentland, 1999:717). Use of narrative in theory-building suggests interaction between empiricism and theory. For example, rather than treat theory

and method independently, Maanen, Sørensen and Mitchell (2007:1148) argue that data-based theorising is reiterative and inclusive of a researcher's intuition based on experience as well as research context. Researchers should link their results to concepts to generate plausible explanations in meeting the unmet expectation that gave rise to the research project (Maanen, *et al*, 2007:1149).

Specifically, McCold and Wachtel (2002:111) explain that theories of restorative justice are built by means of concepts, and that theories are structures that hold and explain the relationship among concepts. McCold and Wachtel note that there have been a number of attempts to define the key restorative justice concept necessary for theory construction, including the definition of restorative justice itself, on which there is as yet no consensus. Umbreit (2001:193) points out that, theories CRJ are based in a number of core values and principles. These include giving priority to the participation of the victim in the way that hold the offender accountable and able to restore the loss suffered by the victims. Not unlike Maanen *et al*, 2007:1148) McCold and Wachtel (2002:111) caution that if one proposes a theory, one should demonstrate some empirical support for it.

Theories of restorative justice here discussed are renewal of moral disengagement, reintegrative shaming, social and moral development, engagement and empowerment, reparation or restoration and universal pragmatics and communicative action.

### **3.4.1 Theory of reversal of moral disengagement**

Several theories have been identified by scholars in the field of restorative justice. Barton (2000:3) identifies the theory of reversal of moral disengagement that is "concerned with the psychology of a person in relation to moral matters". Barton explains that an offender "will tend to silence his/her conscience by adopting various internal disengagement mechanisms", such as blaming, dehumanising, or otherwise denigrating the victim. Barton argues that when the victim tells the "offender face to face about the harm their action has caused, their disengagement is challenged and in most cases successfully reversed from the point of view of victim restoration. This forms part of victims' healing experience as restorative justice illustrates that disengaged and unmoved offenders are aggravating and distressing to victims" (Barton, 2000:3). Barton adds that moral disengagement can cause a victim to display intense hatred for the offender, by calling for their castration, calling them animals and stating that they should be put to death. When the offender shows genuine remorse, victims are "challenged to examine their own disengaged, derogatory views of the offender as a moral monster" (p. 3). Barton (2004:4) is of the opinion that restoration, emotional conciliation and healing are promoted by reversing moral disengagement. Barton (2000:5) further points out that, "with this theory the onus on the facilitators to detect the presence of mechanisms of moral disengagement and to use

appropriate techniques for reversing them”. In addition “convenors of victim offender mediation should aim to create the right conditions for emotional conciliation and healing; any expression of remorse from offenders, or expression of forgiveness from victims must be allowed”.

### **3.4.2 Theory of reintegrative shaming**

Braithwaite is world-renowned for his theory of reintegrative shaming. Braithwaite (2003:55) posits that “societies that have the lowest crime rates are those that effectively shame criminal conduct. There is an important difference between reintegrative shaming and stigmatisation. While reintegrative shaming prevents crime, stigmatisation makes the problem worse”. Stigmatisation “creates outcasts; it is disrespectful and humiliating and treats criminals as evil people who have committed evil acts. In contrast, reintegrative shaming disapproves of the evil of the deed while treating the person as essentially good and respecting them” (p.55). Braithwaite (2000:118) contends that “while reintegrative shaming prevents law breaking, stigmatisation makes it worse”. Braithwaite claims that reintegrating theory “has some modest empirical support”. Several scholars have supported Braithwaite’s theory of active community participation in solving crime.

According to Roche (2004:10), the key to Braithwaite’s theory is that the shaming of the offender’s actions accompanied by expressions of support and validation prevent re-offending. Shapland (2003: 207) agrees that the inclusion of community representatives is advantageous as they are aware of the victim’s needs and may be able to mobilise resources in their community that can contribute to problem-solving. Similarly, Barton (2000:11) notes that Braithwaite’s theory is based on the “premise that crime is best controlled when members of the community are the primary controllers through active participation in shaming offenders and, having shamed them, through concerted participation in ways of reintegrating the offender into the community of law-abiding citizens. Reintegrative shaming occurs when a person’s behaviour is condemned but their self-esteem and confidence are upheld through positive comments about them and gestures of forgiveness and re-acceptance” (Barton, 2000:12).

Zehr and Mika (2003:42) state that, the fact that “offenders are supported and treated respectfully in the restorative justice process demonstrates that community members are actively involved in ensuring that justice is done”. The restorative “justice process seeks to promote change in the community by both preventing similar harm from happening to others and fostering early interventions” to address the needs of victims and offenders’ accountability. Grauwiller and Mills (2004: 62) argue that a community of care offers localised support and enhanced safety for victims. Frederick and Lizdas (2010:44) similarly contend that “as communities became more engaged in ensuring victims’ safety and holding offenders accountable, they

reduce their own tolerance of violence in their communities”. Schiff (2011:236) explains that when a community develops ‘collective ownership’ of the problem of crime, it develops efficacy in controlling crime, offers social support and develops informal sanctions. Schiff (2011:236) adds that a community often has access to resources unknown to government professionals that can strengthen and support bonds between its members. The community also plays an important role in monitoring compliance with restorative agreements.

Frederick and Lizdas (2010:44) observe that women’s groups contend that as communities become more engaged in ensuring victims’ safety and holding offenders accountable, they reduce their own tolerance for violence in their communities. Women’s groups strongly encourage a community-wide response to the problem of domestic violence. Rubin’s (2010:88) research with victims of domestic violence revealed that women’s understanding of community is different from that of the literature. For women the term ‘community’ in the context of domestic violence refers to those to whom they can turn for support. For many women, the community shrinks and changes radically after criminalisation and / or surviving abuse.

Victims of domestic violence have been known to find themselves and not the offender shamed by the community. The women interviewed by Rubin (2010:90) spoke of the judging and blaming they experienced from the community in general. Rubin (2010:98) argues that communities reject women when they report crime. For these women, a real ‘community’ would be one that addresses the needs of women from diverse cultural groups; that is well-informed about the dynamics of domestic violence; and that makes resources available to women who are victims of domestic violence.

### **3.4.3 Theory of social and moral development**

The theory of social and moral development underlies personal transformation of each party to the dispute (Johnson and Van Ness, 2011:16). Mediation encounters and facilitators play a role in such transformation (Barton, 2000:6; Van Ness (2003:173). Barton (2000:6) argues that “learning from one’s own and other people’s mistakes and misdeeds is an important part of an individual’s social and moral development”. Johnson and Van Ness (2011:15) support Barton’s theory of learning through mistakes and note that restorative justice seems to evoke a passion and commitment among its adherents that cannot be explained by cost benefit calculations. Stories are told of dramatic transformative changes in attitudes in which the victim and the offender recognise their common humanity, empathy develops and inner resolution takes place. “Having responded in appropriate ways to repair the harm, the offender is welcomed back into the moral fold with clearly articulated expectations that they will have learned from the incident and will do

better in the future” (Barton, 2000:6). Johnson and Van Ness (2011:16) argue that the transformation that takes place in others is also the transformation a person begins to experience themselves.

According to Barton, (2000:7) “a well-organised and facilitated meeting can be a catalyst for the offender and the victim to seek lasting solutions to underlying problems; however, it is hard to think of a way of breaking through to recidivist offenders and inducing in them a process of moral change”. This is why the role of the abilities of a facilitator in a mediation encounter cannot be underestimated. Van Ness (2003:173) suggests that “facilitators should be recruited from all sectors of society and should have a good understanding of local cultures and communities. They should be able to demonstrate sound judgement and have the necessary interpersonal skills to conduct restorative justice processes”. Facilitators could get through to a recidivist offender.

#### **3.4.4 Theory of engagement and empowerment**

The theory of engagement and empowerment focuses upon victims, offenders and communities. Sawin and Zehr (2011:49) argue that restorative justice that seeks to engage and empower victims should ensure that the victim’s safety is a fundamental element of programme design. Victims and their needs should be the primary consideration and they should be kept informed at every step of the process. Furthermore, the victim’s right to privacy should be protected and they should be offered the widest possible range of support as well as a flexible process and referrals where necessary. Above all, restorative justice seeks to fully engage victims; the criminal justice system has tended to exclude and disempower victims.

Frederick and Lizdas (2010:42) observe that restorative justice emphasises community engagement in rehabilitating the offender. The theory is that offenders are not irredeemable but are capable, especially with the help of the community, of being rehabilitated. The movement against domestic violence’s approach to re-offending (recidivism) is based on its understanding of why women are battered by their partners (Frederick and Lizdas, 2010:42). Firstly, culture and laws tend to reflect the belief that domestic violence is acceptable; therefore communities must convey a strong message that such abuse is not acceptable. Secondly, the movement contends that that life experience may teach the offender that violence is an effective and appropriate means to control their partner; thus individual abusers must be taught different values and skills. Finally, when offenders use violence against their partners they are responsible for making that decision; they need to be offered a range of disincentives as well as opportunities to learn new ways of thinking about their families. Frederick and Lizdas (2010:50) argue that a community that seeks to address domestic violence should have a deep understanding of four issues: “(1) the dynamics of domestic violence; (2) the harm done to a victim in the past and the likelihood of future harm; (3) the offender’s likely response

to any proposed resolution; and (4) the dynamics, both political and personal, that might affect the process or the result”.

Sawin and Zehr (2011:51) point out that most advocates for restorative justice perceive some role for the community. However, there has been heated debate on the definition of a community, the actual role of the community and approaches to engage and empower the community. Some scholars have expressed concern about engaging and empowering communities that are dysfunctional. There is also debate around community engagement and the extent to which it overlaps with concerns about victims.

While the literature on restorative justice has long emphasised who is being empowered or engaged, it has not shed light on who is doing the empowering or engaging in a given restorative justice event, although early efforts saw the facilitator playing a key role in representing the community (Sawin and Zehr, 2011:53). An accomplished facilitator plays a critical role by engaging the victim, the offender, and their loved ones, and inviting each party to tell their life story, or the story of the wrongdoing, “in order to assess the impact of the wrongdoing and the needs arising from it. If this theory holds true, the very opportunity to be listened to might begin to empower the parties and propel them towards healing”.

Stubbs (2010:113) notes that there is strong agreement in the literature that indigenous communities’ responses to domestic violence should be community-driven “and crafted with the full involvement of indigenous people”. In contrast, there is a paucity of research on the cultural assumptions that underlie the theory and practice of restorative justice or what forms of empowerment and engagement are appropriate in various cultural settings (Sawin and Zehr, 2010: 54).

### **3.4.5 Theory of reparation or restoration**

Proponents of restorative justice are of the view that crime upsets the equilibrium between victim and offender; restorative justice restores that equilibrium (Frederick and Lizdas, 2010:40; Sharpe, 2011:29). Toward that end the theory of reparation or restoration requires that victims have a sense of control or involvement in the resolution of their own cases. Sharpe (2011:27) observes that reparation can take many forms. In general, it is described as being material or symbolic, although the two categories overlap to a large extent. Reparation requires that if a person commits a serious wrong against another person, an injustice arises which needs to be put right. The harm that the crime has caused to people and relationships needs to be repaired (Johnson and Van Ness, 2011:12).

The offender must demonstrate genuine repentance and willingness to make amends for the wrongdoing. Material reparation can have a symbolic function, conveying acknowledgment “of responsibility and thus

having the effect of an apology, while symbolic reparation can make a substantial difference in a victim's life" (Johnson and Van Ness, 2011:13). These two forms of reparation differ in terms of their primary function: material reparation generally addresses the specific harm that results from wrongdoing, while symbolic reparation speaks to the wrongness of the act itself (Sharpe, 2011:27). Barton (2000:10) notes that "material reparation results in a final settlement between the offender and victim and typically consists of specific agreement on compensating the victim". Frederick and Lizdas (2010:40) argue that, to "repair the harm done to the victim of domestic violence, the offender can offer tangible things like money, property, medical expenses. or intangible things such as a sense of worth, safety and closure".

In contrast, "symbolic reparation is less visible and often composed of gestures and expressions of courtesy, respect, remorse, apology and forgiveness" (Barton, 2000:10; Sharpe, 2011:28). For example, victims may implicitly hear responsibility and remorse during restorative justice dialogues as the offender explains how and why the crime occurred and respectfully listens to the victim's experience of it. Symbolic reparation precipitates an emotionally healing journey by the participants during the course of which they are able to "rid themselves of the moral, psychological and emotional burdens of the past" (Barton, 2000:10). Daly (2000: 48) cautions, however, "Signs of remorse or shame maybe difficult to read, and that may pose a problem for the ethical practice of restorative justice".

Roche (2004:27) is of the view that "restorative justice emphasises the humanity of both offenders and victims. It seeks to repair social connections and peace rather than retribution against offenders". Roche points out that, proponents of reparation link it to indigenous and religious traditions. For example, Archbishop Desmond Tutu (1995:51) regards restorative justice as a "characteristic of traditional African jurisprudence in which the central concern was not retribution or punishment but in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships". Similarly, Roche argues that reparation is linked to indigenous traditions in countries and regions as diverse as Canada, New Zealand, Australia, and the Navajo Nation in the United States (Roche, 2004:27).

Barton (2000:55) and Daly (2000: 48) agree that, outside of restoration or repair, restorative justice often contains retributive and punitive elements. Punishment and retribution cannot be ruled out of any system of justice. Barton (2000:61) adds that, "in practice, restorative justice responses incorporate punitive and retributive measures with other measures such as increased social and community support to eliminate the underlying causes of offending and, where necessary, treatment or further education".

According to Sharpe (2011:28), repairing the damage caused by crime is important and reparation locates responsibility. When a person commits a crime, they create a debt, an obligation, a liability that must be met.



The “offender who commits the crime should be the active party in redressing it and repairing the harm” (Sharpe, 2011:29). Reparation can vindicate the innocent by showing the community that they were right and the other person was wrong. It demonstrates that the wrong suffered was in fact a wrong Sharpe, 2011:28). A reparative sanction such as restitution requires the offender to compensate the victim for the harm sustained (Van Ness and Strong, 1997:24).

#### **3.4.6 Theory of universal pragmatics and communicative action**

Barrett (2013:338) observes that there are gaps in our understanding of what happens during an encounter between an offender and victim. “To date there is little explanation of the basics workings of the encounter and how it produces personal transformation, learning, strengthens social relationship and an understanding between the parties” (Barrett, 2013:336). Barrett uses Habermas’ discourse theory of universal pragmatics and communicative action to theorise the mediation encounter. Habermas identifies three human perspectives and a number of validity claims to pinpoint the theory of universal pragmatics and communicative action (Habermas, 1979:28, 29, 33; 1984:52, 68). The human perspectives or “three worlds” are objective, subjective, and social (Habermas, 1984: 52, 68). From these different perspectives humans use speech utterances to exercise validity claims or argumentation. The validity claims suggest that (1) utterances are truthful and accurate, (2) the speaker is sincere and trustworthy, and (3) thoughts held and words spoken are normatively appropriate (Habermas, 1979:28, 32-33). The goal of understanding one’s expression from different perspectives and one’s use of validity claims is to accomplish communicative action. Habermas’ theories are more interested in what language does than what is said through language (Barrett, 2013:340).

To Barrett (2013:345) the intersection of these three worlds and validity claims help explain that which occurs during the mediation encounter Barrett (2013:355) argues that, during the mediation encounter, when the participants speak about what happened they are raising three validity claims: that what they are saying about the event is true, that they are being sincere, and that what they are saying about the event is normatively appropriate in the context. The participants take turns to explain the situation and raise their claims with each utterance; at the same time they have an opportunity to question and challenge the other’s claim regarding what happened. Through the use of language, claims are raised, questioned, and explained, or agreed upon and accepted in a space of open and honest dialogue (Barrett, 2013:355). When speaking about their subjective world, the parties can express their needs, desires, and feelings. If all the parties agree on the validity claims, their knowledge and trust of each other can grow, thus strengthening relationships and communicative action (Barrett, 2013:357) which includes positive changes in behaviour.

Hudson (2003:180) acknowledges the power of language described by Barret but notes “that hearing is as important as saying. The telling of the harm suffered and of the reasons for the offence must make the victim and the offender real to each other in order for the harm and its causes and circumstances to be acknowledged as real”. Hudson (2003:183) explains that, in the case of domestic violence, the victim is given an “opportunity to choose how to present her; to abstract herself from the relationship; and to select her own supporters and representatives”. The offender will not be able to ignore her story as it is not told in legal language but in her own words; “words with which she always communicates with him. Therefore he cannot claim not to have understood any more than he can claim not to have heard”. He cannot claim not have been told about her feelings, her understanding of the events, and her wishes and demands for the future. Hudson (2003:185) adds that ground rules need to be carefully established to ensure that restorative processes are not dominated by any powerful individual. Hudson (2003:192) concludes that, “what is appealing about restorative justice is its openness to storytelling and exploration of possibilities for creating constructive responses to offences”.

Roche (2004:10) observes that restorative justice gives offenders an opportunity to express remorse and thus to discharge the shame they feel, while Johnson and Van Ness (2011:10) identify a number of benefits when encounter processes are used in appropriate cases. An encounter offers victims “avenues for restitution, gives them the opportunity to be involved in decisions after the crime is committed, can reduce fear and increase a sense of safety, and may help them to understand the offender and the circumstances that led to the commission of the crime”. It has the transformative potential to allow parties to achieve personal growth even if they do not settle their dispute.

According to Van Ness (2002:6), all the elements discussed under various theories constitute restorative justice. This broader theoretical framework lays the foundation for this study on the use of CRJ by CBPs in domestic violence cases. However, theories of restorative justice are not without limitations to which the discussion now turns.

### **3.4.7 Limitations of restorative justice theories**

Some limitations of restorative justice theories relative to domestic violence include community support for perpetrators, power imbalance, victim misuse, and the coercion and cheap justice problem.

#### **Community support for perpetrators of domestic violence**

Smith (2010:259) argues that all the models of restorative justice involve the community in holding the perpetrators accountable. However in cases of domestic violence, the community often sides with the

perpetrator rather than the victim. Frederick and Lizdas (2010:50) argue that the “most confounding and problematic aspect of community involvement in domestic violence cases is the prevalence of norms that support violence against women, excusing such violence as private or as deserved by the victim”.

Shapland (2003:215) believes that a perfect approach to justice is well-nigh impossible. Shapland adds that even though restorative justice might achieve legitimacy, constraints will still exist at individual level. Therefore, agreements, healing and participation should be pursued with both individuals and communities.

### **Victims can experience a power imbalance as a result of restorative justice**

Strang (2004:57) observes that restorative justice has been criticised for its potential to replicate and perpetuate existing power imbalances between the victim and the offender. Restorative justice interventions do not address the structural inequality and oppression which victims may experience in their relationship with the offender. Strang notes that there has been little research on how to achieve equal treatment. Frederick and Lizdas (2010:51) point out that the power imbalance caused by domestic violence also has implications for the victim’s involvement in the process. Morris and Young (2000:22) observe that, while women want the violence to stop; they do not want necessarily their partner to be prosecuted. Therefore, restorative justice increases the options available to the victim (Morris and Young, 2002:22).

### **Victims may be ‘used’ in restorative justice**

Strang (2004:58) maintains that victims must be able to see the benefits of participating and should never be used as a tool to rehabilitate the offender, due to the danger of being revictimised. In contrast, Morris and Young (2000:22) argue that the benefit of restorative justice is that victims have veto over the acceptability of the proposed sanctions.

### **Coercion and cheap justice problem**

Nancarrow (2010:128) explains that this involves forced “participation in informal judicial process and coercive tactics by the perpetrator in these processes”. In addition, Nancarrow (2010:128) points to the tendency to overemphasise the value of an offender’s apology, and argues that apology is frequently used by those who perpetrate domestic violence as a means of restoring control of their partner – this amounts to cheap justice.

With the general context, philosophy and theories of community restorative justice in mind, the discussion now turns to the elements, principles and practices of community restorative justice.

### 3.5 Key Elements and Principles of the Community Restorative Justice Process

Latimer *et al* (2005:128) note that the main elements of the CRJ process are voluntary participation by the victim and the respondent, telling the truth and a face-to-face encounter. These terms are defined as follows:

- Voluntary Participation – “knowingly and willingly agree to the CRJ process”.
- Truth telling – “the offender needs to accept responsibility for the harm done and be willing to openly and honestly discuss the criminal behaviour”.
- Face-to-face encounter – “the participants should meet in a safe and organised setting to collectively agree on the appropriate method to repair the harm”.

Turning to the principles of CRJ, Zehr (2004:307) explains “that restorative justice reflects three basic assumptions: (1) crime is a violation of people and relationships; (2) violation creates obligations; and (3) setting right the wrongs is central to that obligation”. Zehr (2004:307) contends that this amounts to the following “set of restorative justice principles”:

- “To focus on the harm and consequent needs of the victims, as well as those of communities and offenders;
- To address the obligations that result from the harm (the obligations of offenders as well as communities and society);
- To use inclusive, collaborative processes to the fullest extent;
- To involve those with a legitimate stake in the situation, including victims, offenders, community members and society;
- To seek to put right the wrongs” (Zehr, 2004:307) .

### 3.6 The Practice of Community Restorative Justice

Pranis (2004, 139-140) submits that the practice of restorative justice should include the following characteristics:

- “Opportunity for increased involvement of victims;
- Repair of the harm done to victims to the highest degree possible;
- Increased offender understanding of the harm done to the victim, the community and oneself;
- Encourages the offender to take responsibility for the harm done;
- Results in changes that will reduce the likelihood of the crime happening again;

- Increases the capacity for self-regulation in individuals and the community”.

These practices have led to a number of restorative justice models, including victim offender mediation (VOM), family group conferences, peace-making circles and community panels, each of which is discussed in turn. Before reviewing those models, it is worth considering the origins of the term VOM.

According to Van Ness (2004:96), victim offender mediation (VOM) “was the first contemporary and most common expression of the restorative justice practice. It brings victims and their offenders together in a face-to-face meeting, with a trained facilitator coordinating and facilitating the meeting”. The victims describe “their experience of the crime and the effect it has had on them. The offenders explain what they did and why, answering any questions the victims may have. When both the victim and offender have had their say, the facilitator will help them to consider ways to set things right. Typically, the facilitator will have met with each party prior to their meeting to prepare them”. Van Ness explains that “the VOM can take place at any time during the criminal justice process, or outside the system”. Hooper and Busch (1993:3) describe VOM as a process that “endeavours to allow victims to fully articulate the consequences of the offending for them and to have a voice in structuring the response to the offending”.

Presser and Gaarder (2000:182) agree that VOM is the most common expression of restorative justice, and note that the model was first used in Canada in 1974. Pranis (2004:142) points out that the VOM is sometimes referred to as victim offender dialogue or victim offender conferencing. In contrast, Van Wormer (2009: 110) is of the opinion that “VOM is not the same as victim offender conferencing”. For Van Wormer, on the one hand, victim offender conferencing brings the parties together when one person has injured the other in order to resolve and, if possible, right the wrong; it recognises the victim and offender as participants”. On the other hand, VOM “implies a dispute among equals that must be negotiated”, and recognises the parties as disputants. Bazemore and Schiff (2001:27) point out that VOM is the most widely implemented restorative justice technique in the world.

According to Van Wormer (2009, 110), a family group conference is a model adapted from a Maori (indigenous people of New Zealand) practice to resolve community problems. The “victim, victim’s supporters, offender, offender’s supporters and a facilitator engage in dialogue to explore what happened, how each person has been affected, and what needs to be done to make things as right as possible”. Van Wormer (2009: 110) terms this a solution-based process that is “most often used by child welfare

departments in cases of child abuse and neglect and notes that it works well in close-knit minority communities with strong extended family ties”.

Pranis (2004:142) refers to this practice as restorative group conferences, while Van Ness (2004: 97) distinguishes family group conferencing from VOM; a family group conference involves more parties. The people involved in the conferencing process have an interest in the matter; the motivation for participation could be that “they have also been affected in some way by the offence, or because they care about one of the primary participants”.

As to peacemaking circles, Pranis (2004:143) notes that peacemaking circles involve the “victim, victim’s supporters, offender, offender’s supporters and interested community members in a structured dialogue about what happened, why it happened, what the impact is, and what is needed to repair the harm to prevent it from happening again. The participants sit in a circle. This practice can be used for the adjudication itself as a sentencing circle”. Van Wormer (2009:110) refers to this practice as “healing circles, used in North American native rituals for work with victims and to provide family and community support. As in family group conferencing, truth telling and open communication are primary aspects of this process”.

With regard to community panels (CP), Pranis (2004:144) explains that, “in this approach, a small number of trained community members meet with an offender to talk about what happened. They determine how the problem or situation affected the victim and the community and decide on activities that the offender must engage in to address restorative goals”. Some panels involve victims while others receive input from the victim. Pranis (2004:145) adds that community panels often involve working with just the victim or with the offender, outside of the face-to-face context.

Pranis (2004:145) explains that community panels practices require the offender to admit to the charge in a face-to-face meeting. “Victims’ participation in the panels is always voluntary and offender participation is typically voluntary or represents some level of willingness relative to other options. CP practices also use post-conviction as part of healing or as part of reintegration into the community after a period of incarceration. Some CP practices require community or government resources in addition to offender efforts even if offenders are not involved at all in some restorative practices”. Although there are many models of restorative justice that may or may not include face-to-face contact between the parties or disputants, debate continues as to whether restorative justice works in general and with specific reference to domestic violence.

Similarly debate continues on the question of whether indigenous or traditional dispute resolution processes have influenced restorative justice as it is applied today in various countries. These debates are presented in the following section.

### **3.7 The Debate on the Practice of Community Restorative Justice in Domestic Violence Cases**

Edwards and Sharpe (2004:12) observe that the literature presents a wide range of perspectives on the use of restorative justice in the context of domestic violence. A common theme among both supporters and opponents of the restorative justice process is that the dynamics of domestic violence create challenges for this practice. These include the difficulty of achieving safe and unencumbered participation, and the significance of screening and facilitating skills. Another issue is whether domestic violence should be treated as public or private matter, which extends the debate on whether domestic violence should be dealt with through the criminal justice system, the traditional justice system or the restorative justice process.

Coker (2004:1349) warns that proponents of alternative interventions in domestic violence must not lose sight of the fact that domestic violence is morally wrong. On the other hand, Ptacek (2010:9) notes that, although restorative justice practices were not specifically created to deal with domestic violence, and are expressly excluded in many jurisdictions, they are nonetheless applied to cases of domestic violence. Presser and Gaarder (2000:186) suggest “that there are risks in applying restorative justice to domestic violence, including that of framing domestic violence as not sufficiently important to warrant serious attention”. Hudson (2002:255) points out that the “formal criminal justice system is still the recognised way of demonstrating that society takes domestic violence seriously”. Curran and Bonthuys (2004:17) argue that customary dispute resolution mechanisms are an integral part of the traditional justice system; their research revealed that the attitude of presiding officers in traditional courts “to women’s problems influence the ways in which they deal with complaints of domestic violence”.

The section that follows discusses whether community restorative and traditional justice systems are appropriate for domestic violence cases. Some scholars believe that, while mediation should not be outlawed for domestic violence cases, it should generally not be encouraged. Mandatory mediation should never occur when the relationship has a history of violence, unless the victim opts for mediation. Another school of thought believes that each situation should be evaluated individually through screening to determine whether mediation could be appropriate even when there has been a history of domestic violence. Finally, a small group of scholars argues that mediation can be effective in almost any family law case, even those in which domestic violence is a factor. Similarly, scholars disagree as to whether domestic violence cases are suitable

for resolution by traditional courts. As discussed earlier, the proposed but unsuccessful Traditional Courts Bill (TCB) excluded domestic violence. The first two sections raise opposing arguments regarding restorative justice and the last two raise opposing arguments relative to the traditional justice system.

### **3.7.1 Arguments in favour of the use of community restorative justice in cases of domestic violence**

Scholars identify different reasons for the appropriateness of restorative justice practices in addressing domestic violence. While some signal the need to approach the use of restorative justice for domestic violence cases with moderation, others believe that, as a general rule, it is useful in family cases. Hooper and Busch (1993:29) argue that caution should be exercised in “using restorative justice practices in cases of domestic violence. It should only be attempted in rare cases and then only after special protocols are followed to ensure the victim’s free and informed consent and safety”. Hooper and Busch conclude that the restorative justice process should not compromise the victim’s safety and risk exposing the victim to further violence. With all protocols observed for the victim of domestic violence, “the restorative justice process opens opportunities for victims and offenders to effectively participate in the criminal justice system” (Hooper and Busch, 1993:29).

Similarly, Presser and Gaarder (2000: 186) are of the view that “restorative justice has the potential to increase a victim’s likelihood of reporting abuse since it offers an array of flexible interventions”. These scholars add that “the restorative justice process provides an alternative to women who distrust the criminal justice system. Restorative justice frames domestic violence in a way that has the potential – enabled by laws against domestic violence – to attack the roots of the problem, including social inequities and associated norms, the isolation of individuals and families, and neutralisation of blame” (Presser and Gaarder, 2000: 186).

Graef (2001:31) explains that restorative justice is particularly “helpful (with safeguards) in complex situations of violence in the home, such as domestic violence and child abuse. Such cases are often not reported because the criminal justice process may be perceived as making things worse. The collective shame and overall experience of bringing such cases to court is so damaging to victims and the rest of the family that abuse is suffered in silence. Even if they succeed in gaining a conviction, the family is torn apart, and the victims often feel more guilty than the offender”.

According to Morris and Gelsthorpe (2003:129), “restorative justice allows women to make choices about their future from a range of options rather than primary or sole reliance on criminal justice responses,



especially when they do not wish to end their relationship for emotional, financial or cultural reasons”. Morris and Gelsthorpe argue reasons such as children, love, the desire to save the marriage, residential challenges, lack of financial resources, fear of the offender influence the choices women make and it should be an independent choice “that best suits them rather than professionals deciding for them” (Morris and Gelsthorpe, 2003:132). Daly (2003:209) concedes that “face-to-face encounters between victims and offenders and their supporters is a practice worth maintaining, and perhaps enlarging, although we should not expect it to deliver strong stories of repair and goodwill most of the time”.

Dissel and Ngubeni’s (2003:12) research “with 21 female victims of domestic violence in South Africa who, six to 18 months earlier, had completed a mediation process, revealed that restorative justice practices can be successfully used in domestic violence cases, and that it can result in lasting and meaningful change”. Dissel and Ngubeni argue that the research findings indicate that restorative justice practices are relevant in the majority of cases reviewed and are understood within African culture. Dissel and Ngubeni point out that women “felt that mediation provided a safe space to speak” (Dissel and Ngubeni, 2003:6-8).

Edwards and Sharpe (2004:22) suggest that restorative justice holds theoretical promise as an intervention in domestic violence, offering victims and offenders a choice of avenues to meet particular needs. Facilitators help maintain focus during the dialogue and improve communication in constructive ways. The parties are given an opportunity to explain and understand issues that they were not previously able to explore together. These authors argue that despite the risks involved in the restorative justice process, there is evidence that some domestic violence victims and offenders have found value in participating in this process (Edwards and Sharpe, 2004:22).

Grauwiller and Mills (2004:66) favour restorative justice as a process that “moves intimate abuse beyond the narrow parameters of mainstream feminism, allowing for the possibility of reconceptualising domestic violence to incorporate its nuances and dynamics. This offers the opportunity to address the problem more holistically and directly. It also provides a more culturally specific response that addresses the unique gender dimensions of the problem, including violence by both men and women in heterosexual and homosexual relationships”. Restorative justice provides the kind of justice that women seek, which is non-threatening and healing-oriented (Grauwiller and Mills, 2004:63).

Similarly, Curtis-Fawley and Daly (2005:612) “conducted interviews with victim advocates in two South Australian states on their views on the appropriateness of restorative justice strategies for the women they serve. Twelve of the 15 advocates interviewed held favourable attitudes towards restorative justice, which

most saw as a positive alternative to criminal justice processes. Those who had unfavourable attitudes were unfamiliar with the process and seem to have confused conferencing with mediation". Mills *et al* (2006:357) in support suggest that alternative approaches to criminal justice "may be particularly useful in domestic violence cases because of the unique relationship between the victim and the offender". Many victims and offenders continue in their relationship regardless of the violent behaviour that has developed.

A number of studies demonstrate victim interest in the use of restorative justice for domestic violence cases. Nancarrow's (2006: 101) study compared an indigenous and non-indigenous group in 2000 in order to obtain their perspectives on the appropriateness of restorative justice in cases of domestic violence. "The indigenous women believed that restorative justice offers hope for a more effective justice response to domestic violence" (Nancarrow, 2006: 101).

Burkemper and Balsam (2007: 127) note that some victims of domestic violence may want to engage in a restorative justice process. Burkemper and Balsam (2007: 133) point out that "where restorative justice practices have been used in domestic violence situations, they have resulted in greater victim healing and changes in offender beliefs and behaviours and that those that desire to participate in such processes should be given the opportunity to do so".

Presser and Gaarder (2000:186) regard "restorative strategies as a viable alternative to standard practices. The restorative justice model acknowledges that many people seek to end violence, but not the relationship". To Van Wormer (2009:113) "the process serves partners and those who would like to separate in a more amicable fashion better than standard adversarial disputes".

Van Wormer (2009:108) argue further that the "results of victim satisfaction surveys show that even when the prosecution of a perpetrator of domestic crime has been successful, the results may not meet the needs of the victim survivor. In addition women victims had a negative view of the criminal justice system. Most expressed the desire to make the decision whether or not to have the person arrested and whether or not to withdraw the charges at a later stage. Lack of control over the process was one of the key determinants of dissatisfaction; if the case comes to trial and the victim is forced to testify, what she says against her partner may compromise her safety later on. The restorative process is an informal method that stresses resolution through dialogue and is consistent with women's need to speak on their own behalf.

Belknap and McDonald (2010:374) support restorative justice processes if the victims choose to use them; however the victim should not be coerced to do so. Belknap and McDonald accept that restorative justice “may be the best available alternative to the current court system, which seems ineffective at best and harmful to victims at worst”. Belknap and McDonald (2010:387) further argue that, “if victims of domestic violence have a voice, defendants take responsibility, and communities are more involved in decision making and monitoring domestic violence, particularly if these changes translate into increased victim safety, restorative justice can work”.

Uotila and Sambou (2010:190) explain “that victim offender mediation was introduced in Finland in the 1980s. It was used in intimate relationship violence cases from the onset of mediation practices. Despite the on-going debate questioning the suitability of mediation to domestic violence, there has been a steady annual increase in Finland in the number of domestic violence cases that apply mediation”.

For some scholars, restorative justice broadens the available outcomes of cases. Based on their experience of cases of domestic violence, Edwards and Haslet (2011:902) found that restorative justice is appropriate for such cases. They “witnessed willingness on the part of victims of violence to speak not only about their struggle and grief, but their resilience and strength”. Finally, Landrum (2011:425) points to the appropriateness of restorative justice for domestic violence cases and states without reservation that, mediation can be effective in almost any family law case, even those in which domestic violence is a factor.

### **3.7.2 Arguments against the use of community restorative justice in cases of domestic violence**

Scholars find restorative justice inappropriate or less appropriate for domestic violence cases largely because of the perceived risks to victims and the purported public/private divide in matters of domestic violence, which may jeopardise the seriousness of the action taken against violence. Hooper and Busch (1993:11) argue that restorative justice practice contributes to “the trivialisation of domestic violence and the creation of a veil of secrecy, since it focuses on individual and marital privacy and the desire to preserve the family as an intact unit”.

Presser and Gaarder (2000:186) identify “clear risks in applying restorative justice programmes to domestic violence. Chief among these is the risk of framing such violence as insufficiently important to warrant serious attention”. According to Presser and Gaarder (2000:175), restorative justice has been criticised “for reinforcing the view of domestic violence as a private matter. Restorative justice may not be appropriate in some cases of domestic violence. The justice process needs enforcement teeth which only the legal system can provide” (Presser and Gaarder, 2000:187).

Fulkerson (2001:355) argues that power relations weigh heavily on whether restorative justice processes such as VOM can be effective. Fulkerson feels that mediation-oriented programmes may be ineffective due to the imbalance of power in families that are experiencing domestic violence. There is a risk that the power which the abuser holds over the victim in the family setting will also be a distorting factor in the mediation process. The abusive partner will find a way to prevail over the abused partner despite the mediator's intervention. Thus the goal of mediation, an agreement, is not actually an agreement at all but rather another subtle capitulation by the abused to the power of the abuser. According to Hudson (2002:621), the case for restorative justice in response to domestic violence usually rests on two planks. Firstly, Hudson notes that the established formal criminal justice system has "allegedly failed to provide effective remedies for victims of domestic violence". Secondly, Hudson suggests that "restorative justice has greater potential for providing satisfactory outcomes in more cases" (Hudson, 2002:621).

Coker (2004:1349) acknowledges that the criminal justice system's focus on controlling crime has not provided a solution to the problem of domestic violence; any alternative intervention must be morally grounded since domestic violence is morally wrong. Curtis-Fawley and Daly (2005:603) explain that critics of restorative justice warn that it is not appropriate for domestic violence "because the process and outcomes are not sufficiently formal or stringent, and victims may be further victimised".

In much the same vein, Daly and Stubbs (2006:18) indicate that the informality of the restorative justice process might reprivatise male intimate violence after decades of feminist activism to make it a public issue. Nancarrow (2006:118) contends that feminists concerned about gender inequalities in the justice system acknowledge that this system is often not effective in delivering what women want, and need, for protection and validation. Female victims of domestic violence do not share the same perspective on the use of restorative justice. As noted in the previous section, Nancarrow (2006:101) conducted research with a group of indigenous and non-indigenous women in 2000 to obtain their perspectives "on the appropriateness of restorative justice in cases of domestic violence". Both groups expressed support for some sort of amalgamation of the criminal justice system and restorative justice to address the inadequacies of each approach. However, on the one hand, according to the indigenous group, "restorative justice should be the prominent partner in an amalgamation, backed up by the criminal justice system". On the other hand, "the non-indigenous group saw the criminal justice system as the best primary response and felt that it should be the prominent partner in any amalgamation". Unlike the indigenous group, "the non-indigenous group believed that restorative justice could supplement the criminal justice system to deal with non-violent aspects of the case, on condition that these practices are victim-centred and that women are not coerced into them" (Nancarrow, 2006:101).

According to Van Wormer (2009:107), some experts have “ruled out the suitability of restorative techniques in cases of domestic violence because of the power imbalance in the relationship and the fact that the relationship between the offender and victim is often on-going. Others have advocated for restorative strategies for the same reason”.

Stubbs (2010:92) captures “three major critiques of restorative justice as a response to domestic violence. Firstly, there are unequal power relationships between victims and perpetrators of domestic violence and the offender has the capacity to exert power over the victim and the process itself. Secondly, it is assumed that a uniform set of community values exists, that condemns violence against women. Finally, the emphasis on apology and forgiveness may be misplaced”. Stubbs notes that “supporters of restorative justice claim that it offers significant benefits to victims of crime and that it redresses the failure of the conventional criminal justice to attend to victims’ needs and interests”. “While restorative justice is victim-centred with claimed benefits such as numerous symbolic, material, therapeutic, and moral outcomes” Stubbs continues, “many of these claims have not been tested” (Stubbs, 2010:92).

Frederick and Lizdas (2010:50) argue that the people assisting with restorative justice should understand four things: “the dynamics of domestic violence; the harm done to a victim in the past and the likelihood of harm in the future; the likely response of the offender to any proposed resolution; and the dynamics, both political and personal, that might affect the process or the results”. Yet, Stubbs (2010:985) is concerned that domestic violence is highly gendered and submits that “generic models of restorative justice do not address the specific characteristics of gendered violence as they have a very limited vision of victims’ needs. If restorative justice is to be true to the promises it makes to victims, it may need to adopt models that have the potential to connect victims with services, support and outcomes beyond the apology or reparation that the offender may wish to, or be able to, offer”. CBPs and CAOs could represent such a model as described by Stubbs (2010:985).

The literature notes that traditionalists believe that certain aspects of customary law are good and need to be preserved. Since the function of the law is to meet the legal needs of the people it serves, traditional justice might serve some people’s justice needs when they are victims of domestic violence. Curran and Bonthuys (2004:2) point out that research would be “incomplete if it ignored access to justice in rural areas and under customary law”. Curran and Bonthuys (2004:2) submit that, “at the moment there is no comprehensive study, which evaluates the ability of customary law to respond to domestic violence against women”. This

study may help fill this gap by analysing the traditional justice response to violence against women in rural areas.

### **3.7.3 Arguments for the use of the traditional justice system for domestic violence cases**

Traditional courts deal with domestic violence and women approach traditional courts when they are having domestic problems. Weilenman (2007:91) points out that, poor rural women are more likely to turn to customary law when they are victims of domestic violence. Ntlama and Ndima (2009:23) explain the dynamics of culture in domestic violence and how it is dealt with. When her husband abuses a woman, culture demands that she return to her maiden home. The family waits for her husband to come and apologise for his part in the dispute. If the husband does not come as expected, her father, brother or other male family member accompanies her to the traditional court and represents her in the judicial proceedings. After discussions, if the two families find the husband to be at fault, he is required to commit himself to keep the peace. The wife remains under her family's protection until indemnity has been negotiated and an offering in the form of a cow, or a goat is delivered by the guilty husband to cleanse the family and appease the ancestors. Once the cultural cleansing is complete, it is accepted that the husband's family have given due care and respect to the wife and her family. The woman could decide to approach the traditional court directly and the outcome will be influenced by cultural considerations. According to Ntlama and Ndima (2009:23), the resolution of customary marriage disputes, including domestic violence is firmly embedded in customary law and it is therefore appropriate for such matters to be handled by traditional courts. They note that any fines imposed by the court are paid to the abused spouse. This type of restorative justice is very appropriate to the needs of rural women and is more likely to rebuild family relations than the formal justice system.

Vorster (2001:53) point out that the customary legal process is designed to react immediately in order to heal strained relations between the husband and the wife. Alienation from the ancestors may result if there is no harmony, resulting in the spouses' separation which will make them and their children susceptible to misfortune in the form of "*dikgaba*"- which means bad luck in Tswana (Vorster, 2001:53).

Traditional dispute settlement strategies offer open and easy access to dispute resolution forums, and full participation of all those that have an interest in the matter. Kane, Oloka-Onyango and Tejan-Cole (2005:11) submit that in general, traditional courts tend to encourage mediation to reach decisions that will restore the relationship between the husband and the wife.

Moult's (2005:19) research revealed that many women use traditional justice structures for domestic violence cases. Moult argues that the services offered by the traditional court "better meet women's needs

than the criminal justice system, in terms of the immediacy with which they resolve problems, their focus on mediation and resolution rather than punishment, and their affordability”. Traditional justice seems to “have much more legitimacy for those involved in domestic disputes than the formal justice process” (Moult, 2005:19).

Chopra and Isser (2012:345) argue that formal systems that are effective in upholding women’s human rights “may produce adverse and unwanted, if unintended, consequences for rural women”. The evidence shows that “women and / or their families may avoid the formal justice system and seek traditional alternative remedies more in line with their socio-economic realities. In domestic violence cases, imprisonment of the husband may leave a woman destitute. It has been documented that women have stopped reporting domestic violence for fear of these consequences” (Chopra and Isser, 2012:345).

According to Cunnen (2011:117), “there is ample evidence of the cultural difficulties and disadvantages rural people face in the criminal justice system, and the same problems may be reproduced in restorative justice programmes”. However, some scholars question whether the traditional justice system is an appropriate forum to deal with cases of domestic violence.

#### **3.7.4 Arguments against use of the traditional justice system for domestic violence cases**

Many scholars oppose the use of traditional courts to settle domestic violence cases, while others express reservations. Ubink and Van Rooij (2010:5) note that customary systems are patriarchal and thus deny women’s rights and opportunities; customary perspectives on gender “may be so deeply inculcated that many women are resigned to being treated as inferior”. Furthermore, traditional courts may lack female judges; and “women face cultural impediments in participating fully in traditional court proceedings and in some cases are required to be represented by their husbands or male relatives. Such norms and practices create gender bias in domestic violence cases”. Ubink and Van Rooij (2010:5) argue that those that are opposed to domestic violence cases being handled by the traditional justice system regard the “gender bias of customary law as an incorrigible trait, and advocate for complete disengagement with customary law”. Curran and Bonthuys’ (2004:20) research revealed that, a women who brought a case of “domestic violence before a traditional court would be surrounded by men, including the perpetrators’ family members. As would be the case in other male-dominated courts, this undermines women’s confidence and their ability to state their case, while also decreasing the chance of their claims of domestic violence being understood and taken seriously”.

Kane *et al* concur with Ubink and Van Rooij that the traditional justice system is patriarchal and tends to favour male disputants. Kane *et al* (2005:15) observe that these “disputes are mostly settled in ways that ensure that a husband does not lose face even where he is clearly in the wrong, a consideration that is rarely accorded women”. Wojkowska (2006:21) similarly argues that the system is dominated by men and tends to exclude women. “The goal of harmony can be used to force the parties to accept agreements and local norms, which in turn can result in discrimination against women”. Gasa (2011:28) strongly objects to traditional courts hearing domestic violence cases because, “these courts are not sympathetic to the victims of domestic violence, given the patriarchal framework in which the courts are located”. However, Gasa acknowledges that rural women cannot go elsewhere because they live in traditional communities.

Franco, Soliman, and Cisnero (2014:30) raise the question of whether “patriarchy can interpret cases of violence against women as legitimate disputes and direct such cases to the village justice system for mediation by village elders”. Kahn-Fogel (2012:769) contends that customary law can result in shocking injustice for women. For example, “*ukungena*”, the practice of a widow being forced to marry her deceased husband’s relative, is a form of domestic violence. Kahn-Fogel notes that this increases the woman’s risk of contracting HIV and AIDs. According to Bond (2010:426), feminists have raised concerns that the state’s reluctance to interfere in the traditional justice system leaves women in such communities vulnerable to discrimination; therefore, cases of domestic violence should be handled by the formal courts. Williams and Klusener (2013:287) suggest that all matters pertaining to gender violence should be explicitly excluded from traditional courts. In South Africa, it was hoped that the TCB would come up with rules and procedures to deal with domestic violence. Ntlama and Ndima (2009:18) report that the Bill was expected to address what is consistently perceived to be the greatest weakness of the traditional justice system: failure to affirm gender equality, and assure the dignity of women.

In addition to the claim of patriarchy and gender bias, scholars complain that domestic violence cases should not be handled by traditional courts because women are excluded from decision-making positions on traditional councils and customary law is unwritten. Kane, Oloka-Onyango and Tejan-Cole (2005:14) found that “the presence of women in the customary court council has not had the desired effect on the decision making process in terms of bias against women litigants”. Curran and Bonthuys (2004:21) note that, while the inclusion of women in some customary courts is a necessary and welcome change, which should lead to the development of customary rules that benefit women this has not been the case in practice. Curran and Bonthuys (2004:22) submit that the problem is compounded by the fact that customary law is unwritten; therefore no rules guide the presiding officers dealing with domestic violence cases.



Having considered the arguments for and against the use of restorative justice and traditional justice systems for domestic violence cases, the following section considers complementary use of the criminal justice, traditional justice and restorative justice systems in response to domestic violence cases.

### **3.7.5 The debate on using the criminal justice, traditional justice and informal restorative justice systems in response to domestic violence**

Viewing scholarly arguments as a whole, plural justice systems can be complementary. Hudson (2002:623) argues that “restorative justice and formal justice may develop as parallel systems, each with its strengths and weaknesses. If the aims and principles of retributive and restorative justice are integrated, with the latter’s targets (reintegration, empowerment of victims, reduction in offending, building more cohesive, peaceful communities) being pursued within the constraints of due process safeguards and standards such as proportionality and equitable treatment, improved justice would be possible”. Hudson (2002:623) notes that restorative justice models lack enforceability and are unsuitable for some offences.

Instead, formal criminal justice remains the recognised way of demonstrating that society takes something seriously. Hudson (2002:629-631) believes that there are still many problems in extending restorative justice processes to domestic violence and other serious crimes. Morris and Gelsthorpe (2003:132) argue that the availability of restorative justice processes does not prevent women who prefer to use the criminal justice system from doing so. Furthermore, criminal justice can be used to escalate a case.

Hoyle (2011:294) argues that “restorative justice needs to operate within the criminal justice system due to the benefits of the due process, and checks and balances in the latter system. However, this does not necessarily mean that the police should be involved. Embedding restorative justice in the criminal justice system allows it to flourish without the risks attached to a purely informal process”.

Ubink and Van Rooij (2010:8) suggest that an “important method to improve the functioning of customary law as far as domestic violence is concerned is to develop linkages between the customary justice system and the informal justice system administered by CBPs. Paralegals can help to incorporate women’s human rights into customary norms, dispute resolution and administration”.

Hence, taken as a whole, it appears that plural legal systems can be used to contest each other, be embedded in each other and otherwise complement and not just be contradictory to one another.

Besides the debate about whether CRJ is appropriate for cases of domestic violence, yet another controversy is whether domestic violence is a public or private matter. The following section examines the public and private divide of domestic violence in the three justice systems under consideration.

### **3.7.6 The debate on whether domestic violence cases are a public or private matter in plural legal systems**

The literature presents a wide range of perspectives on the reasons why victims of domestic violence have and still are resisting the criminalisation of domestic violence, stating that it is a private matter and not a public crime. Various scholars oppose this position, which they say may jeopardise the seriousness of action against domestic violence. However, some scholars sympathise with the victim's point of view that a private-based approach such as restorative justice better satisfies their needs and interests than a system designed for an abstract "public interest" (Bennet, 2011:247).

Hanna (1996:1868) contends that domestic violence is a public crime; therefore, the state has a responsibility to intervene aggressively. This sends and follows through on the message that the state will not tolerate violence of any kind. This argument is rooted in the feminist principle that, when the state refuses to intervene based on the rationale that domestic violence is a private family matter; it not only condones but promotes such violence. Hanna (1996: 1869) adds that "shielding women who do not want to use the criminal justice system reinforces the idea that domestic violence is a private crime without social consequences and ultimately marginalises and isolates women who are not expected to respond to such violence on a broader scale". Hanna (1996: 1870) notes that, feminists argue that private violence should be conceptualised as a public issue in order to compel state intervention. The goal is to punish the offender in order to protect potential victims. However, Hanna observes that the feminist public/private paradigm fails to articulate what the responsibilities of individual women are and why it is necessary for them to prosecute despite their reluctance to do so. "Although feminist theorists have called on the state to respond to domestic violence, they have not necessarily advocated that women be forced into the criminal justice system against their will. Furthermore, the public law model on which the criminal justice system is based has been strongly criticised for generally failing to respond to the needs of crime victims". Presser and Gaarder (2000:188) believe that "the restorative justice perspective reconciles the private-public distinction that underpins the problem of domestic violence. Perpetrators of domestic violence support the view that such violence is private. It is argued that the internal affairs of the marriage are inappropriate material for regulation by a regime of formal act-oriented rules" (Presser and Gaarder, 2000:179).

On the other hand, Coker (2002:131) contends that when restorative justice is applied to domestic violence cases, the reliance on the private realms of family and community threatens to reverse progress by pushing

domestic violence back into the realm of the 'private'. Public punishment marks the violence as serious and sends a clear social message that abuse is unacceptable. Coker (2002:131) maintains that, while the feminist critique of the public /private distinction is important, "it is an incomplete analysis of the relationship between abused women and the state". It is inaccurate to describe the state response to domestic violence as a refusal to intervene in 'private family' matters. Race and class mark the history of the state's relationship with families in general and domestic violence in particular. Furthermore, "feminists have paid too little attention to the dangers of a focus on making domestic violence a public problem" (Coker, 2002:132). However, Coker (2002:149) argues that feminist critics are right in worrying that restorative justice processes may privatise domestic violence, creating "second rate justice that offers little protection to abused women". Indeed, current restorative justice processes seem largely inadequate in addressing domestic violence.

Dissel and Ngubeni's (2003:9) research findings revealed that women desire privacy; their interviews with victims of domestic violence showed that victims opted for mediation "with only those directly involved in the dispute. Most of the respondents indicated that they were happy to have the matter resolved in private without other people witnessing the process. They also preferred not to have other people interfering in their domestic affairs". However, Braithwaite (2003:159) notes that, by not taking such crimes to court, restorative justice might fail to treat them seriously. Worst of all, this might result in family violence being treated as a private matter rather than a social problem whose dimensions are profoundly public. Morris and Gelsthorpe (2003:131) concur with the view that restorative justice decriminalises men's violence by according it 'private' status.

Mills and Grauwiller (2006:366) add that, on the one hand, restorative justice "approaches may re-privatise domestic violence by locating the solution in a patriarchal family". On the other hand, scholars such as Daly and Stubbs (2006:18) and Presser and Gaarder (2000:175) contend that the question of whether domestic violence cases are even susceptible to restorative justice depends on whether such violence is considered a public or private matter. For Daly and Stubbs (2006:18), the informality of restorative justice "re-privatises male intimate violence after decades of feminist activism to make it a public issue".

Frederick and Lizdas (2010:49) argue that the "criminal justice system's response to domestic violence (which serves as the chief method whereby offenders are held publicly accountable) is designed, in part, to cut through the secrecy surrounding abuse and to undermine communities' tacit acceptance of violence against women". Frederick and Lizdas further argue that "restorative justice practices simply undercut the public accountability function of the justice system; the more private process could actually leave many

women unprotected and could inadvertently slow the progress toward ending domestic violence. Therefore domestic violence cases should not be diverted into restorative justice programs that allow the offender to evade public accountability”. According to Nancarrow (2010:143), for indigenous women, community involvement in administering justice does not represent the privatisation of crime; rather, it represents an alternative public realm, which has more meaning and is safer than the state’s involvement in administering justice for indigenous people. Froestad and Shearing (2011:543) argue that in relationships with acute power imbalances such as domestic violence, the concern is that restorative justice practices may ‘privatise’ the response to domestic violence and thus trivialise offences that the feminist movement has only recently managed to have recognised as particular and serious. Edward and Haslett (2003:7) concede that concerns about privatising continue to “be the subject of much discussion among members of the movement against domestic violence; the focus should be the victim’s wishes”.

Regarding the traditional justice system, Vorster (2001:53), points out that the traditional court process is public – open to all adults. Moul’s (2005:21) research found that the private/public discourse in traditional justice is a matter of discretion. Some *Induna* are sensitive to the fact that many people are not comfortable talking about their issues in public. “Community members are cleared from the meeting and proceedings resume with just the parties and the mediator present. This is particularly significant in rural settings where the entire village attends cases” (Moul, 2005:21). Curran and Bonthuys (2004:9) explain that the “traditional ways of dealing with matrimonial problems, including domestic violence, enable women to seek assistance from others, including their own and their husband’s families, rather than bringing the issue to public attention by approaching the traditional leader. Many women share their families’ reluctance to expose issues of domestic violence to the public gaze and are thus unlikely to seek outside assistance”. To these scholars women in traditional communities wish to retain privacy about domestic matters. Bringing domestic violence cases to public forum may not just publicly expose domestic problems but also give the appearance that one’s family is failing to remedy family problems (Curran and Bonthuys, 2004:9) yet familhood solidarity is at the centre of traditional communities.

Finally, Roche (2004:201) argues that the legal distinction between the private and the public has been flagged as contributing to concealing and legitimising the subordination of vulnerable groups within society. “Just as respecting the privacy of the family has hidden problems such as domestic violence, respecting the privacy of restorative justice deliberations may also hide abuses which can occur within the process itself. Due consideration should be given to the ways privacy needs can be reconciled with those of accountability”.

### **3.8 The Unsettled Questions of Whether Community Restorative Justice is Appropriate for Domestic Violence Cases and Whether Domestic Violence is a Public or Private Matter**

As the above discussion shows, the debate on the appropriateness of the use of community restorative justice for domestic violence cases has not been resolved. Julich (2010: 250) notes that there is a paucity of research on the effectiveness of programmes that use restorative justice to address domestic violence. Julich (2010: 250, 251) contends that it is too early to tell if victims can achieve a sense of justice through restorative justice. Restorative justice must develop a practice that has the ability to negate the power imbalance inherent in domestic violence. In its current form, restorative justice has limited potential to address domestic violence. Practitioners should avoid reflecting patriarchal structures within society that revictimise and further marginalise victims.

Stubbs (2010:985) points to the need for trans-disciplinary research to address the macro- and micro-foundations of restorative justice in cases of domestic violence. Stubbs argues, “We need to know about the pre-conditions of effective dialogue in restorative justice exchanges and to acknowledge the difficulties of screening domestic violence cases suitable for restorative justice”. The current research study is a step in this direction. The following section considers a conceptual model for CRJ and the nexus between CRJ and domestic violence cases. This is followed by a discussion on CBPs and the nexus between CRJ and CBPs in handling domestic violence cases in rural areas.

### **3.9 Toward a Conceptualisation of Handling Domestic Violence Cases through Community Restorative Justice**

Daly and Stubbs (2006:17) express doubt that restorative justice practices are capable of responding to partner, sexual and family violence. At the same time, these authors provide a useful framework for conceptualising restorative justice by highlighting the problems and benefits indicated in Table 3.1. These problems are pressure on victims, the role of the community, mixed loyalties, the impact on the offender and victim safety. The benefits, according to these scholars, are victim voice and participation, victim validation and offender responsibility, a communicative and flexible environment, relationship repair and responsiveness to victims’ individual needs – each is discussed in turn in relation to the literature.

Table 3-1 Conceptual framework: Problems and benefits of community restorative justice systems.

<b>Problems of CRJ</b>	<b>Benefits of CRJ</b>
Pressure on victims	Victim voice and participation
Role of the community	Victim validation and offender responsibility
Mixed loyalties	Communicative and flexible environment
Impact on offenders	Relationship repair
Victim safety	Responsiveness to individual needs of victims
Source: (Daly and Stubbs, 2006)	

### **3.9.1 Potential problems with community restorative justice**

This section discusses each of the problems identified in Table 3-1.

#### **3.9.1.1 Pressure on victims**

Community restorative justice can be problematic if victims are pressured; violence and domination are inconsistent with the restorative justice philosophy. Victims must be advised of their options and given the opportunity to select an option (Presser and Gaarder, 2000:185, 187). In instances where victims are unable to advocate for their own interests, they may be pressured to accept certain outcomes such as apologies or they may want the state to intervene but are reluctant to make such a request (Daly and Stubbs, 2006:17). Zehr (2004:309) notes that conflict transformation, trauma healing and restorative justice are “susceptible to unconscious biases of gender or culture. All need to more consciously incorporate the voices of women, people of colour and indigenous groups”. The participants in Zehr’s study indicated that given the opportunity, women know what they want and what works and does not work.

#### **3.9.1.2 Role of the community**

Schiff (2011:235) explains that the community is the third stakeholder in restorative justice, and that the notion of community serves several purposes. Schiff identifies several roles played by the community in restorative justice and divides these into immediate, intermediate and long-term responsibilities. Immediate responsibilities involve the community providing a forum for the “victim and the offender to talk about the crime and its impact on all stakeholders and informing the parties to a dispute about available services and resources”. Intermediary responsibilities include creating a safe environment for all stakeholders, and

providing support and follow-up to ensure that reparative agreements are honoured. Long-term responsibilities involve developing capacity to resolve the problem without involving the state and developing and supporting re-integrative strategies for victims and offenders (Schiff, 2011:236-238).

According to Graef (2001:40), community participation is the cornerstone of CRJ. The role of the community differs among communities. Daly and Stubbs (2006:17) caution that, “Community norms may reinforce, not undermine male dominance and victim blaming. Communities may not be sufficiently resourced to take these cases”. A uniform set of community values that condemn violence against women may not exist (Nancarrow, 2006:91), which is problematic. Stubbs (2010:975) notes that “communities are intolerant, illiberal, coercive, engage in socially exclusionary practices and espouse a form of communitarianism that is not at all ‘individual centred’ but authoritarian and repressive”. Nonetheless, community involvement is important to provide the support and enforcement crucial to stop violence and to repair consequent harm and damage (Presser and Gaarder, 2000:183). Hence, the role the community assumes can either hinder or encourage restorative justice. According to Pranis (2004:153), “several decades of referring more and more community problems to professional services (e.g., police, social workers) has eroded community skills and the sense of efficacy in handling community problems – which would detract from restorative justice”. Similarly, Zehr (2005:204) contends that the community has a role to play in the search for justice but that by turning to experts, individuals and communities tend to lose the power and ability to solve their own problems.

#### 3.9.1.3 **Mixed loyalties**

Daly and Stubbs (2006:17) argue that “friends and family may support victims, but may also have divided loyalties and collude with the violence, especially intra-familial cases”. Supporters of victims must be sensitive to and understand the tenacity of the victim’s victimisation. Van Wormer (2009: 108) contends that it is the criminal justice procedures of arrest and prosecution that create problems of mixed loyalties, not restorative justice – extended family and in-laws may be disgruntled by criminal prosecution of the alleged offender, placing the victim in an environment of mixed loyalties. According to Schiff (2011:232), victims experience triple marginalisation; first the offender marginalises the victim, then friends, relatives and community members who usually give support in the immediate aftermath of the crime but not in the weeks and months following the event. Finally, the justice process is interested in the victim only if and until the offender is convicted. In contrast, restorative justice aims to develop on-going relationships that “can sustain care for the victims over time”. The problem of mixed loyalties can be avoided by focussing on victim well-

being and safety from a holistic perspective (Presser and Gaarder, 2000 :186) irrespective of the justice system of choice.

#### 3.9.1.4 **Impact on the offender**

Scholars disagree on whether the impact of restorative justice on the offender is problematic. On the one hand, Daly and Stubbs (2006:17) argue that, “The process may do little to change offender behaviour”, while on the other hand, Presser and Gaarder (2000:185), drawing on Braithwaite’s (2003:55) reintegration shaming theory, contend that the restorative justice process may allow friends, family, and neighbours of the offender to move beyond condemning offenders to welcome them back into the community with the ability to change their behaviour. Offender apologies and remorse do not necessarily imply that restorative justice positively influences offenders. Hopkins (2012: 325) points out that, although apologies by offenders are not uncommon, they are often used to keep victims in relationships rather than to end violence. Even if offender remorse signals a commitment to end violence, this is only successful if interventions such as counselling, environmental change and space to converse about accepting responsibility are provided and if offenders participate meaningfully (Edwards and Haslet, 2011:901-902). Sawin and Zehr (2011:50) point out that restorative justice has focused too exclusively on accountability, neglecting the offender’s needs, such as their need to come to grips with their own sense of victimisation and their need for personal growth.

#### 3.9.1.5 **Victim safety**

Umbreit (2001:21) argues that the safety of the victim is a fundamental guideline for VOM programmes. The “mediator must do everything possible to ensure that the victim will not be harmed in any way”. Morris and Gelsthorpe (2003:133) note that restorative justice increases women safety: “in our view friends and families are far better placed than professionals to prevent the recurrence of violence and to play a role in monitoring the safety plan”. In contrast, Grauwiller and Mills (2004:62) argue “that all battered women are disempowered by violence and that their safety is threatened whenever they are in the presence of their abusers or not”. Grauwiller and Mills (2006:366) submit that the “certainty of this power to silence the victim is a fundamental reason to reject restorative justice processes that address intimate abuse. Mills and Grauwiller (2006:366) add that restorative justice advocates recognise that “whether or not a woman leaves her abuser, she may remain connected to him through her children and that interventions must address this reality and enhance the safety of both the woman and her children”. Both supporters and critics of restorative justice recognise that, safety and offender accountability must be a priority.



Non-indigenous women who participated in Nancarrow's (2010:139) study contended that restorative justice compromises women's safety; that women are not be able to make genuinely informed decisions about participating in a restorative justice process, or negotiate what they really want; and that the chance existed that the restorative justice process would trivialise domestic violence and not send a strong enough message that it is wrong. Uotila and Sambou (2010:201) argue that the aim of restorative justice is to ensure that the "safety of the victim and society is given priority and to change the attitude and behaviour of the offender". In their 2009 study conducted in Norway, Uotila and Sambou (2010:202) found that rather than the formal justice system's focus on punishing the offender, women victims of violence would prefer a method through which to understand the reasons behind their partners' abuse and a solution where safety and help could have been assured to both parties. This comports with the restorative justice theory of social and moral development.

### **3.9.2 Potential benefits of restorative justice**

While Daly and Stubbs' (2006:18) conceptual framework demonstrates the problems associated with restorative justice processes, it also points to the benefits of this process. The benefits "are victim voice and participation, victim validation and offender responsibility, a communicative and flexible environment, and relationship repair", each of which is briefly discussed.

#### **3.9.2.1 Victim voice and participation**

Scholars generally agree that restorative justice offers an opportunity for victims to be heard, as well as the potential to be empowered by confronting the offender, and to gain strength and resilience by actively participating in deciding on the action to be taken by the offender (Edwards and Haslett, 2011:3; Daly and Stubbs, 2006:18; Pranis, 2002:136; Presser and Gaarder, 2000:183). According to Coker (2004:1343), the punitive approach of criminal justice silences the voice of the victim. In contrast, besides victim participation, restorative justice can broaden an offender's "community of care", while advancing the voice of the victim. Schiff (2011: 232) argues that both victims and offenders need to feel that they have been treated fairly and respectfully, that their voices have been heard and that they have had an impact on the outcome of the process. Schellenberg (2010: 56) is of the opinion that victims have a central voice in the restorative justice process; the process ensures that they receive answers to their questions. Achilles and Zehr (2001:87) note that victims need a safe place to express a cataclysm of emotions without judgement or blame.

Green (2011:176) argues that the victim's participation is fundamental if the harm caused is to be addressed. The restorative justice process promotes the victim as the main actor. Unlike in the criminal justice system

where the “victim is relegated to the role of witness or spectator in the unfolding drama between the offender and the state”, Green points out that the aim of restorative justice is to empower victims, providing them with a forum in which their voices are both heard and respected. Yet Sawin and Zehr (2011:50) suggest that offenders should also be engaged and empowered in order to avoid the process becoming an activity done to offenders rather than with them. Finally, Stubbs (2010: 982) contends that it is difficult to discern whether victim participation is voluntary. Therefore the outcomes of the mediation encounter should take “into account underlying inequities and injustices” between the parties.

### **3.9.2.2 Victim validation and offender responsibility**

There is general consensus in the literature that victim validation and offender responsibility are connected. Daly and Stubbs (2006:18) contend that validation of a victim’s account should eliminate blame and facilitate vindication, while offenders take responsibility for their behaviour. Sharpe (2011:28) argues that reparation can validate victims, thereby demonstrating that the wrong suffered was in fact a wrong. Victim expression is central to validate. In this regard, Nancarrow (2006:97) and Pranis (2004:155) points to restorative justice’s openness to exploring creative and constructive responses to offences through heart and spirit. A victim can articulate self-representation, expression of feelings, understanding of events, and wishes and demands for the future. It may be meaningful for a victim to hear an offender take responsibility for harmful action and to explore how to repair the injustice and harm (Edwards and Haslett, 2011:893, 902). Zehr and Mika (2003:41) argue that, in restorative justice, offenders are provided with opportunities and encouragement to understand the harm they have caused to victims and the community and to develop plans for taking appropriate responsibility. Zehr (2005:197) concedes that in some cases offenders accept responsibility reluctantly at first. However, Zehr (2005:204) continues, offenders often need strong encouragement or even coercion to accept their obligations so the offender and the victim can move toward responsibility and closure. Johnstone and Van Ness (2011:7) contend that decision makers should strive for a response that will not stigmatise or punish the offender, but make the offender recognise and take responsibility to right the harm in a manner that will directly benefit the victim.

### **3.9.2.3 Communicative and flexible environment**

Most scholars agree that restorative justice practices are communicative and flexible. For Daly and Stubbs (2006:18), “the process of restorative justice can be tailored to victims’ needs and capacities. Because it is flexible and less formal, it may be less threatening and more responsive to the individual needs of victims”. Similarly Curtis-Fawley and Daly (2005:609) point out that restorative justice not only gives victims a platform for communication but also helps strike a better balance between the “needs and rights of both

offender and victim than the criminal justice approach which primarily focuses on punishment”. While communication is seen by some as the core process of restorative justice, scholars call for proper victim screening and capable facilitators who can ensure productive ways of communication that parties may not have been able to explore together before (Presser and Gaarder, 2000:187; Edwards and Sharpe, 2004:16). In addition, flexibility allows solutions to be shaped that “are appropriate for their family, community, and culture as these customised interventions are more effective” (Pennel and Burford, 1996:207; Presser and Gaarder, 2000:186). Flexibility also enables victims’ cultural considerations to be taken into account. Sokoloff and Dupont (2005:51) argue that, “Service providers who are aware of their clients’ cultures make a difference to their clients’ psychological and emotional wellbeing”.

Stubbs (2010: 981, 982), a critic of restorative justice, notes that CRJ is problematic due to “power imbalances and the dynamics of control” and given the “context of gendered violence, there may be risks in communicating in a more intimate setting”. Nevertheless, toward a communicative environment Uotila and Sambou (2010:196) suggest that “there must be at least some capacity for accord, a willingness to be honest, a desire to settle the dispute and some capacity for compromise”. Van Ness and Strong (2010:77) and Belknap and McDonald (2010:370) attest to the role of facilitators and the community in creating an appropriate environment. Van Ness and Strong (2010:77) argue that a facilitator’s function is to regulate and facilitate communication within the encounter setting and to create a safe environment in which the parties can make their own decisions – which contributes to flexibility of the environment. Belknap and McDonald (2010:370) explain that, for the practice of restorative justice to “be truly restorative in nature, there must be opportunity for communication and dialogue between offenders and victims; both must be actively involved in the process; and community groups and/or citizen volunteers should play facilitative and supportive roles”.

#### 3.9.2.4 **Relationship repair**

Daly and Stubbs (2006:18) argue that the restorative justice process “could address violence between those who want to continue the relationship. It can create opportunities for relationships to be repaired, if that what is desired”. The restorative justice theory of reparation and repair, as indicated earlier, encompasses both material and symbolic reparation (Sharpe: 2011:27).

Van Ness and Strong (2010: 49) argue that “those responsible for the harm resulting from the offence are also responsible for repairing it to the greatest possible extent”. Johnstone and Van Ness (2011:7) similarly maintain that the process should be informal and open to participation by the victim, offender and others

closely connected to the parties to the dispute or the offence in discussions on “what happened, what harm resulted, and what should be done to repair that harm and, perhaps, to prevent further wrongdoing or conflict. Johnstone and Van Ness add that the process should emphasise strengthening or repairing relationships between people, and using the power of healthy relationships to resolve difficult situations”.

### 3.9.2.5 **Responsiveness to victims’ individual needs**

According to Zehr (2005:191), when it comes to crime, the starting point should be the needs of those violated. Victims “have a variety of needs, which must be met if they are to experience even approximate justice. In many cases, the first and most pressing needs are for support and a sense of safety”. Mills and Grauwiller (2006:366) argue that restorative justice increases the chance of condemning the violence while allowing victims to express their needs and concerns. Schellenberg (2010:55) explains that restorative justice grew out of the concern that the needs of victims of “crimes were not being met. In the criminal justice system, crime is considered a violation of the law rather than a violation of victims’ rights”. The state becomes the victim and those harmed by crime become, at best, witnesses for the state. If the victim’s testimony is not required, their role becomes secondary or irrelevant. For Zehr (2005:200) power and responsibility for meeting individual needs of victims should be placed in the hands of those directly involved, the victim, the offender and the community with an aim of addressing future intentions outside of immediate individual needs. Taken as a whole, these scholars suggest that efforts to meet the needs of victims can be based on the restorative justice theory of engagement and empowerment.

### 3.10 **Interactive Nexus between Access to Justice, Community Restorative Justice and Domestic Violence Cases**

The debate in the literature advances the question of whether there is an interactive nexus between access to justice, CRJ, and domestic violence cases on the one hand. On the other hand, the question is whether there is an interactive nexus between access to justice, traditional justice systems and domestic violence cases. Scholars disagree on the appropriateness of informal restorative justice and traditional justice systems for domestic violence cases. As to the use of CRJ for domestic violence cases, arguments of proponents centre on victim satisfaction with the mediation process. The restorative justice programme studied by Edwards and Sharpe (2004:6) recorded an 80% satisfaction rate with the mediation process and its outcomes. This suggests that mediation is appropriate for less serious forms of assault. Similarly, Dissel and Ngubeni (2003:12) interviewed 21 female domestic violence victims in South Africa who had completed a mediation process with their abusers six to 18 months earlier. They found that abuse stopped post-mediation and noted

that these results were consistent even in cases where men felt culturally entitled to behave in an abusive manner. Other proponents focus on such factors as the failings of the criminal justice system in responding to family violence (Stubbs, 2010:974; Van Wormer, 2009:108); uniqueness of relationship between victim and offender (Mills et al, 2006:357); and potentiality for victim healing and offender behaviours (Burkemper and Balsam, 2007:133). In contrast, opponents of the use of CRJ for domestic violence cases claim that CRJ trivialises domestic violence with its concern for family sustainability (Hooper and Busch, 1993:11); reinforces domestic violence as a private matter; fails to address unequal power relations (Fulkerson, 2001:355); does not have the capacity to specifically address gendered violence (Stubbs, 2010:985); and lacks enforcement powers for offender accountability (Ptacek, 2010:7-8). It does appear that, for victims who choose CRJ for domestic violence cases, this choice advances access to justice by one not being limited to the formal justice system. Therefore, irrespective of how one weighs in on the debate about the use of CRJ for domestic violence cases, there appears to be an interactive nexus between access to justice, CRJ and domestic violence cases.

As to the question of whether there is an interactive nexus between access to justice, traditional justice systems and domestic violence cases, again, scholars are on both sides of the debate. Scholars who advance the use of traditional justice systems for domestic violence point to the role of culture in resolving matters on each side of the parties' families such as making offerings of cows or goats (Ntlama and Ndima, 2009:23); avoidance of alienation from the ancestors (Vorster, 2001:53); and immediate focus on mediation and negotiation rather than punishment of the offender (Moult, 2005:19). In contravention scholars convinced of the unsuitability for domestic violence cases being handled by traditional courts indicate that traditional courts are patriarchal and replete with gender bias (Ubink and Van Rooij, 2010:5); exclusion of women from traditional court councils (Kane, *et al* 2005:14); and oral tradition of customary courts (Curran and Bonthuys, 2004:2). This debate is yet unsettled. At any rate, as yet another forum opportunity, there appears to be an interactive nexus between access to justice, traditional justice systems and domestic violence.

The debates underlying the interactive nexus of access to justice, plural legal systems and domestic violence as well as the debate on whether domestic violence cases are a public or private matter comprise the point of departure for this study. The next chapter brings the role of community-based paralegals into the discussion through a review of relevant literature.

### 3.11 Chapter Summary

This chapter examined the different views of various scholars pertaining to restorative justice generally and with specific reference to community restorative justice. Community restorative justice was defined and described and the philosophy underlying restorative justice was discussed. Process theory-building through narrativity was highlighted before different theories of restorative justice were presented as well as limitations of restorative justice theories. A discussion about the key elements, principles and practice of community restorative justice followed before a series of debates about the practice of CRJ was highlighted. Scholars disagree about the use of CRJ and traditional justice systems for domestic violence cases and counter arguments were presented in this regard. This chapter briefly explored the debate on whether domestic violence cases are a public or private matter. Toward a conceptualisation of whether CRJ should be used for domestic violence cases, a series of problems and benefits were highlighted in relation to the literature. That conceptualisation led to part of the conceptual framework that will guide this study. In this chapter it was suggested that there is an interactive nexus between access to justice, CRJ and domestic violence cases on the one hand and an interactive nexus between access to justice, traditional justice systems and domestic violence cases on the other hand. This summary concludes the chapter followed by a more detailed literature review regarding community-based paralegals in Chapter 4.

## **Chapter 4: Community-based Paralegals**

### **4.1 Introduction**

Chapter 2 presented a review of the literature on access to justice and legal pluralism, while Chapter 3 examined the literature on community restorative justice (CRJ) as well as the debate on whether informal CRJ and traditional justice systems are appropriate to address domestic violence cases. This final literature review chapter discusses access to justice and CRJ through a CBP lens. According to Robb-Jackson (2012:5), CBPs are one mechanism to promote citizens' access to justice in rural areas. Globally, CBP programmes are growing in number; these programmes have played a significant role in improving the quality and delivery of services and can stimulate community empowerment and legal literacy. Golub (2003:33) notes that the CBP sector "merits special attention because it transcends societies and sectors".

This chapter examines the paralegal sector in general before defining, describing and distinguishing CBPs. South African paralegals are discussed and the community advice offices (CAOs) in which some operate are profiled. After briefly discussing the principles and values underlying CBP work, paralegal's roles are identified and discussed using literature and including examples from a recent study of CBPs in four South African provinces. This chapter also examines whether there is an interactive nexus between restorative justice, CBPs and the handling of domestic violence cases as a manner of access to justice. The chapter concludes by bringing together the literature reviewed in chapters 2 – 4 which gave rise to the meta-conceptual socio-legal framework that guided the collection and analysis of empirical data.

### **4.2 The Paralegal Sector, General Context**

Scholars attach varied definitions and meanings to the term paralegal and suggest different reasons for the emergence of paralegals Fine (1991:155) Maru (2006a:1) Noone (1991: 27) Franco, Soliman, and Cisnero, (2014:7). One stark distinction is the use of paralegals in global South and global North countries and whether or not paralegals work under attorney or advocate supervision. Maru (2006a:1) contends that paralegal programmes in Africa, South and East Asia, Latin America, Europe and North America are very different. Similarly, Dieng (1996: 20) indicates that whilst there is general understanding of the need to engage the support and services of people who are not lawyers to make the law more accessible, there are "divergences in nomenclature stemming from the role that the lay person is expected to play and consequently in the development of the concept of paralegalism". To Franco, Soliman, and Cisnero, (2014:7) the term paralegal may be used to refer to "people who are the product of law schools namely; law students,

or law graduates who have not yet taken or passed the bar examination”. In practice, there is a distinction between paralegals, at least at the level of the activities they undertake.

According to Fine (1991:155), the paralegal sector in South Africa arose as a direct response to the serious shortcomings of the criminal justice system that was seen as illegitimate and as a tool of apartheid repression as well as inaccessible by oppressed communities in rural and underserved peri-urban areas. The lack of legal access was not only the result of factors such as the high cost of legal services and a grossly deficient state legal aid system, but also because the vast majority of lawyers were neither inclined nor equipped to service oppressed communities. For example, they were unable to speak African languages, highly legalistic, and unprepared or unable to assist with socio-economic and political problems, or were urban biased and unwilling or unable to service outlying areas.

Franco, *et al* (2014:7) point out that, the “word paralegal has been used in the legal activism literature on development-oriented legal assistance for the past 30 years. For example, in the Philippines, then Senator Diokno wrote about paralegals or barefoot lawyers as he called them in 1982”. Franco, *et al* (2014:7) explain that “in development work today, the term refers to a variety of situations; some paralegals are community-based, while others are not, but all share a broadly similar community-oriented, grassroots perspective”.

With regard to the definition and use of paralegals in global North countries, Noone (1991: 27), submits that in the United States paralegals are used extensively by the private profession to deliver legal services. They “originated as assistants to lawyers at a time when only lawyers offered legal services. The American Bar Association defines a paralegal or a legal assistant as a person who is qualified by means of education, training or work experience and who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity to perform specifically delegated, substantive legal work for which a lawyer is responsible” (Noone, 1991: 26). In terms of this definition, “the legal responsibility for a paralegal’s work rests directly or solely with the lawyer”. Noone (1991: 26) points out that “the term paralegal is often used interchangeably with the terms legal assistant, law clerk, lay advocate, and non-lawyer and community legal worker”. Finally, Noone (1991: 26) warns that “it is important to make a clear distinction between those paralegals that act under the supervision and control of lawyers and those who do not”. Unlike paralegals in the United States, paralegals in African countries are not confined to assisting or working alongside lawyers, but perform duties pertaining to a wide range of law-related roles, unsupervised by lawyers.

Walsh (2010:19) explains that paralegals are non-lawyers or persons who have limited legal training and who assist litigants. In global North countries, a paralegal is described as an assistant to a practicing lawyer



who is often employed by that lawyer. In the context of developing countries, a paralegal is someone who typically assists in understanding the legal system where no lawyers are available.

### **4.3 Community-based Paralegals**

This section defines, describes and distinguishes CBPs from other types of paralegals. The discussion then turns specifically to paralegals in the South African context before outlining CBPs' principles and values. Community-based advice offices are then profiled and the challenges experienced by these offices are reviewed.

#### **4.3.1 Definition of community-based paralegals**

In Africa, the term 'community-based paralegal' is used to distinguish them from paralegals operating in urban areas and those employed in law firms or government offices. Dugard and Drage (2013:11) explain that CBPs' role and skills set is the most constructive way of defining them as a broad group. According to Golub (2003:33), CBPs are laypersons that are "often drawn from the groups they serve, who receive specialised training and provide various forms of legal education, advice, and assistance to disadvantaged groups". Golub acknowledges that there are gaps in this definition; for this reason, the author extends the definition to note that CBPs' education includes learning through experience, often by soliciting advice from NGO lawyers or other NGO personnel (themselves paralegals) as concrete issues arise. However, Golub (2003:33) observes that not all paralegals have received paralegal training; therefore, "perhaps then, the notion of paralegal training should give way to one of 'ongoing paralegal development', including but not limited to training".

According to the Community-based Paralegals: Practitioners guide (2010:11) the term 'community-based paralegal' is used to refer to a "paralegal who has formal training, uses an array of tools - both legal and non-legal to provide justice services, and either lives in or has a deep knowledge of the community in which they work".

#### **4.3.2 Description of community-based paralegals**

Community-based paralegals are based in the community, either in rural, semi-rural or semi-urban areas. Paralegals that operate in townships, regarded as urban areas (mostly populated by black people and created by the apartheid government to accommodate migrant workers and their families from the rural areas), are also described as community-based. The most important feature of this description is that CBPs come from the same community that they serve. According to Fine (1991:154), in the South African context, the term

'paralegal' is used to describe community work undertaken by paralegals. Fine (1991:154) describes paralegals as "residents of oppressed communities, trained in basic advice giving, legal and community education skills, whose role it is to serve and be accountable to the community they are working in".

The fact that CBPs live in the communities they serve and are members of the ethnic groups that serve weighs heavily in the literature. Dugard and Drage (2013:11) explain that, "The trait community-based paralegals share is the direct legal and quasi-legal interface with the clients and communities they serve". Maru (2006:2) contends that paralegals are community-based because they are situated in the community that they serve. McQuoid-Mason (2007:113) describes a CBP as a local person who has been trained in the practical aspects of the law, in counselling and the provision of legal advice, and who has skills in administration and public legal education, a description which this study adopts. McQuoid-Mason points out that "Community based-paralegals are not lawyers but make law accessible". In most cases, paralegals are the first point of legal contact for the communities they serve. In much the same vein, Golub (2000:301) describes CBPs as non-lawyers with specialised training who provide legal assistance to disadvantaged groups, and who are themselves members of those groups.

The Community-based Paralegals: Practitioners Guide (2010:16) describes a CBP as a "person who has basic knowledge of the law, legal system and its procedures and basic legal skills, is a member of the community who has knowledge of the ways community members access justice services including through traditional or informal justice mechanisms". A CBP is further described as someone who "has skills and knowledge on alternative dispute mechanisms, including mediation, conflict resolution and negotiation, is able to communicate ideas and information to community members using interactive methods, and can have working relationships with local authorities and service delivery agencies" (p. 16). Community-based paralegals are known to have community organizing skills that can be used to empower communities to address systematic problems.

Different terms have been used to describe CBPs. Dieng (1996:20) uses the term community-based intermediaries. Others refer to CBPs as non-lawyers, barefoot lawyers, or simply paralegals, fieldworkers, or coordinators. Dugard and Drage (2013:11) explain that, "looking generally at the things that paralegals in South Africa do, what sets them apart from other service providers is how they seek to resolve a multitude of wide-ranging community issues, straddling the legal and social welfare systems". Community-based paralegals are well-positioned to use their knowledge of the law; they understand the legal needs of the people they assist, especially those from rural communities.

### **4.3.3 Distinguishing community-based paralegals from other paralegals**

What sets CBPs apart from other paralegals is that they seek to resolve a wide range of community issues while straddling the formal, traditional system and informal legal systems. Community-based paralegals promote access to justice due to their geographical location; they are often the only legal option in far-flung geographical communities . The other unique feature of CBPs is that their approach is also related to the “legal resources approach”, which focuses on the development of legal knowledge and skills within communities, and “developmental legal advocacy”, which focuses on the structural causes of injustice and empowering communities to address them (The Community-based Paralegals: Practitioners Guide, 2010:13). Chopra and Isser (2012:354) found that CBPs are able to “negotiate between different legal orders and foster contestation where systems discriminate against women. They can ease access to formal courts and provide alternatives for women”. Community-based paralegals also use their networks with various service providers to help their clients access justice and services. The paralegal approach to justice includes negotiation and mediation and is often faster and better suits their clients’ wishes (Dugard and Drage, 2013: 23).

The provision of services that meet the individual needs of clients is a hallmark of CBP work. According to the Community-based Paralegals: Practitioners Guide (2010:15) community-based knowledge of the law and traditional practices, “combined with sensitivity to the culture and needs of the community, enables CBPs to be particularly effective”. The strategies pursued by CBPs depend on individual circumstances and the client’s preferences. Each case is treated as unique and requiring creative solutions. Due to their social embeddedness, CBPs frequently use mediation and restorative justice techniques which are culturally appropriate for indigenous people. Their effectiveness is facilitated by similar and proximate living conditions and spaces between themselves and their clients, which promotes empathy. Their holistic approach to justice means they are successful where others are not meeting the needs of local people (Martins and Friedman, 2014:2).

According to Maru (2006a:2), CBPs are generalists that respond to “the varied justice needs of the communities they serve”. Community-based paralegals have special skills acquired through experience as well as training that enable them to promote an understanding of the law in the context in which people live (Dieng, 2006:7). Schonteich (2012:26) argues that paralegals “also play a constructive role as intermediaries between the formal criminal justice system and local communities who are often suspicious of the rules and processes governing the justice system”.

Community-based paralegals are also driven by certain values and principles which are next discussed.

#### **4.3.4 Network management by community-based paralegals**

Community-based paralegals are generally inclined to adapt their interventions and focus to the specific geographic area and needs of the local communities they serve. In so doing, CBPs generate an array of networks to better serve their clients (Dugard and Drage, 2013:11). While CBPs are “aware of the value of creating authentic, lived solutions at grassroots level rather than simply referring matters to lawyers for litigation” (Dugard and Drage, 2013:39), sometimes “CBPs arrange interventions by the police and state social workers” (Golub, 2000:301). Community-based paralegals develop relationships with service providers to meet the unmet needs of rural communities, strengthen the capacity of communities and community members to understand and act on their rights, and promote advocacy from within communities, while taking leadership in policy and legal reform (The Community-based Paralegals: Practitioners Guide, 2010:13).

State institutions are the most important stakeholders in the CBP sector. The ultimate resolution of most problems experienced by community members depends on these institutions; nurturing state relations is important for the paralegal sector’s sustainability and for securing benefits for community members by drawing upon networked relationships. Franco, *et al* (2014:28) argue that some organs of state have expressly recognised CBPs, “while others maintain that paralegals should be constrained and regulated to ensure that they do not encroach on the real practice of law”. According to Dugard and Drage (2013:32), “the state has acknowledged its support for CBPs in very practical, valuable ways, for example in the way that the CCJD branch of CAOs have been physically mainstreamed within criminal justice institutions”. Yet, even though CBPs may not be recognised, regulated, or supported by the state, CBPs “offer skills and professional characteristics that enhance efforts to improve justice for the poor. Similar to the gap that rural public health workers fill in relation to doctors, paralegals provide a dynamic, cost-effective, community-oriented alternative to lawyers” (Community-based Paralegals: Practitioners Guide, 2010:14).

According to Golub (2000:301), the strategies pursued by paralegals “depend on the individual circumstances and preferences of clients”. Walsh (2010:26) submits that “paralegals should be viewed as a priority in building credible justice systems in Africa as they truly deserve recognition as ‘first aid’ in access to justice”. Community-based paralegals not only refer cases to an established network but also take on cases referred by other professionals such as the police, social workers, the courts, and traditional courts as well as those of people who walk into the advice offices. Each case is treated as unique and the solution is not-one-size-fits-all.

### **4.3.5 Categories of community-based paralegals in South Africa**

A review of literature shows that community-based paralegals in South Africa have different statuses and use a variety of approaches (Dugard and Drage, 2013:12; McQuoid-Mason, 2013:567; Golub, 2003:34; Pigou, 2000:4). As discussed above, some are paid professionals, a few are unpaid volunteers and some receive only a stipend. Some paralegals work closely with legal aid lawyers; recently, others have started working with lawyers involved in pro-bono programmes. Some paralegals run their CAOs independently under the supervision of a civil society organisation. Some hold tertiary paralegal qualifications, while others learn on the job, building experience through years of community activism and service. In South Africa there are a number of categories of paralegals.

Dugard and Drage (2013:12) identify seven categories of paralegals in South Africa. The “first is the most formalised category, employed in law firms, government departments, and by trade unions. This category serves the needs of the agency, their employer, rather than the general public”. This study is not concerned with this category of paralegals. McQuoid-Mason (2013:571) explains that CBPs’ services “differ from those provided by legal secretaries in law firms who are sometimes also known as paralegals”.

The second category of paralegals serves the general public through various legal structures where they render valuable client interface and support services to public lawyers. These paralegals work within litigation NGOs and branches of Legal Aid South Africa (LASA). Those associated with LASA work in justice centres in various provinces. McQuoid-Mason (2013:567) explains that justice centres’ satellite offices serve smaller towns and villages and are “staffed by paralegals, who do the initial screening of legal aid clients such as the means test and the nature of the client’s problem, offer basic advice or refer clients to other agencies, enter clients’ details in the office data base, and visit prisons”. As indicated in Chapter 2, these satellite offices are serviced by public defenders who operate out of the justice centre in the nearest large town.

The third category is paralegals who work for the Black Sash which is “an NGO that operates sui generis in the South African landscape to advance social security on a quasi-legal frontier and overwhelmingly relies on paralegals” (Dugard and Drage, 2013:14). The Black Sash Trust emerged from a long history of anti-apartheid activism. The Black Sash currently has seven regional offices around the country reduced from nine (Pigou, 2000:9), mainly based in urban areas, and employs fifteen paralegals with a paralegal diploma (Dugard and Drage, 2013:14). These offices are regarded in many quarters as an elite group, not only because of their long history and the fact that they are relatively well-resourced, but because they are well-administered and managed, and focused and effective. They have been able to translate their day-to-day

work into broader thematic campaigns, particularly around issues relating to social security, labour and marital issues.

According to Dugard and Drage (2013:15), the “Black Sash has a memorandum of understanding with the Department of Home Affairs, the Department of Social Development (DSD) and the South African Social Security Agency (SASSA) to monitor and report back on service delivery at local level. The project is known as the Community Monitoring and Advocacy Programme (CMAP)” (Dugard and Drage, 2013:15). McQuoid-Mason (2013:572) notes that Black Sash paralegals engage in advocacy, consumer protection issues, corruption, social grants, and refugees. Golub (2003:34) submits that the “Black Sash Trust uses professional paralegals to assist citizens with a range of problems, such as obtaining government grants to which they are legally entitled and detecting illegal conduct by government personnel. It also trains volunteers and CBPs”. Toward policy advocacy and governmental accountability across all spheres, “the Black Sash’s work contributes to public interest litigation launched by the Legal Resources Centre (LRC)” (Golub, 2003:34).

The fourth category of paralegals is CBPs who work in CAOs that are the subject of this study. According to Dugard and Drage (2013:17), it is in this setting that paralegals contribute most broadly “to the promotion and enforcement of access to justice across South Africa, both through their wide geographic range and the fact that they are often the only legal or quasi-legal option within far-flung rural communities”. Community-based paralegal offices in KwaZulu-Natal (KZN) are associated with umbrella networks such as the Community Law and Rural Development Centre (CLRDC) in Durban, and the Centre for Community Justice and Development (CCJD) in Pietermaritzburg. Together these two organisations run a network of thirty-nine CAOs coordinated by fifty CBPs. Since this study focuses on CBPs in KZN, a brief background of each network is presented.

The Community-based Paralegals: Practitioners Guide (2010:25) notes that the CLRDC is an NGO that was launched in 1998 and began setting up CAOs in 1989 to provide paralegal services in rural areas of KZN. Formerly known as the Community Law Centre, this NGO was attached to the Law Faculty at the former University of Natal (now University of KwaZulu-Natal) for ten years. Carole Baekey, a visiting American law professor, was the founding director. David Mcquoid-Mason designed the training programme for CLRDC paralegals and was a founding board member. All CBPs at CLRDC CAOs hold a paralegal diploma from the University of Natal. The first five CAOs were hosted by tribal authorities. The CLRDC currently operates twenty-two CAOs in rural communities “that are governed by customary law and ruled by tribal authorities” (The Community-based Paralegals: Practitioners Guide, 2010:26). Pigou (2000:10) notes that

the CLRDC provides administration, management and core funding to the advice offices. Pigou adds that the CLRDC CBP programme and CAOs are designed to provide communities with viable structures through which information can be obtained and disseminated, and build capacity in communities, thereby enabling them to spearhead their own development. CLRDC paralegals work without the supervision of a lawyer, and do not usually require professional assistance (Pigou, 2000:4).

The CCJD (formerly the Centre for Criminal Justice) became an independent NGO at the end of 2012. The founding director of the organisation was Professor A.S. Mathews, a professor at the then Faculty of Law (now School of Law) of the former University of Natal in Pietermaritzburg. The CCJD has a similar background to the CLRDC, with a shared institutional home and training programme for paralegals. The *Community-based Paralegals: Practitioners Guide* (2010:25) points out that the involvement of the UKZN School of Law in the two organisations helped develop a credible and accredited community-based programme in KZN. This ensured that the programme adhered to rigorous standards, and offered an avenue for paralegals to earn a Paralegal Diploma. Originally earning a Paralegal Diploma afforded credit toward law school admission. For example, one paralegal from the CCJD who earned a Paralegal Diploma from the UKZN applied it toward law school admission and graduated with an LLB degree in 2013. The CCJD supports CAOs to deal with problems of domestic violence, human rights abuses, problems encountered by farm workers and farm dwellers, and facilitate claims such as grants, private and state pensions. The CCJD fundraises on behalf of the CAOs, enabling them to focus on the work they do best. Additional support (of a logistical and legal nature) is provided when required. The CBPs receive regular refresher training and the organisation has been accredited to provide a national qualification for paralegals by the South African Qualifications Authority (SAQA). The case studies for this study are CAOs supported by the CCJD; therefore more detail on the work of CCJD paralegals is provided in chapters 6-9.

The fifth category of paralegals is involved in the main with democracy work within communities. The Social Change and Assistance Trust (SCAT) supports forty-five CAOs, mainly in the Eastern, Western and Northern Cape provinces in South Africa. This support primarily takes the form of start-up funding. The CAOs manage themselves with guidance from the SCAT. According to Dugard and Drage (2013:19), the SCAT model is to provide initial funding and to try to move CAOs as expeditiously as possible into self-sufficiency. The CAOs are expected to find alternative sources of financial support, such as small contributions or levies from the community, as well as private sector involvement. Dugard and Drage's (2013:19) research findings revealed that the SCAT model assumes that CAOs can attract funding elsewhere; however it is not evident that they are achieving this goal.

The sixth category of paralegal services is based at university law clinics. South African university law clinics provide legal education and support to clusters of paralegal offices in their area, under the auspices of the Association of University Legal Aid Institutions (AULAI) Trust (The Community-based Paralegals: Practitioners Guide, 2010:25). The Trust acts as a funding agency for eighteen university law clinics and their associated projects, one of which is the Access to Justice Cluster (AJC) which operates through eight clusters, Western Cape, Free State, Northwest (Potchefstroom and Mafikeng), Limpopo, Rhodes, and Stellenbosch, attached to eight university law clinics. The programme supports paralegals in terms of training and back-up legal services to CAOs provided by lawyers from the law clinics (Dugard and Drage, 2013:23).

The seventh and final category of paralegals is stand-alone CBPs who are described by Dugard and Drage (2013:12) as those who work more autonomously or with organisations such as the LRC on a project basis and more recently with pro bono or arrangements that “are primarily about paralegal service per se and wherein paralegals take up and resolve matters themselves, referring to lawyers only as a last resort when litigation is necessary”.

Benjamin (2012:6) explains that, in South Africa, the National Alliance for the Development of Community Advice Offices (NADCAO) was established to bring some stability to a fragmented, under-resourced and vulnerable sector. The NADCAO followed in the footsteps of the National Community Based Paralegal Association (NCBPA) which was formed in 1996 by stakeholders in the paralegal sector who felt that a representative body was required to bring about transformation and development in the paralegal sector, and to drive recognition of paralegals as part of the legal profession. It was argued that such recognition would enhance the financial and operational security of the sector. The National Paralegal Institute (NPI) was established as a project of the NCBPA to deliver standardised and certified training for paralegals to enable them to work with the justice system. The two structures collapsed in 2004. This threw the sector into crisis, and it again became fragmented and struggled for funding. The funders that supported the NCBPA reopened discussions with stakeholders in response to concerns about the fragmented and weakened state of the sector (Benjamin, 2012:11-14). The NADCAO was launched in 2007 to provide strategic support and advocacy to the CBP sector (Dugard and Drage, 2013:18). Its purpose was to consolidate “a national footprint, position itself within national legal and institutional framework, and increase the capacity and sustainability of individual affiliated CAOs. NADCAO is not a membership or a funding organisation”. In 2013, when NADCAO’s mandate expired, a new, membership-based structure, the Association of Community Advice Offices of South Africa (ACAOSA) was launched to act as the voice of paralegals. NADCAO pledged to provide support to ACAOSA from 2014 to 2016.



#### **4.3.6 Profile of community-based advice offices in South Africa**

Community-based paralegals operate and manage CAOs. According to ACAOSA's (2013:7-11) founding document, two hundred and eighty-six CAOs currently operate in South Africa. The Eastern Cape has sixty-five CAOs, forty of which are registered as non-profit organisations (NPOs), while thirty are funded and thirty-five are not funded. The challenges faced by CAOs in this province are limited capacity and skills gaps. In the Western Cape, there are forty-one CAOs, thirty-five of which are registered, and twenty-nine are funded while twelve have no funding (ACAOSA, 2013:7). The main challenge is funding. Gauteng is home to twenty-two CAOs, twenty of which are registered. Nine are funded and thirteen have no funding. In the province of Limpopo there are seventeen CAOs; fifteen are registered, ten are funded, and five are not funded.

In Mpumalanga seventeen advice offices are registered and seven are funded while ten have no funding. In North West, there are twenty-five CAOs, eight of which are funded, and fifteen are not funded. The main challenge is the loss of experienced paralegals due to a lack of funding and monitoring and evaluation of their work (ACAOSA, 2013:9). In Free State, there are twenty-two CAOs; eighteen are registered, seventeen are funded and five have no funding. The main challenge is refresher courses for paralegals (ACAOSA, 2013:11). KwaZulu-Natal has fifty-four CAOs, twenty-four of which are registered, with fifteen supported by the CCJD, twenty-two supported by the CLRDC and seventeen stand-alone advice offices. Forty eight of these CAOs are funded and six have no funding. Finally, there are twenty-three CAOs in the Northern Cape. No information is available as to how many offices are registered and their funding situation(ACAOSA, 2013:11).

The National Alliance for the Development of Community Advice Offices commissioned a study of eight CAOs in four South African provinces to CCJD. Based upon that study, Buckenham (2014:9) argues that lack of funding is limiting the effectiveness of CAOs and adds that "it is remarkable that those advice offices that are not funded still function at all". Six of the eight CAOs that were the focus of that study have experienced long periods without donor funding. Despite the fact that this meant that staff did not receive their salaries they continued to report for work. Indeed, some of the offices were in this position at the time of the NADCAO commissioned study. While paralegals are committed and some have been doing this work for up to thirty years, according to Buckenham their situation is "untenable and CBPs are the pillars of CAOs, without salaries CAOs will collapse" (Buckenham, 2014:9). The literature review revealed that the problem of funding is not restricted to South Africa. For example, Franco, *et al* (2014:7) point out that a lack of funding impedes paralegals' work in the Philippines.

#### **4.3.7 Challenges of community-based advice offices**

Community-based advice offices face many challenges beyond lack of funding. One challenge is whether the existence of CAOs diverts attention away from state efforts to train lawyers to work with diverse populations in remote rural areas. Kahn-Fogel (2012: 776) argues that although paralegals play a vital role in meeting legal needs that lawyers cannot meet, of concern is that they often perform the kind of sophisticated work offered by lawyers. This could be addressed if paralegals were subject to regular oversight by lawyers and played only supportive roles. Kahn-Fogel (2012: 774) adds that, while paralegals cannot replace the work of lawyers, they are able to mitigate some of the harm caused by customary practices and the scarcity of lawyers. Lack of standardisation weakens their efficiency and performance. Furthermore, the efficacy of their work depends on the cooperation and understanding of a given community and local authority.

Other challenges include sustainability of operation and absence of recognition of CAOs and CBPs as well as lack of monitoring and evaluation. Franco, *et al* (2014:18) argue that the perception that only lawyers know the law makes it difficult for paralegals to gain recognition, whether formal or informal. Franco *et al* (2014:31) identify a number of concerns relating to the use of CBPs. The first problem relates to the accountability, sustainability and location of CAOs. Paralegal programmes are poorly financed, and it is an on-going struggle to sustain them over time. Paralegals depend on the patronage of other organisations. When there is staff turnover in the other organisation, this could severely compromise their work (ACAOSA: 2013:11, Franco *et al*, 2014:28). Buckenham's research (2014:9) revealed that some advice offices have adequate office facilities, while others are located in insecure, unsafe, noisy locations and occupy small offices owned by uncaring landlords or share an office with unsuitable tenants. Buckenham argues that proper accommodation is essential for CAOs to work effectively. Furthermore, as noted earlier, some paralegals are not paid on a regular basis; this threatens to collapse the paralegal sector. Msiska, Igweta and Gogan (2007:151) are of the view that the issue of sustainability could be solved by more donor investment in the work of paralegals.

The second problem relates to recognition and certification of paralegals. According to Dugard and Drage (2013:17), South African CAOs are not formally regulated "and there are no prescribed minimum operating standards or regulatory authority to ensure compliance". Buckenham's research also revealed that CBPs undergo such diverse training that it is difficult to establish a uniform level of competency. Some training is accredited while the level and source of other paralegals' training is inconsistent (Buckenham, 2014:12). Kahn-Fogel (2012:776) argues that the lack of standards regulating the paralegal profession is troubling. There are no uniform criteria to determine paralegals' eligibility to dispense legal advice. However, Franco, *et al* (2014:29) caution that recognition and accreditation may bring its own challenges; the process may

create an elite group of paralegals with no organic connection to their constituency in the long run. Franco *et al* ask the question: “Should there be just one type of recognition, a one-size-fits-all approach?”.

The third problem relates to monitoring and evaluation. Community-based paralegals are concerned that there is very little monitoring and evaluation of their work (ACAOSA, 2013:9). Franco, *et al* (2014:29) note that despite the long history of paralegals “little has been done to measure the impact of paralegal work on access to justice”. Some paralegals are weak in following-up on cases reported and handled which would be useful in measuring their impact on the communities they serve. Franco *et al* (2014:30) explain that monitoring and evaluation do not “seem a priority in light of the seemingly more urgent concerns of training paralegals and immediately making them work on issues facing the community. The issue of scarce resources definitely comes into play, as limited funds are used more for training and actual dispute resolution rather than for trying to monitor the outcomes of their work”.

The fourth challenge is that the law and development is not static. According to Franco *et al* (2014:30), aside from the institutional problem of financial sustainability, CBPs are challenged to provide legal assistance at grassroots level, in the context of increased legislation and rights, as well as increased consciousness of rights, but weak implementation. The fifth problem relates to paralegal work with women and children. Community advice offices deal with cases of domestic violence, child abuse and rape. Buckenham’s (2014:4) research revealed that community members prefer paralegals’ approaches to such cases; however various scholars warn that working with vulnerable people is complex and requires a deep understanding of the dynamics involved. Franco *et al* (2014:30) argue that “experience shows that women who suffer domestic violence are unlikely to challenge their attacker without strong support from the community; therefore paralegals may need to engage in organising such support”.

The study commissioned by NADCAO to CCJD identified additional challenges confronting CBPs and their CAOs. These include training and other support as well as standard, accredited training programmes to address the different levels of legal and technical competency across CAOs. Additional training needs include an efficient system to record cases, and training in computers, administration and financial management. Finally, the work of CBPs in South Africa is not well publicised; there is a need to share their knowledge with a wider audience (Buckenham, 2014:8).

Despite the problems faced by CBPs in the management and operation of CAOs, CBPs perform well-defined roles which are next described.

#### **4.4 Roles of Community-based Paralegals**

Kigodi (2013:47) observes that paralegals play a generic role and offer many different services. They are typically involved in anything relating to the rights of women and girls and the community in general. According to Fine (1992:6) CBPs play a role in service, development, and human rights. However, to CBP role identification, this study adds the CBPs' role of straddling plural justice systems. Each role is discussed in turn.

##### **4.4.1 Service role**

Most scholars agree that the scope of service delivery of CBPs is extensive (Stephens, 2009:145; Maru, 2006:450; Dugard and Drage, 2013:12; Pigou, 2000:5; Golub, 2003:26). Service delivery roles of CBPs include being a mediator, negotiator, counsellor and co-ordinator of socio-economic matters and the giving of referrals. In the above-referenced study commissioned by NADCAO to CCJD it was found that across provinces of Gauteng, KwaZulu Natal, Limpopo and Mpumalanga CBPs and CAOs handle at least thirty case categories of issues (Buckenham, 2014:4). In that regard, Buckenham (2014:4) argues that two elements that empower CBPs to render such a wide range of services are (1) their ability to shape innovative remedies peculiar to the needs of a given case and (2) the fact that CBPs are from the communities they serve.

Community-based paralegals and their CAOs directly serve the community by responding to day-to-day problems such as domestic violence, maintenance, pensions, labour issues, financial entitlements like social grants, evictions, identity documents, birth certificates, provident funds, road accident claims, social problems linked to poverty and HIV/AIDS (Stephens, 2009:145; Dugard and Drage, 2013:12). According to Dugard and Drage (2013:12), "South African paralegals primarily deal with concerns involving domestic violence and access to social grants"; "these areas of work relate to two of the most serious remaining fault lines in South Africa: endemic violence in the home and structural unemployment, meaning that a very high proportion of South Africans rely on grants to survive".

Golub (2003:26) argues that mediation, negotiation and other forms of non-judicial representation are conducted by paralegals. Paralegals "help community members solve problems through approaches that encourage resolution without going to court". Most cases are resolved through dialogue with government institutions, and negotiations with private institutions. Similarly, Pigou (2000:8) points out that the objective of paralegals conducting mediation and negotiating is to facilitate solutions in a cost effective manner

without litigation. Dugard and Drage (2013:11) explain that the techniques commonly used by paralegals to resolve problems “are alternative dispute resolution (ADR), mediation and negotiation to establish a holistic approach to help resolve issues or problems within families, and with traditional and state institutions”. Pigou (2000:4-5) contends that informal legal approaches include personal counselling and, although few paralegals have formal counselling skills, this role is an integral part of community-based advice office work.

As to target populations, CBPs and CAOs deliver services to the unemployed, and vulnerable women, men, elderly people, children, disabled, foreign nationals, widows and poorest of the poor who do not know where to go to get help (Buckenham, 2014:6). Socio-economic issues are often related to cases presented to CBPs. Fine (1991:155) and Stephens (2009:145) indicate that lawyers are unprepared or unable to assist with related socio-economic issues of clients and unwilling or unable to service remote rural areas. This creates a void often filled by services of CBPs (Walsh, 2010:19). Pigou (2000:5) explains that where CBPs are unable to help and depending on the nature of the matter, clients are referred to appropriate institutions and service organizations; often with some documentation setting out precisely what assistance is required. This has proven to be effective in many areas, as civil servants may be more helpful when they know that the person seeking their assistance has alternative remedies. Advice offices have been acting as an essential conduit and point of access to both government and non-governmental organizations. As discussed earlier, CBPs have a network of contacts with other service providers and therefore refer people to and receive referrals from organizations that provide specialized services e.g. legal, social and health services. The NADCAO commissioned study revealed that CBPs have a positive relationship with government like the Department of Social Development and Home Affairs and NGOs such as the South African Commission on Gender, faith-based organisation and private institutions (Buckenham, 2014:7). No one is turned away, regardless of their issue; CBPs are able to translate difficult legal and bureaucratic language into frames that local people can understand while providing direction on steps to be taken by clients (Buckenham, 2014:6).

Another factor evident from the NADCAO commissioned study is the usefulness CBPs being co-members of the community served. Community-based paralegals share the culture and history, understand the worldview and know the life struggles of their clients. As a result community members trust CBPs and know that cases will be dealt with effectively, efficiently, promptly and until they are finalised. In addition the CAOs are accessible to clients since the CBP and the CAO are located within communities (Buckenham, 2014:6).

It may seem that the wide range of cases handled by CBPs is too broad. Maru (2006b:450) explains, however, that while CBPs “could gain expertise and effectiveness if the scope is narrow, where service delivery is poor” and critical needs are wide-ranging – such as remote rural communities, “specialisation by CBPs would seem irresponsible”.

#### **4.4.2 Developmental role**

In South Africa, community development is a priority as evidenced by the South African Constitution (RSA, 1996a) and policy documents such as the National Development Plan: Vision 2030 (RSA, 2011). Community-based paralegals play a developmental role that revolves around community education, policy formulation, being a liaison to other development agencies and skills training. As to community education, Fine (1991:160) argues that paralegals address the roots causes of problems. This involves finding out what the needs of communities are, in consultation with communities. Paralegals help to build services and resources, which improve the lives of ordinary people and give them more power and control over their own lives through community education. This is achieved in various ways. Paralegals conduct educational workshops to raise public awareness, use different languages to inform people of their rights, and build the capacity of individuals and groups. According to Golub (2000:298), paralegals raise awareness of the rights due to community members; this is a significant advance for many communities where ignorance of the law abounds. Golub adds that community members learn to “think critically about the law and to raise concerns about the inequitable aspects of many laws”. Paralegals are a resource in the community and a source of information; they distribute educational pamphlets and resources (food/clothing for poor households), inform communities of job opportunities and link them with income generation projects. Golub (2000:303) argues that “community mobilization efforts by paralegals often reach beyond the typical purview and skills of most attorneys”.

Pigou (2000:6,7) contends that CBPs play a developmental role in policy formulation and often contribute to broader initiatives of lobbying and advocacy. Community-based paralegals help develop future policy on access to justice, social welfare and related issues – even though in many jurisdictions CBPs are not officially recognised by government. Pigou (2000:7) further points out that CBPs help build community resources and develop services that are practical. Extending the service role of referring clients to appropriate governmental organisations and NGOs, CAOs operated by CBPs are an active link to development-oriented entities. The NADCAO commissioned study revealed that CBPs carry two types of authority, the legal authority backed up by law, and moral authority since CBP work is based on the effectiveness of what they do, how they do it and the outcome of cases (Buckenham, 2014:3,7). The legal

authority is grounded in the CBPs' knowledge of law which enables them to serve clients and interact with development-related agencies although CBPs cannot enforce law. However, it is moral authority that CBPs use when liaising with governmental agencies and NGOs to negotiate development-related issues on behalf of clients (Buckenham, 2014:3, 7). Community-based paralegals, from a developmental role standpoint, share their knowledge and regularly provide practical skills training for new paralegal recruits (Buckenham, 2014:5).

#### **4.4.3 Human rights role**

Pigou (2000:7) explains that human rights are the core business of advice office work. Franco, *et al* (2014:7) and Stephens (2009:145) point out that CBPs possess a unique skill and are held in high regard by their communities as agents of legal empowerment. The central objectives of paralegals and advice office workers are to make people, especially marginalised people, aware of their rights, to provide information on how and where to exercise those rights, to provide other information, which might be useful in claiming rights, and to ensure that people are treated correctly in claiming their rights (Pigou, 2000:7; Franco, *et al*, 2014:7). Some of the ways in which CBPs exercise their human rights role are through human rights education (Franco, *et al* 2014:16), human rights practices (Fine, 1992:7), valuing cultural identity (Kigodi, 2013:38) and honouring human dignity of service recipients (Buckenham, 2014:4).

To Franco, *et al* (2014:16) human rights education of communities by CBPs is connected to the nature of relationships between CBPs and local officials. If “local officials are open and friendly, it provides paralegals with an opportunity to deepen and extend their rights education work and better enables them to respond quickly to cases that require urgent attention, and this opens an opportunity to gain access to sustainable resources for their work in the medium term”. The NADCAO commissioned study found that CBPs convene workshops and training sessions to further a human rights education campaign (Buckenham (2014:8).

Various ways in which community-based paralegals help build respect for human rights education and practices, such as the right not to be discriminated against, and to education for example, include monitoring the conduct of agencies such as the police and mediating and negotiating conflict resolution, not just between parties but also between clients and service providers (Fine, 1992:7).

When seeking problem resolution clients usually approach the advice office in a vulnerable state. As to honouring human dignity of service recipients, according to Buckenham (2014:4), participants in the NADCAO commissioned study explained that before they approach the advice office, they have been to

other service providers for help. Elsewhere they are met with someone who is “overworked, has little time or interest to listen to their problems and at that time they are tired, confused and stressed”. In contrast study participants revealed that at the advice office, they are assisted by a paralegal that sees them as a fellow human being, has their interest at heart, has time to hear their story and to discern issues. Study participants felt that they are respected, taken seriously and treated with dignity at community advice offices. This suggests evidence of *ubuntu*.

As to valuing cultural identity, Kigodi’s (2013:38) research revealed that CBPs are managing to negotiate power issues and remedy conflicts, which are discriminative and oppressive to women. For example there are some norms and traditions (Masai) that violate women’s and girl’s dignity and are still regarded as valuable. Paralegals value the cultural identity of their clients and they “work to eliminate discrimination within their cultural communities” (Bond, 2010: 427).

#### **4.4.4 Role across plural justice systems**

Given the nature and complexity of this study, this study adds to Fine’s (1992:6) role definitions of CBPs the role of working in an environment of legal pluralism. Schonteich (2012:26) explains that paralegals play a “constructive role as intermediaries between the formal criminal justice system, the traditional justice system and local communities who are often suspicious of the rules and processes governing the justice system”. Schonteich (2012:26) notes that the fact that paralegals usually “come from the communities they serve means that they are able to assist community members to navigate both systems of justice”. Community-based paralegals are “finely attuned to local contexts and needs, speak local languages, have knowledge of local forms of justice and are accepted by the community” (Community-based Paralegals: Practitioners Guide, 2010:13). In other words, while using informal justice system approaches, CBPs are able to apply both the formal and traditional justice systems to a single case.

The ability of CBPs to straddle plural justice systems has led to improved efficiency in the formal justice systems according to some scholars (Msiska, Igweta and Gogan, 2007:150; Kahn-Fogel, 2012: 778, 779). Msiska, Igweta and Gogan (2007:150) contend that the availability of paralegal services has resulted in the judiciary becoming more active in expediting the judicial process. Magistrates visit prisons to screen the remand caseload, “discharge those who have overstayed, grant bail, and list cases for trial; the case flow has thus improved. Criminal justice agencies are finding local solutions to local problems, often at little or no additional cost” due to paralegals’ assistance. Kahn-Fogel (2012: 779) notes that paralegals in Malawi have helped divert large numbers of criminal cases from the overburdened official justice system towards community-based resolution at village level, and have worked to improve the conditions in Malawian



prisons. Kahn-Fogel (2012: 778) argues that paralegals operating under Malawi’s Paralegal Advisory Service (PAS) have provided a model for paralegals to improve the efficiency with which magistrate’s courts process criminal cases.

Chopra and Isser (2012:355) argue that, from a gender perspective, “CBPs can negotiate between different legal systems and foster contestation where systems discriminate against women”. While there is much evidence that CBPs have helped women to navigate the formal and traditional justice systems, empirical evidence of their impact on local power structures will support the case for constructive social change processes that will, in turn, lead to more equitable justice systems. Kigodi’s (2013:38) research revealed that CBPs negotiate power issues and solve conflicts that are rooted in discriminatory practices and are oppressive to women.

Not unlike other studies, the NADCOA commissioned study (Buckenham, 2014:8) revealed that a major strength of the work of CBPs is their ability to straddle the formal justice system, traditional justice system and informal justice system.

#### 4.5 **Towards a Conceptualisation of Community-based Paralegals Affording Access to Justice through Restorative Justice**

With the definition, description and roles of CBPs in mind and drawing primarily on Noone (1991), Maru (2006) and Wojkowska (2006), Table 4-1 provides a helpful conceptual framework for understanding the problems and benefits associated with CBPs. These are discussed in relation to the literature on CBPs and restorative justice.

Table 4-1 Conceptual framework: Problems and benefits of community-based paralegals

<b>Problems</b>	<b>Benefits</b>
Second class justice	Capacity to straddle plural legal system
Cheap alternative to justice	Use a wider and more flexible set of tools
Lack the guarantee of independence and consistency	Need not limit themselves to an adversarial approach
Lack of state regulation of services	Cost effectiveness and availability

Divert pressure to improve training of lawyers	CBPs provide culturally competent services
Unequal power relations	CBPs as partners with the formal justice system
Adapted by researcher from Noone, 1991; Maru, 2006; and Wojkowska, 2006	

**4.5.1 Potential problems in utilising community-based paralegals**

This section discusses the potential problems in utilising CBPs as listed in Table 4-1.

**4.5.1.1 Second class justice**

Walsh (2010:19) notes that practising lawyers and bar associations have often resisted proposals that justice institutions make use of paralegals to close the gaps in service delivery on the grounds that paralegals would either compete with lawyers or lower the standard of the services that qualified lawyers provide. Robb-Jackson (2012:12) explains that, the reason why paralegals are said to offer second-class justice is that they receive limited training and do not fully comprehend the law. The argument that paralegals condemn the poor to “second-class” legal services does not hold; according to Golub (2000:303), “the real choice is often not between second-class help by paralegals and first-class help by lawyers, but between paralegal assistance or no assistance at all. Even where lawyers are available, paralegals can sometimes be equally competent”.

Wojkowska (2006:14) notes, that “there are fears that acceptance of informal systems poses the risk of the institutionalisation of low quality justice for the poor”. Cappelletti (1992:35) argues that the adjudicators involved in alternative justice systems lack the guarantees of independence that are typical of professional judges, and hence they might be subject to more pressure and interference, especially when there is a marked socio-economic power difference between the parties. Cappelletti (1992:35) acknowledges that people will continue to search for alternative forms of justice if their needs are not met: “The search for alternatives, has represented a fundamental part of what I happened to call the ‘third wave’ in the access-to-justice movement”. The author cautions that alternative systems could end up providing ‘second-class justice’. However, Cappelletti maintains that the access to justice movement has found that there are valid reasons for proceeding in this ‘third wave’ direction. There are situations in which, far from producing a second-class result, these alternative approaches produce results, which, even qualitatively, are better than ordinary adjudication.

#### 4.5.1.2 **Cheap alternatives to justice**

According to Ptacek (2010:7-8), scepticism exists about whether offenders can truly be held accountable in informal restorative justice practices. The danger here is cheap justice, meaning that these processes could be too easy on offenders – or too easy to manipulate – and thus be both ineffective and unjust. Nancarrow (2003:16) argues that the “cheap justice problem refers to the tendency in restorative justice practice such as mediation to over-emphasise the value of an offender apology”. To Nancarrow (2003:16) this creates two kinds of cheap justice problems “(1) an overemphasis on offender rehabilitation at the expense of moral solidarity with the victim, and (2) a sincere apology or reconciliation may neglect the victim’s primary needs”.

#### 4.5.1.3 **Lack of guarantee of independence**

As noted earlier, Cappelletti (1992:35) reasons that the problem with alternative justice systems is that those that are involved lack the guarantee of independence that is typical of professional judges; hence they might be subject to pressures and interference, especially when there are marked socio-economic power differences between the parties. However, CBPs do not charge fees and are not contracted to promote the interests of a particular client; they take a broader view of a case, consider both sides of a dispute and pursue a result that is generally free from bias and favour (The Community-based Paralegals: Practitioners Guide, 2010:13)

#### 4.5.1.4 **Lack of regulated quality control**

Robb-Jackson (2012:12) points out that, paralegals are said to lack proper oversight because they are not governed by any regulations. Similarly Dugard and Drage (2013:33) explain that the overarching problem in the CBP sector is the unclear regulatory environment within which CAOs operate; however, this can also give them an advantage by allowing a large number of unique, locally specific and dynamic CAOs to emerge. The downside is that there is no comprehensive quality control and assurance, “meaning that communities are vulnerable to fly by night CAOs”. To address this problem, Robb-Jackson (2012:23) suggests that paralegal programmes be recognised and that they should collaborate with formal justice actors on an on-going basis. Dugard and Drage (2013:33) note that there are both supporters and opponents of formal regulation among CAOs and umbrella organisations such as the CCJD and CLRDC that support the work of paralegals. Opposition to regulation is based on the fear that it might lead to an over-restrictive definition of paralegal work. Some CAOs support recognition due to its funding implications. As noted in Chapter 1, NADCAO has provided leadership in lobbying for the inclusion of paralegals in the Legal

Practice Bill (LPB). Since this was not successful, Dugard and Drage (2013:34) suggest that “another regulatory option would be to formally draw CBPs into LASA structures; this could enhance sustainability and professionalism within the CDP sector”.

#### 4.5.1.5 **Divert pressure to improve training of lawyers**

Noone (1991:34) explains that an argument advanced against the use of paralegals is that it may divert pressure being applied to improve the training of lawyers. Lawyers should be trained to provide the positive aspects of legal service delivery attributed to paralegals. Noone (1991:34) maintains that if lawyers were trained “in communication skills and cultural, race, gender, and class issues, and provided services that are accessible to those that are geographically and culturally isolated”, paralegals’ services may not be needed. However, the author recognises that this is not something that will happen overnight, arguing that, “until then paralegals can form an important role in making links between the individuals and the legal system” (p. 34). Simultaneously, Robb-Jackson (2013:23) points out that a potential risk of paralegal programmes “is that they may reduce the responsibility of the state to make formal justice processes more accessible”.

In contrast, Cappelletti (1992:35) states that, “presently it is common knowledge that the lawyer based approach presents serious shortcomings, the shortcoming to this approach is in fact that quite often the legal problems of the poor present special features of which a lawyer might have no experience at all”. Cappelletti adds that not even a very rich country would be willing and able to establish a large organisation of lawyers paid from the public purse to meet the legal demands of the poor (p. 35). Maru (2006a: 13) notes that in “Sierra Leone’s dualist structure, lawyers are barred from practicing in customary courts, yet these are the institutions of most practical relevance to the majority of people; even if there were to be an abundance of lawyers, they would not be able to provide much-needed legal assistance”. According to Maru, it is for this reason that the CBP programme is able to deliver basic justice services at chiefdom level which a lawyer would not be able to do; this makes the programme more attractive through applying the rigour of legal practice to the wide range of justice problems that communities face. Kahn-Fogel (2012: 725) argues that “increasing the number of lawyers would not, in and of itself”, ensure the availability of legal services to the average person. Franco, *et al* (2014:31) submit that, given the non-likelihood “that the number of public interest lawyers will increase substantially in the future, the need for paralegals to reach out to the poorest of the poor will continue”.

#### 4.5.1.6 **Unequal power relations**

Wojkowska (2006:20) argues that the traditional justice system does not work in resolving disputes between parties with very different levels of power and authority. “Unequal power relations and susceptibility to elite capture may reinforce existing power hierarchies and social structures at the expense of disadvantaged groups” (Wojkowska, 2006:22). Stubbs (2010:92) notes that “critiques of restorative justice as a response to domestic violence observe that there are unequal power relationships between victims and perpetrators of domestic violence and that the offender has the capacity to exert power over a victim and the process itself.

#### 4.5.2 **Potential benefits of utilising community-based paralegals**

This section discusses the potential benefits of utilising community-based paralegals.

##### 4.5.2.1 **Capacity to straddle plural legal systems**

Schoalrs suggest that CBPs help communities to make formal law, living customary law and government work for them. Living customary law is described by Ubink and Van Rooij (2010:6) as the “norms that govern daily life in the community at the local level”. It is said to hold government personnel accountable, especially when there are service delivery failures. Unlike CBPs, lawyers’ training mainly introduces them to the formal legal system; the majority of lawyers live in urban areas close to regional court structures while CBPs generally live in the area they serve. Cappelletti (1992:30) argues that the lawyer model has serious limitations in providing legal advice; “this is compounded by the fact that the private lawyers usually have their offices in the better quarters of the towns, hence there is a further difficulty – including a psychological obstacle for the poor to contact them”. Cappelletti (1992:30) argued 22 years ago that private lawyers would rarely, if ever, “be willing to undertake the role of counselling and educating, which is necessary if they need to reach out to the poor”. Maru (2006a:1) is of the view that “if paralegal programmes are well adapted to the context in which they work, they have the potential to synthesise modern and traditional approaches to justice and to bridge the gap between the law and society”.

In their evaluation of CCJD, Fernandez *et al* (2009:45), found that the way in which CCJD CBPs mediate the formal law into an informal legal setting, shows that the CBP programme has managed to achieve a symbiotic relationship between the traditional, informal and the formal legal systems, which is unique and should be maintained. Stapleton (2007:23) observes that discovering new ways of including citizens in the justice system through complementary formal and informal justice systems encourages rather than ignores community participation in the criminal justice system. According to Maru (2006b:470), due to CBPs’

“familiarity with local communities, paralegals are often more capable than lawyers when it comes to straddling formal, informal and customary legal systems”.

#### **4.5.2.2 Community-based paralegals partner with the formal and traditional justice systems**

Scholars provide evidence of CBPs not only straddling justice systems but also partnering with officials in formal and traditional justice systems. Robb-Jackson (2012:23) contends that paralegals’ work play a significant role in affording access to justice and CBPs “should continually collaborate with formal justice actors”. In much the same vein, Golub (2003:35) points out that paralegals’ effectiveness also depends on relationships with law enforcement agencies and the political arena in which they operate. As to the traditional justice system, Ubink and Van Rooij (2010:6) contend that one of the important methods to improve the functioning of customary law is to develop linkages between the customary justice system and the informal justice system administered by paralegals. Likewise Dugard and Drage (2013:32) indicate that during their study, they were told about a chief that asked paralegals to conduct proceedings in his court in order to ensure that the parties in dispute were aware of their legal rights and options.

#### **4.5.2.3 Community-based paralegals have a wider and more flexible set of tools**

According to Robb-Jackson (2013:13) and Maru (2006a: 33), paralegals apply a combination of legal and non-legal tools to meet their clients’ justice needs, including mediation, education, organising, advocacy, and referring cases to lawyers for litigation. They address intra-communal disputes, as well as problems and abuse that arise between citizens and the traditional authorities, between citizens and state institutions, and between citizens and private firms. The focus of the service provided by CBPs is on disempowered communities, in order to remedy breaches of fundamental rights and freedoms.

Moorehead (2003:765) notes that studies on the role of non-lawyers reveal that clients felt that non-lawyers were significantly better than lawyers in the following “areas:

- Knowing the right people with whom to speak about the client’s problem,
- Paying attention to the client’s emotional concerns,
- Listening to what the client had to say, and treating the client as if she or he mattered,
- Taking action that the client wished, and having enough time for the client,
- Giving the client information on what would happen in the case,

- Standing up for the client's rights".

Moorehead's (2003:765) study found that non-lawyers out-perform lawyers in making the client feel comfortable and informed. Non-lawyers were also more comfortable with and skilled at working with those with a less sophisticated understanding of the law; clients reported a high level of satisfaction with non-lawyers, especially in terms of non-legal needs such as emotional support and effective communication.

#### 4.5.2.4 **Community-based paralegals need not limit themselves to an adversarial approach**

Maru (2006b:470) observes that paralegals do not limit themselves to an adversarial approach. According to Robb-Jackson (2012:19), in Sierra Leone, paralegals offer communities new and additional justice options, thereby changing the traditional role of chiefs as the focal point of justice. Paralegals who were interviewed stressed that they are not in competition with the chiefs, but are playing a complementary role; the focus is collaboration in increasing access to justice. Cappelletti (1992:35) explains that there are advantages to a procedure that is simple, informal and less expensive than litigation, such as non-adversarial mediation. However, serious cases should remain the preserve of the courts. Schonteich (2012:25) found that paralegals are playing an increasingly important role in enhancing access to justice, largely through a non-adversarial set of tools.

#### 4.5.2.5 **Cost effectiveness and availability**

Scholars give different reasons for indicating that CBPs' free provision of legal services ensures that justice is accessible to all. Maru (2006a:470) explains that entry barriers to CBP services are low: it is much easier and less expensive to train and deploy paralegals than lawyers. Robb-Jackson (2012:12) observes that CBPs are recognised for providing cost-effective, relevant, and proximate justice solutions, and that they improve the accessibility and delivery of legal services. Golub (2000:303) argues that even where lawyers are available, paralegals can sometimes be equally competent, and they are far more accessible and cost effective. With paralegals in place, lawyers can operate in a more selective manner. Pigou (2000:25) notes that paralegals are frequently the only providers of legal advice in remote and poor rural communities, and that they play a crucial role in extending cost-effective legal services.

Moreover, in terms of availability and due to their long-term engagement with cases and on-going physical presence in the community, paralegal operated programmes have the potential to reduce retaliatory violence against women who seek justice services, thus strengthening and complementing the formal and state justice processes and bridging the gap between the law and the people (Robb-Jackson, 2000:23). Kigodi's (2013:88)

research revealed that paralegals “stand out as the best alternative to people living without legal protection”. Nonetheless, some legal professionals like lawyers and advocates regard them as intruders and unprofessional workers that are unqualified to handle legal matters despite their visible role.

#### **4.5.2.6 Community-based paralegals provide culturally competent services**

Dugard and Drage’s (2013:38) study revealed that many of the soft skills of paralegals derive from the fact that they live in the community that they serve. Wojkowska (2006:13) found that formal justice systems could be culturally uncomfortable for rural women and that going through the formal justice system may lead to more problems. Vorster (2001:54) takes this debate further and points out that “knowledge of the cultural context of the customs, ideas and practices is essential”. He submits that in the field of customary law, such knowledge might promote justice and harmonious relations between people. Robb-Jackson (2012: 12) adds that over and above the fact that paralegals are culturally, geographically and economically closer to the communities they serve, they have specialised knowledge of particular areas with which lawyers may be unfamiliar, such as alternative dispute mechanisms and cultural practices.

#### **4.6 The Interactive Nexus between Community Restorative Justice, Community-based Paralegals and Domestic Violence Cases**

Given the various roles, skills and knowledge of CBPs in advancing access to justice, there could be a nexus between restorative justice practices, CBPs and the handling of domestic violence cases. The review of the literature on access to justice has demonstrated that there is a difference between people having a right of access to the justice system and access to justice in reality (Dias, 2009:4). Access to justice is a broad concept that refers to a variety of issues that have an impact on people or communities’ ability to seek and obtain redress when their human rights are violated. Forums to hear these issues are not exclusive to the formal legal system; they include access to the customary or traditional justice system and informal systems of justice such as restorative justice practices. This demonstrates the relationship between access to justice and the informal justice role played by CBPs that service clients by operating across plural justice systems. Accessing justice in relation to domestic violence through the criminal justice system has been the subject of much critique. Presser and Gaarder (2000:186) believe that laws that ‘get tough’ on offenders have fallen short of their intended goals, in part because the extra-legal causes of women’s oppression remain unchanged. Some battered women do not believe that the criminal justice system can effectively solve their problems (Presser and Gaarder, 2000:187). In contravention, some scholars cite the benefits of the rule of law in response to violence against women. The law has a positive role to play and the cumulative evidence



suggests that the greatest prospects for eliminating violence and abuse are associated with criminal justice responses, which incorporate surveillance and control and include rehabilitation programmes with an explicit focus on violent behaviour and supporting beliefs. According to Lewis *et al* (2001: 121), while potentially relevant to certain offending behaviour, community conferencing is inappropriate to deal with longstanding relationships in which one partner has been persistently violent to the other; nor can an arrest be the sole intervention to eliminate the offending behaviour. Gaemate and Howley (2009:253) explain that in a punitive system, there is always a tension between recognising the harm to the victim and protecting the rights of the offender. This, points to the importance of restorative responses to domestic violence being introduced in a general framework of restorative justice.

The criminal justice system is by far the most recognised way of solving domestic violence. This begs the question of whether there can be an interactive nexus between CRJ, CBPs' activities and the processing of domestic violence cases as a way to expand access to justice (Robb-Jackson, 2012:23). Despite the rapid growth of CBP programmes, there is a paucity of research on this issue. Kigodi (2013:18) contends that the role of paralegals in addressing domestic violence has been partially studied but not fully covered regarding challenges and success from the point of view of beneficiaries. Kigodi (2013:15) adds that violence against women and girls is rampant and other institutions like the police and courts are largely incapable of providing assistance to poor communities. The informal legal systems used by paralegals in Tanzania emerged to narrow this gap.

Dugard and Drage (2013:11) and Fernandez *et al* (2009:46) agree that South African CBPs incorporate both restorative justice and victim care theories in their day-to-day interactions with victims of domestic violence, helping to solve problems within families. It is therefore suggested that there is an interactive nexus between CRJ, CBPs and domestic violence cases. However, there is a gap in the empirical literature on this subject which this study hopes to help fill. Exploring the role of CBPs in CRJ from the perspective of CBPs and those who have received services from CBPs is the best way to provide insight into these phenomena. The discussion now turns to the convergence of the literature review and formulation of the meta-conceptual socio-legal framework that guides the production of empirical evidence, findings, conclusions and recommendations.

#### **4.7 Convergence of the Literature Review and the Formulation of the Meta-conceptual Socio-legal Framework**

The literature examined in this chapter centred on CBPs and restorative justice practices. Earlier literature review chapters encompassed access to justice in a legal pluralism environment and CRJ. With the convergence of the literature review, several conceptual frameworks are adopted to guide the study. As stated at the close of Chapter 3, Table 3-1 adapted from Daly and Stubbs (2006:17), will be used to identify and study the problems and benefits associated with restorative justice. To design Table 4-1, which explores the problems and benefits associated with CBPs, the researcher drew largely on the scholarly work of Noone (1991:34), Maru (2006:470) and Wojkowska (2006). To discuss the meaning of the problems and benefits associated with community restorative justice on the one hand and with CBPs on the other hand, the researcher drew upon scholarly work of other authors. For convenience both tables are re-presented below.

Table 3-1 Problems and Benefits of Community Restorative Justice

<b>Problems of CRJ</b>	<b>Benefits of CRJ</b>
Pressure on victims	Victim voice and participation
Role of the community	Victim validation and offender responsibility
Mixed loyalties	Communicative and flexible environment
Impact on offenders	Relationship repair
Victim safety	Responsiveness to individual needs of victims
Source: (Daly and Stubbs, 2006)	

Table 4-1 Problems and Benefits of Community-based Paralegals

<b>Problems of CBPs</b>	<b>Benefits of CBPs</b>
Second class justice	Capacity to straddle plural legal system
Cheap alternative to justice	Have a wider and more flexible set of tools
Lack the guarantee of independence and consistency	Need not limit themselves to an adversarial approach

Lack of state regulation of services	Cost effectiveness and availability
Divert pressure to improve training of lawyers	CBPs provide culturally competent services
Unequal power relations	CBPs as partners with the formal justice system
Adapted by researcher from Noone, 1991; Maru, 2006; and Wojkowska, 2006	

Combined, Tables 3-1 and 4-1 provide the meta-conceptual framework for the social science aspect of this research study. Multiple case studies, each presented in Chapters 6-9 display matrices that are used to both present and analyse data. How the data respond to the meta-conceptual framework is detailed in chapter 10 after a cross-case synthesis of all four case studies using matrix analysis. Data from the social science component is examined through non-doctrinal analysis. In contrast, doctrinal analysis refers to the law or legal analysis of statutes or case law. In this study, the DVA and case law relating to domestic violence constitute the pertinent law. Taken together, the social science meta-conceptual framework that yields non-doctrinal analysis and the law, which generates doctrinal analysis, comprise the overarching socio-legal framework that guides this research study.

#### 4.8 Chapter Summary

In this chapter, the paralegal sector was introduced as the third literature review chapter. Categories of paralegals and profiles of CAOs in South Africa received primary concentration. The category of paralegals that is the subject of this study was identified as CBPs who manage CAOs with the support of the NGO sector. Various roles of CBPs were highlighted such as the service, developmental, human rights roles as well as the role of straddling plural justice systems. Just as there are problems and benefits associated with CRJ so are there problems and benefits associated with CBPs. Selected problems and benefits relevant to CBPs were discussed with reference to scholarly views regarding such problems and benefits. In view of the principles, values and roles of CBPs it was suggested in this chapter that there is an interactive nexus between CRJ, CBPs and domestic violence cases. Likewise, it appeared in Chapter 3 that there is an interactive nexus between access to justice, plural legal systems and domestic violence cases. These nexuses are important because they are expected to shed light on the complexity of the environment within which CBPs and CAOs operate as well as the intricate state of being of CBPs. This chapter highlighted the convergence of the three-chapter-long literature review and the formulation of the meta-conceptual socio-legal framework that guides this empiricism.

## **Chapter 5: Research Design and Methods**

### **5.1 Introduction**

This study investigated the extent to which women in the rural areas of Bulwer, Ixopo, Madadeni, and New Hanover are accessing justice when it comes to domestic violence and how justice is administered in these areas. This chapter describes the research design, underlying philosophical worldviews, research strategy, sampling, data collection methods, and data analysis as well as efforts to achieve reliability and validity of this mixed methods study. It also describes how these methodological techniques were applied to carry out the study's investigation. The ethical considerations taken into account during the course of this study and the possible limitations of the research design are noted before the chapter is concluded by a summary.

### **5.2 The Research Design**

There are different types of research designs to study a topic. According to Creswell (2009:14), the most common research designs are qualitative and quantitative. The third type of research design is mixed methods, which is employed in this study. Yin (2009:26) describes a "research design as a plan that guides the investigator in the process of collecting, analysing, and interpreting evidence from research". For Yin (2009:26), a research design is like a research plan that addresses "four problems: what questions to study, what data are relevant, what data to collect, and how to analyse the results". The mixed methods research design for this study was informed by the nature of the research problem which required a descriptive, exploratory and – to a degree – an explanatory approach. The descriptive component provides general text narrative on access to justice and the role played by paralegals in promoting access to justice for women in rural areas. The exploratory component provides an in-depth analysis of the experiences of community-based paralegals (CBPs) and victims of domestic violence in community restorative justice (CRJ). The explanatory approach allows for a preliminary understanding of CBPs' role across plural legal systems when handling cases of domestic violence.

This study also adopted a socio-legal approach in its research design, in order to combine the analysis of statutory law, case precedents and social science mixed methods. The legal aspect is doctrinal and the social science aspect is non-doctrinal. The doctrinal part of research examines the purpose and policy of the Domestic Violence Act (DVA) and other relevant statutes. The Act aims to give victims swift and effective protection. This study investigates the perceptions of the DVA held by victims of domestic violence who seek assistance from CBPs. The doctrinal aspect also considers case law relevant to domestic violence. The

non-doctrinal part investigates perceptions victims of domestic violence on how plural justice systems relate to their every day lives. Chapter 2 discussed access to justice and from Chapters 3 and 4 on CRJ and CBPs respectively a meta-conceptual framework that revolves around the problems and benefits of CRJ and CBPs was formulated based upon a review of the literature. The research designed allowed for production of empirical evidence of how the CRJ, CBPs and the DVA interact against the backdrop of legal pluralism. The mixed methods research design and philosophical worldviews underlying the study are discussed in this section.

### **5.2.1 Mixed methods research design**

A mixed methods research design combines quantitative and qualitative techniques in a single study to provide a more comprehensive analysis of different types of interrelated social processes. “While these combined approaches are all termed mixed methods, they differ in the relative emphasis given to one or the other method and in the sequencing of their use in a research project” (Johnson, Onwuegbuzie and Turner, 2007:118). In this study, “greater emphasis is placed on the qualitative approach given the research problem and research questions and objectives. The quantitative approach is employed to provide a more comprehensive analysis of the research findings” (Creswell, 2009:4).

Creswell (2009:14), Yin (2009:63) and Stewart and Cole (2006:328) elaborate on the mixed methods research design. Creswell (2009:14) notes that this method is less well-known than quantitative or qualitative research designs. He adds that it arose out of recognition by researchers that all research designs have limitations that can be offset by mixed methods. According to Creswell (2003:4), mixed methods research is “more than simply collecting and analysing both kinds of data; it also involves the use of both approaches in tandem so that the overall strength of a study is greater than either qualitative or quantitative research alone”. Similarly, Yin (2009:63) observes “that mixed methods research enables investigators to address more complicated research questions and collect a richer and stronger array of evidence than can be accomplished by any single method”.

Stewart and Cole (2006:328) note that feminist mixed methods research is applicable to gender-oriented studies. They argue that feminist researchers typically ground their research questions in women’s experiences with the goal of understanding these experiences and improving women’s lives. The authors add that using quantitative data to frame qualitative findings offers a way to magnify the strengths of qualitative methods, including depth, validity, and descriptive and interpretive power, either by leveraging the qualitative findings into a more generalised set of findings or by facilitating an understanding of the findings as one piece of a complex system that works at many levels (Stewart and Cole, 2006:334). In this study,

descriptive statistics on the number, types and outcomes of cases handled by paralegals are used in tandem with the social processes of the role of CBPs and CRJ to illuminate the interaction between CBPs, CRJ and the DVA. Hence, secondary data from the CCJD database of statistics provide a framework for the qualitative data and *vice versa*.

A deeper examination of qualitative and quantitative inquiries reveals why a mixed methods research design is appropriate for this study.

Scholars cite different reasons for selecting a qualitative research inquiry. Golafshani (2003:600) suggests that a qualitative research inquiry produces findings that cannot be arrived at by means of statistical procedures; it gives rise to findings arrived at from real-life settings where the phenomena of interest unfolds naturally. Similarly, Gadbois, Patterson, Javis and Cunningham (1999:1) state that a qualitative research design enables a researcher to use techniques based on analysis of real life situations. This “often includes searching for underlying themes or patterns that emerge during the research process”. In much the same vein, Hancock *et al* (2007:7) observe that qualitative research is “concerned with the social aspects of our world and seeks to answer questions about why people behave the way they do, how opinions and attitudes are formed, how people are affected by the events that occur around them, and how and why cultures and practices have developed in the way they have”.

On the other hand, quantitative research is framed in terms of numbers rather than words (Creswell, 2009:3). Gadbois *et al* (1999:1) suggest that quantitative research “can be effective for feminist research gathering statistical information could enable a researcher to recognise the enormity of a widely-occurring problem such as women abuse” which sets women’s experiences in a broader context. Furthermore, it may be comforting for women who have experienced abuse to recognise “that their experience is not an isolated individual occurrence, but one that has been shared by a significant number of other women”. However, despite its methodological strengths, many researchers find the quantitative research process “coercive, constraining, and limited in its ability to fully uncover the complexity of sensitive issues”. (Gadbois *et al*, 1999:1).

A mixed methods approach was selected for the current study as it was believed that a single research design would not sufficiently develop an in-depth socio-legal understanding of the DVA and the work of CBPs across plural justice systems in general and in CRJ in particular. As Creswell (2009:203) argues, “the problems addressed by social science researchers are complex, and the use of either quantitative or qualitative approaches on their own is inadequate to address this complexity”. The combined use of qualitative and quantitative research provides an expanded understanding of the research problem. More

insight is gained by combining qualitative and quantitative research on the various issues involving CBPs, victims of domestic violence experiences with the criminal justice system and alternative approaches such as CRJ and the traditional justice system.

Stewart and Cole (2006:335) explain that qualitative methods are often used to unearth or identify issues or themes, while quantitative methods are used to answer questions relating to frequency and association that often cannot be addressed by qualitative methods. While this study seeks to determine CBPs' role in restorative justice, the types and frequency of cases handled need to be established. Creswell (2009:18) notes that if a problem "needs to be understood because little research has been done on it, this merits a qualitative exploratory approach". The author adds that this approach is suitable if the "topic has never been explored with a certain group of people". There is a paucity of research on the work of CBPs and very little research on their approach to CRJ in domestic violence cases. Creswell (2009:12) adds that a mixed methods design has the potential to "serve a larger, transformative purpose to advocate for marginalised groups such as women, ethnic minorities, people with disabilities, and others".

Moreover, mixed methods research is appropriate in public governance research. Public governance is an umbrella term for public administration, public management and public policy pertaining to the public and NGO sectors. The multidisciplinary, interdisciplinary and trans-disciplinary nature of this research study that cross-cuts law, state and non-state justice systems and social science is useful in a study of public governance. The mixed methods research design enables the public governance researcher to cut across fields in a manner that enriches and deepens the investigation. The researcher used a mixed methods design to describe and explore the public administration and informal approaches that have been used to facilitate access to justice for rural women who are victims of domestic violence. The mixed methods design illuminated the type, number and disposition of cases as well as procedures and processes for the CBPs' handling of domestic violence cases. However, this mixed methods study is primarily qualitative with the quantitative evidence playing a secondary and supportive role without the need for statistical inferences.

The descriptive, exploratory and somewhat explanatory nature of the study enabled the researcher to collect information that is open-ended, thereby addressing the research problem by providing insight into the work of CBPs. The mixed methods design helped fulfil the purpose of this study which was to provide an in-depth understanding of the world as seen through the eyes of CBPs and female victims of domestic violence. It enabled the paralegal sector and survivors of domestic violence, through narrative adduced by this study, to advocate for the kind of justice that will meet their unique needs across plural justice systems. As Creswell (2009:4) notes, the aim of a mixed methods research study is not to impose preordained concepts and

hypotheses. New theories may be generated or existing theories built upon during the research. In this study, the quantitative data revealed the number, types and disposition of domestic violence cases handled by CBPs, including the number of cases resolved through restorative justice and through the criminal justice process. Again, this secondary data sets the experience of women in a larger context.

## **5.2.2 Philosophical worldviews**

According to Creswell (2009:5), a research design does not stand alone. It includes the “intersection of philosophy, strategies of inquiry and methods” of collecting research data. This study employs a combination of the pragmatic worldview and the advocacy participatory worldview.

### **5.2.2.1 Pragmatic worldview**

A mixed methods design adheres to the philosophy of pragmatism. It supports the combination of quantitative and qualitative methods in a sequential fashion, (Morgan, 2007:66). A pragmatic worldview according to Creswell (2009:10) is concerned with what works, and what is useful and should be used under certain circumstances. The pragmatic worldview assisted the researcher to examine the views and perceptions of CBPs and victims of domestic violence. The case statistics provide a description of which aspects of restorative justice work, and the circumstances under which it does and does not operate successfully. Morgan (2007:71) identifies three aspects of the pragmatic approach “as a justification for combining qualitative and quantitative methods”; namely: adduction, intersubjectivity, and transferability. Adduction, according to Morgan (2007:71) is “a process of inquiry that evaluates the results of prior inductions through their ability to predict the workability of future lines of behaviour. The inductive results from the qualitative approach serve as inputs to the deductive goals of a quantitative approach, and *vice versa*”. The intersubjectivity approach combines the existence of a “single ‘real world’ with individuals’ unique interpretations of that world” (Morgan, 2007:72). Transferability emphasises “the connection between epistemological concerns about the nature of the knowledge that is produced and technical concerns about the methods that are used to generate that knowledge” (Morgan, 2007:73). According to Morgan (2007:73), “in a pragmatic approach, important questions include the extent to which the researcher can take the lessons learned from one type of method in a specific setting and make the most appropriate use of that knowledge in other circumstances”. This offers the researcher an opportunity to transfer the knowledge gained from this study to what may work for CBPs and CRJ in similar settings.

According to Creswell (2009:10-11), pragmatism is concerned with applications (what works) and solutions to problems. This worldview allowed the researcher to focus on the research problem instead of the methods and use all available approaches to understand the problem. Creswell contends that pragmatism is not



committed to any one system of philosophy and the researcher draw liberally on both qualitative and quantitative assumptions during the research process. This helped the researcher to investigate whether restorative justice approaches work or not in cases of domestic violence. For GoldKuhl (2012:2), “pragmatism is concerned with action and change and the interplay between knowledge and action. This makes it appropriate as a basis for research approaches that intervene in the world rather than merely observing it”.

Hence, the pragmatic worldview offers an opportunity to use different assumptions, as well as different forms of data collection and analysis. This worldview is the overarching philosophical worldview in the research design for this study. Pragmatism facilitates an in-depth understanding of the DVA, and the work of CBPs and their CRJ approaches. The pragmatic worldview is appropriate for this kind of study as what is happening in practice may help create a theory or build upon existing theories to improve policy and the administration of justice for women in rural areas.

**5.2.2.2 Epistemological orientations for pragmatism and interpretivism**

According to GoldKuhl (2012:6), one of the principles of interpretive research is “concerned with the relationship between the investigator and practitioner during data gathering”. Interpretive research emphasises that “the researched subjects are interpreters and co-producers of meaningful data. This implies that empirical data gathering is a process of meanings that are socially constructed” by researchers and participants. The key goal of interpretive knowledge is to understand, while in pragmatism, constructive knowledge is emphasised. While pragmatism requires that knowledge should be useful for action and change, interpretivists claim that knowledge should be interesting in itself. GoldKuhl (2012:6) explains that “methodologically, pragmatism is associated with inquiry as the main type of investigation. In interpretivism, the main type of investigation would be field study and data generation is conducted through interpretation”.

GoldKuhl (2012:12) captures the differences in epistemological orientation between pragmatism and interpretivism.

Table 5-1 Contrast between pragmatism and interpretivism

	<b>Pragmatism</b>	<b>Interpretivism</b>
<b>Ontology</b>	Symbolic realism	Constructivism
<b>Empirical focus</b>	Action and change	Beliefs (socially constructed cognition)

<b>Type of knowledge</b>	Constructive knowledge	Understanding
<b>Role of knowledge</b>	Useful for action	Interesting and informative
<b>Type of investigation</b>	Inquiry	Field study
<b>Data generation</b>	Data through assessment and intervention	Data through interpretation
<b>Role of researcher</b>	Engaged in change	Engaged in understanding
Source: GoldKuhl (2012:12)		

As shown in Table 5-1, GoldKuhl (2012:6), distinguishes elements of pragmatism and interpretivism for mixed methods research studies – i.e., action and design-oriented research. The pragmatic worldview helped the researcher to examine the views and perceptions of CBPs and victims of domestic violence in order to socially construct what aspects of restorative justice work, and under which circumstances it works or not. Interpretivism helped the researcher to understand the underlying factors influencing the choices made by survivors of violence. Through the data collected from the participants, the researcher gained valuable knowledge and insight into their situation in accessing justice and together the researcher and participants co-created knowledge – such as procedures and processes used by CBPs in mediation. Preservation of the voices of the respondents through narrative adduced by this study substantiate the advocacy-participatory worldview.

**5.2.2.3 Advocacy and participatory worldview**

In this study, the respondents’ views hold to the philosophical assumptions of the advocacy/participatory approach. According to Creswell (2009:9), this worldview focuses on the “needs of groups and individuals in society that may be marginalised or disenfranchised. Advocacy research provides a voice for these groups or individuals, raising their consciousness or advancing an agenda for change to improve their lives”. This philosophy holds that research must include “an action agenda for reform that may change the lives of the research participants”. This worldview helped give voice to the paralegals and female victims of domestic violence. The advocacy and participatory worldview laid a foundation to capture the perceptions of CBPs of what is working in terms of their restorative justice approach, and the practical consequences of this approach. Victims of domestic violence were given space to articulate their justice needs and share their views on whether the restorative justice process on its own can provide the outcomes they desire to solve domestic violence, or if it needs to be combined with the formal court process.

The research adopted an action agenda by providing a voice for CBPs and raising awareness of the role they play in CRJ. The advocacy and participatory worldview provided a platform for participants to articulate what works at grassroots level and what changes can be introduced in the practice of restorative justice. It will also assist the CBPs to advance an action agenda for recognition of the role they play in restorative justice in KZN rural communities, which is not the case at present.

In this study a case study strategy facilitated execution of the research design guided by the philosophical worldviews of pragmatism and advocacy-participatory.

### 5.3 Case Study Strategy

Creswell (2009:11) notes that, after selecting an appropriate design for the study, the researcher needs to decide on a research strategy within the chosen design. The primary strategy used in this study was the case study. In the four case studies, qualitative research is supported by descriptive quantitative data. According to Baxter and Jack (2008:556), “a case study is an excellent opportunity to gain deep insight into a case. It enables the researcher to gather data from a variety of sources and to triangulate data to illuminate the case”. Haverland and Yanow (2012:12) note that, case study research is the primary strategy in public administration research. According to Yin (2009:4), a case study is used in “many situations, to contribute to our knowledge of individual groups”. Yin adds that a “case study allows investigators to retain the holistic and meaningful characteristic of real-life events”, to understand a real-life phenomenon in depth, or to describe an intervention and the real-life context in which the intervention occurred (Yin, 2009:18 and 20).

Scholars note that there are various definitions of a case study. According to Haverland and Yanow (2012:12), in interpretive research, a case study is often used as a synonym for ‘site’ or ‘setting’; the bounded location in which the research is conducted that is considered to have potential to illustrate the focus of the researcher’s interest. Creswell (2009: 13) defines “a case study as a strategy used by a researcher to explore a programme, event, activity, process, or one or more individuals in depth”. Yin (2009:16) notes that “a case study is an empirical inquiry that:

- Investigates a contemporary phenomenon in depth and holistically within its real-life context, especially when
- The boundaries between the phenomenon and context are not clearly evident.”

Yin (2009:18) notes that, while certain features of the case study strategy are not critical in defining the strategy, they may be considered variations within case study research and also provide answers to common

questions. Single and multiple case studies are variants of case study designs. According to Baxter and Jack (2008:545), a case study is used when (a) the focus of the study is to answer 'how' and 'why' questions; (b) when one cannot manipulate the behaviour of those involved in the study; (c) when one wants to cover contextual conditions because one believes they are relevant to the phenomena under study; or (d) when the boundaries are not clear between the phenomenon and context. Likewise, Yin (2009:10) contends that if one needs to know 'how' or 'why' a programme worked, one would lean towards a case study or a field experiment. In this case study, the researcher is interested in establishing whether, and if so, 'how' and 'why' the CRJ approach adopted by CBPs has worked in cases of domestic violence.

Scholars suggest a number of factors to consider when adopting a case study strategy (Yin, 2009:19, 27; Baxter and Jack, 2008:546, 547, 550). Yin (2009:19) indicates that case study research may go beyond 'qualitative research' and use a mix of quantitative and qualitative evidence. Moreover, Yin (2009:27) identifies "five important components of case study research, which are a study's questions, propositions if any, units of analysis, the logic linking the data to the propositions and the criteria for interpreting the findings". Baxter and Jack (2008:546) suggest that when considering what one's research question will be, one must also consider what the case is (the unit of analysis). The authors suggest that, asking the following questions can help to determine what one's case is: do I want to 'analyse' the individual? Do I want to 'analyse' a program? Do I want to 'analyse' the process? Do I want to 'analyse' different organisations? Baxter and Jack (2008:547) maintain that once one has "determined that the research question is best answered using a case study and the case and its boundaries have been determined; one must consider what type of case study will be conducted". The selection of a specific type of case study design is guided by the overall study purpose. The question to be asked is: are you looking to describe a case, explore a case, or compare cases? The different "types of case studies include explanatory, exploratory, descriptive, multiple case studies, intrinsic, instrumental, and collective" (Baxter and Jack, 2008:547). Explaining each type is beyond the scope of this study. This study is a descriptive, exploratory and to a degree an explanatory case study.

Baxter and Jack (2008:547) observe that it is important that after "identifying the 'case' and the specific 'type' of case study to be conducted, a researcher must consider if it is prudent to conduct a single case study or if better understanding of the phenomenon will be gained through conducting a multiple case study". Multiple cases can then draw a single set of "cross-case conclusions" (Yin, 2009:20). A multiple case study allows a researcher to analyse within each setting and across settings. Yin (2009:59, 60) explains that "individual cases within multiple case study designs may be either holistic or embedded. When an embedded design is used, each individual case study may include the collection and analysis of quantitative data,

including the use of surveys within each case”. The case study is embedded if it involves more than one unit of analysis (Yin, 2009:50) and/or a mixed research design to demonstrate a more “holistic data collection strategy for studying the main case but then calls upon other quantitative techniques to collect data about embedded units of analysis, in this situation, different research methods are embedded within your case study” (Yin, 2009:63). In this study, quantitative information such as descriptive statistics of domestic violence cases handled by CBPs were embedded in the qualitative component to help address the research questions, and achieve the research objectives (Yin 2009:59). A descriptive, exploratory and to a lesser degree, explanatory multiple case study strategy was adopted. The study employed an embedded multiple case study strategy applying several units of analysis, namely, CBPs and their clients as stakeholder segments which are the primary units of analysis embedded in a CAO as an organisational unit of analysis. In other words, on the one hand quantitative data collection methods were embedded in the qualitative approach. On the other hand stakeholder segments as units of analysis were embedded in the CAO as organisational unit of analysis.

Baxter and Jack (2008:550) explain that multiple case studies examine several “cases in order to understand the similarities and differences within and between the cases”. The authors contend that the goal of the case study should be to replicate the study across cases and draw comparisons. Baxter and Jack (2008:550) argue that “it is important that the cases are chosen carefully so that the researcher can predict the results across cases, or predict contrasting results based on a theory”. The multiple case studies are presented in chapters 6 to 9 and the evidence shows replication logic (Yin, 2009:56).

This study is concerned with ‘why’ women who are victims of domestic violence choose the CRJ approach administered by CBPs, and ‘how’ the informal approach of CRJ is applied by CBPs. The purpose of the study is to explore CBPs’ restorative justice approach in cases of domestic violence. The analytical technique used to link the data to the study proposition is cross-case analysis. The study as whole uses a multiple case design and socio-legal approach to provide an in-depth understanding of CBPs’ work with victims of domestic violence and the CRJ approach used by CBPs and CAOs (Yin, 2009:53).

The case study research sites are located at Bulwer, Ixopo, Madadeni, and New Hanover. The multiple case studies allowed for comparison and contrast of the experiences and perceptions of each CAO. This allowed the researcher to compare different practices and procedures used by CBPs in resolving similar cases of domestic violence, and to consider how the restorative approaches vary between each office and the paralegals themselves. These four research sites were selected in terms of their geographical location, setting and approach to handling cases of domestic violence cases. The geographical spread is in terms of direction

in relation to Pietermaritzburg: New Hanover is in the Midlands, close to Pietermaritzburg, Ixopo is in the south, Bulwer is to the east and Madadeni is to the north of Pietermaritzburg. The location relates to where the office is based or located: the New Hanover and Ixopo CAOs are based at the local magistrate's court, while the Madadeni and Bulwer CAOs are based at police stations. The aim is to consider how the restorative approaches vary between the sites located at the police station and those located at the magistrate's court.

The setting is in terms of the type of area. Farms surround New Hanover and Ixopo with a small area occupied by traditional villages. Bulwer is a rural town surrounded by several villages and farms, while a township surrounds Madadeni, although it also serves traditional villages. The case studies were selected in order to access community members from these areas, obtain diverse views and to establish whether the area participants come from influences their views and experiences. Furthermore, the cases were selected because the embedded units of analysis could provide insight and an opportunity to understand the research problem better.

According to Yin (2009:53), "evidence from multiple cases is often considered more compelling, and the overall study is therefore regarded as being more robust". Baxter and Jack (2008:550) point out that "overall, the evidence generated by this type of study is considered robust and reliable, but it can also be extremely time consuming and expensive". The same data collection methods were employed across all four case studies in alignment with replication logic (Yin, 2009:60).

#### 5.4 **Research Sampling**

Research in remote rural areas has many practical constraints; the choice of sampling method was informed by the constraints discussed below.

There are different sampling techniques, not all of which are discussed here. The study employed a two-pronged sampling strategy. One component was based upon replication logic regarding the selection of cases (Yin, 2009:60). The other component involved sampling techniques relative to study participants within each case selected. In replication logic cases are carefully chosen so that the researcher can predict similar results under the circumstances which involves literal as opposed to theoretical replication and generally includes two or three cases (Yin 2009:54). The four CAOs studied for this thesis were carefully selected and it was predicted that, more often than not, CBPs use CRJ to handle domestic violence cases and generate successful results that meet individual needs of female victims of domestic violence in rural areas.

As to sampling techniques for study participants in the qualitative aspect of this study, this study used (1) purposive sampling (2) snowball sampling and (3) convenience sampling.

According to Richie *et al* (2003:78-79), purposive sampling is “precisely what the name suggests. Members of a sample are chosen with a purpose”. Richie *et al* (2003:78-79) note that the sample units are chosen because they have certain characteristics which the researcher wants to explore “in order to gain a deeper understanding of the subject of the study”. This sample enables the researcher to cover all the key elements relevant to the study and include some diversity. Richie *et al* (2003:79) notes that some scholars refer to this as judgement or criterion sampling but the term ‘purposive sampling’ is commonly used in the literature.

As to snowball sampling, Richie *et al* (2003:94) note that it is also called chain sampling; these terms are used to describe an approach where people who have been interviewed for the study identify other participants. This is relevant when the study involves a sensitive subject such as domestic violence. “Snowball sampling relies on referrals; one participant recruits others. This can help researchers to capitalise on informal networks that might be difficult to access, such as victims of domestic violence” (Hancock, 2007:22). This process can also be characterised as convenience sampling. The paralegals who participated in the study helped to identify focus group participants (who had been involved in the cases that are the subject of the study). However, Richie *et al* (2003:94) caution that because sample members are generated by people who are also involved in the study, “there is danger that the diversity of the sample frame is compromised”.

Convenience and purposive sampling were used in selection of paralegals and focus group participants based upon those who were available and likely to participate in the study. Richie *et al* (2003:81) argue that convenience sampling is the most common form of qualitative sampling because it lacks any clear sampling strategy. Yin (2009:85) observes that when a researcher is “interviewing key persons, you must cater to the interviewee’s schedule and availability, not your own”. In this study the criteria for participation were discussed with the paralegals who in turn provided an overview of the study to potential focus group participants. Due to the sensitive nature of domestic violence, personal information such as age, socio-economic background, parental status, and ethnicity was not solicited. In purposive sampling, individuals are selected because they have experienced the central problem under investigation (Creswell, 2009:218). The study targeted women participants only because it focuses on domestic violence perpetrated against women by men. Men will be the subject of another study. On receipt of ethical clearance, pre-interviews were conducted with the focus group participants to review the research project, answer any questions regarding the study and for them to sign the consent form.

According to Hancock *et al* (2007:22) and Finch and Lewis (2003:171), the recommended size of a focus group is six to ten people and “each focus group should have some characteristics in common which are important to the topic under investigation. The group may have experienced a similar problem or have received similar treatment. They might know or not know one another”. Ritchie, Lewis and Elam (2003:83) explain that the reason why qualitative samples are small is because very little evidence is obtained from additional field work; furthermore the phenomenon needs to “appear once to be part of the analytical map”. Therefore, increasing the sample size does not contribute new evidence. The type of information produced by a qualitative study is usually rich in detail; the researcher does not necessary need to conduct further field work. Richie *et al* (2003:84) observe that it would not be possible to conduct “hundreds of interviews, observations or focus groups unless the researcher intends to spend several years doing so”.

## 5.5 Data Collection Methods

According to Lewis (2003:56), the basic consideration in deciding which research design is appropriate for a study is whether or not the required data exist, are available and accessible. Other questions to consider are whether data sought will “shed more light on the research topic”; and “the feasibility from the point of view of both the researcher and participants” of carrying out in-depth interviews or focus groups.

In terms of data collection, mixed methods research is classified according to four major factors: (1) timing, (2) the weighting or priority given to quantitative and qualitative research, (3) mixing of quantitative and qualitative data, and (3) a theoretical or conceptual perspective that guides the study. In terms of timing, Creswell (2009:206) notes that the researcher needs to consider the timing of their qualitative and quantitative data collection; whether it will be in phases, i.e., sequential or concurrent, or transformative in which the researcher uses a theoretical lens as an overarching perspective (Creswell, 2009:15). Creswell explains that when the data are collected sequentially, either the qualitative or the quantitative data come first. In concurrent collection, the qualitative and quantitative data are gathered at the same time. The transformative lens uses a data collection method that involves a sequential or a concurrent approach.

The second factor is the weighting or priority given to the quantitative or qualitative research. A researcher may sometimes intentionally use one form of data in a supportive role. The weight is placed on the first phase. The quantitative data and results assist the interpretation of the qualitative findings (Creswell, 2009:211). The third factor is mixing qualitative and quantitative data. According to Creswell (2009:208), the researcher’s primary aim might be to collect one form of data with the other form providing supportive information. In this study the secondary database (quantitative) which was collected after the qualitative



data, supported the primary (qualitative) data. Creswell (2009:214) states that the secondary method is embedded, or nested within the predominant method. The quantitative data address the number, types and outcome of cases, while the qualitative data explore the procedures and processes conducted by CBPs and experienced by victims of domestic violence. The data are mixed through being connected between the qualitative data analysis and the quantitative data collection. The data are not compared, but reside side by side as two different pictures that provide an overall composite assessment of the problem. Richie, *et al* (2003:41) explain that some studies require an examination of both the number and nature of the same phenomenon. If the phenomenon is too complex or delicate to be captured fully in a statistical enquiry, qualitative research is required alongside the quantitative data to provide detail or in-depth understanding. This approach assisted the researcher to gain a broader perspective

According to Richie *et al* (2003:38), scholars question whether combining the two methods is a good idea. “Some argue that the two approaches are so different in their philosophical and methodological origins that they cannot be effectively blended”. However, other scholars have conceded that there is value in bringing these types of data together. Richie *et al* (2003:38) argue that each approach provides a distinctive kind of evidence and used together, they offer a powerful resource to inform and illuminate policy or practice. According to Richie *et al* (2003:37), while the mixed methods approach is often discussed in the context of combining qualitative and quantitative methods, the same principles apply to using more than one qualitative method to carry out an investigation since each brings a particular kind of insight to a study. This study used interviews and focus groups to collect data. Richie *et al* (2003:38) argue that a focus group might be used as an initial stage, to raise and begin to explore relevant issues which will then be taken forward in in-depth interviews, or the other way round. In order to meet the objectives of this study, two qualitative approaches were adopted.

The fourth and final factor is whether a theoretical perspective guides the entire research design. In mixed methods research (Creswell, 2009: 208), theories “shape the type of questions asked, who participates in the study, how data are collected and the conclusions reached”. This study adopted a two-pronged conceptual framework that revolves around the problems and benefits associated with CRJ and CBPs. A meta-conceptual framework was created based on the work of scholars in the different streams of literature, each of which are described in the literature review.

Baxter and Jack (2008:554) note that a hallmark of case study research is the use of multiple data sources; a method that is said to enhance data credibility. Yin (2009:99) points out that sources may “include documentation, archival records, interviews, direct observations, participant observation, and physical

artefacts”. Yin states that all these sources could potentially be relevant in the same study. According to Baxter and Jack (2008:554), a researcher “can collect and integrate quantitative survey data, which facilitates a holistic understanding of the phenomenon under study”. These authors indicate that “data from these multiple sources are converged in the analysis process” rather than handled individually. This strengthens the findings as the various strands of data are braided together to promote a greater understanding of the case and phenomena under study.

This study used a sequential and transformative strategy for data collection. According to Creswell (2009:14), in using a sequential strategy, “the researcher seeks to elaborate or expand on the findings of one method using another method”. This may involve beginning with a qualitative interview for exploratory purposes and following up with a quantitative method so that the researcher can generalise the results to a population. Alternatively, the study may begin with a quantitative method in which a theory or concept is tested, followed by a qualitative method involving detailed exploration with a few cases or individuals (Creswell, 2000:211). In employing a transformative strategy, “the researcher uses a theoretical lens as an overarching perspective within a design that contains both quantitative and qualitative data” (Creswell, 2009:15). Creswell, 2009:15) explains that “this lens provides a framework for topics of interest, methods for collecting data, and outcomes or changes anticipated by the study”. In this study primary qualitative data were collected before secondary quantitative data were collected. Interviews and focus groups were used to obtain qualitative data. In terms of the quantitative data, the secondary data consisted of archival statistics on the type, number and outcome of cases handled by CBPs at the respective CAOs. Documentary evidence, archival records, observation and statutory and case law form additional parts of the secondary data. Sources of evidence are briefly discussed below.

### **5.5.1 Interviews**

According to Richie (2003:36), interviews are the most used method in qualitative research. They offer the researcher an opportunity to conduct a “detailed investigation of people’s personal perspectives and gain in-depth understanding of the personal context within which the research subject is located, and provide very detailed coverage of the research topic”. Yin (2009:106) contends that, “interviews are one of the most important sources of case study information”. The author regards interviews as guided conversations rather than structured queries. However, Yin (2009:106) points out that a case study requires the researcher to operate on two levels at the same time: satisfying the needs of one’s line of inquiry while simultaneously posing ‘friendly’ and ‘nonthreatening’ questions in one’s open-ended interviews.

In in-depth interviews the researcher asks key respondents about the facts of a matter as well as their opinions about events (Yin, 2009:107). Yin (2009:107) further notes that in this type of interview “you may even ask the interviewee to propose her or his own insight into certain occurrences and may use such propositions as the basis for further inquiry”. Legard, Keegan and Ward (2003:129) likewise observe that in-depth interviews are one of the main methods of data collection in qualitative research. In-depth interviews combine structure with flexibility to provide the researcher with an opportunity to have some sense of the themes they want to explore. An “in-depth interview allows the researcher to fully explore all the factors that underpin participants’ answers: reasons, feelings, opinions, and beliefs” (Legard *et al*, 2003:141). It is interactive and “generative in the sense that new knowledge or thoughts are likely to be created at some stage of the research study” (Legard *et al*, 2003:142). The in-depth interviews with the CBPs enabled the researcher to obtain evidence on the process and procedures of CRJ applied at their CAOs. Follow-up telephonic interviews were conducted with each paralegal, to establish similarities and differences in the process and procedures of CRJ in dealing with cases of domestic violence.

According to Yin (2009:107) in-depth interviews may take place over an extended period of time rather than in a single sitting. The second type of interview “is a focused interview, in which a person is interviewed for a short period of time, for example, an hour. While such interviews may remain open-ended and assume a conversational manner, one is more likely to follow a set of questions derived from the case study protocol”.

There are three methods of interviewing: structured, unstructured and semi-structured. Structured interviews use prepared questions (Hancock *et al*, 2007:16) that are posed “to each interviewee in an identical manner using a strictly predetermined order”. In contrast, unstructured interviews are like a free flowing conversation. “Semi-structured interviews involve a number of open-ended questions based on the topic areas the researcher wants to cover”. Hancock *et al* (2007:16) note that semi-structured interviews assist “both the interviewer and the interviewee to discuss the topic in more detail. The interviewer also has the freedom to probe the interviewee to elaborate on an original response or to follow a line of inquiry introduced by the interviewee”.

Preparations for semi-structured interviews include drawing up a questionnaire as a guide. This is not done to restrict the researcher; rather, according to Hancock *et al* (2007:16), the interview needs to be conducted with sensitivity and be sufficiently flexible to allow follow up of points of interest with the interviewee. The process includes the researcher administering an informed consent form before the interview in order to ensure that participation is voluntary. The researcher also has to seek permission to use a voice recorder. Hancock *et al* (2007:16) further state that during interviews, “participants provide the researcher with

information through verbal interchange. Non-verbal behaviours and the interview context are noted by the researcher and become part of the data”.

The researcher travelled to each CAO to conduct interviews with the paralegals and focus group participants. The interviews and focus groups were conducted on the same day. The interviews with the paralegals took place in the morning, and the focus groups took place from 11h00 to 15h00. This study focuses on CBPs’ experiences of working with victims of domestic violence and their application of CRJ to such cases. Field research was conducted through face-to-face interviews with paralegals to obtain their views on their work and their opinions on the usefulness and appropriateness of restorative justice approaches in cases of domestic violence. Seven CBPs were interviewed: two from New Hanover, two from Bulwer, two from Ixopo and one from Madadeni. The paralegals are an important individual unit of analysis as they hold knowledge on how rural women access justice in cases of domestic violence.

The interviews gathered information on the following:

- Community-based paralegals’ views on access to justice; why it is important; barriers in accessing justice, especially for victims of domestic violence; the ways that access to justice could be improved; and their role in promoting access to justice in the rural areas of KZN.
- Community-based paralegals’ views on their work, the constraints they experience, and the value and benefits of their work in rural communities.
- Community-based paralegals’ role in CRJ, whether they use the restorative justice approach in domestic violence cases, what process of restorative justice they are involved in, and their views on why rural women choose restorative justice over the criminal justice system.

This approach allowed for cross-case comparison of the experiences and perceptions of different paralegal participants. Yin (2009:108) observes that interviews are an essential source of case study evidence “because most cases are about human affairs or behavioural events”. Yin (2009:109) notes that “interview responses are also subject ‘to the common problem of bias’; to overcome this, the researcher should corroborate interview data with information from other sources”. The data collected during the interviews were corroborated by descriptive statistics from the CCJD’s case database. This enabled the researcher to compare the success of different methods of resolving similar problems and to consider how restorative justice approaches vary amongst the CBPs. The cross-case comparison is presented in chapter 10.

The field research was also conducted through focus groups to ascertain the views of victims of domestic violence, their experiences of restorative justice processes, and their attitudes towards the justice system.

### **5.5.2 Focus groups**

Gadbois *et al* (1999:1) state that qualitative research practices include focus group discussions, as well as different types of interviews as discussed above. Focus groups involve a small number of people. They are considered to work well with approximately six to eight people (Hancock *et al*, 2007: 17; Richie, *et al* 2003:37). Focus groups are used where the group process will illuminate the research issue. Richie, *et al* (2003:37) indicate that focus groups provide a social context for research, and thus explore how people think and talk about the topic. While the researcher used a set of questions to conduct interviews the researcher used a focus group guide to generate focus group discussions. The focus group guide helped generate “interaction between the participants. Participants present their own views and experience, but they also hear from other people. They listen, reflect on what is said, and reconsider their own standpoint” (Finch and Lewis (2003:171). Additional information is thus triggered in response to what they hear. Participants may ask one another questions, seek clarification, and comment on what they have heard, prompting others to reveal more.

As stated above, the interviews and focus groups at a given CAO were conducted on the same day. The focus groups took place from 11h00 to 15h00. Focus groups were conducted with survivors of domestic violence. Six clients participated in a focus group at each research site, making a combined total of 24. The aim was to obtain a wide cross-section of views, perceptions and experiences regarding the restorative justice services rendered by paralegals. The participants were from local communities and the venue was accessible. The focus group discussions were conducted at the CAOs with which all participants are familiar. The focus groups were conducted in isiZulu and the data were translated and transcribed by the researcher. Hancock *et al* (2007:17) note that the transcripts of “focus group discussions can be analysed to explore the ways in which the participants interact with and influence one another’s ideas” unlike one-on-one interviews.

The researcher conducted focus group discussions with victims of domestic violence at Bulwer, Madadeni, Ixopo, and New Hanover CAOs to gather information on the following:

- Victims’ views on whether they are using the criminal justice system for protection from domestic violence or the traditional or informal restorative justice systems, which system they prefer and why.

- Victims' views on the work and role played by paralegals in restorative justice, on recognition of paralegals within the justice system and other matters pertaining to the role of paralegals in restorative justice.

To help the focus group participants become familiar with the nature of the study, the group was broken down into three sub-groups with two participants each. This is tantamount to a 'break away' session. The pairs of participants in each sub-group were each given the same questions from the focus group guide to discuss. The researcher walked around the room listening to and prompting discussion. The 'break away' sessions were not recorded but the researcher made notes about the different discussions and the non-verbal communication that transpired. Afterwards the group assembled as a whole and reported back regarding the discussion experienced in the 'break away' session. During the report-backs all participants were allowed to comment or add information to report-backs of other pairs of participants. This enabled participants to share personal accounts in support of or divergent from the statements made during the report-back..

Refreshments were served after the workshop. All the focus group participants were initially somewhat hesitant, as they were under the impression that the interviews were evaluations of the paralegals' work. The participants were very protective of the paralegals, even though it was explained that the discussion was for the purposes of an academic study. It took the researcher half an hour to gain their trust, which was understandable as domestic violence is a sensitive issue. The participants did not know one another which might have added to their discomfort in answering questions. According to Hancock *et al* (2007:180), serving refreshments prior to the focus group helps the participants to loosen up and to meet other participants. However, when the refreshments were served after the formal discussion, more information was shared than in the formal setting. The focus groups took longer than was anticipated, partly because it took time to get the group to relax and speak about their experiences.

It appeared that no participant was further traumatised by reliving their experiences; indeed there was much robust debate and laughter as the discussion progressed and they relaxed. The laughter made listening to the tape after the focus group a challenge; it would have been better if a video recording were used. A voice recorder that recognised isiZulu and automatically transcribed and translated would also have been helpful.

Hancock *et al* (2009:18) caution that "although the opportunity to gather data from various sources is attractive because of the rigour associated with this approach, there are dangers". One is the collection of overwhelming amounts of data that require management and analysis. The data were overwhelming and it was time consuming to bring the data from the four research sites together. However the data were

triangulated and compared and the evidence was contrasted. One of the concerns about case studies identified by Yin (2009:15) is that they take too long, and they result in a massive amount of data.

The methodological choices were guided by a feminist research assumption that meaning comes from women's experiences, their perceptions of these experiences, and their life stories (Gadbois, 1999:4).

Yin (2009:115) observes that "the most important advantage of using multiple sources of evidence is the development of converging lines of inquiry, the process of triangulation". The aim is to corroborate the same fact. When one triangulates "the data, the events or facts of the case study are supported by more than a single source of evidence". Several themes emerged and were documented. The characteristics of each theme, and the relationship between them were noted. This is further explained in the section on data analysis, which follows in section 5.6.

### **5.5.3 Documentary evidence**

According to Yin (2009:101), this type of information can take many forms. Yin (2009:103) notes that it is important to consider the following kinds of documents:

- Letters, memoranda, e-mail correspondence, and other personal documents, such as diaries, calendars and notes;
- Agendas, announcements and minutes of meetings, and other written reports of events;
- Administrative documents – proposals, progress reports, and other internal records;
- Formal studies or evaluations of the same "case" that one is studying; and
- News clippings and other articles in the mass media or community newspapers.

In case studies, documents are used to corroborate and augment evidence from other sources. Amongst other things, the researcher should arrange access to the files of any organisations under study, including documents in storage (Yin, 2009:103). Richie, *et al* (2003:35) explain "that documentary evidence is useful where the history of events or experiences is relevant to the study". However, in case study research, the the authors continue " a researcher should refrain from overreliance on documentation. This is because a casual investigator may mistakenly assume that the documents 'contain the unmitigated truth'". Yin (2009:105) argues that, "in reviewing any document, the researcher should understand that documents are written for a specific purpose and a specific audience other than those of the case study".

Documents or written information such as reports and evaluations of the CAO cases under study enabled the researcher to obtain information which would otherwise not have been easily obtained, because there are few

academic studies on the work of CBPs. The literature review is central to this study, especially on the topics of CRJ and domestic violence. It provided the researcher with a platform to launch the study. The survey of the literature showed that the CRJ approach could be effective in cases of domestic violence under certain circumstances. Archival records were also used as a source of evidence in this study.

#### **5.5.4 Archival records**

In many case studies, archival records take the form of computer files and records. Yin (2009:105) provides the following “examples of archival records:

- Public use files” such as the census and other statistical data made available by government;
- Service records, such as those showing the number of clients served over a given period of time;
- Organisational records, such as budgets or personnel records;
- Maps and charts of the geographical characteristics of a place; and
- Survey data, such as data previously collected about a site’s employees, residents or participants” (Yin, 2009:105).

The quantitative data was obtained from the CCJD, which received data from the CAOs. A case intake form, which documents cases of domestic violence, is completed by the CBP for each client. The intake forms (which are manual records) are collected from the advice offices by the CCJD and captured by data capturers onto the centralised database, which is located at the CCJD. Yin (2009:106) cautions that when archival evidence “has been deemed relevant, an investigator must be careful to ascertain the conditions under which it was produced as well as its accuracy”. Just like documentation, Yin (2009:106) argues that the researcher should understand the conditions under which the archival records were produced and should appreciate that they were produced for a specific purpose and a specific audience other than the case study investigation.

The CCJD collects data in order to track the status of the paralegal programme, and to be able to take stock, evaluate and plan the programme. According to Friedman and Martins (2010:119) data collection began in an unsystematic way and has been progressively refined over the years. It was eventually realised that a database was needed to make ‘connections that go beyond numbers’. The advantage of this system is that statistics provide a fuller picture of the work done at the CAOs and the outreach work in communities such as workshops and presentations at various community forums are available immediately. The data used in this study show the cases were handled and the socio-economic status of clients. The CCJD has an external hard drive to store the data. One person is responsible for supervising data at the CCJD and a database expert is responsible for designing and maintaining the database. The archival records were retrieved upon request.



Creswell (2009:12) notes that, survey research provides a quantitative or numeric description of trends and attitudes. This study included a survey of the records of domestic violence cases dealt with by the paralegals at four research sites (case studies), discussed in chapters 6, 7, 8 and 9. The purpose is to assess the effectiveness of the paralegals' methods in dealing with these cases, and to determine the type of domestic violence cases they deal with and the significance of these records in understanding the trends in domestic violence cases handled by paralegals through CRJ.

Other archival records consulted legal statutes and case law. These data were collected from law reports and case reports obtained through legal research using key words and phrases in data obtained from study participants.

### **5.5.5 Observation**

According to Yin (2009:109), if the case study “takes place in the natural setting of the case”, this creates an opportunity for direct observation. The researcher visited each case study research site to conduct interviews and focus group discussions. The observations are described in chapters 6 to 9 regarding the profile of each research site including the location. Observational evidence is useful in providing additional information about the research site and the topic under study; and it adds a “new dimension for understanding either the context or the phenomenon being studied” (Yin, 2009:110). Richie, *et al* (2003:35) argue that observation offers the researcher an opportunity to record and analyse behaviour and interaction as they occur. This enables events, and actions to be ‘seen’ through the eyes of the researcher.

### **5.5.6 Statutory and case law in a socio-legal study**

As indicated under the sub-section above on archival records, another source of evidence for this study was statutes and case law that interprets law and policy in South Africa. This evidence provided the doctrinal component of the socio-legal study. Doctrinal means the ‘black letter law’, positive law through statutes and case law extricated from its economic, political, and socio-cultural context (Halliday, 2012:1). The term socio-legal study is subject to a number of definitions such as sociology of law or the relationship between law and society (Svensson, 2014:39-40). To Svensson (2014:39-40) socio-legal study is a social science tied to the legal sciences and the critical question for a researcher is “what aspects of law and society are comparable?” Socio-legal studies are concerned with ‘law in action’ not just ‘law in books’ (Halliday, 2012:2, 3). The approach to a socio-legal study can be top-down or bottom-up (Banakar, 2011:497). For example, the point of departure for a top-down study is analysis of the ‘black letter law’ before engagement of members of society whereas the approach to a bottom-up socio-legal study begins with social science data collection techniques such as interviews and focus groups. Bottom-up socio-legal studies are concerned with

law at the micro-level and how community members perceive, use and experience black letter law and the formal legal system (Banakar, 2011:497). Banakar (2011:497) explains that socio-legal studies have the ability to dislodge law from its narrow legal context and reconstruct it in its socio-cultural or historical context.

Socio-legal studies can also be used to build theory (Halliday, Kitzinger, and Kitizinger, 2014:6). While analysis of narrative can be used in socio-legal studies, this is rare (Wolff, 2014:27). Halliday, *et al* (2014:5) used a socio-legal perspective to explore the potential legal significance of chronic disorders of consciousness, interviewing family members of catastrophically brain-injured patients and drawing upon legal statutes that govern the medical field. That study allowed them to build legal theory on chronic disorders of consciousness. As to narrative analysis, Wolff (2014:27) points out that it is absent from law and society scholarship. Narrative allows study participants to tell their stories in their own words; on their own terms making use of the ‘three worlds’ – objective, subjective and social (Czarniawska, 2004:651) as purported by Habermas (1979:28, 29, 33) in Chapter 3.

In this socio-legal study, a bottom-up approach was employed. Although the researcher was generally aware of, for instance, the DVA (RSA, 1998a), the Maintenance Act (1998b), the Recognition of Customary Marriages Act (RSA, 1998c), and knew the TCB (RSA, 2008) existed, she did not analyse these statutes and the proposed TCB or search for relevant case precedents until after conducting interviews and focus groups of paralegals and CAO service recipients. The aim was to freshly gauge narrative from study participants based upon their own perceptions. The researcher sought to place the DVA, other statutes and the proposed TCB in its socio-cultural context by obtaining that context from study participant narratives. Excerpts from narrative were subjected to matrix analysis in a way that allows the narrative to tell a story through the matrix and about the various sub-headings in the case study chapters. The researcher’s narrative is then applied to advance story-telling through matrix analysis. In addition, just as Halliday, *et al* (2014:6) used the socio-legal approach to build theory, so did the researcher use the socio-legal perspective to help build process theory about the role of CBPs in forum shopping and language pragmatics as explained in Chapter 10. In other words, because the positive legalist approach with its ‘black letter law’ is devoid of socio-cultural and historical context, this socio-legal study tried to deconstruct the narrowness of law and instead facilitate the ability of study participants to place their perceptions of domestic violence related law and the legal process in its socio-cultural context.

## 5.6 Data Analysis

Data analysis is the process a researcher uses to reduce data to a story and its interpretation. It involves the reduction of large amounts of collected data to make sense of them. The first step is coding the transcribed data from the interviews and field notes in order to identify patterns and themes. According to Richie, *et al* (2003:221), in most analytical approaches, data analysis involves deciding upon the themes under which the data will be labelled, sorted and compared. The text transcript was broken down into overlapping themes and sub-themes. Codes were developed and applied to the textual data (Kawulich, 2004:107). However, narrative from the participants was preserved as reflected in the various matrices in Chapters 6-10.

The mixed methods research design assisted the researcher to investigate the role of CBPs in CRJ in rural areas of KZN. By combining the mixed methods design with doctrinal legal research design a socio-legal approach enabled a comprehensive view of the topic under investigation (Yin, 2009: 63).

### 5.6.1 Data analysis strategy for mixed methods research

The type of analysis depends on the type of case study. There are different types of strategies and techniques for data analysis. Yin (2009:130) identifies four general strategies. The first is to follow the theoretical propositions that led to one's case study. The second general strategy is to develop a descriptive framework to organise the case study. The third strategy is using both qualitative and quantitative data. Finally, the fourth general analytic strategy is defining and testing alternative explanations. Yin (2009:133) notes that researchers generally use all four strategies. Yin (2009:136) points out that, if analytical techniques are properly applied, the reward is compelling case study analysis and ultimately, a compelling case study. "There are five analytical techniques: pattern matching, explanation building, time-series analysis, logic models, and cross-case synthesis" (Yin (2009:136). Discussion of each strategy and technique is beyond the scope of this study. Only the general and specific analytical techniques used are discussed.

The researcher a number of general strategies as noted above. The strategy of developing a descriptive framework to organise the study was executed through the metaconceptual framework formulated in the literature review. Another general strategy used was a combination of both qualitative and quantitative data. Yin (2009:132) observes that, by using both qualitative and quantitative data, a mixed methods strategy can yield appreciable benefits. Exploring, describing or explaining events requires the collection of qualitative data. Yin (2009:133) further argues that quantitative data could be relevant to a "study for at least two reasons. First, the data may cover the behaviour or events that the case study is trying to explain - typically,

the outcomes in an evaluative case study. Second, the data may be related to an embedded unit of analysis within the broader case study". Thus the case study used both qualitative and quantitative data.

A third general strategy – defining and testing alternative explanations was combined with the specific analytic technique of explanation-building. In this regard the researcher used narrative from study participants and doctrinal analysis to help explain the role of CBPs in CRJ as a matter of access to justice.

### **5.6.2 Data analysis techniques for mixed methods research**

To provide a deeper discussion of data analysis this section discusses data analysis techniques for mixed methods research. This study employed the matrix or logical analysis data analysis technique along with interpretive phenomenological analysis (IPA). Yin (2009: 129) explains that matrix/logical analysis highlights similarities and differences. It is a logical reasoning process, based on the categorisation and organisation of qualitative data. It is often based on comparison across cases and mainly involves tables and matrices to set out the available data and facilitate comparisons and the construction of hypotheses. Yin (2009:156) explains that the researcher starts by creating word tables that display the data from the individual case according to a uniform framework. The analysis of the word tables can start to probe whether different groups of cases appear to share some similarities. The examination of word tables for cross-case patterns relies on argumentative interpretation rather than numeric tallies (Yin, 2009: 160).

According to Creswell (2009:219), the researcher makes a matrix of categories and places evidence within such categories. Data transformation takes place by qualitatively creating codes and themes and then counting the number of times they occur in the text data (Creswell, 2009:224).The information in cells could be a quotation from the qualitative data. The researcher uses statements as themes to create an instrument that is grounded in the views of the participants. During analysis, the researcher unifies the themes and ideas into a practical, comprehensive interpretation of the topic (Creswell, 2009: 219). However, in this study matrix analysis was combined with narrative analysis such that narrative from study participants formulate stories in relation to the sub-headings in the case study chapters.

Interpretive phenomenological analysis involves an attempt to understand the experiences an individual has in life, how they made sense of them and what meanings those experiences hold. Interpretive phenomenological analysis is concerned with how participants themselves make sense of their experiences. Therefore it is concerned with the meaning which these experiences hold for the participants. Interpretive phenomenological analysis employs qualitative methodology; most IPA work has been conducted using semi-structured interviews which enable the participants to provide a fuller, richer account than would be

possible with a standard quantitative instrument and allow the researcher considerable flexibility in probing interesting areas which emerge. Interviews are taped and transcribed verbatim and then subjected to detailed qualitative analysis to elicit key themes in the participants' talk (Creswell, 2009:176).

Another qualitative data analysis technique is cross-case synthesis. This applies specifically to the analysis of multiple cases. According to Yin (2009:156), this technique is particularly relevant if a case study consists of at least two cases. The findings are more robust than if a single case were used. Multiple case studies strengthen the research findings. Cross-case synthesis can be performed whether the individual case studies have previously been conducted as independent research studies or as a predesigned part of the same study. The researcher conducted four case studies and they are recorded in separate chapters. Each case study focused on the same intervention strategy undertaken by different CBPs. A cross-case analysis was conducted. The analysis dissected and arranged the evidence from the four cases in the form of word tables. The analysis of qualitative data involves summarising the mass of data collected and presenting the results in a way that communicates the most important features.

For analysis purposes, the interview questions and focus group guide were separated into categories consistent with the research objectives and research questions. The researcher reviewed the transcripts from the interviews and focus groups and undertook the following:

- a) Placed interview responses underneath the research questions to which they applied;
- b) Placed focus group responses opposite paralegal responses to show where there was agreement and where there was disagreement on the same question;
- c) Captured themes emerging from the data beyond the research questions, such as aspects of African indigenous knowledge systems of governance and justice.

The interviews lasted for two hours and the focus groups took three hours. After each interview, notes were made on both the content and process of the meeting. Emerging themes and the researcher's impressions based on observation were documented. The tapes were transcribed. Each participant was identified with a code symbol. Permission to audiotape the discussions was granted by both groups. It was explained that the tapes would not be transcribed verbatim and that some of the content would be used in the final analysis and report. In addition to the notes, after each interview, the transcript was reviewed; thereafter similar ideas and themes were grouped and given conceptual labels. Constant comparison was used to identify the themes in

the interviews and focus groups using colour codes. This contributed to explanation-building as an analytic technique (Yin, 2009:141).

In terms of quantitative data, according to Creswell (2009:16), in mixed methods studies, researchers interpret the statistical results, and the themes or patterns that emerge from the qualitative data. The quantitative data were analysed by importing the CCJD database for 2009 to 2011 to Excel software so that the types and outcomes of cases handled by the CBPs could be analysed and pie charts and bar graphs could be generated.

Data triangulation is the use of multiple data sources to help understand a phenomenon (Yin, 2009:114, 116). The qualitative and quantitative data as well as statutory and case law and literature review were triangulated in this study.

### **5.6.3 Strategies and techniques for legal analysis**

A number of strategies and techniques were used for legal analysis of the doctrinal component of the study. Once statutes and case law were obtained the researcher searched for issues in statutes and case law – reported and unreported that speak to the data collected in the field. The researcher compared and contrasted the views of study participants with sections of statutes and judicial reasoning in case reports. In other words, the researcher used legal analysis to evaluate the extent to which perceptions of members of society are consistent or inconsistent with statutes and case law related to domestic violence.

### **5.7 Reliability and Validity in Mixed Methods Research**

Quantitative and qualitative research designs have different aims and approaches, some of which are discussed above. Likewise, each research design carries different ontological and epistemological outlooks. Therefore, establishing reliability and validity for each research design also varies. According to Glesne and Peshkin (1992:6, 7), quantitative research uses the positivist worldview whereby facts are observed and measured to substantiate an objective reality. Golafshani (2003:599) points out that, on the one hand, reliability in quantitative research revolves around whether the result is replicable and if the findings are generalisable to a given population. Lewis and Richie (2003:271) argue “that reliability is generally understood to be concerned with the replicability of the research findings and whether or not they would be repeated if another study, using the same or similar methods, was undertaken”. However there is concern that the idea of replicability is naïve; the study can never be, nor should it be, repeated. On the other hand, Golafshani (2003:599) explains that validity enquires into “whether the means of measurement are accurate and whether they are actually measuring what they are intended to measure”.

In contrast, reliability in qualitative research is concerned with elements of credibility, dependability, conformability, transferability and authenticity (Lincoln and Guba, 1985:289-331). Taken together, these elements imply a focus on the trustworthiness of qualitative research in terms of reliability and validity (Elo, Kääriäinen, Kanste, Pölkki, Utriainen and Kyngä 2014:2; Lincoln and Guba, 1985: 289-331). Lincoln and Guba (1985:316) note that, in qualitative research, the demonstration of validity is tantamount to establishing reliability. In breaking down the elements of the trustworthiness of a qualitative study, credibility means accurately identifying and describing the study participants. According to Tracy (2010:843-844), the credibility of qualitative studies can be achieved through description (where the research shows rather than tells occurrences); triangulation through multiple sources of evidence, theoretical frames and multiple types of data analysis. Tracy (2010:845) adds multivocality as a component of credibility which means that the multiple and varied voices of respondents are presented and analysed in the study.

Turning to dependability, Yin (2009:116, 120-122) and Arthur and Nazroo (2003:132) suggest a number of data collection and analysis tools to ensure the dependability of a study such as the development of a case study database including field notes, narratives from respondents, tabular material collected from the site under study, and multiple sources of evidence. Conformability is concerned with objectivity by presenting data with “potential for congruence between two or more independent people about data’s accuracy, relevance or meaning” (Elo *et al*, 2014:2). Transferability of findings is more appropriate in a qualitative study while statistical generalisation of findings is appropriate for quantitative studies. Tracy (2010:846) argues that transferability and naturalistic generalisation can result from qualitative studies, suggesting that knowledge generated by case studies can be useful in similar settings, populations and circumstances. It is the reader who decides on transferability and naturalistic generalisation based on the thick description provided by the researcher through the voices of the respondents. Although statistical generalisation is unhelpful for qualitative research, Yin (2009:15) contends that case studies allow the researcher to expand and generalise theories from the findings; this is known as analytic generalisation. With regard to the authenticity of qualitative research, Bower, Aboloafia and Carr (2000:374) explain that two implied questions are raised: ‘has the author been there in the field?’ and ‘has the researcher faithfully represented the local experience he or she encountered?’ To ensure that these questions are raised a researcher should detail field experiences, set out their theoretical and conceptual predispositions and provide a chain of evidence reiterative with data interpretation (Bower, *et al*, 2000:375).

With reference to public administration research, Bower *et al* (2000:374) identify plausibility and criticality as important components of qualitative methods. Plausibility can be achieved by “working to establish a connection to the reader, seeking to provide a story that is neither too fantastic nor irrelevant or trivial”

(Bower *et al*, 2000:379). Criticality involves qualitative research that enables illumination and understanding of public governance issues that facilitate different viewpoints from both participants and readers which by extension can lead to alternative policy actions (Bower *et al*, 2000:382). Scholars agree that triangulation of sources of data and modes of data analysis generate reliability and validity in mixed methods research (Golafshani, 2003:599; Baxter and Jack, 2009:603-604; Richie *et al*, 2003:43; Yin, 2009:116).

In terms of reliability and validity of the quantitative component, this study used a pre-existing database of statistics. Rather than seeking to replicate a study or generalise the findings through the collection of primary data by means of a survey, secondary statistics on the number, type and disposition of cases handled by CBPs at each CAO during the years 2009 to 2011 were used. The instrument used to supply and maintain the database is a case intake report that each CBP must submit to the CCJD head office. Statistics from the case intake forms are then input into the database by a CCJD employee. The instrument (attached as Appendix C) is believed to be valid in that it measures what it is designed to measure – the number, type and disposition of cases handled by CBPs at a given CAO. The data were analysed to answer the questions raised in the literature on CRJ, and its effectiveness and appropriateness in domestic violence cases handled by CBPs. The data were analysed to determine the role paralegals are playing in resolving legal problems and thereby contributing to the unclogging of congested court rolls.

Insofar as reliability and validity of the qualitative component of the study are concerned, the researcher followed the above delineated steps to ensure trustworthiness. The qualitative data reveal the perceptions of the paralegals that participated in the study and community members who were the recipients of the paralegals' services. The matrix analysis presented in the case study chapters, illustrates the researcher's efforts to maintain and interpret narrative from the study participants.

## 5.8 Ethical Considerations

According to Lewis (2003:66), any research study raises ethical considerations. Lewis adds that participants must consent to participate in the study (p. 66). The participants were given information on the purpose of the study, how it will be used and the study topic. Participants were informed at the beginning of the interviews and focus groups that ethical procedures require that informants consent to participate in the study and sign a consent form (Teddlie and Tashakori, 2009:199). The consent form included a clause on confidentiality and anonymity. Lewis (2003:67) contends that “anonymity and confidentiality must be made clear to study participants. Anonymity means that the identity of those taking part will not be known outside the research team”. While this protects focus group participants, the interview participants'



anonymity can be guaranteed because their names are linked to the institutions; as the institutions are one of the units of analysis in this study, their names are not mentioned. Lewis (2003:67) explains that confidentiality means avoiding the attribution of comments, in reports or presentations, to identified participants. This means that archiving some forms of data such as audio recordings will compromise anonymity and confidentiality (Lewis, 2003:68). According to Lewis (2003:68), in any study it is important to consider the ways in which participation might be harmful to the respondents and to take evasive action. He indicates that “this arises most clearly in studies on sensitive topics which might uncover painful experiences and lead people to disclose information which they have rarely or never previously shared”.

In this study, consent forms were read aloud and explained to participants. While participants were informed as to how their anonymity and confidentiality would be protected, as Lewis (2003:67) points out above, this could be a difficult feat to achieve for CBPs. However, CBPs indicated that their names could be used as they want their activities in CRJ to be known. Participants were further informed of their right to withdraw from participation in the study at any time during the research process. Protocols in place by the University of KwaZulu-Natal were followed and the ethical clearance letter issued.

## 5.9 Limitations of the Study

Creswell (2009:215) observes that mixed methods data collection does present limitations; methodologically “unequal evidence within a study” is produced, “which may be a disadvantage when interpreting the final results”. Hancock *et al* (2007:7) note that the choice of a research focus and methodology also result in limitations. This study suffered some limitations, which are acknowledged here.

The study’s research design provided in-depth, rich data on the experiences of women from KZN’s rural areas. However, the sample was restricted to 24 women. Hancock *et al* (2007:7) observe that one of the limitations of qualitative studies is that the results of the study may not be generalisable to a larger population if the sample is small and the participants are not randomly selected. This research study sought insight into CBPs in KZN, not the whole country and CAOs that are supported by the CCJD, not all CAOs in the country; hence the small sample.

According to Yin (2009: 53), a multiple case study can require extensive resources and time beyond the means of a single student. Therefore, the decision to undertake multiple case studies should not be taken lightly. Yin (2009:72) points out that the researcher might be influenced in selecting the case study in order to advocate for a particular cause. This might be true in this study because CBPs’ work is currently not

statutorily recognised. However, Yin (2009:72) suggests that one test of such bias is the degree to which the researcher is open to contrary findings, to which the researcher is open.

The key strength of this study is the understanding and insight that emerged with respect to rural women's experience with CRJ and CBPs in the context of cases of domestic violence. However, the researcher has been involved with CCJD and CAOs for seventeen years and had therefore interacted with the paralegals prior to the study; therefore the results may be influenced by the researcher's personal biases. To offset this potential bias, the researcher tried to preserve the narrative of paralegals and of service recipients. In addition, the researcher focused upon using experience with the paralegal sector to interpret narrative (Maanen, Sørensen and Mitchell, 2007:1148) in an effort to help build theory from practice.

The researcher's presence during data gathering, which is often unavoidable in qualitative research, might have affected the participants' responses. For example, Creswell (2009:34), points out that a limitation of mixed method research is that it provides indirect information filtered through the views of interviewees and that the researcher's presence in a focus group may give rise to biased responses. As a result the researcher spent time explaining to CBPs and focus group participants that this study is an academic inquiry connected to doctoral thesis research and not a measure of performance of CBPs. The researcher also tried to generate a relaxed environment for study participants so that they could 'speak their minds'. Multiple sources of evidence and triangulation helped minimise any impact on the findings.

While archival records can be used in conjunction with other sources of information to produce a case study, Yin (2009:106) notes that caution should be exercised in using such records as, like any documentation, they were produced for a specific purpose and specific audience other than the case study; these conditions must be fully appreciated in interpreting the usefulness and accuracy of the records. As CCJD data is collected in the field and captured by different people, it is possible that errors may occur. However, the paper records of the paralegals that participated in the study verified the quantitative data collected by the CCJD.

There was a possibility of bias in the paralegals' involvement of announcing the upcoming study to focus group participants. There is a risk that the paralegals might publicise the study to those who would describe CBP work in a positive light. It was therefore important to compare the data from the focus groups with the quantitative data in order to establish whether or not they corresponded.

Furthermore, another limitation is that the study involved multiple case studies; the volume of data made analysis and interpretation time consuming and at times overwhelming.

Yet another limitation is that the study did not consider men's experiences in the process of restorative justice and their opinions on the role of CBPs in access to justice. The inclusion of men who participated in the restorative justice process would have provided a balance to the research findings. The semi-structured interviews addressed some of these limitations due to their flexibility; responses were followed up and non-verbal information provided further understanding of these responses (Creswell, 2009: 32).

In some scholarly circles the inability to generalise findings from studies that are mainly qualitative in approach is considered a limitation. A small sample size is more likely to yield information on individuals' experiences and perceptions than generalisable findings on CBPs. However, the theoretical propositions derived from comparative case studies allow for analytical generalisation (Yin, 2009:15). Therefore, findings may be transferable to women seeking access to justice with regard to domestic violence in other rural areas.

Available relevant literature mostly relates to CBPs' general work and not specifically to the interaction between CBPs and CRJ or the impact of the DVA on CBPs and CRJ. This is a limitation. Yet, findings from this study and dissemination of knowledge produced may help to fill this gap in the literature.

#### 5.10 **Chapter Summary**

This study adopted a socio-legal approach in its research design, in order to combine an analysis of statutory law and case law with social science mixed methods. The study employed a mixed methods research design that was more heavily inclined to the qualitative paradigm. By using this research design, the research results are more likely to show the complexity of the interactive nexus between access to justice, plural legal systems, community restorative justice, community-based paralegals and domestic violence cases.

This chapter showed that the researcher combined descriptive statistics on the types and outcomes of cases handled by paralegals with the social processes of the role of CBPs in CRJ demonstrated through narrative; together, this combination illuminates the interaction between the CBPs, CRJ and the DVA. This secondary data placed the experience of women in a broader context.

This chapter explained the integration of the pragmatic and the advocacy participatory worldviews employed in this study. The pragmatic worldview approach assisted the researcher to examine the views and perceptions of CBPs and victims of domestic violence. A pragmatic worldview was appropriate because it allowed the researcher to use a mixed methods approach and to draw liberally from qualitative and quantitative assumptions in conducting the research. This helped the researcher to understand what the truth might look like, and which restorative justice approaches work or do not work in cases of domestic violence.

Interpretive principles were incorporated in the study; these helped the researcher to understand the underlying factors influencing the choices made by survivors of violence. The information contributed by the participants enlightened the researcher on their situation in accessing justice. The voices of the respondents substantiates the advocacy-participatory worldview. The researcher subscribed to an action agenda by providing a voice for CBPs and raising awareness of the role they play in CRJ. The advocacy and participatory worldview provided a platform for participants to articulate what works at grassroots level and what changes can be introduced in restorative justice practice.

In this chapter it was indicated that the study adopted a descriptive, exploratory and explanatory multiple case study strategy. The case studies (research sites) are located at Bulwer, Ixopo, Madadeni, and New Hanover. The multiple cases allowed for comparison of the experiences and perceptions of CBPs and service recipients associated with each CAO. Sampling strategies were discussed. Data analysis techniques were highlighted for the social science and legal research. The manner of achieving reliability and validity in mixed methods research was presented and the use of triangulation explained. Ethical considerations and limitations of the study were also delineated in this chapter.

The following four chapters explore the context of the four case studies along with the findings from the quantitative and qualitative data for each CAO.

## **Chapter 6: The Case of Bulwer Community Advice Office**

### **6.1 Introduction**

The previous chapter outlined the research design and methods and highlighted the various strategies, sampling techniques, data collection and analysis methods employed for this study. This chapter presents the context of the Bulwer Community Advice Office (CAO) as well as the findings from secondary quantitative and primary qualitative data. The quantitative data entails case intake and the number and types of cases handled by the CBPs between 2009 and 2011. The qualitative data are divided into two sections. The first section covers the qualitative data derived from interviews with paralegals and focus group discussions with service recipients. These data relate to the formal justice system (Domestic Violence Act) and the informal system of community restorative justice (CRJ). The second section covers the qualitative data on interaction between CBPs and the traditional justice system. The data are discussed with reference to the literature.

### **6.2 Context of the Bulwer Community Advice Office**

#### **6.2.1 Location**

The office is situated in the small rural town of Bulwer, 70 kilometres west of Pietermaritzburg. It is situated in the police station precinct in the Sisonke Municipal District. The municipality covers a geographic area of 1 970 sq. km, and has a population of 107 558. Bulwer has limited infrastructure but is gradually developing. Areas around the small town have access to electricity, although there is still a lack of sanitation and the nearest hospital is in Pietermaritzburg.

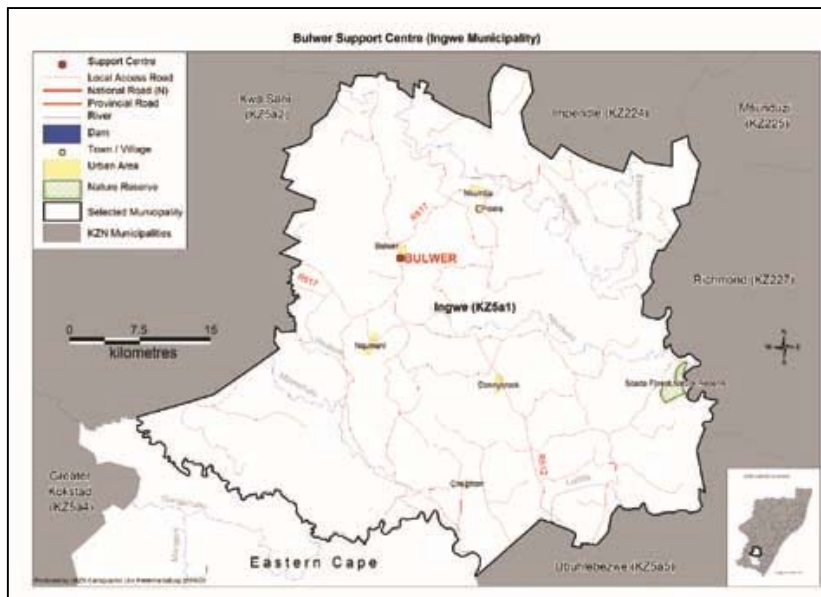


Figure 6-1 Location of the Bulwer community advice office (Source: UKZN Dept. Geography)

### 6.2.2 Socio-economic conditions of service beneficiaries

The office predominantly serves rural and farming areas, which combine traditional areas under *Amakhosi* and *Izinduna*. People find it easy to access the Bulwer office because it is situated in the shopping district in the area. Throughout the study paralegals from the Bulwer advice office are referred to as BWP1 and BWP2.

The Bulwer CAO collects data on the socio-economic circumstances of their clients; the chart below shows the socio-economic status of clients from 2009 to 2011. The study could have included case data from 2011 to 2013; however the database was being upgraded at the time of the review, and there was a backlog of two years. The survey of cases recorded during 2009 to 2011 shows that 38% of the clients who approached the office were unemployed, 16% were housewives and only 13% were employed; the remainder were pensioners (17%), and students (14%).

Poverty is a problem in the area, with the majority of people relying on government welfare grants. In addition to providing basic legal services, the CBPs engage in community projects to help community members generate income to feed their families. According to BWP1 and BWP2, most unemployed people in Bulwer seek assistance with obtaining social grants; while others request help with social problems relating to poverty (CBP interview, 11 July 2012).

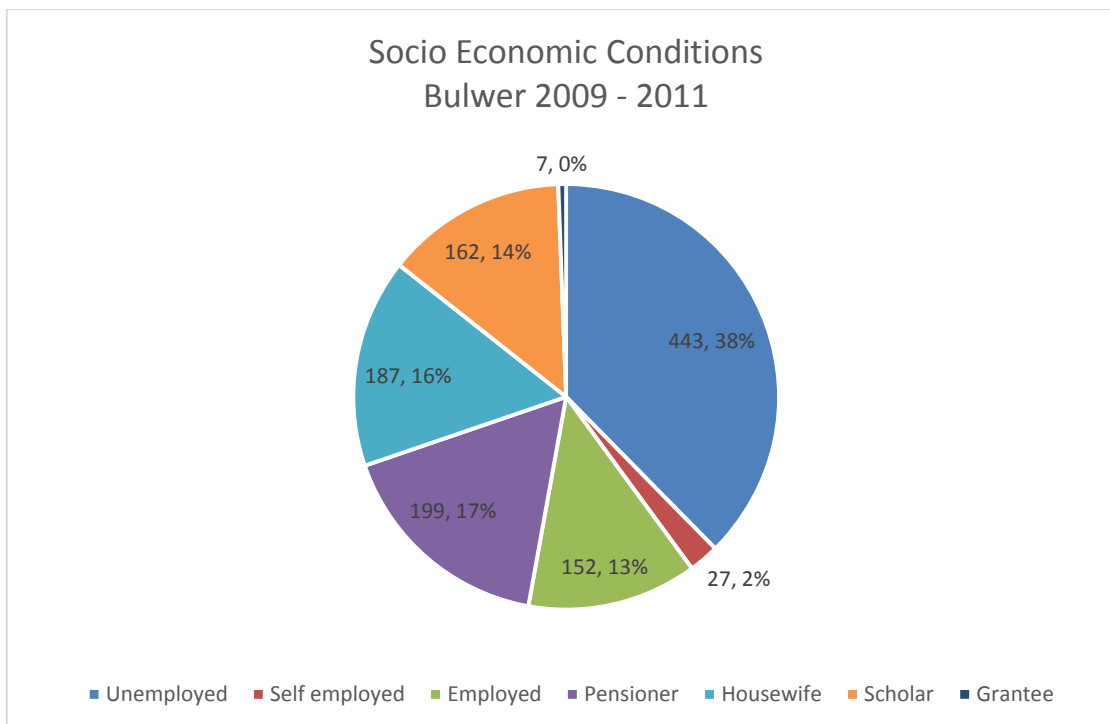


Figure 6-2 Socio-economic background of Bulwer clients

As shown in the chart below, the largest number of unemployed clients seeks legal advice (552). This includes assistance with obtaining documents and legal advice regarding state grants. Legal advice also relates to applying for financial entitlements such as provident funds, private pensions, and the repayment of money owing. It is interesting to note that the CAO serves the employed, unemployed and the self-employed. This shows that even those with some financial means find the services rendered at the CAO a useful channel to access justice. It was noted in the literature review that while access to justice is available through state legal aid, there are gaps in the legal aid model; hence the utilisation of CAO services.

### 6.3 Results of Data Collection

#### 6.3.1 Quantitative data

This section begins with a description of the statistics on case intake, followed by an indication of whether domestic violence cases were handled through the CRJ or the criminal justice system.

### 6.3.1.1 Case intake

The statistics on case intake are viewed in conjunction with the qualitative data yielded by the interviews with the CBPs and survivors of domestic violence who participated in the focus groups. A case often involves two or more clients; for example, in cases that involve the restorative justice approach, regardless of the nature of the problem, paralegals tend to involve family members and their extended network. The CBPs at this CAO sometimes conduct mediation together. Raye and Roberts (2011:212) explain that, while victim offender mediation (VOM) was previously a one-on-one meeting with a third party facilitator, “As time went on programmes departed from this initial model in numerous ways. Many meetings began to include more participants, such as parents, supporters and, while solo mediators were portrayed as a norm, the use of co-mediators”, as in the case of Bulwer.

In total, 1177 cases were recorded from 2009 to 2011. Figure 6-3 shows the number of cases recorded by the Bulwer CAO during this period and the proportion of domestic violence cases compared with other categories.

Figure 6-4 shows the target beneficiaries. It reflects that 63% of the clients were female and 27% male. The biggest problem for adult females that approach the Bulwer CAO is domestic violence. BWP1 and BWP2 stated that 80% of the people seeking help with domestic violence cases are women. The statistics show that women make use of the services at least three times more than men. However, it is interesting that in the ‘*domestic violence*’ category, there are also men who approach the CAO as victims. This is also the largest category of men seeking assistance. BWP1 and BWP2 stated that men feel increasingly confident to call on the CAO. They also observed that women do abuse men, although to a lesser extent. Grauwiller and Mills (2004:66) point out that restorative justice practice “provides a more culturally specific response that addresses the unique gender dimension of the problem, including violence by both men and women”. They add that, as “male and female violence does not happen in a vacuum we need to hear out the woman’s side as well as the men to evaluate if their complaints may have some merit” (Grauwiller and Mills, 2004:60). “Our office is there for all victims irrespective of gender” BWP1. Not only do the Bulwer statistics reflect the correlation between case categories and gender, but gender can be further differentiated into target population groups, and correlated with case category. However because the statistics were developed for a specific purpose by the CCJD, it was not possible to draw these correlations specifically for domestic violence cases as a single category due to time constraints; the available data combined all categories. A review of the records for the period 2009-2011 also revealed that 119 physically disabled clients visited the Bulwer CAO for assistance.



### 6.3.1.2 Domestic violence

The second largest number of unemployed clients fell into the domestic violence category. Domestic violence constituted 354 (30%) of all cases.

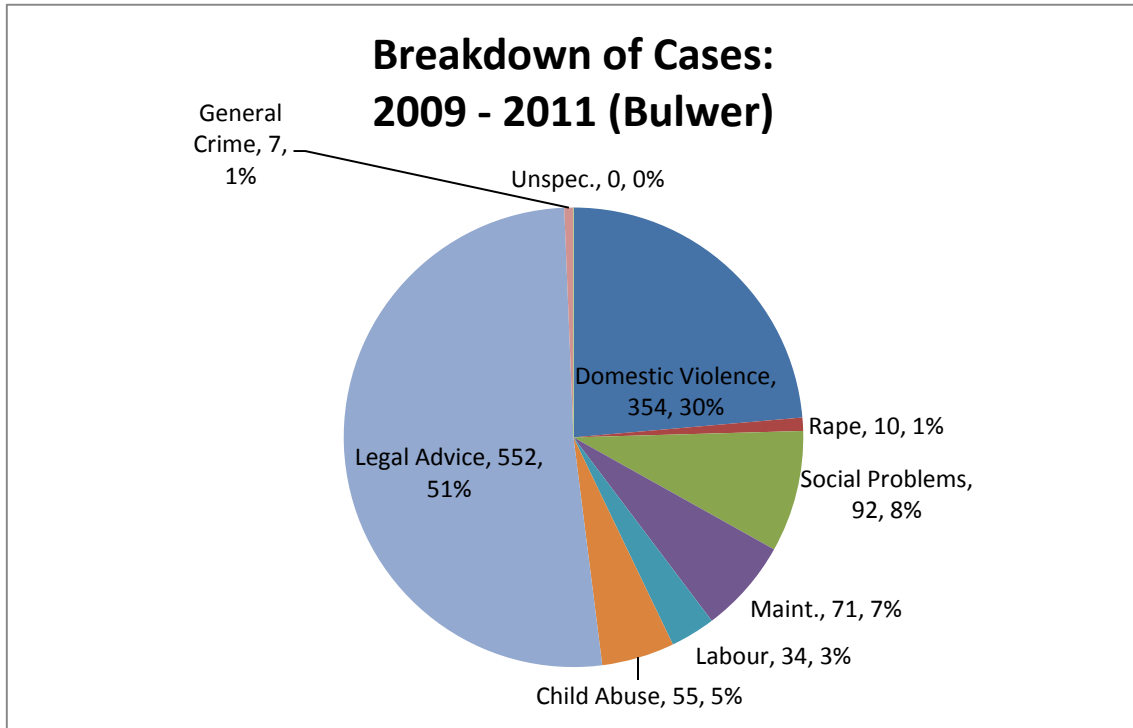


Figure 6-3 Number of cases recorded in Bulwer 2009-2011

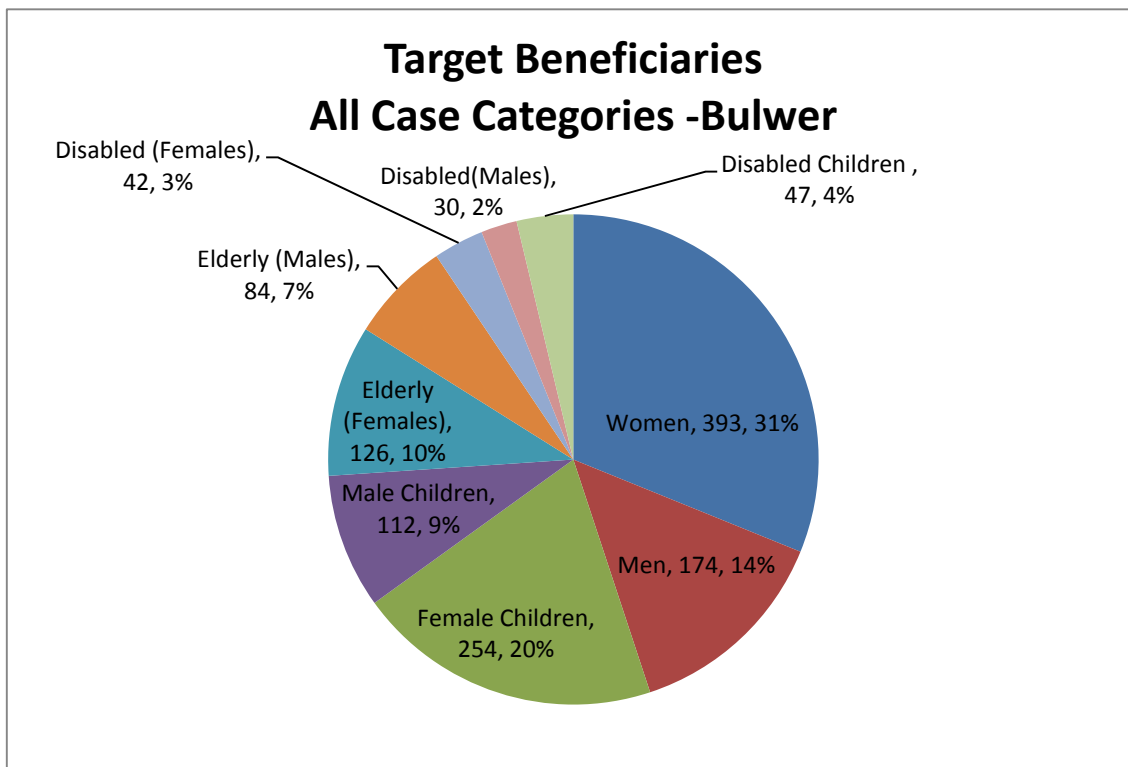


Figure 6-4 Target beneficiaries for all case categories in Bulwer

Domestic violence cases handled at the Bulwer CAO include physical, sexual, emotional, economic and verbal abuse in a domestic relationship. BWP1 reported that 40% of the domestic violence cases she handles involve emotional abuse, followed by economic abuse at 35%; indeed, she stated that the two are often linked. Smythe and Artz’s (2005:26) research revealed that financial issues are a leading factor in “precipitating intimate partner violence and other forms of abuse”. Physical abuse constituted 10% of the cases and sexual abuse 5%. Interestingly both women and men report sexual abuse. However, BWPI said that not everyone is comfortable talking about sexual abuse and when they do it takes a lot of courage. She submitted that sexual abuse is under-reported. An important statement made by BWP2 is that one case can involve all four acts of domestic violence.

BWP1 explained that HIV/AIDS add to the problem and the dynamics of domestic violence: “partners do not accept that they are HIV positive, and when one of them tests positive this causes arguments. It is difficult to handle these cases because clients become especially emotional during mediation”. Another factor is unemployment, which leads to arguments over money to buy food, maintain the household and raise children, as illustrated by the following case reported by BWP2. “A 40 year old married woman residing at

Tafuleni reported that her husband is violent with her. He receives a disability grant, but he refuses to help her to buy groceries. He said that she has to use the child support grant or else go and look for a job. He does not stay with his wife and the children. He stays with his mother where he does everything for her”.

### 6.3.1.3 **Community restorative justice process**

The majority of cases are between spouses, and the cases are mostly resolved through the restorative justice process. Grauwiller and Mills (2004:66) explain that the restorative justice practice “provides the opportunity to address the problem of domestic violence holistically and directly”. The most common models of restorative justice are VOM and the Family Group Conference. This study focuses on VOM. In some cases both restorative justice approaches and the court process are used in a single case, as revealed by the findings of the qualitative research. Moul’s (2005:21) research revealed that “victims of domestic violence also prefer using multiple structures, to curb the abusive behaviour thus mediation and protection order”.

In 2009 the Bulwer CAO recorded 140 cases of domestic violence, of which 71 were resolved through the restorative justice process; 67% of these are recorded as having been successfully mediated (Smithers *et al*, 2009-2012; Sangweni, 2012. Centre for Community Justice statistical reports). Success in mediation is defined in the data capturing instrument protocol prepared by the CCJD as a guide for CBPs as a situation where both parties are happy with the outcome, and on following up the case one month later, the agreements reached during VOM are holding (Smithers, 2013:27). In 2010, the office attended to 93 cases of domestic violence; 64 of these were addressed through mediation, of which 57 were successfully resolved. Domestic violence cases in 2011 numbered 121, with 98 dealt with by mediation and 79 mediations successful.

Therefore, from 2009 to 2011, 354 cases of domestic violence were handled by the office. Of these, 233 cases (66%) were mediated with 203 successfully resolved, a success rate of 87% (Figure 6-5).

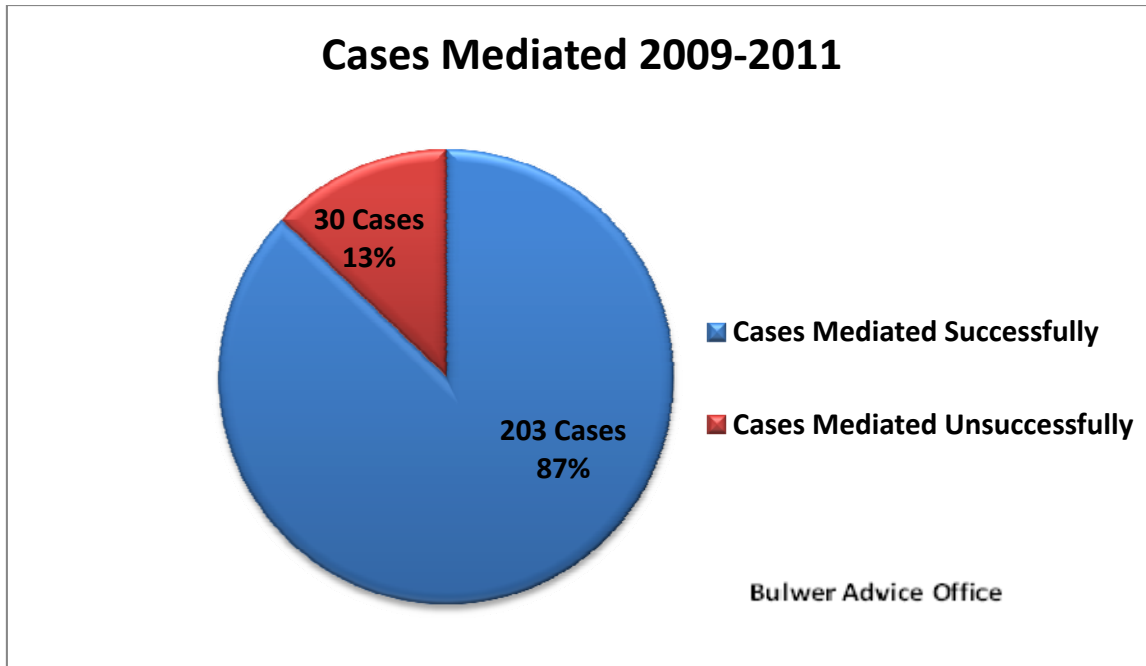


Figure 6-5 Domestic violence cases mediated in Bulwer 2009-2011

Unsuccessful cases refer to those that were mediated but no agreement was reached; these cases were then referred to the court for Protection Orders. According to the records, only 25 cases went through the court process (see Figure 6-6 below). The rate of cases successfully mediated is high, demonstrating that CBPs are resolving domestic violence disputes using the restorative justice approach.

The quantitative information is supported by statements from the focus group discussion (BWFG). Participants noted that domestic violence is frequently not reported because people do not want to go to the police. All the participants said that someone who had previously visited the CAO referred them to the office. Participants were vocal about keeping their experiences of domestic violence private, which explains the high rate of VOM at the Bulwer CAO.

#### 6.3.1.4 Protection orders

Both the police and the courts are involved in addressing domestic violence, with the courts being the most involved, given that Protection Orders are applied for and granted there. The police play a role when physical violence requires a charge of assault, and when Protection Orders are violated. Figure 6-6 shows the number of domestic violence cases referred to court for Protection Orders, a small number compared with

the number mediated. The reason is provided by the qualitative data; during the focus group discussion all the participants argued that Protection Orders are not a popular means of solving domestic violence.

A total of 25 cases were referred for Protection Orders from 2009 to 2011, a mere 7% of the total number of domestic violence cases. Of these, 17 (68%) were granted an Interim Order by the presiding magistrate. Ten Protection Orders were later confirmed.

According to the information obtained from the Bulwer CAO and verified by the CCJD's records for 2009 to 2011, in 2009, 10 cases were recommended for Protection Orders. Of these, seven Interim Protection Orders were granted and five of the seven were finalised or confirmed. In 2010, eight cases were recommended for Protection Orders; six Interim Protection Orders were granted, and two were finalised or confirmed. In 2011, seven cases were recommended for Protection Orders; four Interim Orders were granted and three were confirmed or finalised (Sangweni, 2012).

The number of mediations represents court time saved by the paralegals that are able to mediate the majority of cases that present at the office. The statistics show that when paralegals assisted the victims of domestic violence with their applications, 10 of the Interim Orders were finalised, a rate of 40%. The CBPs explained



Figure 6-6 Protection order referrals for clients at Bulwer CAO 2009-2011

that this relatively low proportion is due to the fact that many orders are withdrawn because neither the offender nor the victim appeared in court (BWP2). Stapleton (2007:43) points out that, community-based

initiatives such as the practice of restorative justice by CBPs reduce congestion in the courts. These descriptive statistics are concerned with understanding the CBPs' work rather than a statistical comparison of case intake and case outcome.

Fernandez *et al* (2009:47) argue that CBPs, who have gained considerable experience in how clients perceive the law, its value and how they respond to it, would be the first port of call for any socio-legal researcher interested in studying their work. Therefore it is very important to capture the voice of the CBPs and community members in order to understand access to justice, restorative justice and the role of the paralegal in CRJ. The matrices that follow carefully retain the voices of study participants while briefly discussing the responses in relation to the literature, research objectives and research questions. This discussion is further explored in chapter 10, which provides a comparative cross-case (non-doctrinal) analysis of the social science data followed by doctrinal analysis, which integrates domestic violence law and case precedents with findings from the social science data.

### **6.3.2 Qualitative data from interviews of paralegals and a focus group of service recipients**

This section presents data adduced from paralegals and focus groups. It is organised under sub-headings related to (1) mediation procedure and process administered by paralegals, (2) access to justice, (3) use of the DVA in Bulwer and (4) the role of the Bulwer CAO in CRJ. One or more matrix displays narrative obtained during data collection. There is a separate matrix on mediation procedure and process for each case study. These particular matrices were co-created by the researcher and the CBPs who participated in the study. In the column on procedure, the researcher devised the list based on interview responses, and some are devised from the list of approaches to mediation programme design discussed by Landrum (2011:448). However, in the column on process, the researcher makes every effort to preserve the voices of the respective paralegals. Community-based paralegals at different support centres often provided the same or similar descriptions of procedures and responses on process. A coding system is used to identify the respondents and a particular CAO. The code starts with the first letter of the CAO followed by a number – for example, BWP1 for a paralegal interviewed in Bulwer, BWP2 for another paralegal in Bulwer. The code for focus group narrative is BWFG. The coding process is the same for the other cases in case study chapters 7 to 9 with the only change being identification of the CAO. The matrix display of interview responses regarding mediation procedures and processes is followed by a series of matrices that are aligned with the sub-headings and that show relevant narrative from interviews and focus groups from each of the four case studies. Throughout the series of matrices (6-2 to 6-8), the column on the left depicts narrative from focus group discussions and the column on the right, narrative from paralegal interviews. In other words, each case study chapter displays, describes and interprets data from the paralegals and CCJD service recipients at a

single CAO, while chapter 10 uses cross-case synthesis (Yin, 2009:156) to compare and contrast the results across paralegals from all four CAOs and respective service recipients across all advice offices.

### 6.3.2.1 Mediation procedures and processes in Bulwer

The mediation process investigated is VOM, discussed in chapter 3. Matrix 6-1 details the procedure and process used for CRJ to address domestic violence cases as explained by the paralegals to the researcher. In the column on procedure, the researcher devised the list based on interview responses, and some are devised from the list of approaches to mediation programme design discussed by Landrum (2011:448). Matrix 6-1 also shows how paralegals perceive their role in the VOM procedure and process. It also provides evidence of how CBPs use restorative justice initiatives to address domestic violence, whether or not a restorative justice intervention is appropriate in domestic violence cases, and whether CBP-led initiatives increase access to justice, as well as identification of factors that contribute to the success or failure of restorative justice practices such as VOM. These are all research questions raised by this study.

Matrix 6-1 Mediation procedures and processes in Bulwer

<b>Mediation procedure and process for Bulwer community-advice office</b>	
<b>Procedure</b>	<b>Process</b>
<p><b>Referrals</b> Because we are based at the police station, the police, traditional court and other stakeholders such as social welfare refer all cases of domestic violence to our office. People seek the process after attending educational workshops. Others come to our houses, but we encourage them to come to the office.</p>	<p>“Courts are prone to delays and are confusing for rural people.” BWP2 “Still even today women do not understand the purpose of Protection Orders, and it is not properly explained at the police station, which is the first place of contact. The police refer all cases of domestic violence to our office first, this started this year. We explain how Protection Orders and mediation work, so that the victim can make an informed decision”. BWP2 “We ask a client who referred her, and what brought her to the office to establish that she had come to the right place.” BWP2</p>
<p><b>Voluntary participation</b> Participants prefer mediation, they choose it and they love it. Clients participate freely. One client mentioned that by choosing mediation the office is actually doing offenders a favour because they could have gone to court. Therefore participation by offenders is not completely free, but is motivated by the fear of courts.</p>	<p>“Participation in mediation in this office is voluntary but the offender may participate because of fear of arrest.” BWP1 “The reason why some come running is because our calling letter says they need to present themselves at the office at the police station.” BWP2 “Since mediation is informal it encourages people to feel free to participate and to speak to us”. BWP2</p>
<p><b>Case intake</b> A rural person always asks a question that confirms if she has come at the right place. Thereafter the interview begins and the information is recorded in the</p>	<p>“Rural people are very careful with the information. They first have to make sure that they are speaking to the right person and have come to the right place that they have been referred to.” BWP1 “Others are fussy; they only want to speak to a paralegal that is married and older.” BWP2. “They say, ‘I do not want to speak about my marital affairs with someone who is not</p>

<b>Mediation procedure and process for Bulwer community-advice office</b>	
<b>Procedure</b>	<b>Process</b>
case register and domestic violence intake form.	married, she would not understand.’ Luckily we are all married so we meet the criteria”. BWP2
<b>Counselling</b> We provide counselling sessions for the victim prior to the mediation to reduce victims’ fear and anger towards the offender.	“This process is crucial. For example I established during counselling that a person was arrested for a rape that he did not commit. This was established during this session before mediation”. BWP1
<b>Case selection</b> There are several factors that are considered in deciding whether a participant’s case is suitable for mediation.	“We consider the level of aggression by the offender, and injuries sustained by the victim in the attack, but we do not take a decision for the client. If the client wishes use the mediation route, we have never refused to organise a mediation request by the victim.” BWP1 “We also mediate post-Protection Order if the victim approaches us.” BWP1 “Sometimes the other party is difficult to deal with, but if we see that there is chance of reconciliation, we try to reason with the difficult one.” BWP2
<b>Ground rules and responsibilities</b> Ground rules ensure that parties listen to each with sufficient time to respond to each other.	“The ground rules are important, as you get clients who have not been communicating for a long time, and they become so angry that it becomes a shouting match.” BWP2 “We insist that each party listens to the other without interruption.” BWP1
<b>Telling their stories</b> The complainant tells her side of the story in the presence of the defendant, in the same way as she told it when she came to report.	“We are very patient in listening to a long story, and have experience in detecting lies. Hence we ask the victim to repeat the story as it was told during the initial consultation.” BWP1 “The story must involve true facts. We know we can sift truth from false allegations.” BWP1 “The victim must tell her story in the presence of the offender as she has told us when she came to the office to complain”. BWP2
<b>Mediation logistics</b> Both sides are called into the advice office and they sit for mediation. If the victim chooses mediation, we contact the offender, determine whether he agrees to participate and schedule a hearing date and time that is suitable to both. If there is discomfort during dialogue, the paralegals deal with parties separately. We explain to the parties separately the importance of the process and that it is in the interest of both parties to be able to communicate, and to learn to listen to each other.	“After the victim has made a choice; the offender is given a calling letter to come for mediation on a date that is suitable for both parties. The calling letters are delivered by the police since we are based at the police station; sometimes victims deliver calling letters themselves.” BWP1 “We write a letter and request the police to assist us to deliver the letter to the offender”. BWP2 “The mediation process is informal. It might involve separate meetings with each party. A difficult offender is made aware that the process is voluntary, yet for it to succeed requires commitment and the desire to put things right and reconcile.” BWP1 “If the other party is not cooperating, we excuse the party from the meeting and talk to each party separately; we tell them separately that in order for the problem to be resolved, they need to communicate.” BWP2
<b>Solutions from each party</b> The offices do not take decisions for clients: they are the ones who come with a solution.  The paralegals are there to guide the process and help parties to communicate.	“We do not take decisions for the parties, but they are the ones who come up with a solution”. BWP2 “Most do reach an agreement; some of the solution involves cultural cleansing. This is common in Zulu culture.” BWP1 “The victim and the offender are informed that the solution to their problem will come from the parties themselves, and that we are here to guide the process and help them to communicate. They must be prepared to hear each other.” BWP1



<b>Mediation procedure and process for Bulwer community-advice office</b>	
<b>Procedure</b>	<b>Process</b>
	“The victim and the offender come up with a resolution that will be conducive to both of them.” BWP2
<p><b>Discussion of solutions</b> We assist the victims and the perpetrators to discuss their problem with the aim of reaching a mutually agreeable settlement.</p>	<p>“Our main aim is for the victim and the offender to reach a level where they begin to discuss solutions to their problems in an environment that is not oppressive, and that they do not prolong making a decision that is in their interest.” BWP1 “The delays that are taken by the courts to resolve issues is the reason why mediation is a better option - if a woman is in a difficult situation and needs help, she does not want it tomorrow or any other day, she wants it today”. BWP2</p>
<p><b>Victim safety</b> Mediation is also used with other remedies, or procedures such as Protection Orders, and counselling. This is to maximise safety.</p>	<p>“The victim speaks without fear, and she is allowed get her anger out of her body. I can assume that they feel safe because we are located at the police station. Sometimes we alert the police to be on standby if we feel that the offender is aggressive.” BWP1 “The position of the office, provide safety for the victim, because our office is based at the police station”. BWP2</p>
<p><b>Victim/offender satisfaction</b> The victim and the offender like the privacy of mediation, and feel they are treated with respect.</p>	<p>“The victim and the offender express satisfaction with the way we handle their cases. We satisfy them unlike the tension they experience in court. Clients tell us they do not want to go court because they do not want to make their problem public.” BWP2 “They appreciate mediation because the discussion takes place in private.” BWP1</p>
<p><b>Citizen satisfaction with agreement</b> The victim and the offender do reconcile, and the offender shows remorse. We make other remedies available to run concurrently.</p>	<p>“They say mediation preserves relationships, that there are so many homes now where there is peace, and it is private. It revives communication between parties and it is easy to reconcile in that setting, but it is difficult to reconcile once you involve the police.” BWP1 “If the mediation agreement does not hold, the client is now empowered to approach the courts and seek a Protection Order.” BW1 “Sometimes the one party would not be satisfied, because that person is a difficult person in nature, and does not like to take instruction from other people, or does not like to be advised.” BWP2</p>
<p><b>Case follow-up</b> Parties are contacted by telephone and home visits. They are asked if they were satisfied with the mediation, whether the agreement was satisfactory and whether more problems developed after the mediation.</p>	<p>“Follow-up is conducted through home visits and telephone calls. Sometimes clients come to the office to report back post-mediation. Some bring gifts to say thank you.” BWP1 “Some clients are happy and comfortable with their case to be handled by the courts, however on taking Protection Order, the couple end up divorcing.” BWP2</p>

<b>Mediation procedure and process for Bulwer community-advice office</b>	
<b>Procedure</b>	<b>Process</b>
<p><b>Refusal to participate or comply with agreement</b> We have no authority to enforce the agreement, but we have credibility because we are located at the magistrate's court. Most of the offenders abide by the agreement because they would rather avoid going to court and the humiliation of being arrested in front of their children or at work.</p>	<p>"It occurs in rare situations. In other cases when it occurs you find that the other party had already lost hope, so mediation was just the last resort." BWP2 "We have credibility because we are based at the police station and have a backup of the police." BWP1 "It occurs but it is on occasional basis. I believe being located at the police station helps because if it occurs, I just ask the police for assistance." BWP2. "Once he gets a visit from the police I know he will be at the office the following day." BWP1</p>
<p><b>Unsuccessful mediations</b> Parties refused to compromise or reach an agreement.</p>	<p>"Some of the solutions during mediation result in the victim applying for a Protection Order as well to stop the violence from continuing." BWP2 "It has worked for some and it has failed for others, the reason being the husband will say 'I cannot stay with someone who has a protection against me.' In some instances the husband stops beating up his wife; it really depends on each case." BWP1</p>
<p><b>Access to justice</b> Mediation is said to bring peace and is private. It revives communication between parties, which is hard to achieve once you involve the police.  If the mediation agreement does not hold, the client is now informed and empowered to approach the courts and seek a Protection Order.</p>	<p>"We believe that the law can only apply if people know about it and that it addresses their legal needs. To us that is access to justice." BWP1 "Access to justice should not be about when a victim wants to open a case and worries about the consequences, thinking, 'If I open a case against my husband and he ends up being arrested what will happen to me and my children, will the family relationship that we have end up being ruined?' Access to justice should be about access to informal justice." BWP1 "The process that we use of mediation makes people respect each other at no costs involved. That is access to justice." BWP2</p>
<p><b>Factors contributing to success</b> A holistic approach to mediation is the main contributing factor. Parties deal with other issues that also have an impact on their relationship</p>	<p>"The fact that we are aware of cultural practices and beliefs and are able to discuss and address cultural issues contributes to our success." BWP1 "Even maintenance cases that are taken to court, destroys families, for a rural woman it is regarded as not a good idea to take maintenance case to court, these cases are also resolved through mediation." BWP2</p>
<p><b>Appropriateness of mediation in domestic violence</b> Women come to our offices and choose mediation. Mediation ties in very well with our traditional system of justice, as they both promote reconciliation. They each tell their story in a way that promotes <i>ubuntu</i>.</p>	<p>"Mediation has worked for cases of domestic violence and it is appropriate. Cases that are not suited are those that involve rape. However in some cases we have mediated cases of rape, where a woman sleeps with a man with consent but in order to get back at him, she then decided to open a rape case at a later stage." BWP2 "It is not appropriate for cases where there has been serious assault and extreme violence. But we respect the choice that the victim makes not to charge the offender and to opt for mediation. A Protection Order works where the couples are no longer in love and no longer staying together. There have been instances where I wish we could be given a mandate as well to decide for women in cases of extreme violence." BWP1</p>
<p><b>Record-keeping</b></p>	<p>"We keep a record of the mediation process. Mediation can take only 45 minutes if the offender cooperates and owns up to the behaviour.</p>

<b>Mediation procedure and process for Bulwer community-advice office</b>	
<b>Procedure</b>	<b>Process</b>
We keep case registers, an electronic database, an index book of cases, and intake forms.	Sometimes the calling letter is enough to stop violence because the offender will come to the office and immediately apologise and admit that what he has been doing to his wife is wrong. We can tell a genuine apology and the one that is rehearsed.” BWP1  “We used to record our cases manually using case intake form before we had computers, but now we keep all the information and statistics on a data base”. BWP2
<b>Post-mediation</b> We ask our clients to see if the problem is continuing, and encourage our client to come back, in which case we assist with further steps.	“Because we focus on the harm and impact of the behaviour, others take the initiative and phone.” BWP2 “Sometimes the offender phones and expresses satisfaction with the mediation and says, ‘I know where to come, if there is problem I will be the first one to come.’ After mediation it is rare for violence to start again. If does happen, we encourage the victim to approach the courts and apply for a Protection Order.” BWP1

In addition to reflecting the significance of screening cases (Burkemper and Balsam, 2007:128), matrix 6-1 also shows that an important dimension of the paralegals’ restorative justice approach to cases of domestic violence is personal empowerment of victims so that they no longer regard the abuse as something about which to be ashamed. Rather, the perpetrator should be ashamed of his conduct and the victim can put a stop to it by talking about her victimisation and the impact it had on her life. Barrett (2013:337) argues that the dialogue used in “face-to face encounters helps the victim and the offender to understand the harm that has occurred and together come to agreement regarding what measures need to be taken to right the wrong”. Van Ness (2011:9) points out that the facilitator plays an “important role in assisting the victim and the offender to speak openly, but respectfully to each other about what happened, express their feelings and have a say in what should be done about the matter”.

Matrix 6-1 reveals women’s preferences regarding the kind of approach used for domestic violence cases and the use of mediation. The paralegals noted that they explain how mediation and Protection Orders work. They pointed out that there are instances where women use both mediation and Protection Orders. This holistic approach increases access to justice. In much the same vein, Robb-Jackson (2012:11) observes that CBPs’ interventions promote empowerment and “legal literacy in communities by supporting individuals to make informed legal choices”.

Community-based paralegals educate and inform both the victim and the offender about the destructiveness and impact of domestic violence on the family and the community as a whole. As a result, improved behaviour is expected. Toward that end, Schellenberg (2010: 61) argues that the restorative justice process is

regarded “as a teachable moment especially for the offender. It provides the offender with an opportunity and encouragement to learn new ways of acting”. According to Barton (2000:6), learning through “one’s own and other people’s mistakes and misdeeds is an important part of an individual’s social and moral development”.

The results from the quantitative data and the procedures and processes employed by the Bulwer CAO suggest that CBPs’ CRJ interventions in cases of domestic violence are effective. The paralegals themselves said that it is appropriate, with the exception of some situations where the parties cannot reconcile; for example, where there has been extreme violence. While restorative justice may not be appropriate in some cases of domestic violence (Presser and Gaarder, 2000:187), there appears to be a nexus between the two.

The study further revealed that CBPs have been successful in reaching the poor, particularly women, and those living in rural areas. This helps answer the question of whether CBP programmes increase access to justice for victims of domestic violence.

The focus now shifts from the interview data to the focus group data. This section blends data from the interviews with CBPs and the focus group discussion with survivors of domestic violence. While the interview data are displayed in accordance with the mediation procedure and process, the data from the focus group are organised according to the focus group questionnaire guide but arranged under the broad headings of (1) access to justice, (2) use of the DVA, and (3) restorative justice. Focus group participants were drawn from the community; they were recruited based on having received services from the office. The focus group data and paralegal interview data are compared to show where the paralegals and their clients agree or disagree at a particular CAO. A coding system is used to identify the respondents and the particular CAO. The code starts with the first letter of the CAO to indicate that the responses came from the focus group as a whole, for example, BWFG. The coding is the same for the other cases in all chapters.

### 6.3.2.2 Access to justice in Bulwer

Matrix 6-2 Comparative responses on practical ways to improve access to justice for rural female victims of domestic violence in Bulwer

Focus group discussions	Community-based paralegals
“Domestic violence hearings should be private if we decide to go the court route. Victims of domestic violence should be allowed to participate in the court	“Informal justice makes people free to engage with problems. People tell their side of the story clearly in the language that they are comfortable with. The

<b>Focus group discussions</b>	<b>Community-based paralegals</b>
proceedings as to how the offender should be punished.” BWFG	solution to the problem comes from both parties.” BWP1
“Offenders should be given an opportunity to change their behaviour or be made to see and appreciate the harm caused to the victim and the impact his behaviour had on his family as whole.” BWFG	“The courts deal with the person not the problem, and provide a solution without hearing the other side. For instance issuing the Protection Order without an explanation of how it works. Instead of being a solution it becomes a problem.” BWP2

Matrix 6-2 shows that women have limited participation in judicial systems. This point confirms Zehr’s (2005:30) contention that “victims have little say as to whether or how the case is prosecuted” in the formal justice system. Likewise data support Wojkowska’s (2006: 13) observation that language is cited as one of the reasons why poor people do not use the formal justice system; they do not understand the language of the court. According to Barrett (2013:340), language is much more than simply words and phrases. “Not only does it convey meaning, but also through languages we are able, among other things to relate to and influence others.

### 6.3.2.3 Use of the Domestic Violence Act in Bulwer

In terms of the formal justice system and implementation of the DVA, comparative responses from paralegals and service recipients indicate that fear of reprisal or social ostracism and lack of economic independence make women reluctant to use the courts.

Matrix 6-3 Comparative responses on the use of the Domestic Violence Act for protection in Bulwer

<b>Focus group discussions</b>	<b>Community-based paralegals</b>
“If you open a case against your husband, your marriage is over; you are going to live on the street. Children are traumatised when their father is arrested for domestic violence. Children of parents who divorced struggle, and battle to cope with life.” BWFG	“Court intervention brings challenges for women who are unemployed, they would rather preserve their marriage and not end up destitute. It is true, it does happen and we have seen it.” BWPI “I had post-Protection Order mediation and the man was adamant he is going to leave his wife if she does not cancel a Protection Order.” BWP2
“Reporting domestic violence involves the police. In our community, as soon as the people see a police van, they quickly gather to find out what is happening, everyone becomes curious.” BWFG “It is humiliating for people to know that I am a victim of domestic violence.” BWFG	“It is common for victims to say, ‘I do not want to involve the police because I do not want people from my village to know my private matter because police vans always attracts curious onlookers’.” BWP2 “Some they do not even want their family members to know what is happening in their marriage.” BWP1

Focus group discussions	Community-based paralegals
<p>“The courts are good and bad: they have their role for those who choose to go to court, but for those that choose an alternative they are bad news.” BWFG</p>	<p>“There is always family pressure for victims to withdraw the case from in-laws.” BWP1  “Even older children encourage parents to resolve their problem outside the court.” BWP2</p>
<p>“Once the matter goes to court, you cannot fix it.” BWFG</p> <p>“A Protection Order means that he leaves the home and that is usually followed by divorce.” BWFG</p>	<p>“The problem areas in the main is where women come back to withdraw Protection Orders. The police are now referring all cases to us to inform women how Protection Orders work and the implication of withdrawing the Protection Order.” BWP1  “Since we are based at the police station once a woman is sure that she wants a Protection Order she is given one. If she is not happy to go the protection route, she is informed about our restorative justice processes. We have conducted educational workshops covering almost all villages and farms in our area about the Domestic Violence Act. Still Protection Orders are not the solution they want, despite being beaten and threatened with violence.” BWP2</p>
<p>“Poverty is what makes us not to approach the courts. I always say if I had money or the means I would have left him long time ago, even if I still love him.” BWFG</p>	<p>“In Bulwer 60% of domestic violence cases are economic abuse, 20% is physical violence and 15% is emotional and 5% sexual.” BWP2</p>
<p>“We choose mediation because it is quick.” BWFG</p>	<p>“We arrange mediation and most of them are completed in much less time than the courts.” BWP1, 2</p>
<p>“Protection Order is worse, because offenders leave home and even stop supporting the children.” BWFG</p>	<p>“Protection Order it is said by women that it is drastic and harsh.” BWP1  “If mediation is not successful, the victims gain knowledge to approach the courts and seek a Protection Order.” BWP2  “In Bulwer we are tired of Protection Order withdrawals, the deal now is to put the Protection Order on hold.” BWP1</p>
<p>“Most of us think that the best option is, if you decide to approach the police, you leave home.” BWFG</p>	<p>“It is difficult for victims to reconcile with the offender once they involve the police, you will find that the victim still wants to stay with the offender, and the offender will make it clear that he does not want to stay with a wife who has a Protection Order against him.” BWP1  “We see that when we mediate after Protection Orders.” BWP2</p>
<p>“Another consideration is ‘Where I am going to live, will I be safe?’ So we decide to stay. We put up with the abuse because we cannot go back to our home of birth.” BWFG</p>	<p>“There is always a consideration that the offender is a breadwinner - he owns property and the woman is not working.” BWP2</p>
<p>“It is culture that once you decide to get married</p>	<p>“In rural communities culture plays a very important role</p>

<b>Focus group discussions</b>	<b>Community-based paralegals</b>
( <i>ukugana</i> ) you cannot go back home.” BWFG	and it has a strong influence on women’s response to domestic violence.” BWP1,2
“The other thing that we spoke about in my group is, sometimes love plays an important part in our decision, but we always cover up and say we are staying because of children.” BWFG	“In some cases love plays a role in what kind of choice a woman will make and how she responds to domestic violence.” BWP2 “We see it during mediation and it is rarely admitted, though offenders are quick to declare that they love their wives during mediation.” BWP1

Matrix 6-3 shows that women avoid the formal justice system for many reasons and choose the legal options that offer the most benefits. Sandefur and Siddigi (2011:116) call this ‘rational forum shopping’. Data shows that women choose whether to report to the formal, traditional, or informal justice system or not reporting by comparing the consequences of reporting under each system. According to Morris and Gelsthorpe (2003:129), the rationale for forum shopping could “be for the sake of the children, or because the woman is still in love with her partner, because she wants the relationship to work, because she has nowhere else to go, because she has no money, or because she is afraid of her partner and knows that the violence will continue irrespective of police action”. Edwards and Sharpe (2004:22) suggest that restorative justice holds theoretical promise as an intervention in domestic violence, offering victims and offenders a choice of avenues to meet particular needs. According to Sloth-Nielsen and Mwambene (2010: 43), African “cultures have always valued individual rights and choices”. This is confirmed by Matrix 6-3.

Matrix 6-4 Comparative responses on problems with the criminal justice system regarding domestic violence in Bulwer

<b>Focus group Discussions</b>	<b>Community-based paralegals</b>
“The problem is the law takes the decision we do not agree with. For example you would prefer your husband to be given a warning, not to be sent to jail and punished.” BWFG	“Most of the victims of domestic violence just want the violence to stop. They say, ‘Just talk to him and tell him to stop beating me’.” BWP1, 2
“There is no opportunity to disagree with the punishment. The courts do not have time to listen to the background of the problem; you are expected to answer questions asked only.” BWFG	“In most of the cases we handle in Bulwer, what the victim wants is the violence to stop, not to punish the offender so he ends up getting a criminal record.” BWP1 “Courts do not have enough time to deal with other issues related to domestic violence, as we do in our office.” BWP2

<b>Focus group Discussions</b>	<b>Community-based paralegals</b>
<p>“We have a problem, because domestic violence cases are heard in public, it is difficult for us to have people who know us to hear what is going on in private at a public hearing. These public hearings do not build relationships.” BWFG</p>	<p>“We explain to the party the issue of confidentiality. They appreciate mediation because the discussion takes place in private.” BWP1  ““The parties in a private setting are encouraged to discuss their problems and come up with a solution that is favourable to both parties”. BWP2</p>
<p>“We are aware that the justice system is there to protect us. However at the same time we use it as the last resort, and only when you are prepared to face the retaliation of your action.” BWFG</p>	<p>“Survivors of domestic violence say mediation preserve relationships. There are so many homes now where there is peace, and it is private.” BWP1</p>
<p>“The courts do not protect you against victimisation when the trial is over.” BWFG  ““We call the police and they do not come.” BWFG  “I fear the courts, fear the police. I had a bad experience when my neighbour raped my daughter. First it took so long for the case to be heard in court, around two years. It was so hard for my daughter to talk about what happened so long ago and to see the offender in court. When it was my turn to be cross-examined, I felt attacked and undermined on the witness stand. It was confusing as some of the details asked I could not recall. I decided to withdraw the case before it was finalised. He was released from awaiting trial imprisonment and I moved to another area”. BWFG</p>	<p>“In mediation, victims are given an opportunity to talk about how the offender has hurt her. That is the reason why they prefer mediation to the court process. Both parties are encouraged to present their side of the story in a way that promotes <i>Ubuntu</i> (harmony and caring).” BWP1, 2</p>
<p>“The justice system is not suitable for domestic violence.” BWFG</p>	<p>“Mediation is not appropriate in cases where there has been serious assault and extreme violence. In serious cases we wish we could be given the power to decide which option will be suitable. However we respect the victim’s choice.” BWP2  ““The formal system is a long process, whereas mediation is short and straight to the point. Court proceedings are mostly confusing to our people, whereas mediation is conducted in their mother language. People are scared of going to court, and the language that is used at court is also confusing.” BWP1</p>

Narrative presented in Matrix 6-4 reflects that a number of problems exist with the handling of domestic violence cases by the formal justice system. For instance, the formal justice system does not listen to the victim and “does not let them help to decide how the situation should be resolved” (Zehr, 2005:32). Another



problem is the fact that the formal legal system has limitations that render it ill-prepared as a platform for the democratic exercise of the right to access to justice by rural women without financial means. In addition, focus group participants express in Matrix 6-4 dissatisfaction with private matters being dealt with in the public justice system (Coker, 2002:132). However, the literature review revealed that the public/ private distinction is creating a dilemma for criminal justice personnel and women’s rights activists and anti-violence advocates who fought to put domestic violence in the public domain.

**6.3.2.4 Bulwer community advice office and community restorative justice**

This section presents the data on the use of CAOs and community restorative justice. In chapter 4, CAOs are profiled and challenges experienced by CAOs discussed. The Bulwer CAO is located in the local police station. Matrices 6-5 to 6-8 display data that compare the paralegals and focus group participants’ responses on the need for CAOs, the role of paralegals, and interaction between paralegals, the formal justice system and restorative justice processes as well as experiences of using restorative justice processes. The data reveal that CAOs are regarded as a significant source for facilitating access to justice.

Matrix 6-5 Comparative responses on the need for community advice offices and community-based paralegals in Bulwer

Focus group discussions	Community-based paralegals
<p>“In our view paralegals are still champions of democracy, we call on them for everything, and then they refer us to other service providers with referral letters.” BWFG</p>	<p>“We are accessible to community members, consulting lawyers is costly”. BWP2            “We are respected in our community; we fill the knowledge and legal need (service delivery) gap left by the state. But our experience has shown that after 18 years paralegals are the first port of call and beacon of hope for communities”. BWP1</p>
<p>“We are not yet fully aware of our rights. Paralegals educate us about issues that affect us in our rural communities.” BWFG</p>	<p>“Community people are not yet confident to pursue their rights and hold government/public institutions accountable. Paralegals are assisting in this role, educating people by conducting workshops on issues affecting communities.” BWP1, 2</p>
<p>“They treat us with respect and have patience to listen to our problems, they are different from other institutions, paralegals live with us.” BWFG</p>	<p>“Paralegals are closer to the people, live with the people they serve and gain their experience through working with people.” BWP2            “Community members respect us and have trust in our services.” BWP1</p>

Community members were quite vocal about the need for CAOs and CBPs' role in restorative justice. The focus group responses show that community members have acquired knowledge as a result of CBPs' awareness-raising initiatives. The CBPs deal with a wide range of social justice issues (Pigou, 2000:5). Responses in Matrix 6-5 indicates that CBPs assist community members with assertion of rights (Stapleton, 2007:43; Golub, 2000:298) and mobilisation and training (Stephens, 2009:145).

Matrix 6-6 displays study participants' perceptions about the varied roles of paralegals. Several restorative justice theories are apparent such as the theory of engagement and empowerment

Matrix 6-6 Comparative responses on the role of paralegals in the restorative justice system in Bulwer

Focus group discussions	Community-based paralegals
<p>“In this office you talk about everything, you are free and equal in this office.” BWFG</p>	<p>“Since mediation is informal it makes people feel free to speak with us.” BWP1            “We do not take advantage of the people we assist, and everyone is treated fairly in this office.” BWP2</p>
<p>“They bring us together to talk about our marital problems and deal with own problems.” BWFG</p>	<p>“We bring the offender and the victim together, where they sit down, where no one is in a hurry and they discuss their problem. Perhaps they have never given each other an opportunity to do so before.” BWP2            “Parties are able to tell their side of the story clearly in the language that they are comfortable with” BWP1</p>
<p>“The paralegal mediation process is also educational because at the end we leave their office empowered with knowledge and problem solving skills.” BWFG</p>	<p>“We provide socio-legal advice with our mediation process and the client walks out of the office empowered and happy.” BWP2            “The location and the relationship we have with the police, courts, traditional authority and other stakeholders benefits our clients; they get first-hand information about the functions of these institutions and the role they play in justice. It is an advantage that we are based at the police station too.” BWP1</p>
<p>“Paralegals conduct the process in private, they are welcoming and friendly.” BWFG            “My husband beat me for years; I never entertained the idea of going to the police because I did not want to end on the streets. Family members are not helpful, his and mine. His will tell me to put up with it, they have been through the same thing; mine will call him and speak to him but the violence continues. The process at the traditional court is different - they say if you love</p>	<p>“We are strict in making sure that what is said in the office remains in the office. Confidentiality is important in our work, because we reside in the same community as our clients. They say, ‘I will tell you my story because I trust you; I am reporting this case here because I do not want my other family members to find out about it.’” BWP1            “They appreciate mediation because the discussion takes place in private.” BWP2</p>

Focus group discussions	Community-based paralegals
your husband go back home, if you do not they say <i>lobolo</i> (dowry) must go back, if he says he does not love you, they say he must leave home and maintain you or build you another house. No talk, no discussion and the hearings are in public". BWFG	"Rural communities do not want domestic violence to be a public issue; I think we are losing the battle of trying to encourage people to report violence to the police." BWP2
<p>"What we like about paralegals is they do not take sides during mediation." BWFG</p> <p>"They listen to both sides of the story." BWFG</p>	<p>"We allow them to say their side of the story and help them reach an agreement." BWP1</p> <p>"Both the victim and the offender tell their side of the story". BWP2</p> <p>"We are neutral when dealing with cases of domestic violence. If the victim is wrong we do not take her side just because she is the one who reported the case." BWP1</p>
<p>"All of us here would not be together with our husbands if we had gone to the police as they would have left home." BWFG</p>	<p>"We are always friendly and welcoming to both the victim and the offender." BWP1</p> <p>"The fact that we are aware of cultural practices and beliefs and are able to address cultural issues contributes to the benefits the victim and offender get out of our mediation process." BWP2</p>

Matrix 6-6 shows that paralegals have an in-depth understanding of the local context regarding the dynamics of domestic violence. In the *Progress of the World Women Report* (2011:74) paralegals reported that their knowledge of formal justice enables them to offer advice with a full understanding of the social and legal context.

The CBPs explained that they create a conducive environment for the victim to speak freely. Edwards and Sharpe (2004:22) observe that facilitators helps maintain focus during dialogue and improve communication between the victim and the offender. The parties are given an opportunity to explain and understand issues that they have previously not been able to explore together.

According to Bennett (2011:1053), the formal courts are beyond the reach of most litigants, due to their alien procedures and language. Barrett (2013:358) is of the view that language plays a significant role in the restorative justice process.

Matrix 6-7 Comparative responses on the interaction between community restorative justice, the formal justice system and community-based paralegals in Bulwer

Focus group discussions	Community-based paralegals
<p>“Here in Bulwer people in the village know that before you go to the police you should start at the container (the park home the paralegals uses as an office). We were referred by others who have done the same.” BWFG</p>	<p>“Because of where we are located, we have credibility. Our people still have a lot of respect for authority, it is just that they do not want the intervention of the police and the courts in their private lives.” BWP1, 2</p>
<p>“Paralegals we are told are not part of the justice system. But to us in the community we see them as part because they are located at the police station, we are happy with the way they assist us, and we are aware there is some collaboration with the police here and the court in Hlanganani.” BWFG</p>	<p>“If we had more support and recognition from the government we could achieve more, but we rely on donor funding which is not sustainable.” BWP1, 2</p>
<p>“There should be a provision in the justice system for a victim offender dialogue first, and if the parties fail to resolve their problems or violence continues then the matter should go to court. Most of us do not want to open a case against our husbands.” BWFG</p>	<p>“Women from rural communities see the court as a kind of public humiliation.” BWP2  “Rural people are generally not comfortable with the justice system, Protection Order is worse.” BWP1  “For rural people the involvement of the police in domestic matters is a problem.” BWP2  “That is where we fill the gap, because the justice system is not working for some people - in some cases the couple end up divorcing where a woman decided to apply for a Protection Order. Other women even here in Bulwer are comfortable with the matters being handled by the courts.” BWP1</p>
<p>“They should continue as they have been doing, we do not want any changes, they are highly trained, we say that because of our experiences when they were handling our cases.” BWFG</p>	<p>“We have a diploma from the University of Natal now UKZN in paralegal service. We have been trained in conducting mediation, and the Centre assesses our mediation skills for Community Justice. I have been conducting mediations for 16 years.” BWP1, 2</p>

According to Maru (2006:470), due to CBPs’ “familiarity with local communities, they are more capable than other legal professionals when it comes to straddling formal and informal legal systems”. According to Dugard and Drage (2013:11), paralegals “commonly use the alternative dispute resolution techniques of mediation and negotiation to establish a holistic approach to help solve people’s problems within families, and work with state authorities, such as the police and the courts to assist with Protection Orders”.

Matrix 6-8 Comparative responses on experiences of restorative justice processes and benefits in Bulwer

Focus group discussions	Community-based paralegals
<p>“I have heard about this office, but never paid attention. One day I decided to share my pain with my neighbour, and I explained my reservation about going to the police. She explained to me how paralegals work with victims of domestic violence. I came; I wish I had known about their mediation work, I would not have suffered for 12 years. There were things I could not talk to my family about, in marriage there are things that cannot be shared with family and friends. Paralegals are neutral people, they do not know me and they do not know him. My husband thanked my neighbour for referring me to the paralegal office.” BWFG</p>	<p>“People choose mediation because they can sit down with the other party and discuss their problem, whereas when they are at court, they are just given a solution without looking at the problem holistically, like the mediation process does.” BWP2</p> <p>“In mediation there is no legal representative, each party must state his side of the story, true facts came out and a decision is taken by both parties in the dispute”. BWP1</p>
<p>“Our husbands were very happy that we came to the paralegal office to report instead of the police. He left a message on my phone saying he was very sorry for what he has done. At the time he was no longer eating at home, but now he surprises me sometimes and when I come home from work he has already cooked our meal.” BWFG</p>	<p>“We are at the police station, partners respond to calling letters because they fear authority.” BWP2</p> <p>“In our office, parties are satisfied, they do not appreciate the delays that is taken by the courts to solve the problem, that is a turn off to victims. If a woman wants help, she does not want it tomorrow, she wants it now as in today”. BWP1</p>
<p>“Paralegals here are 100% good. If I had to speak for myself, when we came here with my husband we were very angry and when we left we were smiling having decided we are reconciling and starting a new chapter, which was in 2009 when we came here. I came here eight months ago to say thank you to the paralegals. He has never lifted his hand again to beat me. He even bought a house in Durban and he wants the family to relocate so that we can be closer to him because he works in Durban.” BWFG</p>	<p>“The benefit of mediation is the victim and offender are able to deal with underlying issues that have contributed to their fight.” BWP1</p>
<p>“Paralegals do follow up, we met at the store and she asked me how things are and I am told her that things have changed for the better.” BWFG</p> <p>“It opens communications, you reach a stage that you are unable to talk about your problems together without being emotional, even the problem becomes worse. Family members who knew my problem asked me what helped me because they have noticed a change in my husband’s behaviour because they knew I did not go to the police. It helps because sometimes you hurt someone without realising the impact of that hurt. Mediation is better if you still want to continue with the relationship.” BWFG</p>	<p>“Mediation revives communication between the victim and the offender.” BWP1, 2</p>

Matrices 6-2 to 6-8 have shown in qualitative terms, the extent to which the lives of participants have been impacted by the intervention of CBPs. The qualitative data demonstrates empowerment and a change in partners' behaviour. The victims' interaction with the restorative justice process has enhanced their problem-solving abilities and communication skills; this will enable them to make sound decisions when faced with a similar problem. The skills acquired could be extended to other social justice issues. Schellenberg (2010:56) observes that, in addition to communication skills, offenders gain empathy and conflict management skills and accountability for their crime.

The focus groups expressed the view that the paralegals from the Bulwer CAO have become well-known for their ability to mediate in any kind of dispute, be it financial or emotional, particularly in cases of domestic violence; hence the high rate of success in such cases. The statistics confirm this description of the restorative justice approach.

### **6.3.3 Qualitative data on the linkages between the traditional justice system and community-based paralegals in Bulwer**

As noted in the literature review CCJD paralegals have been working with the formal and traditional justice systems since the inception of the programme in 1997. The CAOs in various rural areas of KZN were established in consultation with traditional leaders. The Bulwer CAO networks with six traditional courts. Raising human rights awareness is part of CBPs' work in the community. From October 2013 to June 2014, Bulwer paralegals conducted nine dialogues with traditional leaders in their area. According to Friedman (2014:6), the dialogues covered the following areas of law: domestic violence, maintenance, sexual offences, customary marriages and intestate succession, and child justice. The CCJD produced pamphlets in a simple format on the various statutes related to the abovementioned issues. These were translated into isiZulu. The aim of this project was not to influence how traditional leaders implement their justice system, but to raise awareness among these leaders of these issues. The qualitative data below from the interviews with paralegals shows the importance of these dialogues.

Furthermore, during the dialogues the CBPs were able to highlight areas where there could be improvement to address practices that negate traditional justice systems, such as gender discrimination and bias. The reports from the dialogues indicate willingness to strengthen the working relationship to improve the implementation of the traditional justice system in rural areas. Friedman (2014:3) argues that traditional authority is either trivialised or romanticised. Those who trivialise traditional leadership give high regard to accountability, and see no governance role for traditional leaders. On the other hand, those who romanticise

it view this system as the most accessible and highly participatory. The majority of people, particularly in rural areas, consider traditional authority part of their culture and identity. According to Friedman (2014:4), paralegals noted that, while traditional leaders can be law unto themselves, traditional authority is a consistent structure in the community that is not affected by elections.

Matrix 6-9 below presents the qualitative data from the interviews with CBPs on their working relationship with traditional courts. The data is organised under the broad headings of (1) composition and operation of the traditional courts (2) interaction between the traditional courts and the CAO through case referrals by the traditional courts to the CAO (3) and from the CAO to the traditional courts, (4) interaction between the traditional courts and the CAO through observation and advice, (5) traditional courts and domestic violence, and (6) paralegals' views on whether traditional courts should handle domestic violence cases.

Paralegals' interaction with traditional courts is not restricted to case referral. They are also invited to visit them as observers and are sometimes asked to give advice on cases during traditional court proceedings. The paralegal's observations are arranged using a word table similar to the one used in earlier sections to record the qualitative data. The cases selected were used by paralegals as examples to support their points during the interviews. Similarly, in the section on how traditional courts handle cases of domestic violence, cases are used to provide insight and context on the type of domestic violence cases the traditional courts deal with. Matrices 6-9 to 6-14 below illustrate collaboration between the CAO and traditional courts in Bulwer. These courts are located in deep rural areas, and some are far from the advice office. BWP1 has been active in working with traditional leaders and is a strong link between the Bulwer CAO and the traditional courts.

#### **6.3.3.1 The composition and operation of traditional courts**

Composition and operation of traditional courts vary according to specific jurisdictions. The listing in Matrix 6-9 was co-created by the CBPs and the researcher. The researcher extracted the information from the interviews to create a column on the left and used the TCB provisions and literature as a guide to modify the listing. In addition to the interviews with paralegals, documentary evidence on paralegals' interaction with traditional courts consisting of reports prepared by paralegals in performing their duties was used in the tables and narrative sections. Matrix 6-9 presents data that reflect Ubink and Van Rooij's (2010:3) observation that the positive attributes associated with the traditional justice system include its accessibility to the people who use it; the familiarity and flexibility of procedures; the limited cost of bringing a case to court; the use of familiar language; the short time it takes to resolve a case; and the presiding officers' familiarity with the local context.

Matrix 6-9 displays data in juxtaposition to the Traditional Courts Bill. Paralegals' observations of traditional court practices are at times parallel and at other times contradictory to the literature reviewed and the proposed Traditional Courts Bill which has since been shelved. In some jurisdictions, women are excluded from participating in the traditional court. Dexter and Ntahombaye (2005:10) note that, in Burundi, women are "excluded from being invested in their own right; they are invested with their husbands as '*bapfasoni*', a person of wisdom and integrity, but do not have the right to deliberate with men or render judgement".

Matrix 6-9 Paralegal's comments on composition and operation of traditional courts

<b>Relevant sections of the proposed Traditional Courts Bill (TCB) or the literature</b>	<b>Paralegal comments on traditional court current practice</b>
<p><b>Public aspect of the traditional court</b> Section 1 of the TCB</p>	<p>"CBPs work with six traditional courts in Bulwer. Court 1 has 25 members of the council; eight are women Court 2 has 19 members; six are women Court 3 has 31 members; nine are women. BWP1 Court 4 has 18 members Court 5 has 21 members Court 6 has 19 members. BWP2 Court attendance could be between 45 and 50 people. All cases are conducted in open court and there is no privacy". BWP1</p>
<p><b>Court fees</b> Ubink and Van Rooij (2010:3)</p>	<p>"Members of the community pay R100 to open a case at the traditional court". BWP2</p>
<p><b>Presiding officers at traditional courts</b> Section 1, clause 4 of the TCB</p>	<p>"<i>Inkosi</i> or <i>Izinduna</i> are presiding officers at the traditional court. They are assisted by "<i>uMkhandlu</i>" known as the traditional council".</p> <p>"Women are also represented in the council (<i>uMkhandlu</i>). According to our observation at Bulwer, other council members treat women in the council with respect". BWP1, 2</p> <p>"Presiding officers (council members) have different levels of education. You get school principals in the council; others are employed in different areas; other councillors are unemployed, and they are mainly old men on pension". BWP1</p>



<b>Relevant sections of the proposed Traditional Courts Bill (TCB) or the literature</b>	<b>Paralegal comments on traditional court current practice</b>
<b>Jurisdiction of traditional Courts</b> Section 5 of the TCB	“The most common issues that come before the traditional courts are domestic violence, customary marriages, paternity disputes, accusations of witchcraft, inheritance, adultery, pregnancy outside marriage, petty theft, family and neighbour disputes, insults, land disputes and other social problems, and others”. BWP1
<b>Procedure of traditional courts</b> Section 9, clause 9 of the TCB	“Lawyers do not play a role in the traditional court; they do not appear at the traditional court. During the case proceedings, both the complainant and the respondent sit on a grass mat ( <i>ucansi</i> ) and face the <i>Izinduna</i> who would be sitting on benches. The charge is read to the respondent and he or she is given a chance to plead guilty or not. Witnesses are called to testify. During the proceedings community members are allowed to ask questions to the disputing parties. This happens where a court is just one room”. BWP2
<b>Use of familiar procedure</b> Sections 2 and 9 of the TCB	“Community members know the procedures of the traditional court. The court process is very simple and quick”. BWP1, 2
<b>Languages</b> Bennett (2011:1053)	“There is no language problem. isiZulu is the language that is used at the traditional court”. BWP1, 2
<b>Outcome of court cases</b> Sections 11,12 and 13 of the TCB	“Outcome of court case is a fine, compensation; some members out of their own initiative they leave the village and go to settle in another village, especially when a family member is accused of rape”. BWP1, 2
<b>Restorative nature of the traditional Court Process</b> Section 3 of the TCB	“Communitymembers are told to be quick when they explain what happened, as there are other cases to be attended to. The courts sometimes have no time to conduct mediation”. BWP1, 2
<b>Recording of cases</b> Section 18 of the TCB	“As far as I can see traditional courts do not record their cases. Secretaries write letters to respondents, conveying decisions and stipulating the compensation or fine to be paid”. BWP1, 2

Makec (2007:135) explains that traditional justice rarely causes anxiety or fear if a trained lawyer does not represent the parties. However, there is controversy regarding the representation of women in the traditional court. A comment by paralegals that their male relatives or husband represents women has drawn criticism from various scholars. Mnisi-Weeks (2012:153) argues that customary law practices force women to be

represented by men. Mnisi-Weeks adds that this is “self-defeating because the same male relatives with whom you have a dispute issue might represent you”. Mnisi-Weeks notes that Section 9 of the TCB discussed in chapter 2 proposed to continue this practice. Similarly, Dissel and Ngubeni (2003:11) found that when a study participant filed a case with the traditional authority, “even though her complaint was against her husband, the husband spoke on her behalf”. Archilles and Zehr (2001: 87) argue that “it is important that people have the opportunity to express themselves in a safe environment”. The idea of a victim being represented by another person in a domestic violence case is against the principles of restorative justice (Zehr, 2004:307).

Given the role of CBPs in straddling plural justice systems, the traditional courts refer cases to the Bulwer CAO. The data displayed in matrix 6-10 of section 6.3.3.2 and matrix 6-11 of section 6.3.3.3 show the cases referred between the traditional courts and the Bulwer CAO.

### 6.3.3.2 Case referrals from traditional courts to Bulwer community advice office

Matrix 6-10 shows that Bulwer paralegals have handled domestic violence cases referred by traditional courts involving physical, sexual, economic, and emotional violence, as well as cases related to customary marriages, registration of customary marriages and intestate succession issues.

Matrix 6-10 Cases referred from traditional courts to the Bulwer community advice office

Type of case	Reasons for referral
Domestic violence: Physical violence	“These are cases that involve physical violence. They are referred for protection order and counselling. Traditional courts do not condone physical violence. In fact they frown upon a man who beats his wife”. BWP1
Domestic violence: Sexual abuse.	<p>“Traditional courts refer to us because their cases are open to the public; it is embarrassing to the man to discuss such issues in public. However if it is a woman accused of adultery the court will go ahead with the case. That is the patriarchal nature of the traditional court”. BWP1</p> <p>“Marital rape is not recognised. There is belief that a man cannot rape his wife, because he paid <i>lobolo</i>”. BWP2</p> <p>“Husbands always accuse women for infecting them with AIDS even though they are the ones having extramarital affairs”. BWP1, 2</p> <p>“These cases have dual reference. The court refers such</p>

Type of case	Reasons for referral
	<p>matters. Women after reporting to the traditional court and face humiliation they came on their own and report cases of this nature to us”. BWP1.</p>
<p>Domestic violence: Economic abuse</p>	<p>“Women who have been to the traditional court for maintenance are often unhappy with the decision taken and the treatment they received at the traditional court”. BWP1, 2</p> <p>“Some are referred because a man does not want to sell their livestock to support his family”. BWP1</p>
<p>Domestic violence: Emotional abuse</p>	<p>“This type of cases is very common in rural areas for women to be accused of having children out of wedlock. The paternity tests used at the courts are not popular and leave children vulnerable to abuse. The hearing is in public; women are treated with disrespect and are humiliated in front of everyone”. BWP1</p> <p>“This category of cases also has dual referrals, from the court, and sometimes from the women themselves after having been to the traditional court”. BWP1</p>
<p>Domestic violence: Customary marriages - polygamy (“<i>Isithembu</i>”)</p>	<p>“This arrangement sometimes cause emotional stress for the women involved. <i>Inkosi</i> referred a man with two wives to the office. He paid <i>lobolo</i> for both his wives. He registered the second marriage and the second wife was refusing to give permission for him to register the first wife”. BWP2</p> <p>“There are so many problems around the registration of customary marriages. For example a man who marries by civil marriage to one woman and another by customary marriage. The other challenge happens when the man dies and there are two women, one married through customary and the other through civil marriage. The man dies and his customary law marriage is not registered. We have assisted with registration of marriage after death. We also get cases where people want to change a marriage regime because all customary marriages are in community of property”. BWP2</p>
<p>Domestic violence: Rape</p>	<p>“Rape is under reported. Some people still do not report rape to the police for various reasons. For example a case of a young girl who was taken by young boys and raped. The grandmother denied that the girl was raped but we think she was trying to settle out of court because she was promised damages will be paid by the boy’s family”. BWP1, 2</p>
<p>Domestic Violence: Emotional and economic abuse</p>	<p>“This relates to death benefits that go to a girlfriend yet the are abused when they are expected to pay for the burial”. BWP1</p>

Friedman’s (2014:6) interviews with traditional leaders revealed that they know that physical violence in a domestic relationship needs to be reported to the police, or at least to the paralegal in their area. Friedman also found that traditional leaders are aware that sexual relations could be construed as rape if force is involved. Matrix 6-10 indicates that women move from one justice system to the other (Chopra and Isser, 2012:353; Sandefur and Siddiqi, 2011:112). Gasa (2011:28) points out that if the TCB were to become law, rural women would not have the luxury of forum shopping as in terms of section 20 of the TCB discussed in chapter 2, they would be unable to withdraw the traditional court case. Gasa argues that this would leave women without access to justice. “The reality is that the traditional courts are not sympathetic to victims of the crimes excluded given the patriarchal framework in which they are created” (Gasa, 2011:28).

### 6.3.3.3 Case referrals from Bulwer community advice office to traditional courts

Just as traditional courts refer cases to the Bulwer CAO so does the Bulwer CAO refer domestic violence cases to traditional courts.

Matrix 6-11 Cases referred by the Bulwer community advice office to traditional courts

Cases referred from CAO to traditional courts	Reasons for referral to traditional courts
Adultery	“Cases where clients seek damages per cultural practice, ‘ <i>inkokhelo yenhlawulo</i> ’, are referred to the traditional court. “Some of the cases after settlement through mediation require an additional order that involves cultural cleansing. This common in Zulu culture.” BWP1
Pregnancy outside of marriage	“This happens when a man refuses to pay damages for impregnating a girl as required by Zulu culture. The traditional court takes on this is, you impregnate you pay”. BWP1.
Return of <i>lobolo</i>	“Traditional courts handle issues of <i>lobolo</i> well; our offices do not deal with this issue”. BWP1, 2.
Emotional abuse	“Sometimes women ask for compensation, and we refer them to the traditional courts”. BWP1, 2

On the one hand, Matrix 6-11 demonstrates paralegals’ understanding and knowledge of local culture and that they respect traditional courts’ authority (Walsh, 2010:25). They are able to identify matters that are the province of traditional courts and refer cases. This could be interpreted as respecting the boundaries of service delivery in the best interests of their clients. Furthermore, it shows confidence in the traditional authority and acknowledgement of the strength of the traditional court. Vorster (2001:54) believes that “knowledge of the cultural context of customs, ideas and practices is essential for sound decision-making by

those involved in facilitating mediation”. Cultural competency of CBPs seems to all them to use that knowledge to “promote justice and harmonious relations between people” (Vorster, 2001:54).

On the other hand, Matrix 6-10 demonstrates that traditional authorities have limitations and that they are aware of this; therefore they welcome paralegals’ intervention in some cases. Local traditional leaders value working with paralegals and acknowledge their skills in handling the cases referred by traditional courts. This suggests a link between the traditional justice system and the informal justice system for which Ubink and Van Rooij (2010:8) advocate. This would enable women’s human rights to be incorporated into customary norms, and dispute resolution and administration.

In the next section, narrative from paralegals is displayed to reveal interaction between traditional courts and the Bulwer CAO besides cross-referrals of cases.

#### 6.3.3.4 Interaction between traditional courts and the community advice office through Bulwer paralegals’ observation and advice

In matrix 6-12, data in the column on the left shows CBPs observation of traditional proceedings while narrative in the column on the right provides CBPs’ comments about and advice to traditional courts regarding court proceedings. The information in Matrix 6-12 reveals the gender dynamics at play. Ubink and Van Rooij (2010:6) argue that the attractiveness of customary law is its flexibility and negotiability, even when norms are clear. Flexibility and negotiability of traditional courts are confirmed by the two examples provided by a Bulwer paralegal in matrix 6-12; her advice was taken on board, and she was able to prevent further humiliation and abuse of the children. While certain customary practices are praised, it is clear that some are harmful and violate human rights, as the paralegal rightfully pointed out to the traditional court.

Matrix 6-12 Bulwer paralegals’ interaction with traditional leaders and traditional courts

CBPs’ observation of traditional court proceedings	CBPs’ comments about and advice to courts
“We get invitations to observe the court process”. BWP1, 2	“Sometimes during the traditional court proceedings we offer advice if we observe that the process is causing discomfort to the complainant and the respondent”. BWP1, 2.
<p><b>Case observation 1: Paternity.</b>            “In this case I was invited by <i>Inkosi</i> to come to the court. A young woman gave her son to the wrong family to look after. The young woman apparently had dated two young men at the same time. It looks like</p>	<p>“This is how the traditional court dealt with the case: on the day of the trial the child was brought before the court and mother of boyfriend 2 was requested to undress the child for physical examination by the complainant (mother of boyfriend 1) The first step involved examination of the genitals of the child and</p>

CBPs' observation of traditional court proceedings	CBPs' comments about and advice to courts
<p>she did not know who the father of her son was. She informed boyfriend 1 of her pregnancy and he denied that he is the one who impregnated her. She then informed boyfriend 2 and who was happy with the prospect of becoming a father and took responsibility and looked after the young woman whilst she was pregnant. When the child was born, she handed the baby to boyfriend 2. When the child turned four years, the mother of boyfriend 1 saw the child, and noticed a strong resemblance with her son. She approached the traditional court and took her son (boyfriend 1) to the court to claim fatherhood". BWP1</p>	<p>other parts of the body. The second step involved palm of the hand examination, looking at the lines on the palms of the hands to see if they match those of the father. The complainant announced the child is her grandson".</p> <p>"The family of boyfriend 2 protested when the complainant confirmed that the child is her grandchild. The presiding officer requested BWPI to assist with the case. BWP1 suggested a formal paternity test and informed the court she will assist the family and help them arrange for the test".</p> <p>"The tests results revealed that the mother of boyfriend 1 was right; the child belonged to boyfriend 1. The family of boyfriend 2 refused to hand over the child. However the <i>Inkosi</i> asked the family of boyfriend 1 to pay compensation to the family of boyfriend 2 for looking after the child and that the family of boyfriend 2 must hand over the child to his rightful family". BWP1</p>
<p><b>Case observation 2: Child abuse</b></p> <p>"In this case a man accused his wife of having an affair and he alleged that he was not the father of the little girl. His wife approached the traditional court to confirm paternity but the way it was handled amounted to child abuse. These cases are common in rural areas. In some cases, there is a motive behind this. Unfortunately children have to suffer from this". BWP2.</p>	<p><b>The restorative justice process:</b></p> <p>"On the day of the hearing the husband brought elderly members of the family to assist him with physical examination to determine paternity. The mother was requested to undress the little girl. This physical examination was awful; it so was embarrassing and the child was crying. I asked <i>Inkosi</i> if he could allow me to address the court".</p> <p>"I informed the court that children have rights and this process is traumatic to the child and hard on the mother, and what is done here amounts to abuse. I asked if the can court allow the mother to dress the girl. I suggested that under the circumstances it will be in the best interests of the child that a formal paternity test be conducted". BWP1</p>

Wojkowska (2006:18) argues that the traditional justice system may be "unsuitable for certain disputes that are important such as domestic violence", and that it does not perform well in such cases. This is verified by what happened to the child as stated in the above narrative. However, given the flexibility of the traditional justice system in this case, and without antagonising the presiding officers, the Bulwer paralegal suggested a diversion from the system to deal with paternity disputes in a way that does not abuse the child.

The paralegal’s intervention is in line with Makec’s (2007:135) observation that due to its flexibility, the traditional justice system may permit experienced persons among the audience to offer advice. He argues that “in this way the public assists the courts in the administration of justice” (p. 135). An interesting observation about the two examples is that the Bulwer paralegal did not stop the proceedings when the little boy was subjected to a traditional paternity test; it was only towards the end that she suggested an alternative remedy. However, she was horrified when the little girl was submitted to the same test. This may suggest gender bias on the part of the paralegal.

### 6.3.3.5 Traditional courts and domestic violence cases

The literature review revealed that domestic violence is a complex issue that has challenged the criminal justice system (Zehr, 2005:31) and is similarly a challenge to the traditional justice system (Williams and Klusener, 2013:287). Rural women have been known to turn to customary law as well as religious authorities and traditional healers when victimised by domestic violence (Weilenman, 2007:91). Among the reasons for traditional courts as a forum of choice is that “they are perceived as cheap, quick and more adjusted to circumstances because they promote reconciliation between people” (Wojkowska, 2006:16). Yet scholars criticise traditional courts as inherently patriarchal and thereby violative of womens’ rights (Ubink and Van Rooij, 2010:5; Kane *et al*, 2006:20).

This section presents and interprets data regarding CBPs observations of domestic violence cases deliberated by traditional courts. The column on the left lists the types of domestic violence cases observed by CBPs while the column on the right shows case deliberations as observed by CBPs. Matrix 6-13 shows that among the types of domestic violence cases reported to traditional courts are emotional, physical and economic abuse.

Matrix 6-13 Handling of domestic violence cases by traditional courts

<b>Domestic violence cases</b>	<b>CBPs’ observations of traditional court case deliberations</b>
<p><b>Case 1: Emotional Abuse</b>            “A pregnant woman was emotionally abused by her partner. She reported the abuse to the traditional court. The partner was invited to come to court; he continued to insult his partner in court by calling her names”. BWP1</p>	<p><b>Case deliberations:</b>            “The <i>Induma</i> (presiding officer) took sides and supported the man. The <i>Induma</i> further remarked that she deserves the treatment. What was she expecting because she chose to “<i>ukukipita</i>” (to be a kept woman) and became pregnant for that matter. Therefore she must accept the insult”. BWP1</p>
<p><b>Case 2: Emotional abuse</b>            “A man was cheating on his wife with another woman</p>	<p><b>Case deliberations:</b>            “She reported her husband’s infidelity to the</p>

<b>Domestic violence cases</b>	<b>CBPs' observations of traditional court case deliberations</b>
<p>from the same village where the couple were residing. The wife heard the rumour from other women from the village. And she heard that the affair had been a source of gossip in the village for some time". BWP2</p>	<p>traditional court. The husband and the girlfriend were called to appear before the traditional court. The discussions were embarrassing to the girlfriend and the husband. They were asked to explain to the court "<i>ukuthi ba bhebhane ka njani</i>". The court asked the girlfriend and the husband to pay compensation to the wife". BWP2</p>
<p><b>Case 3 Physical abuse</b>          "A woman was accused of having a child out of wedlock and of having an affair with a policeman. The source of the rumour was a neighbour, who informed the husband that her friend (wife) confessed to her. The husband responded by beating his wife and chased the wife and the child from their homestead". BWP1</p>	<p><b>Case deliberations:</b>          "The case was referred from the traditional court to the CAO. The woman requested mediation and the outcome was a paternity test, which confirmed the husband was the father. The husband apologised and invited the wife back. But the woman wanted to sue for damages for the humiliation and embarrassment she suffered. The case was referred back to the traditional court for damages. The <i>Inkosi</i> awarded the damages sought but did not sanction the husband". BWP1</p>
<p><b>Case 4 Economic abuse</b>          "A woman came to the advice office to complain that she reported a maintenance matter for the support of her four children to the traditional court. The traditional court proceeding was biased and the court listened to her husband's story and ignored her story. The reason, the client said, is because one <i>Induna</i> in the council is related and is a friend of her husband". BWP1</p>	<p><b>Case deliberations:</b>          "The <i>Induna</i> informed the court that her husband could not tell a lie because he is a friend of her husband; he knows everything about the couple. The woman complained about lack of privacy, people who have come for their cases sit in the room and listen to other people's matters". BWP1</p>

Narrative presented in matrix 6-13 suggest that women who have suffered various forms of domestic violence do approach the traditional courts for relief. Moulton (2005:19) argues that, if implemented in accordance with customary law, the services of traditional courts better meet women's needs than the criminal justice system. The data both support and contradict this assertion. However, it is important to note that cases 1 – 4 provide a clear picture of how cases of domestic violence are dealt with in traditional courts. At the same time, according to the paralegals, this does not mean that there are no positive stories of domestic violence cases having been successfully dealt with by traditional courts.

Data in matrix 6-13 further indicate that women are not given an opportunity to be heard in traditional courts. Apparently traditional courts sometimes fail women and can be oppressive and discriminate against women. Ubink and Van Rooij (2010:5) argue that the customary gender perspective may "leave many women resigned to being treated as inferior as a matter of course, with no alternative but to accept their



situation”. Wojkowska (2006:20) argues that the traditional justice system does not work in resolving “disputes between parties who have very different levels of power and authority”, as is the case with the cases discussed in matrix 6-13.

### 6.3.3.6 Views of paralegals on domestic violence cases being handled by the traditional courts

The community-based paralegals themselves give counter arguments as to whether traditional courts should handle domestic violence cases. Narratives in this regard are presented in matrix 6-14. Paralegals also complain about certain aspects of the TCB.

Matrix 6-14 Views of Bulwer paralegals on whether traditional courts should handle domestic violence cases

Arguments against traditional courts handling domestic violence cases	Arguments in favour of traditional courts handling domestic violence cases
“They are biased towards women; they do not listen to women’s stories. They humiliate women; women’s stories are not taken seriously and women’s rights are undermined”. BWP2	“Traditional courts could be an appropriate forum for handling some cases of domestic violence; there is a potential that with training, they could protect the rights of women”. BWP1
“They should not handle cases of domestic violence that involve physical violence”. BWP1	“They must be training organised for traditional courts’ presiding officers and their councils, “ <i>uMkhandlu</i> ” on gender, and to raise their awareness of human rights, to stop human rights abuse at the traditional court”. BWP2
<p>“They should not preside over rape cases at all”. BWP1, BWP2</p> <p>“Only advocacy on the ground by paralegals with traditional leaders, as we are currently doing will bring about change that we need as women. We have not thoroughly engaged with the TCB Bill nor attended any consultation around the Bill”. BWP1, BWP2</p> <p>“The <i>Inkosi</i> and <i>Induna</i> mentioned during the dialogues that they did not attend meetings called to discuss the TCB”. BWP1</p>	“We conducted training recently with <i>Amakhosi</i> on the Domestic Violence Act and Sexual Offences Act. We hope to see some changes”. BWP1 and BWP2

According to narrative from paralegals, the way traditional courts handle domestic violence does not seem to strengthen relationships; instead, it enforces the notion that women are not equal to men. In other words elements of patriarchy exist in traditional courts (Kane *et al* 2005:11).

#### 6.4 Chapter Summary

In this chapter, the context of the Bulwer CAO was presented including the geographical location of the Bulwer sub-local area and socio-economic conditions of CAO service beneficiaries. The results of data collection were segmented into three sections. The first section provided results of secondary quantitative data comprised of descriptive statistics. The descriptive statistics were concerned with creating a better understanding of qualitative data rather than statistical inferences. The quantitative data, presented in Figures 6-3 to 6-6 showed the number, types and outcomes of cases handled by CBPs. These figures further demonstrated that CBPs are resolving domestic violence disputes using both the restorative justice approach and Protection Orders issued by the courts to access justice depending on choice exercised by complainants. The highest numbers of cases are resolved through mediation.

The other two sections presented qualitative data. One section presented narrative from interviews of paralegals and a focus group of service recipients. The other section highlighted data that demonstrate linkages between the traditional justice system and CBPs. Matrix analysis and interpretive principles were used to interpret data in relation to narrative and the literature. Matrix 6-1, which was co-created by CBPs and the researcher, presented mediation procedures and processes as explained to the researcher by CBPs. Matrices 6-2 to 6-8 presented a comparative analysis between narrative from CBPs and from focus group participants that shed light on perceptions regarding, for example, interaction with the formal and informal justice systems, the need for CAOs and the role of CBPs in CRJ. Matrices 6-9 to 6-14 provide evidence that Bulwer paralegals are promoting access to justice not only within the criminal justice system and through CRJ but also within the traditional justice system in collaboration with local power structures. Therefore CBPs work across multiple legal systems. In this chapter, data also showed whether CBPs believe that traditional leaders and traditional courts should handle domestic violence cases before the chapter concluded.

## **Chapter 7: The Case of Ixopo Community Advice Office**

### **7.1 Introduction**

The previous chapter presented the context of the Bulwer Community Advice Office (CAO) and the findings from the quantitative and qualitative data. This chapter explores the context of the Ixopo CAO as well as the findings from the secondary quantitative and primary qualitative data. The quantitative data entails case intake, and the number and types of cases handled by CBPs between 2009 and 2011. The qualitative data are divided into two sections. The first covers qualitative data derived from the interviews with paralegals and the focus group discussions with service recipients. These data relate to the formal justice system (Domestic Violence Act) and the informal system of community restorative justice (CRJ). The second section covers qualitative data that reflects the interaction between CBPs and the traditional justice system. The data are discussed with reference to the literature reviewed.

### **7.2 Context of the Ixopo Advice Office**

#### **7.2.1 Location of the Ixopo community advice office**

Established in 2000, this CAO is situated in the rural town of Ixopo in the Sisonke Municipal District in the Midlands of KZN. The municipality covers a geographic area of 3,597 sq. km, and has a population of 209 517. People from surrounding areas converge on Ixopo for their shopping, health and other needs. The CAO serves rural and traditional areas, all of which are under *Amakhosi* and *Izinduna*. The Ixopo advice office is run by two CBPs.



Figure 7-1 Location of Ixopo community advice office (Source: UKZN Dept. Geography)

### 7.2.2 Socio-economic conditions of service beneficiaries

Figure 7-2 shows clients' social and economic backgrounds and the needs they approached the Ixopo CAO with between 2009 and 2011. During this period, only 13% of the office's 2 587 clients were employed, 69% were unemployed, 11% were pensioners and 6% were students. Sixty-two percent of the clients sought help with cases relating to domestic violence, while 26% asked for legal advice regarding pensions, death benefits, grants and other financial claims.

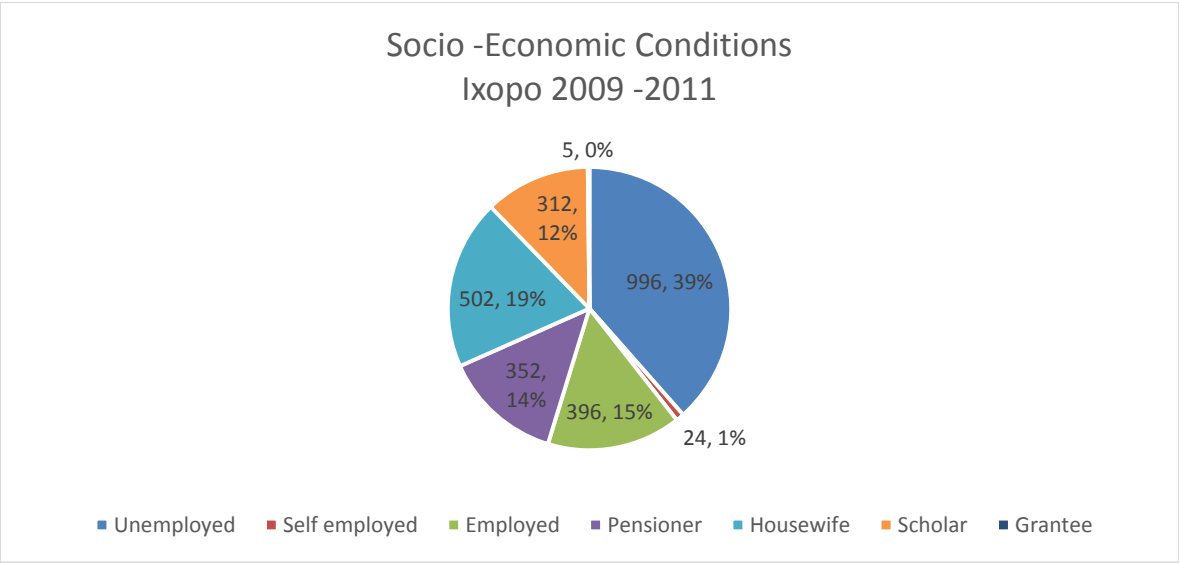


Figure 7-2 Socio-economic background of Ixopo clients

7.3 Results of Data Collection

7.3.1 Quantitative data

This section begins with a description of statistics on case intake followed by an indication of whether domestic violence cases were handled through CRJ or the criminal justice system.

7.3.1.1 Case intake

The statistics on case intake are viewed in conjunction with the qualitative data yielded by interviews with the CBPs and survivors of domestic violence who participated in the focus groups. A case often involves two or more clients; for example, in cases that involve the restorative justice approach, whatever the nature of the problem, paralegals tend to involve family members and their extended network. A total of 2 388 cases were recorded from 2009 to 2011. The graph shows the proportion of domestic violence and other cases.

In terms of age and gender, from 2009 to 2011, 67.5% of the clients were female and 22.5% were male. The biggest problem for adult females that approach the Ixopo CAO is domestic violence. Similar to the situation in Bulwer, women make use of the services at least three times more than men. The statistics also reflect the correlation between case categories and gender, and between target population groups by gender and case category. As in Bulwer, it was not possible to draw these correlations specifically for domestic violence cases due to time constraints; the available data combined all categories.

A hundred and forty physically disabled clients visited the centre between 2009 and 2011.

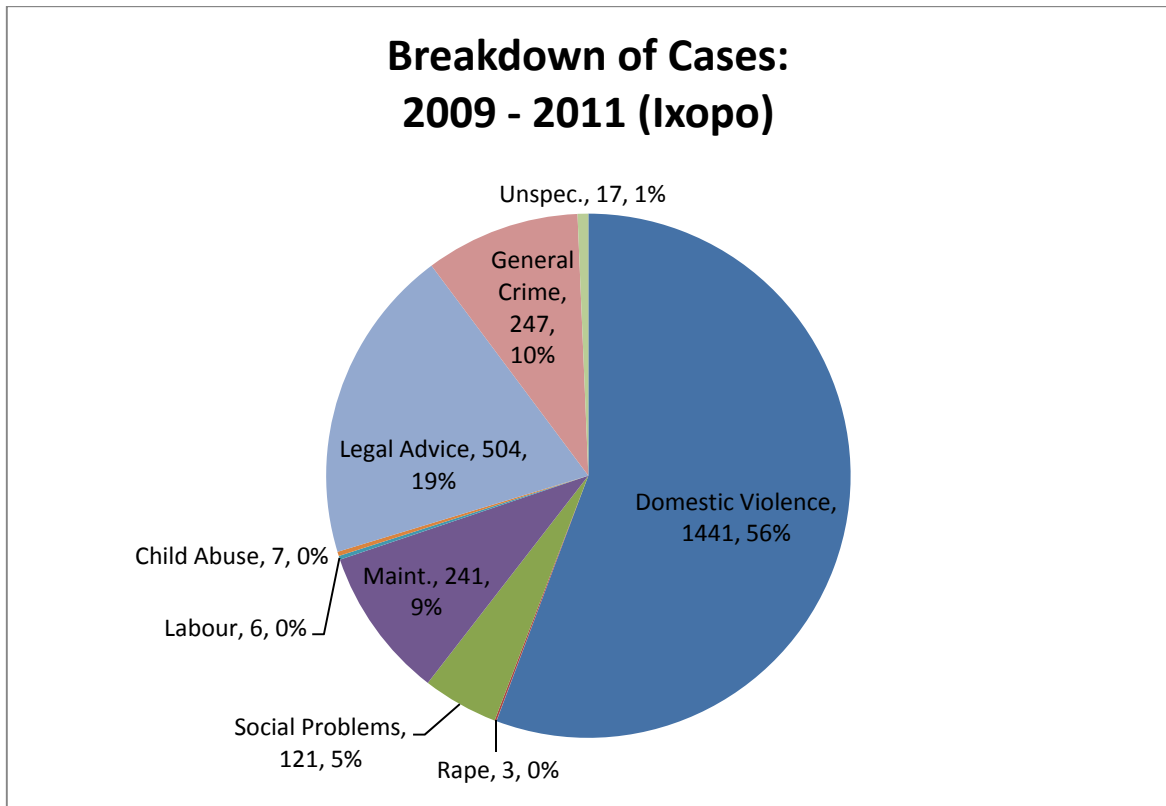


Figure 7-3 Number of cases recorded in Ixopo, 2009-2011

Figures 7-3 and 7-4 indicate that the majority of cases handled concern domestic violence and the highest number of a single category of service recipients are women. Domestic violence is further discussed below.

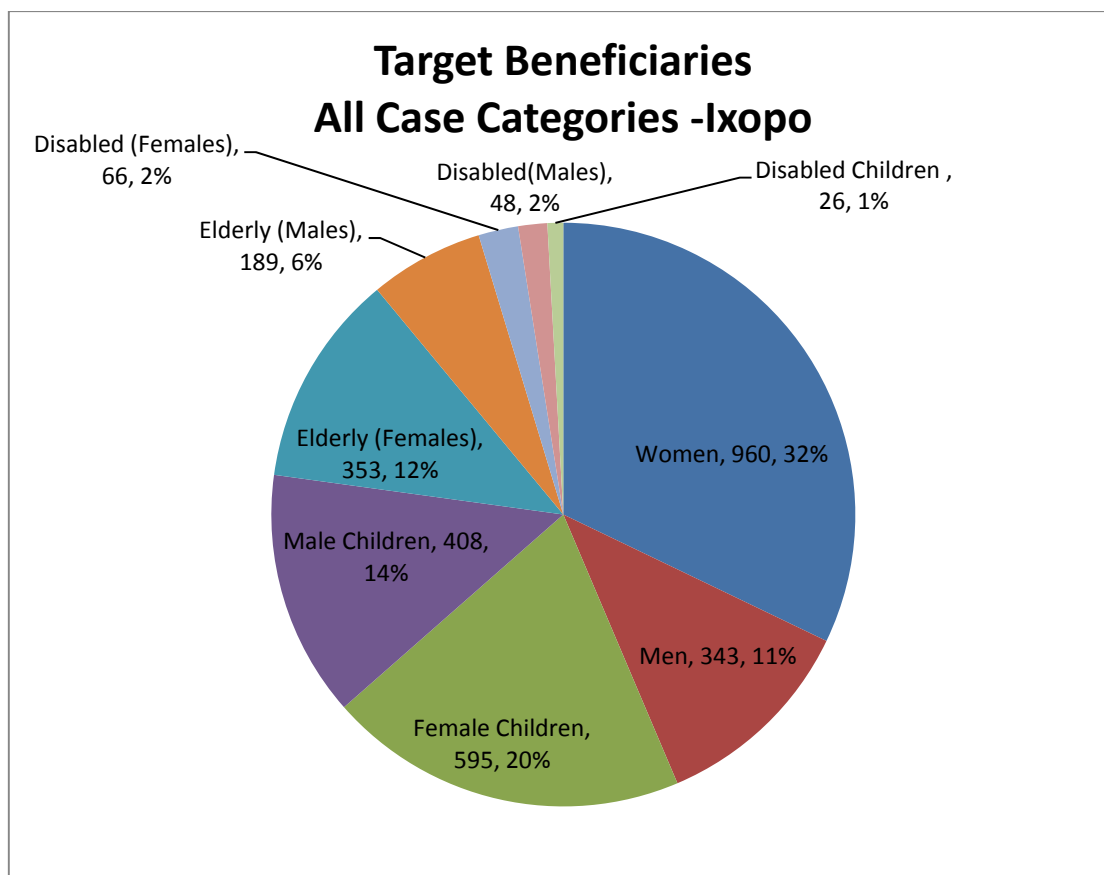


Figure 7-4 Target beneficiaries for all case categories in Ixopo (2009 – 2011)

#### 7.3.1.2 Domestic violence

As Figure 7-3 indicates, domestic violence is the most prevalent problem handled by the Ixopo CAO, accounting for 56% of all cases from 2009 to 2011. According to IXP1 and 2, such violence was often exacerbated by unemployment and alcohol abuse. The paralegals conducted VOM to address domestic violence and helped those who chose the court route with Protection Orders. Chopra and Isser (2012:345) suggest that women “seek alternative remedies that are more in line with their socio-economic realities”. The next biggest category was legal advice on issues such as obtaining identity documents and birth certificates as well as financial entitlements such as pensions.

The number of domestic violence cases increased from 435 in 2009 to 511 in 2010 and decreased slightly to 495 in 2011. IXP1 and IXP2 attributed this increase to people’s greater willingness to report such violence and knowledge of how to do so. Only a small number of victims chose to apply for Protection Orders, in

which case paralegals help them to fill in the form and explain how they work. Others prefer mediation, and 87% of mediations are recorded as successful for the victim.

IXP1 and IXP2 explained that the high case intake in Ixopo is the result of the police, social workers, and courts referring all cases that they are unable to deal with. “Domestic violence cases are high, because these stakeholders refer all cases of domestic violence to the Ixopo CAO” (IXP1 and IXP2). These paralegals added that they find the dynamics of such cases very challenging. Initially they felt that their partners were undermining them, or were too lazy to do their job by processing these cases. These paralegals now understand that it is because such cases require unique skills that are possessed by CBPs. The Ixopo community-based paralegals believe that the widespread domestic violence in Ixopo and surrounding areas is exacerbated by the attitudes of some men towards women. There are men who still believe that women should stay at home and concentrate on housework. This makes it difficult for women to find work and increases their economic dependence, making it harder to leave an abusive partner.

Domestic violence cases handled at the Ixopo CAO include physical, emotional, economic and verbal abuse in a domestic relationship. The majority of cases are between spouses, and are dealt with through both mediation and the court process. The mediation process investigated is VOM, which was discussed in the literature review.

#### **7.3.1.3 Community restorative justice process**

Of the 435 domestic violence cases handled in 2009, 322 were resolved through mediation and 303 of these cases were recorded as having been successfully concluded (Smithers *et al*, 2009-2012). Success is defined as a case where paralegals have conducted mediation and a follow-up after a month or more and where both parties as well as the paralegal express satisfaction with the outcome (Freedman and Kubayi, 2008). Figure 7-5 shows the percentage of cases successfully mediated.



In 2010 the office dealt with 511 cases of domestic violence; of these, 465 were mediated, with 398 mediations recorded as having been successful. In 2011 there were 495 cases of domestic violence, with 366 dealt with through mediation, and 298 of these recorded as successful. In total, 1 441 cases of domestic violence were handled from 2009 to 2011. Of these, 1 153 were mediated, representing 80%, and the paralegals reported a mediation success rate of 87%. Figure 7-5 shows the proportion of cases resolved

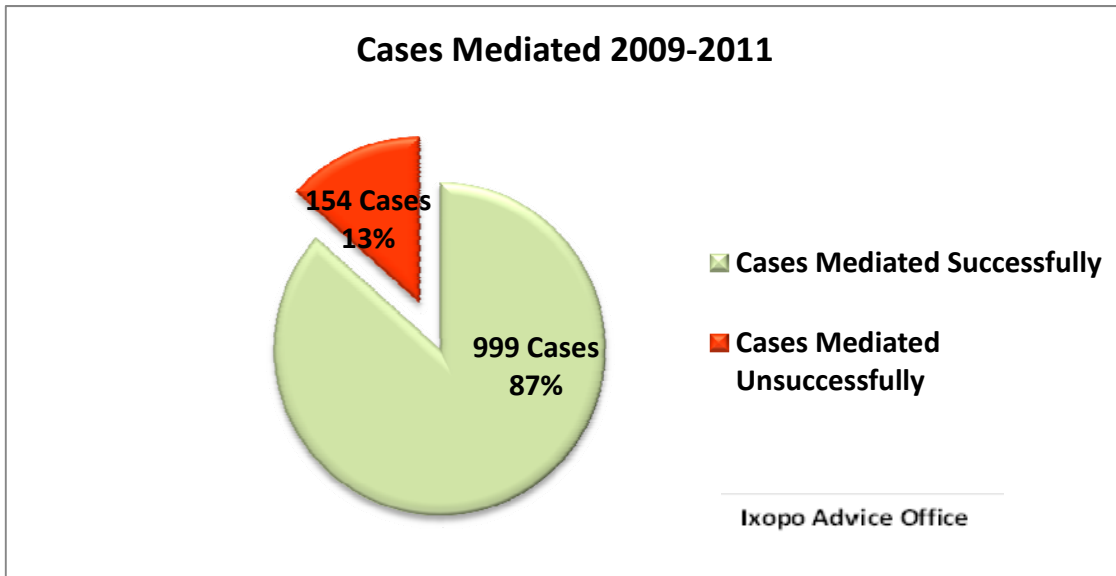


Figure 7-5 Domestic violence cases mediated at Ixopo

through mediation, and how many were successful. The unsuccessful cases were referred to the court for Protection Orders. The statistics show that the mediation approach has been popular and successful in cases of domestic violence, indicating that CBPs are resolving domestic violence disputes in a manner that preserves the relationship and the dignity of both victim and offender.

According to the paralegals at the Ixopo CAO, the majority of clients who choose mediation are married. They go to the police station not to open a case but to ask the police to issue a warning, and do not know about or want Protection Orders. The police take a statement and send the client to the advice office with an affidavit; the clients usually request mediation.

#### 7.3.1.4 Protection orders

According to the information obtained from the Ixopo CAO and verified by the records kept by the CCJD in 2009, 73 cases were recommended for Protection Orders and of these 65 Interim Protection Orders were granted and 59 were finalised or confirmed. In 2010, 43 cases were recommended for Protection Orders; 39

Interim Protection Orders were granted and 35 were finalised or confirmed. In 2011, 81 cases were recommended for Protection Orders and of these 73 Interim Protection Orders were granted and 69 were confirmed or finalised.

In total therefore, 197 cases were referred for a Protection Order during this period, constituting 14% of domestic violence cases. Of these, 177 (90%) were granted an Interim Order, and 163 were later confirmed.

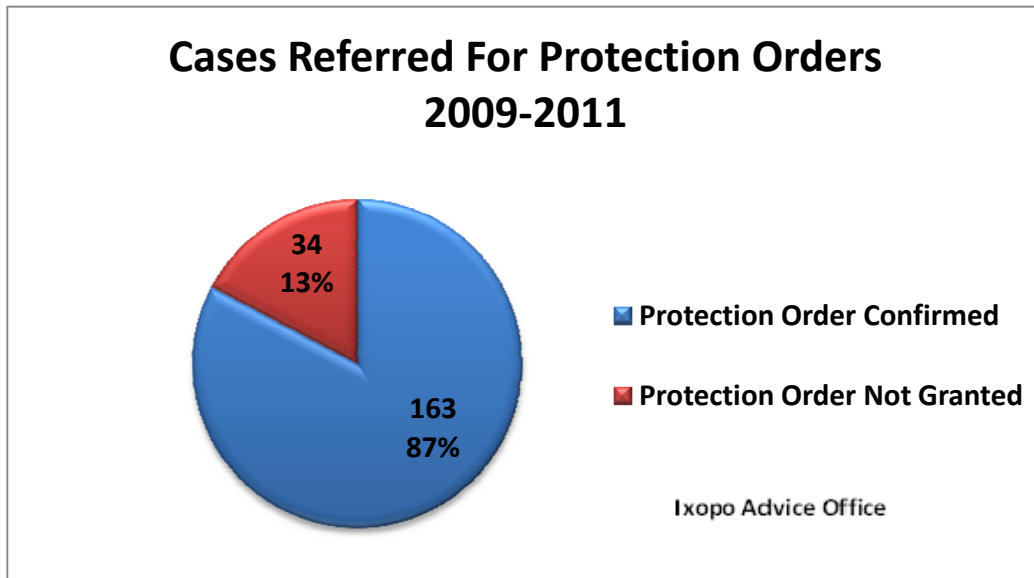


Figure 7-6 Protection order referrals for clients in Ixopo

Figure 7-6 shows the number of cases referred to court for Protection Orders, a small number compared to the cases mediated. This represents court time saved by the paralegals that are able to mediate the majority of cases presented at the CAO. The success rate is high, indicating that when the paralegals determine that a case requires court intervention, their assessment is confirmed by the court decision in granting the Interim Order. Follow-up by the paralegals reveals that, 163 of the Interim Orders were finalised, a rate of 83%.

The majority of cases of domestic violence start with people approaching the advice office directly. The cases involving Protection Orders involve assault, and by the time they are referred to court the victim is ready to apply for a Protection Order. According to the paralegals, the majority of people who apply for Protection Orders are young people who are cohabiting, the majority of whom live in the squatter settlements near the town of Ixopo. Those that are not granted do not meet the requirements of an order.

The following matrices carefully retain the voice of study participants while briefly discussing the responses in relation to the literature, research objectives and research questions. This discussion is further explored in

chapter 10, which provides a comparative cross-case (non-doctrinal) analysis of the social science data followed by doctrinal analysis, which integrates domestic violence law and case precedents with the findings from the social science data.

A comparison of the number of cases successfully mediated, and the number of Protection Orders confirmed, as well as referrals of cases of domestic violence from criminal justice institutions such as the police and the courts in Ixopo, measures the impact of the paralegals on the lives of victims of domestic violence. In the same way as Bulwer, the statistics show that access to justice for rural women is enhanced by the work of CBPs.

Domestic violence in Ixopo is clearly a problem; the number of new cases is increasing each year, and it is the dominant problem that clients present with. At the same time, the paralegals believe that the main reason for the increase in the number of cases is that the reporting of domestic violence is increasing, rather than the number of incidents. Furthermore, follow-ups by paralegals show an increasing rate of long-term success of mediation in reducing violence.

### **7.3.2 Qualitative data from interviews of paralegals and a focus group of service recipients**

As undertaken in chapter 6, this section of chapter 7 presents data adduced from paralegals and focus groups. It is organised under sub-headings related to (1) mediation procedure and process administered by paralegals, (2) access to justice, (3) use of the DVA in Ixopo and (4) the role of the Ixopo CAO in CRJ. One or more matrix displays narrative obtained during data collection. There is a separate matrix on mediation procedure and process for each case study. These particular matrices were co-created by the researcher and the CBPs who participated in the study. In the column on procedure, the researcher devised the list based on interview responses, and some are devised from the list of approaches to mediation programme design discussed by Landrum (2011:448). However, in the column on process, the researcher makes every effort to preserve the voices of the respective paralegals. Community-based paralegals at different support centres often provided the same or similar descriptions of procedures and responses on process. A coding system is used to identify the respondents and a particular CAO. The code starts with the first letter of the CAO followed by a number – for example, IXP1 for a paralegal interviewed in Ixopo, IXP2 for another paralegal in Ixopo. The code for focus group narrative is IXFG. The coding process is the same for the other cases in case study chapters 8-9 with identifiers of CAOs changed as appropriate. The matrix display of interview responses regarding mediation procedures and processes is followed by a series of matrices that are aligned with the sub-headings and that show relevant narrative from interviews and focus groups from this case study. Throughout the series of matrices (7-2 to 7-8), the column on the left depicts narrative from focus

group discussions and the column on the right, narrative from paralegal interviews. In other words, each case study chapter displays, describes and interprets data from the paralegals and CCJD service recipients at a single CAO, while chapter 10 uses cross-case synthesis (Yin, 2009:156) to compare and contrast the results across paralegals from all four CAOs and respective service recipients across all advice offices.

### 7.3.2.1 **Mediation procedures and processes in Ixopo**

Matrix 7-1 displays the procedure and process for the CRJ approach to domestic violence cases as explained by the Ixopo paralegals to the researcher. The Ixopo CAO has the highest annual case intake of the CCJD's 15 offices; it is always full. The researcher interviewed one paralegal while the other was busy with clients and thereafter the other took over in order that her partner could be interviewed. Some of the responses from the two paralegals are the same. The mediation process investigated is VOM, discussed in chapter 3. The matrix display of interview responses on mediation procedures and practices is followed by a matrices that display interview and focus group narrative, which demonstrate how focus group participants and paralegals independently and comparatively responded to the study inquiry. As with the Bulwer case study, subsequent matrices are organised under the sub-headings of (2) access to justice, (3) use of the DVA and (4) use of the restorative justice system by the CAO.

Based on the information detailed in matrix 7-1 below in similar fashion to Bulwer, the Ixopo CAO's restorative justice initiatives focus on building relationships. The successful resolution of their clients' domestic disputes illustrates that CBPs' paralegal training, personal skills and experience, combined with their mediation approach is effective in the resolution of domestic violence cases, and has advantages over the formal criminal justice system's approach to domestic violence. The results from the quantitative data and the procedures and processes employed indicate that, as with the Bulwer office, the restorative justice intervention by Ixopo CBPs is appropriate for the majority of cases of domestic violence. However, Ixopo CBPs contend that domestic violence cases that involve physical harm should be dealt with by the criminal justice system. This point is supported by the literature by Hudson (2002:629), for example, who indicates that "formal criminal justice remains the recognised way of demonstrating that society takes something seriously". Stubbs' (2010:985) observation that "victim and offender interests can be adequately addressed through restorative justice" even in domestic violence cases, is evidenced by narrative in matrix 7-1. In addition narrative in matrix 7-1 brings to bear a number of theories and themes discussed in the literature review chapters such as the theory of moral disengagement (Barton, 2005:5) and the theory of universal pragmatics and communicative action (Barrett, 2013:337). Themes from the literature can be drawn from narrative of CBPs such as offender responsibility (Edwards and Haselet, 2011:901-902); opportunities for

victim choice (Morris and Gelsthorpe, 2003:129); exercise of victim voice and participation (Green, 2011:176); lack of guarantee of independence of mediation facilitators (Cappelletti, 1992:35); and the significance of cultural competency of facilitators (Vorster, 2001:54) amongst others. The fact that the Ixopo CAO is located in the magistrate’s court seems to offer leverage to CBPs who use the pending issuance of a PO from the court next door to encourage offender participation in the mediation encounter.

Matrix 7-1 Mediation procedures and processes for Ixopo

<b>Mediation procedures and processes for Ixopo</b>	
<b>Procedure</b>	<b>Process</b>
<p><b>Referrals</b> The paralegals take referrals from the police, courts, traditional courts, social welfare, and health workers. Some seek the process on their own after attending educational workshops, some have seen or read our pamphlets, while relatives, friends and neighbours refer others.</p>	<p>“Police refer cases where a victim indicates that she wants the offender to be given a warning; she does not want a Protection Order. Some victims come with affidavits from the police station, which is when we realise that the police are experiencing challenges with writing affidavits. We approach the station and show them how to write an affidavit.” IXP1</p> <p>“Our office is based at the court, and the magistrate refers cases of domestic violence for mediation to our office, when the victim chooses not to go ahead with the Protection Order.” IXP2</p>
<p><b>Voluntary participation</b> Participation by the person seeking mediation is voluntary.</p> <p>If the victim chooses mediation, the office contacts the offender, determines whether he agrees to participate and schedules a hearing date and time that is suitable to both.</p>	<p>“We always inform the offender that he is not forced to participate in the mediation. However, his non-participation means the matter will be referred to the court.” IXP2</p> <p>“I inform the offender that it is up to him to decide whether he wants to participate or not. But he must note that the police cells are just a door away, a magistrate’s court is also in the same premises and we are lucky in Ixopo that the correctional facilities are also less than 100 meters away. So his matter will not take long to be resolved by the court. It is very interesting to observe the reaction; we know it is a subtle coercion.” IXP1</p>
<p><b>Case intake</b> A preliminary interview helps us to make an assessment of whether to take a case or not. Paralegals use case intake forms, and refer those that are not suitable for mediation to appropriate agencies.</p>	<p>“In the preliminary interview with the victim we explain the court approach and the mediation approach. The victim makes a choice.” IXP1, 2</p> <p>“The offender comes per invitation. Because Ixopo is a rural area, calling letters are given to the victim to give to an <i>Induna</i> (a chief’s counsel) in the area who serves the letter to the offender. Sometimes the victim prefers that we call the offender, because she does not want people in the area to know her private affairs and that she is an abused woman, and some do not trust that the <i>Induna</i> will be discreet”. IXP1</p>
<p><b>Counselling</b> Paralegals provide counselling sessions for the victim prior to the mediation to reduce the victim’s fear and anger towards the offender.</p>	<p>“Counselling is done on the first visit, in a situation where the victim is crying or cannot even speak because of anger. Sometimes the alleged offenders need it, especially when both of them are so angry with one another and it is impossible to proceed without calming both down”. IXP1</p> <p>“Sometimes the victim has gone through so many traumas that you do not know where to start. Sometimes listening to the story, you realise that it is important to provide counselling to stabilise the victim. I have had instances where a victim will say, ‘Thank you very much for the counselling you have provided; now I know what to do with my situation, I will come back, if not you will know I have sorted out the problem’.” IXP2</p>

<b>Mediation procedures and processes for Ixopo</b>	
<b>Procedure</b>	<b>Process</b>
<p><b>Case selection</b> They are several factors that are considered in deciding whether a participant's case is suitable for mediation.</p>	<p>“We look at the characteristics of the offender, such as if he would come for mediation and whether he owns a gun, the level of fear from the victim, if she is afraid of the offender.” IXP1</p> <p>“We do not take the case further if we discover that the victim's story has changed from when she initially came to report.” IXP2</p>
<p><b>Ground rules and responsibilities</b> Paralegals establish ground rules for the victim and the offender, especially to listen to each other and take turns in speaking.</p>	<p>“We tell the victim and the offender that they must respect each other, with no interruptions, that what is going to be discussed here is confidential and therefore they should feel free to talk. And lastly cell phones must be off or otherwise the process will be long.” IXP1</p> <p>“We introduce ourselves, it is interesting to observe the offender's reaction when he sees that the person who called him is a woman - immediately the facial expression changes to become unfriendly.” IXP2</p>
<p><b>Telling their Story</b> The victim is given an opportunity to tell her story of how the crime affected her.</p>	<p>“I am a patient person, I allow the victim to talk and discuss past events and how hurt she is by the offender, and the offender equally is given an opportunity to respond. Sometimes the emotions become raised and I leave them to argue until they are tired.” IXP1</p> <p>“I ask participants to take a 10 minute break, when I notice fatigue and come back ready to start again, it works because then they have an opportunity to reflect on the process and what is being discussed.” IXP2</p>
<p><b>Mediation logistics</b> If the victim chooses mediation, paralegals contact the offender, determine whether he agrees to participate and schedule a hearing date and time that is suitable to both.</p>	<p>“Even though we have a high intake of cases, we can handle four mediations a day. One person conducts mediation whilst the other is consulting, assisting people who are coming in.” IXP1.</p> <p>“Some mediations are shorter, especially where the offender, has seen that he was wrong. Others can take between 1hr 30 minutes and two hours. We do not conduct mediations on a Monday and Friday, as they are the busiest time for case intake.” IXP2</p> <p>“Offenders and victim have a face-to-face meeting. The process is informal, when they are talking I note down points. When they are done, I raise each point and let them discuss the issue further. There are times when I request to meet with each person separately”. IXP1</p> <p>“I do not miss an opportunity to remind the offender that he is given a gift by his wife of reconciliation, therefore he must appreciate the opportunity provided. This works like magic”. IXP2</p>
<p><b>Solutions from each party</b> Paralegals do not take decisions for their clients; they are the ones who come with a solution. The paralegals are there to guide the process and help them to communicate.</p>	<p>“The victim and the offender come with the solution. The reason why victims choose mediation is because she still wants to live with the offender. I have observed that in turn that is what the offender desires as well - to continue with his relationship with the victim.” IXP1</p> <p>“We help the clients to learn to communicate. If the clients are shouting at each other, we meet with them separately and explain that it is in their interest to be able to communicate and listen to one another. During the mediation I inform the parties that the solution will come from them not me.”</p>

<b>Mediation procedures and processes for Ixopo</b>	
<b>Procedure</b>	<b>Process</b>
	IXP2
<p><b>Discussion of solutions</b> The office assists the victims and the perpetrators to discuss their problem with the aim of a mutually agreeable settlement.</p>	<p>“In all the cases we handle, the offender apologises, even the victim apologises for the part she had played which brought them to the Centre.” IXP2</p> <p>“Listening to the parties discussing their problem, it is amazing to discover that beautiful relationships could actually end when they are not supposed to, and that parties could not communicate before it reached a level where they have to involve a third party.” IXP1</p>
<p><b>Victim safety</b> The location of our office provides some measure of security. It is based at the magistrate’s court, where there are police officers. Offenders are afraid to be violent because of fear of arrest.</p>	<p>“I just tell the offender that the police cell is right here, and that I am going to come visit their home and he better start learning to behave in a civil manner towards his wife. I say to the man that it is not the victim that is going to open a case; it is yourself because your wife has been considerate by bringing you here. This has worked well; we have not had a situation where our client was hurt, after mediation.” IXP1</p> <p>“At the end of the mediation, we inform the offender that we are going to make a follow-up to find out how things are going. We think this could be a deterrent from further violence.” IXP2</p>
<p><b>Victim/ offender satisfaction with procedure and process</b> As soon as the men see the paralegals are women, they show a negative attitude. They bring their gender stereotypes to the mediation process, and some are so prejudiced against women, but at the end of the mediation they are all smiles.</p>	<p>“The people who have been through our mediation are so impressed with the procedure and process, they have praised our professionalism during mediation.” IXP1, 2</p> <p>“The offender will say, ‘I am so glad my wife brought me here instead of the court, even myself I am empowered’.” IXP1</p>
<p><b>Citizen satisfaction with agreement</b> The paralegals ask if they are happy with their agreement before they leave our office.</p>	<p>“We tell them that we make follow-ups to find out if they are honouring the agreement. What is good about this process is that the agreement comes from the victim and the offender.” IXP1, 2</p>
<p><b>Case follow-up</b> Parties are contacted by telephone and home visits; they are asked if they were satisfied with the hearing, whether it was conducted fairly. They say everything they want to say.</p>	<p>“We follow up telephonically and through home visits. In Ixopo villages are far apart, and we only conduct home visits in special cases, especially where the abuse occurred for long time, because we need to satisfy ourselves that offender indeed has changed his old habits and behaviour towards the victim.” IXP1</p> <p>“Mediation has proven that it can break a circle of abuse.” IXP1, 2</p>
<p><b>Refusal to participate or comply with agreement</b> The office has no authority to enforce the agreement, but has credibility because it is located at the magistrate’s court. Most of the offenders abide by the agreement because they would rather avoid going to court.</p>	<p>“Sometimes offenders attempt to walk out of the mediation, but they always change their mind when we tell them that they are free to leave, but we will assist the victim to open a case of assault, and we have said that on many occasions that the victim is here out of her loyalty to you, has done the offender a favour by not reporting clearly a criminal act that is sanctioned by the law. They do not dare to challenge us because we are right there at the magistrate’s court.” IXP1</p> <p>“An offender once walked out of mediation, five minutes later, he came back</p>

<b>Mediation procedures and processes for Ixopo</b>	
<b>Procedure</b>	<b>Process</b>
	and apologised for walking out and he said he feels ashamed because he realised he was treated with respect and his response was terrible towards the paralegal and that what he is about to learn will make him a better person for his wife.” IXP2
<p><b>Unsuccessful mediations</b></p> <p>The parties refused to compromise or reach an agreement, deciding either to separate or get a Protection Order.</p>	<p>“Based on our experience, unsuccessful mediations sometimes are blamed on the victim, because we do not allow lies, and we deliberate on facts and the truth. We do not take sides, we look at both angles of the conflict and the underlying issues that have caused the conflict, and if the victim has a part in that conflict we point that out.” IXP1</p> <p>“The mediation is unsuccessful because the victim and offender refuse to accept responsibility. Our mediation is victim and offender-centred. It is our job to assist the woman to take the responsibility as well, she cannot hit the offender with a pot and not expect an immediate impulse reaction.” IXP2</p>
<p><b>Access to justice</b></p> <p>Mediation is a preferred approach with clients.</p>	<p>“Most of the victims of domestic violence just want the violence to stop. They ask us to talk to the offenders and tell them to stop beating their partners. We are increasing access to justice for victims. People in our community respect the ‘brown envelopes’ that are our calling letters. They instil fear in offenders.” IXP2</p> <p>“The problem with access to justice is that people are not confident to seek assistance from formal structures of justice because it does not work for them.” IXP1</p> <p>“For ordinary people, access to justice means access to free legal services.” IXP2</p>
<p><b>Factors contributing to success</b></p> <p>The procedure enables the victim and the offender to deal with underlying issues holistically. The offender comes to realise that he did not know how much he hurt the victim. The parties bring to the fore incidents that happened a long time ago.</p> <p>People who come to the office have been seen by other people but with no success. Mediation works and is definitely not cheap justice. If it did not work, the office would have stopped mediating domestic violence cases a long time ago.</p>	<p>“We are familiar with cultural practices and customs in our community and are able to address cultural issues contributes to our success. It is an advantage that we are based at the magistrate’s court. We give people time; our mediation process is not rushed, in some instances a mediation process takes several sessions.” IXP1</p> <p>“We make sure clients are free to talk and cover everything that is of concern in the relationship. Language is very important. As a mediator who speaks the same language as my clients, I could quickly grasp the hidden meaning in words that are spoken between the offender and the victim.” IXP1</p> <p>“During mediation we talk about the law (how the law prohibits domestic violence) and then we talk about traditional Zulu practices, how domestic violence is sanctioned there as well.” IXP2</p> <p>“I think I have a gift to do mediation, I have 12 years’ experience doing this. Mediation is not an easy approach; you need to give your clients time and full attention for it to succeed. I put myself at a level where they become comfortable with me, but let them know that I am there to help.” IXP2</p> <p>“If you do not know the culture of the people you are dealing with, you will not understand why the said culture should cause conflict, and should be something that caused them to fight over. Combining this with my knowledge of the law is what makes our mediation a success.” IXP1</p>



<b>Mediation procedures and processes for Ixopo</b>	
<b>Procedure</b>	<b>Process</b>
<p><b>Appropriateness of mediation in domestic violence</b></p> <p>Women come to our offices and choose mediation. Mediation ties in very well with our traditional system of justice, as they both promote reconciliation.</p>	<p>“Mediation is very effective and it works, especially for married couples. As soon as we inform the offender of the reason why he was called to the Centre we get full cooperation. The relief on their faces when they learn that they are not going to be arrested, because their wives have decided against that action, is obvious. They are ready to change their bad habits of treating their wives like minors.” IXP2</p> <p>“Serious cases of domestic violence that involves serious assault should be dealt with by the criminal justice system but women come to our offices and choose mediation.” IXP1</p>
<p><b>Record-keeping</b></p> <p>The paralegals keep case registers, record cases onto an electronic database, have an index book of cases, and intake forms.</p>	<p>“We keep case registers, a database and index book. Follow-ups are done through home visits and by telephone calls.” IXP1, 2</p>
<p><b>Post-mediation</b></p> <p>Paralegals ask clients to see if the problem is continuing, and encourage them to come back, in which case they assist in taking further steps such as further mediation or a Protection Order.</p>	<p>“The way we work, people highly value our work, we take public transport to go and visit victims in their homes, we are always warmly received and they tell us we care, that we are unique service providers. We do not visit everyone, we select based on the seriousness of the case.” IXP1</p> <p>“I sometimes think our selection is biased towards married women, we rarely visit unmarried couples”. IXP2</p>

Matrix 7-1 shows a number of roles of CBPs in CRJ. For example, CBPs undertake deliberations to ensure that the victim, the offender and the nature of the case are ripe for mediation (Hudson, 2002:629). Ixopo CBPs seem to adhere to screening procedures and processes (Umbreit, 2001:26). Interestingly – as interpretative analysis would have it, *Induna* serve calling papers upon offenders to report for the mediation encounter. This feature of CAO system – where the traditional justice system is serving process on a respondent in a mediation case handled by a CAO – does not appear in the literature. Ixopo CBPs use techniques to reverse moral disengagement of offenders – like the offender who abruptly walked out of a mediation session only to see the error of his ways and returning to apologise to the CBP who had treated him with so much respect (Barton, 2005:5, Roche, 2004:10). Another example of the application of this theory to the role of CBPs is the impact on an offender when the CBP reminds him that his wife is “giving him the gift of reconciliation” rather than laying a criminal charge against him.

Another role of CBPs in CRJ is affording sufficient time for victims and offenders to tell their respective stories in their home language with each party listening to the other canvassing the ‘three worlds’ and ‘validity claims’ propounded by Habermas (1984:52, 68) and Barrett (2013:337). This leads to the role of CBPs in giving voice to parties and ensuring participation (Green, 2011:176) – not just for the victim but for

the offender as well. While the literature raises the lack of guaranteed independence and consistency as a problem associated with CBPs (Cappelletti, 1992:35), Ixopo CBPs clarify that they not take sides of either party. Rather, Ixopo CBPs have refused to continue with a CRJ case when the victim is dishonest about her claim. There is strong support in the literature that a hallmark role of CBPs is demonstration of their cultural competence (Robb-Jackson, 2012:12; Sokoloff and Dupont, 2005:51; Van Ness, 2003:173). It is evident from narrative in Matrix 7-1 that one of the reasons that CBPs perform various roles well is because they speak the same home language and share the same culture as the clients that they serve. Data indicate that one of the reasons victims of domestic violence avoid the criminal justice system is because of its cultural incompetence. Yet another role played by Ixopo CBPs is making home visits to ensure that the violence has stopped and communicative action (Barrett, 2013:377) has occurred. This role of CBPs is not reflected in the literature.

While there are other examples that could be discussed as to how narrative in Matrix 7-1 comports with, contradicts or advances the literature on CRJ and CBP, the focus now shifts from the interview data to the focus group data. This section on qualitative data blends data from the interviews with the CBPs and data from the focus groups with survivors of domestic violence. While the interview data are displayed in accordance with the mediation procedure and process, the data from the focus groups are organised according to the focus group questionnaire guide. The researcher drew from relevant CBP interview narrative and matched it with focus group responses regarding access to justice for comparative purposes. Focus group participants were recruited from the community, with members invited to participate on the basis that they had received services from the office. The focus group involved six participants divided into three groups of two in 'break away' style before the six participants responded to the focus group guide as a whole, which was explained in chapter 5. Again, in matrices 7-2 to 7-8, information from the focus group discussions is compared with the data obtained from the interviews with the paralegals.

#### **7.3.2.2 Access to justice in Ixopo**

To McQuoid-Mason (2011:171) access to justice in South Africa is two pronged. On the one hand is access to constitutionally guaranteed socio-economic rights. On the other hand is access to legal advice and legal services. The challenges of accessing justice are increased by poverty and the "remoteness of the law from most people's lives" (Dugard, 2006:266). Matrix 7-2 provides narrative as to how access to justice for rural female victims of domestic violence can be improved. Taken as a whole, focus group respondents believe that access to justice could be improved if matters were heard in private.

Matrix 7-2 Comparative responses on practical ways to improve access to justice for rural female victims of domestic violence in Ixopo

Focus group participants	Community-based paralegals
<p>“In a situation where violence is serious the hearings should be held in private if we decide to go the court route, but definitely it is not our first option.” IXFG</p>	<p>“Most of the victims of domestic violence just want the violence to stop.’ Brown envelopes from our office instil fear in offenders.” IXP1, 2</p>
<p>“Mediation should be part of the justice system, to provide women with choices.” IXFG</p>	<p>“Sometimes we mediate post-Protection Orders, other times we mediate and refer the case for a Protection Order as an additional measure. The mediation deliberation is not ‘one-size-fits-all’, it is tailored to suite each individual case.” IXP1, 2</p>
<p>“If mediation becomes part of the justice system, it will restore confidence in the justice system, but paralegals should be allowed to operate independently with subsidy from government.” IXFG</p>	<p>“Mediation has always been part of our informal justice system. The problem with it in traditional courts is that it the traditional courts are not gender-sensitive; it has its challenges but challenges that can be overcome. Traditional courts require the services of paralegals to guide the process.” IXP2</p>
<p>“Victims of domestic violence should be allowed to participate in the court proceedings as to how the offender should be punished. When we say we do not want to open a case they refer us to the paralegals. We are lucky in Ixopo because of the advice office.” IXFG</p>	<p>“Most victims come to our office with affidavits already completed at the police station. When the police hear the request that the victim does not want the Protection Order but wants the offender to be warned, they refer to our office.” IXP1</p>
<p>“Paralegals and justice must work together; recognise the work of paralegals, because they assist people who are semi-illiterate and illiterate people. The state must subsidise paralegal work without paralegals becoming part of the state.” IXFG</p>	<p>“There should be awareness-raising workshops, especially in deep rural areas.” IXP2                       “More education and consultation with the community around the issue of Protection Orders is needed.” IXP1                      “The informal justice system should be recognised, and the role played by paralegals should be acknowledged.” IXP1, 2</p>

Data presented in matrix 7-2 indicate that victims are not totally against the formal justice system, but recommend that the private-based mediation approach by paralegals be made part of the criminal justice system. While Hoyle (2011:294) advocates for restorative justice operating within the criminal justice system, this is not the proposition from focus group respondents. Instead, respondents think that CBPs should maintain their independence from the formal state apparatus. The developmental role of CBPs is evidenced by narrative calling for community education and workshops that raise awareness of rights (Golub, 2003:303; Fine, 1991:160). Matrix 7-2 further shows that CBPs straddle the criminal justice, traditional justice and informal restorative justice systems (Chopra and Isser, 2012:335; Moulton, 2005:20). Use of multiple legal orders offer choices to victims of domestic violence (Harper, Wojkowska and Cunningham, 2011:179; Presser and Gaarder, 2000:178). However, according to these respondents, use of

multiple justice systems is not as much for the systems to contest each other as Chopra and Isser (2012:335) would have it. Rather, CBPs use multiple justice systems concurrently such as mediation combined with a PO seemingly to broaden choice and benefits for victims.

### 7.3.2.3 Use of the Domestic Violence Act in Ixopo

Matrices 7-3 and 7-4 present the study participants’ perceptions of whether the DVA offers protection from domestic violence. The DVA No 116 of 1998 (RSA,1998a) was framed to provide the maximum protection to those most vulnerable to this form of abuse. However, according to the paralegals, victims are apprehensive of the consequences of prosecution and conviction (Hudson, 2000:255). Women who participated in the focus groups feel that the DVA is not addressing their justice needs. It thus appears that both paralegals and service recipients believe that the DVA is too drastic a measure in responding to domestic violence, although they differ somewhat in terms of what type of domestic violence cases should be resolved through restorative justice.

Matrix 7-3 Comparative responses on the use of the Domestic Violence Act for protection in Ixopo

Focus group participants	Community-based paralegals
<p>“We do not want our husbands to be arrested and lose their jobs.” IX FG</p>	<p>“Women do not want their husbands arrested and lose their jobs. It is difficult to come out of jail and find a job, and they do not want to be responsible for their husband’s criminal record. There is the consideration that he is a breadwinner.” IXP1</p> <p>“Victims are apprehensive of the consequences of prosecution and conviction.” IXP2</p>
<p>“There is no privacy at the police station and at the court. This is what happens when we involve the police, your matter becomes public.” IXFG</p>	<p>“Women prefer mediation because it is private. Even though our office is based at the magistrate’s court, it is a reasonable distance away to provide privacy. There are two offices and a waiting room.” IXP2</p>
<p>“Going to court can lead to divorce and tear the family apart.” IXFG</p> <p>“A Protection Order makes the situation worse, brings tension to the family.” IXFG</p>	<p>“Reporting to the police sometimes leads to divorce. People are not satisfied with the involvement of the police and courts in domestic violence matters. Rural people are generally not comfortable with the justice system, and Protection Orders are worse. They are only happy if they see that I am involved, and I work with the police.” IXP1</p> <p>“Courts do not have time to deal with some of the issues we deal with at our offices; people are confused by the Protection Order and are hostile towards it. The courts take long; women want their problems to be solved as speedily</p>

Focus group participants	Community-based paralegals
	as possible.” IXP2
<p>“The attitude of the police is bad, some are young and do not even know how to talk to an adult woman. There is gender bias, because police at the charge office are males.” IXFG</p>	<p>“They are not using the Act because they are protecting their marriage and their children.” IXP1</p> <p>“A Protection Order is harsh, it is too drastic a measure. Criminal justice is harsh and leaves no room for people who want to remain in a relationship, which is the reason they choose an alternative process.” IXP1</p>
<p>“Our culture is not compatible with the Act. Our tradition says we resolve the problem within the family and do not involve outsiders. We report to our in-laws first, but the decisions of the in-laws are always biased in favour of the offender. But we do not want the court option, it is harsh and that is not what we want. From the culture perspective we also do not want to upset our ancestors.” IXFG</p>	<p>“Culture and traditional custom is also another cause for women not to use the Domestic Violence Act.” IXP2</p>
<p>“There is a stigma attached to being a victim of domestic violence, victims do not want to diminish their husband’s status in the community, they feel we undermine them by going to the police.” IXFG</p>	<p>“They see the court process as a stigma.” IXP1</p> <p>“Victims see police and courts as a kind of public humiliation, a stigma.” IXP2</p>
<p>“There is no privacy at the police station charge office.” IXFG</p>	<p>“There are difficulties of privacy and confidentiality in smaller rural communities.” IXP2</p>
<p>“There is pressure from the in-laws when reporting to the police, the whole family turns against you.” IXFG</p>	<p>“Community people withdraw Protection Orders for various reasons, such as pressure from family members. There is too much pressure placed on women by family members not to go to the police.” IXP1</p>
<p>“A Protection Order on its own is not enough, if you depend on your husband for support it does not work.” IXFG</p> <p>“We do not want to take our husbands to court, especially when we are financially dependent, we do not like the decisions of the court.” IXFG</p>	<p>“Victims are dependent on their partners because of a lack of skills, unemployment, poverty, financial dependence, fear of the abuser’s violence, and in some cases unwillingness to live without the man if he is arrested and convicted.” IXP2</p> <p>“Victims may be uninterested in prosecution not only out of fear, but also out of love, or economic concerns, or consideration for children.” IXP1</p> <p>“Men allege that they do not want their life to be controlled by a piece of paper (<i>Impilo ye phepha</i>).” IXP1</p>

Narrative in matrix 7-3 shows that there is a gap between access to justice through the DVA and social, legal and economic realities on the ground. The responses show that there are adverse and unwanted and

unintended consequences for women who report domestic violence such as breaking families apart, stigma attached to domestic violence reporting – for both the offender and the victim, and the possibility of divorce (Chopra and Isser, 2012:345; Morris and Gelsthorpe, 2003:129 Simojoki, 2011:38). In addition as Van Wormer (2009:108) contends, focus group responses indicate that filing a criminal charge through the DVA finds victims facing mixed loyalties as families frown upon the victim having the offender arrested which leads to prosecution. Importantly, focus group respondents seem more concerned with family sustainability which may stem from loving their partners, financial dependence upon their partners, or both; than with criminalising their partners.

Community-based paralegals and rural female victims of domestic violence raise further issues about use of the criminal justice system in Matrix 7-4.

Matrix 7-4 Comparative responses on problems with the criminal justice system regarding domestic violence in Ixopo

Focus group participants	Community-based paralegals
<p>“Protection Orders make the situation worse for us and we get blamed for exposing family issues outside the family.” IXFG</p> <p>“It breaks the family apart.” IXFG</p> <p>“We depend on our husbands, and if we go to court we lose support.” IXFG</p> <p>“Cases will be dealt with faster, because paralegals will deal with cases like ours and resolve them without appearing in court.” IXFG</p>	<p>“The court process sows division within the family. Women want justice now, it makes sense for them to choose a process that is speedy, humane, and does not require too much of their time and less costly in terms of public transport that they need to take to come to court.” IXP1</p> <p>“People are not satisfied with the formal justice system because it takes a long time for matters to be finalised. In most cases the people complain about the longer process that our courts take in order to finalise the case.” IXP2</p> <p>“Women withdrawing Protection Orders is a challenge for courts and police. Still the Protection Order is not the solution they want, despite being beaten and threatened with violence.” IXP1</p> <p>“The courts issue Protection Orders without explanation of how it works; instead of being a solution it becomes a problem.” IXP2</p> <p>“The court provides a solution without hearing the other side.” IXP1</p> <p>“The criminal justice system is a painful process for women who wish to continue with their marriage, which is the reason why in cases of domestic violence they choose the informal route.”</p>

Focus group participants	Community-based paralegals
	IXP1, 2
<p>“Courts have no time to listen to a long story, they issue Protection Orders without hearing the other side. Mediation is not part of the justice system and they do not follow up after the court process to find out how the victim is coping.” IXFG</p> <p>“We know the Act, it does not work for us, and going to court is wrong, is not what we want.” IXFG</p>	<p>“Protection Orders work where the couples are no longer in love and no longer staying together.” IXP2</p>
<p>“If the offender goes to jail what happens when he comes out? What about intimidation from family members, what about our children, the majority of us financially depend on abusive men.” IXFG</p>	<p>“Harassment by family members if court action is taken is one of the reasons why victims shy away from the justice system. There is no protection outside the court.” IXP1</p>
<p>“Police are not discreet when they visit our homestead.” IXFG</p>	<p>“The police assist us with home visits sometimes, but they drop us at a distance, we understand the need for privacy by victims.” IXP1</p>
<p>“In court they use the interpreters, we are not sure if they are conveying the right information.” IXFG</p>	<p>“People do not understand the legal language of the court and procedures. Rural women often do not understand what is being said.” IXP2</p>

Data in Matrix 7-4 reflect alignment with Van de Meene and Van Rooij’s identification of gender-specific barriers to access to justice such as “alien, foreign or formalistic language” spoke in formal courts. Wojkowska’s (2006:16) observation that the formal justice system “is remote, slow, and is still costly, biased and unreliable” is verified by these study participants.

As a matter of access to justice in Ixopo, it appears that the problems associated with rule of law orthodoxy and the criminal justice system as described by the CBPs and survivors of domestic violence are juxtaposed against the benefits of CRJ and CBPs. In other words, according to data reflected in Matrix 7-4, victims want to be listened to about their complaint and to be free of gender bias. The CRJ process advanced by CBPs seems to create a platform for the victim and the offender to be heard and appears not to discriminate against either party. Through the mediation encounter of the restorative justice process, the offender cannot ignore the victim as she has the opportunity for her partner to listen to her during the mediation encounter (Curtis-Fawley and Daly, 2005:609; Hudson, 2003:183; Pennel and Burford, 1996:207).

The next section presents and interprets data relative to whether there is a need for CAOs and to the role of CBPs in the restorative justice system as practiced by the CAOs and CBPs understudy. This is covered in matrices 7-5 and 7-6. In matrices 7-7 and 7-8 narrative gives respondents’ views on the interaction between

the restorative and criminal justice systems and CBPs on the one hand and experiences of respondents in restorative justice processes on the other hand.

#### 7.3.2.4 Ixopo community advice office and community restorative justice

In chapter 4, South African CAOs were profiled in section 4.3.6 and challenges of CAOs were discussed in section 4.3.7. Generally, CAOs are operated and managed by CBPs and designed to deliver restorative justice practices. As discussed in Chapter 4, the challenges related to sustainability and location of CAOs problematize the work of CBPs in CRJ (Msiska, Igweta and Gogan, 2007:151; Buckenham, 2014:9). The Ixopo CAO is located in the magistrate’s court for that jurisdiction.

Matrix 7-5 raises the voice of study participants through the advocacy-participatory worldview underlying this study as to whether there is a need for CAOs and CBPs.

Matrix 7-5 Comparative responses on the need for community advice offices and community-based paralegals in Ixopo

Focus group participants	Community-based paralegals
“Paralegal approach is different to other structures responsible for service delivery. They deliver quality service.” IXFG	“Those that I network with have come to respect my work, and value my contribution of promoting access to justice for women and children in Ixopo.” IXP1 “Other stakeholders are amazed at how well informed we are, they come to us for information. Though some stakeholders undermine our work sometimes, they know the quality of our work, and they come to us for information.” IXP2
“They treat us with respect, listen to our problems, give us enough time to explain our problems and concerns.” IXFG	“We have developed good listening skills over the years; all information is important in mediation and we do not censor our clients when they speak. That is the reason why we organise mediation when we know we will give all the attention it deserves.” IXP2
“Problems are resolved quickly and outcome of the mediation is immediate.” IXFG	“We resolve cases quickly; uncomplicated cases are resolved within a short space of time, maybe an hour.” IXP1

Narrative in matrix 7-5 reflects a need for CAOs and CBPs in view of the service role (Stephens, 2009:145) and the human rights role played by CBPs such as honouring human dignity (2014:4). In addition, matrix 7-5 shows that clients and the other stakeholders with whom CBPs interact with have confidence in the work



of paralegals; although their process is quick and provides immediate relief, they deal with the issue of domestic violence holistically rather than in a piecemeal fashion; they also deal with other underlying issues such as maintenance (Van Ness and Strong (2010: 49) and social grants (Dugard and Drage, 2013:12).

Matrix 7-6 helps to clarify the role of paralegals in community restorative justice but should be read in conjunction with matrix 7-1 on procedures and processes as it reflects the structure and methods used by paralegals to deal with domestic violence cases. Data in matrix 7-6 suggest that CBPs apply the restorative justice theory of engagement and empowerment of victims and offenders (Sawin and Zehr, 2011:53) given the CBPs communication techniques.

Matrix 7-6 Comparative responses on the role of paralegals in the restorative justice system in Ixopo

Focus group participants	Community-based paralegals
<p>“They bring us together and provide a platform where we can talk about our problems.” IXFG</p>	<p>“Victims of domestic violence are given an opportunity to have their say in mediation, a process they relate to, and they find the court process intimidating and oppressive as they are expected only to answer questions. That is the reason they prefer our mediation process to the court process.” IXP1</p> <p>“Courts are confusing for rural people.” IXP2</p>
<p>“It helps us to resolve our problem on our own and in future to communicate better.” IXFG</p> <p>“The office has improved people’s communication. We have a place to come to, and we are free to express our feelings during mediation.” IXFG</p> <p>“People feel free to talk without fear.” IXFG</p> <p>“They empower us with problem-solving skills.” IXFG</p>	<p>“Communication is the key in mediation: most of the time, the victim and offender talk about things they have never communicated about with each other before.” IXP1</p> <p>“Mediation makes people free to engage with their problem.” IXP2</p>
<p>“We speak the same language and they understand our culture as they are from the same community as us. They welcome us with a smile before we even say anything.” IXFG</p>	<p>“We speak the same language as our clients, it helps to eliminate misunderstanding. We share the same culture with the people we are assisting.” IXP1</p> <p>“Understanding local culture is important because it easy to dismiss another person’s culture if you do not live it. What is culturally important might not be important to a person from another culture.” IXP2</p>
<p>“They help us understand the work of the police and courts in the process of restorative justice.” IXFG</p>	<p>“In the preliminary interview with the victim we explain the court approach and the mediation approach. The victim makes a choice.” IXP1, 2</p>

Focus group participants	Community-based paralegals
“Paralegals resolve our problems quickly, and the service is free.” IXFG	“Our mediation is completed in much less time than the courts.” IXP1, 2
“Paralegals resolve problems easily and without any delay.” IXFG	<p>“Our process is quick but produces results, mediation works; it is definitely not cheap justice. If it did not work we would have stopped mediating domestic violence cases long time ago.” IXP2</p> <p>“Cases take long to finalise, yet mediation is a straightforward process that is finalised within a period of days.” IXP2</p> <p>“Victims are interested in a process that provides quick remedies, that is why mediation is attractive.” IXP1</p>
“They give us time to tell our story, and treat us with respect.” IXFG	<p>“The offender equally is given an opportunity to respond to the victim’s story. Sometimes the emotions become raised, it happens in mediation but we are there to assist the parties to communicate”. IXP1</p> <p>“Courts take action without hearing the other side, for instance issuing a Protection Order without explaining how it works. Instead of a solution it becomes a problem.” IXP2</p>
“They do not take sides, the mediation process is fair.” IXFG	“We do not take sides, we look at both angles of the conflict and the underlying issues that have caused the conflict, and if the victim has a part in that conflict we point that out.” IXP2

Paralegals indicate that speaking the same language of service recipients and allowing them to articulate their story in their own language eliminates misunderstanding. The importance of language has been acknowledged by various scholars, and it is noted that language is one of the reasons why victims choose informal justice systems (Kane *et al*, 2005:10; Wojkowska, 2006:16; Moul, 2005:23). This factor illuminates the role of CAOs and CBPs in cultural competency (Vorster, 2001:54). Paralegals seem to employ a wide and flexible set of tools (Robb-Jackson, 2012:12) particularly through a pragmatic approach to communication techniques. It seems that this communication pragmatism is connected to “making the client feel comfortable” and being skilled “at working with those with a less sophisticated understanding of the law” (Moorehead, 2003:765). A review of the literature indicates that problems with CBPs include dispensing second class justice (Wojkowska, 2006:14), cheap justice (Ptacek, 2010:7-8) and lacking guaranteed independence and consistency (Cappelletti, 1992:35). Data presented in matrix 7-7 suggest that these respondents disagree.

As to the interaction between restorative justice practices, the criminal justice system and CBPs, narrative in matrix 7-7 raises issues about the training of CBPs, incorporation of CBPs into the criminal justice system and state recognition of CBPs. Scholars are concerned about CBPs “not performing the kind of sophisticated work offered by lawyers” (Kahn-Fogel, 2012: 776) and whether “CBP training is accredited or inconsistent” (Buckenham, 2014:12). Focus group respondents indicate that Ixopo CBPs are trained. While Franco, *et al* (2014:29) point out that state recognition “may create an elite group of paralegals with no organic connection to their constituency”, Ixopo CBPs seek statutory recognition but sufficient independence from the state so as not to restrict the spectrum of their work and limit the individualised assistance that they render to clients. They do not wish to be incorporated into the criminal justice system. Other scholars contend that lack of state recognition of CBPs weakens CBP service delivery when engaging other service providers (Kigodi (2013:68) and that state recognition would help build “credible justice systems in Africa” (Walsh, 2010:26).

Matrix 7-7 Comparative responses on interaction between restorative justice, the criminal justice system and community-based paralegals in Ixopo

Focus group participants	Community-based paralegals
<p>“People are very experienced and we can see they are well trained, they know what they are doing. Social workers and lawyers should not do mediation. The police and courts should continue what they are doing and refer mediation cases to paralegals.” IXFG</p>	<p>“The court process is not used much since people prefer visiting the advice office on domestic violence because the process is quicker. The courts are used for serious cases of domestic violence, but in our case only if the victim chooses to go the court route.” IXP1</p> <p>“If our current role gets incorporated within the justice system, there is the danger that it will change the way we work with the victims of domestic violence. The courts will tell us that we cannot conduct Victim Offender Mediation for three hours, as there will be other people to attend to. We will not be able to perform some of the tasks that we engage in, in order to help our clients.” IXP1, 2</p>
<p>“Paralegals should be a link with formal justice but they should continue to conduct mediation.” IXFG</p>	<p>“Other professionals look down upon us because we do not have statutory recognition.” IXP1</p> <p>“As paralegals our work is flexible and is designed to suit each individual case; if we work within the formal system, we will be restricted by the rules and procedures. For example we conduct our work not only at the office, we visit homes, workplaces to attend to clients.” IXP1, 2</p> <p>“We want recognition by the government but with our</p>

Focus group participants	Community-based paralegals
	<p>own legislation. We want financial support but should be allowed to operate independently of the courts, but play a supportive role to the courts. We should be allowed to continue with our restorative justice work, and only involve the state to enforce or give an order to the agreement reached. Working for the state would limit our work.” IXP1, 2</p> <p>“As paralegals we deal with every case that is brought to our attention. Our work is unique and flexible and is designed to suite each individual case. Within the formal justice system, we will be restricted by the rules and procedures.” IXP1, 2</p> <p>“We will lose trust and credibility with community members.” IXP1, 2</p>
<p>“They should carry on with their mediation work, and give legal advice because this is what they do best.” IXFG</p>	<p>“I believe working for the state will limit our work in a sense that as paralegals we deal with every case that is brought to our attention, and we use various approaches in dealing with cases such as mediation. We do not only deal with specific problems; every client that comes to our offices has to be assisted.” IXP1, 2</p>
<p>“Paralegals do not take sides.” IXFG</p>	<p>“Once we take sides, the credibility of the office is compromised.” IXP2</p>

Furthermore, as with other matrices, matrix 7-7, shows that CBPs tend to be neutral mediators for cases presented. Matrix 7-8 demonstrates restorative justice theories of reparation (Roche, 2004:27) and of social and moral development (Barton, 2000:7) along with the recurring theme of perils of lack of statutory recognition. Examples are given of family restoration and sustainability achieved through CBP restorative justice techniques.

Matrix 7-8 Comparative responses on experiences of restorative justice processes in Ixopo

Focus group participants	Community-based paralegals
<p>“Our problems are taken seriously by paralegals, unlike other people, where our problems provide them with entertainment. They do not talk about our problem because they stay in the same community with us.” IXFG</p> <p>“It created mutual respect and the mediation was conducted professionally by people who know what they are doing.” IXFG</p>	<p>“We take community issues serious, they might be trivial but to community members it is important. We are also involved in the same struggle because our networking stakeholders take us seriously when it suits them, but when they are lazy to help community members they refer cases even where the victim had made it clear that she wants a Protection Order. When it does not suit them they remind us that our profession</p>

Focus group participants	Community-based paralegals
<p>“Mediation restores our relationships and marriages.” IXFG</p>	<p>is not recognised by the law.” IXP1, 2</p> <p>“Victims respect us and do not question our credentials.” IXP2</p>
<p>“We receive counselling and support throughout the process of mediation.” IXFG</p> <p>“They always secure cooperation from our husbands; we do not know how they do it.” IXFG</p> <p>“They bring respect and <i>Ubuntu</i>.” IXFG</p>	<p>“Counselling is part of us providing a holistic service to women who have suffered trauma.” IXP1</p> <p>“Follow-up that we conduct means that we care for our clients and their welfare and this provide victims with a sense of security. They love our home visit, we get served the best food when we visit, we sit with them on their grass mats and we feel special too.” IXP2</p>
<p>“They explain everything and make sure that we understand everything that is said. We enjoy their talk, especially when they explain the law to our husbands.” IXFG</p> <p>“They bring happiness and laughter in our homes.” IXFG</p>	<p>“People tell their side of the story clearly in the language that they are comfortable with.” IXP1</p>
<p>“We save time by coming to this office and it is less expensive in that you do not have to go to court so many times and take time off work.” IXFG</p> <p>“It was a success story, home visits were conducted and they phoned us.” IXFG</p>	<p>“Justice personnel do not conduct home visits; do they care what happens to the victim once the case is finalised?” IXP1</p>
<p>“It brings peace and trust to our families.” IXFG</p> <p>“Husbands became more supportive financially. Husbands appreciate the presence of the advice office in the area.” IXFG</p>	<p>“The success rate of mediation of domestic violence has been very high with an outcome of forgiveness and reconciliation.” IXP1</p>

As to the theory of moral and social development and highlighting the crucial role of a facilitator in this process, Barton (2000:7) points out that “it is hard to think of a way to get through to recidivist offenders and inducing them in a process of moral change”. While it is unclear whether the husbands mentioned in matrix 7-8 are repeat offenders, data does indicate that CBPs have played a role in social and moral development of families by devising ways of inducing offender participation in this process, according to narrative of focus group participants. In addition, narrative from focus groups indicate that CBPs have played a role in restoring relationships and marriages and that one strategy used by CBPs to ensure both moral and social development and restoration is home visits. The role of CBPs as counsellors (Pigou, 2000:4-5) is also illuminated in the description of service recipients’ and CBPs’ experience of restorative justice practices in matrix 7-8.

The focus now shifts from the CBP interview data and focus group data from survivors of domestic violence to paralegals' involvement with the traditional justice system.

### **7.3.3 Qualitative data as to linkages between the traditional justice system and community-based paralegals in Ixopo**

Chopra (2008:39) point out that CBPs can play an important role in infusing formal legal knowledge into traditional justice process. Trained in formal laws and procedures, they have the capacity to understand different justice systems, the community's values systems and the official laws. In other words, they act as an important bridge between informal and traditional justice systems. The Ixopo CAO works closely with three traditional courts. In this section, Ixopo paralegals comment on the composition and operation of traditional courts and cases referred between the CAO and traditional courts. The matrices below show the interaction between Ixopo paralegals and traditional courts as well as views of Ixopo CBPs on whether traditional courts should handle domestic violence cases. Differences lie in responses and comments from one CAO to another; however, some comments are similar to those from the Bulwer CAO. As noted in chapter 6, in order to provide a better overview of paralegals' work with traditional courts, the information presented does not focus on similar aspects when discussing information from the matrices.

#### **7.3.3.1 The composition and operation of traditional courts**

Traditional courts are known in the rural community of Ixopo as "*inkantolo ye Inkosi*" and the TCB refer to the traditional courts that operate specifically in KwaZulu Natal as "*inKantolo yeNdabuko*". The traditional courts that operate in KwaZulu-Natal follow Zulu culture, custom and tradition, Ntlama and Ndimba (2009:20) observe this and state that traditional courts "derive their legitimacy from culture and tradition". These traditions and customs are not written; instead knowledge vested in traditional courts is passed down from generation to generation (Stapleton, 2007:4). Narrative in matrix 7-9 shows Ixopo paralegals' comments on current practice and TCB provisions. Provisions from the proposed TCB (and from literature) appear in the column on the left while comments from CBPs as to how traditional courts are composed and how they operate appear in the column on the right.

Matrix 7-9 Paralegal's comments on composition and operation of traditional courts

<b>Relevant sections of the proposed Traditional Courts Bill or the literature</b>	<b>Paralegals' comments on current practice in the traditional court</b>
<p><b>Public aspect of the traditional court</b></p> <p>Section 1 of the TCB</p>	<p>“The traditional court I work with (court 1 in the area) is presided over by a female <i>Inkosi</i> and her council (<i>uMkhandlu</i>). The <i>Inkosi</i> does not allow community members to attend court proceedings if the matter concerns domestic violence. The court is cleared when domestic violence matters are dealt with; only the parties and the presiding officers attend. Domestic violence is dealt with privately and parties are treated in a dignified manner. Maybe is because the <i>Inkosi</i> is a woman”. IXP1</p> <p>“In court 2 in the area the hearing is in public, and in court 3 the <i>Inkosi</i> does not want to develop a working relationship with the paralegals”. IXP2</p>
<p><b>Court fees</b></p> <p>Ubink and Van Rooij (2010:3)</p>	<p>“Members of the community pay R100 to open a case at the traditional court”. IXP1 and IXP2</p>
<p><b>Presiding officers of traditional courts</b></p> <p>Section 1, clause 4 of the TCB</p>	<p>“The traditional court in court 1 is presided over by a woman <i>Inkosi</i> and has six male and 15 female members of the council”. IXP1</p> <p>“A man runs Court 2 with women being part of '<i>uMkhandlu</i>'. Sometimes men in the area are disrespectful towards these women”. IXP2</p>
<p><b>Jurisdiction of traditional courts</b></p> <p>Section 5 of the TCB</p>	<p>“Traditional courts deal with domestic violence cases, marriage issues, and culturally related issues such as payment of damages for pregnancy, return of <i>lobolo</i>, paternity disputes and witchcraft”. IXP1 and IXP2</p>
<p><b>Procedure of traditional courts</b></p> <p>Section 9, clause 9 of the TCB</p>	<p>“Community members know the traditional court procedures”. IXP2.</p>
<p><b>Legal representation</b></p> <p>Section 9, clause 9 of the TCB</p>	<p>“Lawyers do not represent people at the traditional court. Women are represented by their husbands or male relatives in the traditional court”. IXP2</p>
<p><b>Language</b></p> <p>Kane <i>et al</i> (2005:10)</p>	<p>“There is no language barrier. IsiZulu is the only language used at the court. However the language used and behaviour of some of the men and council members is abusive to women”. IXP1, 2</p>

Relevant sections of the proposed Traditional Courts Bill or the literature	Paralegals' comments on current practice in the traditional court
<b>Outcome of court cases</b> Sections 11,12 and 13 of the TCB	"The outcome of a court case may be a fine, compensation, or people may be pressured to leave the village. The traditional courts do well in this area, and base their decisions on facts and other cultural considerations". IXP1, 2
<b>Restorative nature of the traditional court process</b> Section 3 of the TCB	"In practice it is something else; there is no restoring of relationships in some cases. People are told not to tell a long story, because there are other cases to be attended". IXP1, 2
<b>Recording of cases</b> Section 18 of the TCB	"There are no case records in the traditional courts". IXP1

Matrix 7-9 reflects a unique response by the paralegals from Ixopo in relation to the court setting and the composition of 'uMkhandlu'. The council "assists the chief because they are knowledgeable in customary law and it is very influential due to its power to make decisions" (Makec, 2007:136). The paralegals believe that people are allowed privacy in the one traditional court because the *Inkosi* is a woman. Therefore, traditional courts are not immune to the public/private divide as discussed in chapter 3. The court presided over by the woman Inkosi is likewise dominated by women – with fifteen female members and six male members of the 'uMkhandlu'. This composition of the court is contrary to the weight of reviewed literature which indicates that traditional courts are dominated by men (Moult, 2005:19; Kane *et al*, 2005:15). However, this finding is consistent with Becker's (2006:34) and Nzegwu's (2012:15) respective findings of pre-colonial traditional justice systems and political arenas portraying complementarity is male and female leadership roles. Hence, this Ixopo traditional court seems to reflect its ancient African roots.

In terms of the public/private divide regarding domestic violence proceedings narrative in matrix 7-9 shows that traditional leaders and/or the council have discretion as to whether or not to make the hearings public (Moult, 2005:21; Vorster, 2005:53 Makec 2007:136). Ixopo CBPs state that the female Inkosi clears the courtroom of public spectators. However, some traditional courts in Ixopo are open to the public and council members are reported to disrespect women. The decision as to whether or not to make domestic violence proceedings public or private reflects the dynamics of traditional leadership and the influence of gender on how women are treated.

Narrative in matrix 7-10 below indicates collaboration and the working relationship between the Ixopo CAO and the traditional courts. Ixopo paralegals handle domestic violence cases referred by the traditional courts



involving physical, sexual, economic, emotional abuse as well as cases relating to customary marriages with regard to intestate succession and registration of marriages.

**7.3.3.2 Case referrals from traditional courts to the Ixopo community advice office**

Given the role of CBPs in straddling plural justice systems (Dugard and Drage, 2013:32; Maru, 2006b:470) traditional courts refer cases to the Ixopo CAO. Women from rural areas often go through various structures of reporting marital problems. Paralegals reported that they usually ask if the matter has been reported elsewhere before, or if there has been an attempt by the woman to solve the problem within the family. Moul (2005:20) observes from research, that a woman will report the problem to the family first, if the problem does not get resolved, the church is approached to intervene and then, if unsuccessful the matter is taken to the traditional court. Data from paralegals show that traditional court may deal with some matters or refer matters to the CAO or to the formal justice system. Court intervention according to focus group participants and paralegals is the last resort.

Narrative in matrix 7-10 indicates different types of domestic violence cases referred from the traditional courts to the Ixopo CAO. Cases that come from the traditional courts involve, physical violence, sexual, and economic abuse. The emotional abuse case category also involves problems around customary marriages and intestate succession issues.

Matrix 7-10 Cases referred by traditional courts to the Ixopo community advice office

Type of cases	Reasons for referral
Domestic violence: Physical abuse	“Traditional courts refer cases of domestic violence, where there has been physical violence for Protection Orders and counselling”. IXP1
Domestic violence: Sexual abuse	<p>“Traditional courts refer these cases, mostly if the complainant is a woman. The reason is older man are the most affected by this problem. In one case a young woman wanted to leave an old man and the man became jealous and accused the woman of having an affair”. IXP1</p> <p>“The other issue that falls into this category is the issue of HIV and AIDS. In the presence of HIV in the marriage, the woman is always blamed for it. Men do not want to use a condom even when they know that they are having unprotected sex outside the marriage”. IXP2</p> <p>“The other issue in this category is marital rape. Sometimes it is linked to a woman refusing to sleep with her husband for fear of contracting AIDS, but she will be subjected to forceful relations”.</p>

Type of cases	Reasons for referral
	IXP2
Domestic violence: Emotional abuse	“Different types of cases are referred by traditional courts that fall under the emotional abuse category. Sometimes we are invited to attend and observe when they deal with cases. Some involve emotional abuse where a woman is accused of having a child out of wedlock and the husband denies paternity”. IXP1
Domestic violence: Customary marriages – polygamy as emotional abuse (“ <i>Isithembu</i> ”)	<p>“In this category there is an issue of registration of customary marriages. When a man take another wife who is younger, the younger wife will quickly register her marriage and now the older one has to ask permission from the one that has registered, and they always refuse”. IXP1</p> <p>“During the workshop with women in Ixopo on customary marriages, the majority of women were against the registration of customary marriages by all wives; they said only one wife, the first one must register, and this minimises conflict. In the past, customary law gave powers to the first wife and polygamy worked well; there was fair distribution of resources and their husband’s conjugal rights. Now the youngest take all if they register first”. IXP1</p>
Domestic violence: Intestate succession as emotional abuse	<p>“The other category is the issue of intestate succession. The problem arises, when the marriage is not registered, and common law marriages are not recognised. Family members of the deceased are a problem. They always want to grab everything, and they go around collecting children that the wife did not know about”. IXP2</p> <p>“In a case of common law marriage, family members rush to the courts and claim the deceased was not married so that family member can be appointed as executor”. IXP2</p>

The responses in matrix 7-10 suggest that traditional courts may refer cases of physical violence to the CAO due to the inability of traditional courts to issue Protection Orders. Curran and Bonthuys (2004:21) point out that the DVA only be enforced in a magistrate’s court and family courts. These scholars indicate that “there is no provision for traditional courts to issue protection orders. Yet there are currently approximately 1500 customary courts operating in South Africa” (p. 21).

Legal issues of customary marriages and intestate succession are often referred by traditional courts to CAOs as a result of a legal anomaly created by rule of law orthodoxy which at times results in emotional abuse of women. For example, the Recognition of Customary Marriages Act (RCMA) withdrew the power of traditional marriages under customary law and instead only recognises traditional marriages that are registered under common law (Herbst and Du Plessis, 2008:14). The RCMA therefore interferes with the

application of customary law, adversely impacts traditional practices of polygamy and makes it difficult for traditional courts to handle these matters. A source of emotional abuse occurs when a subsequent wife registers her marriage to the husband she shares with the first wife before the first wife registers her marriage to their common husband. Since the legal anomaly complicates the dispensing of traditional justice, traditional courts refer these matters to CAOs.

The issue of intestate succession brings to bear a distinction between western and African jurisprudence. Unlike intestate succession in western jurisprudence which dwells upon the rights of the deceased, African jurisprudence attaches intestate succession to the institution of marriage (Lankhorst and Veldman, 2011:95). In African jurisprudence, intestate succession vests rights in male offspring of the parties. As narrative in matrix 7-10 reveals, in the event a marriage is not registered under the RCMA, biological relatives of the deceased may seek to dispossess the wife of her inheritance if she has not borne any male children of the deceased. The source of emotional abuse may stem from the deceased’s biological relatives introducing male children into the situation allegedly borne by another woman unknown to the wife. These types of cases are likewise referred to CAOs for disposition. While traditional court officers assess whether or not they should hear a matter or refer it to another forum, CBPs note that a woman who is dissatisfied with traditional courts visit the CAO if they are aware of its existence.

The next section explores the types of cases referred from the Ixopo CAO to traditional courts.

**7.3.3.3 Case referrals from Ixopo community advice office to traditional courts**

The Ixopo paralegals believe not all cases can be resolved through mediation only. Rather, to be holistically resolved some cases require traditional court intervention. This is particularly true of cases that relate to cultural beliefs and practices (Harper *et al*, (2011:179). Traditional courts are better suited to decide on traditional measures or sanctions according to custom.

Matrix 7-11 Cases referred by the Ixopo community advice office to traditional courts

Type of case	Reasons for referral to traditional courts
Adultery	“Cases such as these we refer if a woman wants cultural cleansing and damages, ‘ <i>inkokhelo yenhlawulo</i> ’”. IXP1
Damages sought for pregnancy	“The traditional courts are best at dealing with this issue and in determining how much is to be paid. If the boyfriend does not pay, it means he is not acknowledging the child. This has cultural implications for the child. This is very common, although is not strictly domestic violence it is stressful for the woman”. IXP2

Type of case	Reasons for referral to traditional courts
Return of <i>Lobolo</i>	“Traditional courts know under what circumstances <i>lobolo</i> has to be returned. The husband can demand a return of <i>Ilobolo</i> , if the wife loses affection towards him”. IXP2
Witchcraft	“Straight witchcraft accusations, we refer. The traditional courts know how to deal with this issue. Sometimes we deal with this issue if it is one of the underlying issues of domestic violence”. IXP1

The Ixopo paralegals explained during interviews that some cultural practices are valued by people who believe in them.

#### 7.3.3.4 Interaction between traditional courts and the community advice office through Ixopo paralegals’ observation and advice

Ixopo paralegals attend traditional courts hearings on invitation by traditional authorities. They are invited as interested parties on the case, or they are invited to offer advice to traditional leaders. The information provided below shows that paralegals take advantage of this invitation, they address the abuse of processes through negotiations with presiding officers and raise awareness as to the harmful impact such processes have on the people appearing before the traditional court (Ubink and Van Rooij, 2010:14).

Narrative in matrix 7-12 explains the interaction of Ixopo paralegals with the traditional courts. In order to demonstrate the interaction, they used cases as examples. The examples shown highlight the dynamics of *ilobolo* in traditional marriages. *Ilobolo* on the one hand ties the families of the victim and the offender together and on the other hand it is a focal area when the ties are broken and the relationship between the offender and the victim comes to an end.

Matrix 7-12 Ixopo paralegals’ interaction with traditional leaders and traditional courts

Observation of traditional court proceedings	CBPs’ comments about and advice to courts
“We get invitations to observe the court process”. IXP1,2	“We only offer advice if the advice is requested”. IXP1, 2
<p><b>Case observation 1: Return of <i>ilobolo</i></b></p> <p>“In this case I was invited by <i>Inkosi</i> to come to the court. I was asked to observe a case relating to the return of <i>ilobolo</i>. A young man paid <i>lobolo</i> of R20 000 and seven cows to the family of his future wife</p>	“The matter was taken to the traditional court and the woman was asked to explain her change of mind. She explained that the man bores her and surprisingly nobody probed what she meant. I had a feeling the council of the elders knew what she meant; I was surprised how men would protect each other around

Observation of traditional court proceedings	CBPs' comments about and advice to courts
<p>that is called '<i>ingoduso</i>'. Everything required by culture was done and the couple were allowed to visit each other. After these visits the young woman changed her mind before the marriage ceremony could take place".</p>	<p>such matters. I was informed outside the court that the young woman told her family members that '<i>akasavukelwa</i>'".</p> <p>"The court agreed that <i>lobolo</i> must be paid back; the cows were returned but the cash was already used. I negotiated that the family should be allowed to pay the cash in installments of R2 000 a month. I was requested to accompany the people who were assigned to fetch the cows, to make sure that the order of the court is respected, since I pleaded for the family to be allowed to repay the cash in instalments. The <i>Inkosi</i> appreciates the presence of the office in his area because it makes the traditional council run smoothly. The advice office can offer advice when needed".</p> <p>IXP2</p>
<p><b>Case observation 2: Customary marriage/divorce</b></p> <p>"In this case the husband accused his wife of bewitching him. He informed the traditional court that he saw fresh traditional marks on her private parts with black <i>muthi</i> smeared on the marks. When he asked what the marks were for, she said so that he can love only her. He demanded that she go back home and leave their child behind and he wanted a portion of his <i>lobolo</i> back. The court sent a message to call me to come to court, because there is an issue of the child involved". IXP2</p>	<p>"The court informed the husband that, culturally, if he does not want his wife, he must move out of their house or build her a house. He cannot demand <i>ilobolo</i> because they have a child together. I advised the court that the wife cannot leave her child with her husband because the child is still young and needs a mother. The man was not happy with this outcome". IXP2</p>

Case one in the observation section shows that traditional courts are male-friendly. According to the Ixopo paralegals, traditional courts are not women-friendly. An Ixopo CBP notes that the situation is worse when the presiding officers are all male as is the case in some courts (IXP2). Another Ixopo paralegal is of the view that traditional courts do not fully understand the DVA (IXP1). Ubink and Van Rooij (2010:5) note that in "customary administration issues men hold most leadership positions. Such norms and practices create a gender bias in, for instance, cases of inheritance, divorce and domestic violence. Some see this gender bias of customary law as an incorrigible trait, and advocate for a complete disengagement with customary law".

The second case reflects that traditional courts could also champion women's rights. Ubink and Van Rooij (2010:6) maintain that the argument that customary law administrators require capacity development in the area of mediation and gender equality might be correct or incorrect. They know what they are doing and have the capacity to do it right. Chopra and Isser (2012:349) raise the same point; their interviews with

*Amakhosi* revealed that some chiefs would welcome statutory regulation but will guard against changing their dispute resolution process.

The discussion now turns to the suitability and unsuitability of traditional courts handling domestic violence cases.

### 7.3.3.5 Traditional courts and domestic violence cases

Literature review in chapter 3 presented arguments as to whether domestic violence should be handled through the traditional justice system. Data from this study and literature reviewed show that rural women use traditional courts when they suffer abuse at home (Weilenman, 2007:91). Sandefur and Siddiqi's (2011: 121) research findings reveal that 38% of domestic violence cases were reported to the traditional courts, compared to 4% reported to the formal courts and 58% were not reported to any institutions or justice systems. Their research further revealed that more women reported domestic violence to traditional courts than men. The examples provided in this section forms part of the observation by paralegals of the traditional court process in Ixopo.

Matrix 7-13 Handling of domestic violence cases by traditional courts

Domestic violence cases	CBPs' observation of traditional court case deliberations
<p><b>Case 1: Domestic violence and child abuse</b></p> <p>“The court invited me because the matter before the traditional court involved a young boy of about nine years. The child was assaulted by his 82-year-old grandfather. During the proceedings it turns out that the old man was also violent towards his wife, a granny of about 70 years old. I suspect the grandmother realised that something terrible is going to happen if the violence does not stop”. IXP2</p>	<p><b>Case deliberations:</b></p> <p>“The boy’s grandmother approached the traditional court. On the day of the trial the court heard in detail the abusive behaviour of the old man and that he is extremely aggressive and violent. His wife has been beaten up on a regular basis and she showed the court scars on her body; some were current. In this case I advised the court that the matter should be referred to the police because the old man is going to kill his wife and the grandchild based on the information available regarding his aggression. The court agreed and the old man was taken to the police. He was found guilty; however he was given a suspended sentence and released on warning due to his health and old age”. IXP2</p>
<p><b>Case 2: Emotional abuse</b></p> <p>“In this case a man accused his wife of falling pregnant with another man’s child. The woman reported the matter to <i>Inkosi</i> and wanted advice. <i>Inkosi</i> decided the matter should be taken to the traditional</p>	<p><b>Case deliberations:</b></p> <p>“On the day of the trial she was requested to show the <i>uMkhandlu</i> how big her stomach was. The most humiliating part was that she had a pinafore on, that meant an inappropriate display of her thighs and</p>

<p>court. I think <i>Inkosi</i> knew that in Zulu culture if the wife falls pregnant whilst married, the child belongs to her husband”. IXP2</p> <p>“This council had women representatives. The women in the council did not object to this treatment of a pregnant woman. Their representation was for the purpose of gender balance only. I felt that their presence is not significant to fellow women in the village when they fail to intervene when a woman was being humiliated”. IXP2</p>	<p>underwear to those old men of the council. I was shocked and embarrassed”. IXP2</p> <p>“I requested permission to address the council and I advised the council it is against the spirit and objectives of the traditional court what they are doing and it is an abuse of the woman’s right to privacy. She thanked me afterwards; she said had she known about the office she would not have gone to the traditional court to report the case, when her husband accused her of conceiving the child of another man”. IXP2</p>
<p><b>Case 3: Emotional abuse</b></p> <p>“In this case a woman was accused of having an affair; as a result she fell pregnant. Her husband claimed the pregnancy was not his and that she must undergo abortion. The woman refused”. IXP1</p>	<p><b>Case deliberations:</b></p> <p>“She approached the traditional court for protection. The court decided that after the baby is born, she must approach the court for a paternity test”. IXP1</p>

Narrative in matrix 7-13 shows that traditional courts handle domestic violence cases and women approach the traditional court with domestic violence cases. The example of cases provided by IXP 2 indicates positive and negative attributes of traditional courts that scholars identify in the literature. Johnstone (2011:17) points out that the main attribute of traditional courts is its flexibility which “allows traditional leaders to craft pragmatic solutions that respond to the issues at the crux of a dispute”. This is demonstrated in case 1, where a paralegal was invited to assist the court with this case and the positive response by the court towards the advice provided. Similarly Dugard and Drage (2013:32) mention that during their research they were informed about a traditional leader “asking the paralegal to conduct proceedings in his court so as to ensure that parties in dispute were aware of their legal options”.

However, Johnstone (2011:17) argues, the flexibility of rules may result in “lack of consistency and predictability”. Traditional leaders may conduct different processes and apply different rules to separate groups. Case 2 was handled differently from case 3. The woman in case 2 was humiliated and yet in case 3, which is similar to case 2, the case was handled well. It is because of this unpredictability that scholars such as Wojkowska (2006:23) argue that the traditional justice system does not perform well in cases of domestic violence. Robb-Jackson (2013:55) indicates that the role of paralegals is very important in that they are able to “address problems and abuses that arise between citizens and traditional authorities” as is the case in case 2.

The literature comports with the observation by paralegals that the presence of women in the traditional council in some cases does not result in protection of women who have suffered domestic violence (Curran

and Bonthuys, 2004:21; Harper *et al*, 2011:175). Women advocates have lobbied for the inclusion of women in the traditional court as judges and as members of the traditional council, on the assumption that women may provide a better interpretation of customary law and challenge abusive practice towards women who choose traditional courts to pursue justice. Ubink and Van Rooij (2010:6) argue that the solution is to enhance women’s position in the customary justice system by appointing female deputies to male headmen. They note that in the Uukwambi traditional authority in Namibia, efforts have been made to implement this recommendation. In KZN, it is a question of attitude, as revealed by cases cited by the paralegals. Information from case observations by paralegals show that the inclusion of women has not had the desired impact, a woman was humiliated in the presence of CBPs and onlookers (Kane et al, 2005:14).

The issue of gender equality is still a challenge for the traditional justice system; the discrimination against women appears entrenched in the traditional justice system (Mnisi-Weeks, 2012:153). Through giving advice, paralegals are contributing in the elimination of discrimination by working within the traditional justice system to address the problem (Harper *et al*, 2011:175).

**7.3.3.6 Views of paralegals on domestic violence cases being handled by traditional courts**

Data from paralegals reveal that culture is important for rural women victims of domestic violence. Culture seems to be considered by CBPs in deciding what action to take against abuse. Ixopo paralegals recognise the role of traditional courts in addressing cultural concerns of the victim and the offender whereas the criminal justice system personnel may misunderstand how and why culture relates to domestic violence (Gaarder and Presser, 2006:489). Ntlama and Ndima (2009:23) explain the dynamics of culture in domestic violence and how it is dealt with in traditional justice systems in chapter 3.

Matrix 7-14 displays narrative from paralegals as counter-arguments regarding whether traditional courts should handle domestic violence cases, CBPs’ perspectives on the TCB, and the impact the TCB may have on domestic violence.

Matrix 7-14 Views of paralegals on whether traditional courts should handle domestic violence cases

<b>Arguments against traditional courts handling domestic violence cases</b>	<b>Arguments in favour of traditional courts handling domestic violence cases</b>
“Traditional court is a not appropriate forum for handling domestic violence cases in our opinion”.	“There are many rural people who prefer to take their cases to the traditional courts. We respect their choice



Arguments against traditional courts handling domestic violence cases	Arguments in favour of traditional courts handling domestic violence cases
IXP1, 2.	and will assist the court where we can". IXP1, 2
"They are biased towards women, sometimes women are not listened to, and their evidence is undermined sometimes. The humiliation they suffer from council members is terrible". IXP1, 2.	"Traditional courts should handle cases of those who choose the traditional court as a forum to hear their domestic problems". IXP1, 2
"Traditional court should not handle rape cases. But marital rape is still a controversial issue in rural areas". IXP1, 2	"The councils need training to guide them how best to respond to domestic violence. Because community members will continue to use traditional courts. We must say that sometimes they do well in these cases". IXP1, 2
<p data-bbox="180 730 766 819">"We noticed during a workshop with traditional leaders that they do not believe the issue of marital rape, when a man has paid <i>lobolo</i>". IXP1, 2</p> <p data-bbox="180 846 766 985">"<i>Amakhosi</i> will not be prepared to give up their powers; as it is the TCB gives <i>Amakhosi</i> more powers. No aspect of the bill will give women more voice, nor will it increase or improve women's participation in the council". IXP1, 2</p>	<p data-bbox="782 730 1366 819">"We conducted training recently with <i>Amakhosi</i> on the Domestic Violence Act and Sexual Offences Act". IXP1, 2</p>

Ixopo paralegals hold the same view as some of the scholars that traditional courts are not a suitable forum to address problems of domestic violence since CBPs have observed that traditional courts are biased towards women, sometimes women are not listened to, women's evidence is undermined, and women are humiliated in court. Ubink (2011:52) made the same observation as the paralegals that customary law lacks gender equality, the system is patriarchal, favouring men's interest over those of women both in processes and customary administration, and there are cultural impediments to women's participation in court debates. On the one hand, Wojkowska (2006:24) maintains that, while one cannot deny the strength of traditional courts, when it comes to matters of domestic violence, customary justice has no role to play. On the other hand, paralegals acknowledge that there are women who prefer to take their cases to the traditional court. Paralegals, however are pro- choice, therefore they do not prevent women from taking their cases to traditional courts if desired by victims; and CBPs will assist them. Harper *et al* (2011: 179) believe that paralegals can assist women to make an informed choice because they can straddle both formal and traditional justice system and their legal awareness training enhances women's choice.

Robb-Jackson (2013:63) cautions that there is concern that paralegals are shifting power dynamics by providing women with an opportunity to choose justice options and thereby changing the historical role of traditional leaders as the "main justice focal point". Gasa (2011) complains that the TCB would deny choice

since it would compel women under the jurisdiction of traditional courts not to seek redress elsewhere. Paralegals believe they provide a complementary role to traditional courts and the training CBPs provide to traditional leaders is aimed at improving traditional courts' response to domestic violence cases while endowing victims with the power of choice.

#### 7.4 Chapter Summary

In this chapter, the context of the Bulwer CAO was presented including the geographical location of the Bulwer sub-local area and socio-economic conditions of CAO service beneficiaries. The results of data collection were segmented into three sections. The first section provided results of secondary quantitative data comprised of descriptive statistics. The descriptive statistics were concerned with creating a better understanding of qualitative data rather than statistical inferences. The quantitative data, presented in Figures 7-3 to 7-6 showed the number, types and outcomes of cases handled by CBPs. These figures further demonstrated that CBPs are resolving domestic violence disputes using both the restorative justice approach and Protection Orders issued by the courts to access justice depending on choice exercised by complainants. The highest numbers of cases are resolved through mediation.

The other two sections presented qualitative data. One section presented narrative from interviews of paralegals and a focus group of service recipients. The other section highlighted data that demonstrate linkages between the traditional justice system and CBPs. Matrix analysis and interpretive principles were used to interpret data in relation to narrative and the literature. Matrix 7-1, which was co-created by CBPs and the researcher, presented mediation procedures and processes as explained to the researcher by CBPs. Matrices 7-2 to 7-8 presented a comparative analysis between narrative from CBPs and from focus group participants that shed light on perceptions regarding, for example, interaction with the formal and informal justice systems, the need for CAOs and the role of CBPs in CRJ. Matrices 7-9 to 7-14 provide evidence that Ixopo paralegals are promoting access to justice not only within the criminal justice system and through CRJ but also within the traditional justice system in collaboration with local power structures. Hence, CBPs work in an environment of legal pluralism. In this chapter, data also showed whether CBPs believe that traditional leaders and traditional courts should handle domestic violence cases before the chapter concluded.

## Chapter 8: The Case of Madadeni Community Advice Office

### 8.1 Introduction

The previous two chapters explored the contexts of the Bulwer and Ixopo CAOs as well as the findings from the quantitative and qualitative data. This chapter explores the context of the Madadeni CAO along with the findings from the secondary quantitative and primary qualitative data. The quantitative data entails case intake, and the number and types of cases handled by the CBP between 2009 and 2011. The qualitative data are divided into two sections. The first covers qualitative data derived from the interviews with the paralegal and the focus group discussion with service recipients. These data relate to the formal justice system (Domestic Violence Act) and the informal system of community restorative justice CRJ. The second section covers the qualitative data on interaction between the CBP and the traditional justice system. The data are discussed with reference to the literature reviewed.

### 8.2 Context of Madadeni Community Advice Office

#### 8.2.1 Location of Madadeni community advice office

Madadeni is a township 20 kilometres outside Newcastle, in the Amajuba Municipal District in Northern KZN (see Figure 8-1). The office is based at the old magistrate's court and the premises are currently shared with the police and Home Affairs. The office is run by one paralegal.

The office is accessible to people coming to shop in town. Facilitated by its location, the office works well with other stakeholders, mainly the police, social welfare and the Department of Justice, which are all less

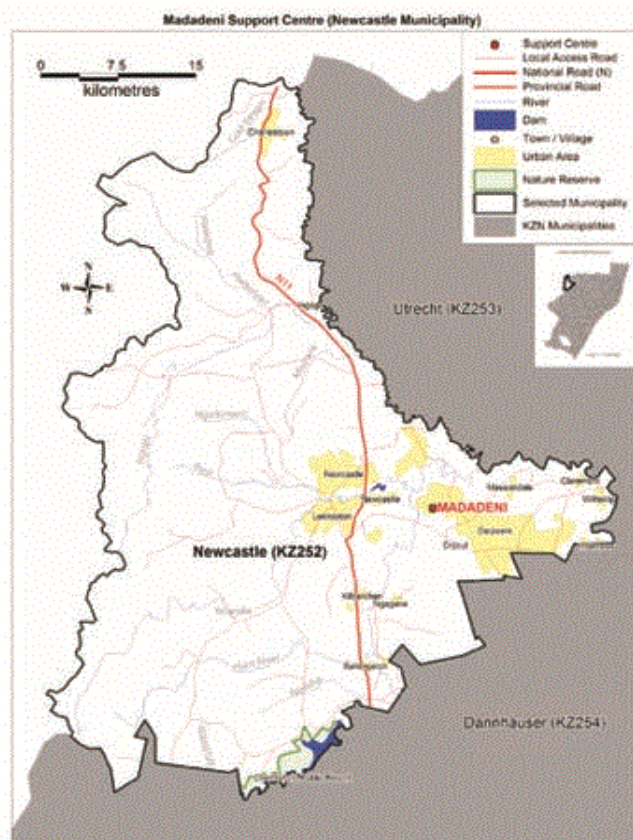


Figure 8-1 Location of Madadeni community advice office (Source: Dept Geography, UKZN)

than 250 metres away. There is also a strong working relationship with the local municipality, traditional leaders, and the community policing forum. For example, if clients ask for assistance with grants, the paralegal refers them to the Department of Welfare (Social Development), and if they wish to apply for Protection Orders, she refers them to the Department of Justice at the magistrate’s court. In 2011 alone, these partners referred 172 cases to the office, while the Madadeni CAO referred 53 cases to other institutions.

**8.2.2 Socio-economic conditions of service beneficiaries**

The local municipality covers a geographic area of 5 055 sq. km, with a population of 439 760. Some of the areas served by the office are rural and fall under the traditional leadership of *Amakhosi* and *Izinduna*. Most clients are unemployed and the majority of those with jobs work in factories and shops, earning low wages. Most people depend on government grants to take care of their families and cater for their basic needs.

As the charts below show, from 2009 to 2011, 79% of the CAO’s clients were of working age; of these, only a quarter were employed. Sixty one per cent of all the clients were unemployed and only 17% were employed.

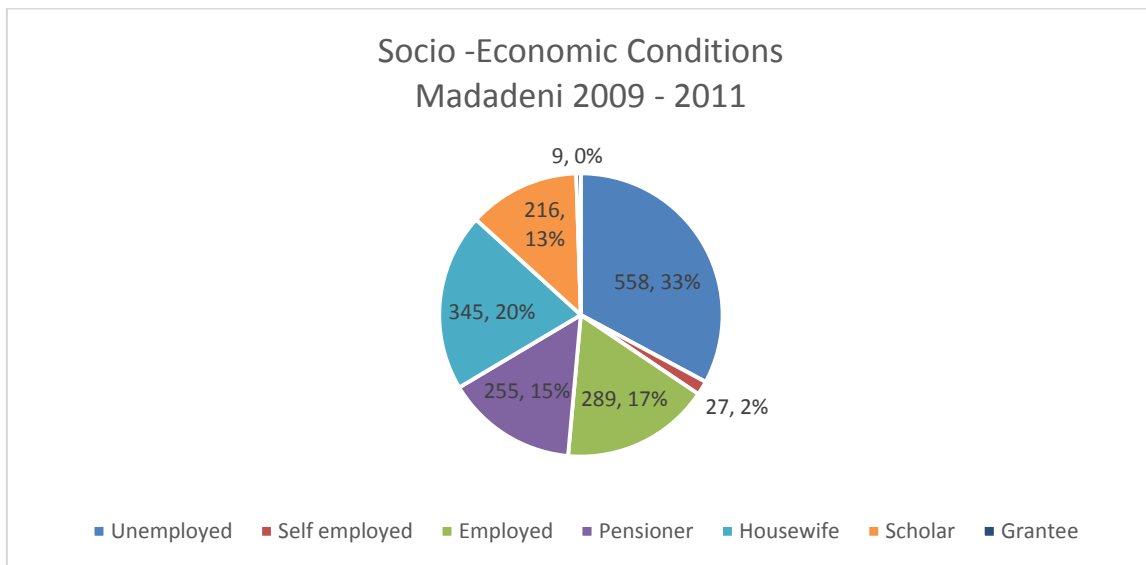


Figure 8-2 Socio-economic background of Madadeni clients

### 8.3 Results of Data Collection

#### 8.3.1 Quantitative data

This section begins with a description of statistics on case intake, followed by an indication of whether domestic violence cases were handled through CRJ or the criminal justice system.

##### 8.3.1.1 Case intake

The statistics on case intake are viewed in conjunction with the qualitative data yielded by interviews with the CBP and the survivors of domestic violence who participated in the focus group. A case often involves two or more clients: for example, in cases that involve the restorative justice approach, whatever the nature of the problem, the paralegal tends to involve family members and their extended network. A total of 1 851 cases were recorded from 2009 to 2011.

The chart below shows the number of cases recorded by the Madadeni CAO from 2009 to 2011 and the proportion of domestic violence cases compared with other categories.

The Madadeni office attends to all types of cases, including criminal cases of domestic violence, child abuse and rape; legal cases involving access to government grants, obtaining documents, pension pay-outs, disputes between neighbours, paternity, divorce queries, maintenance, road accident claims, legal advice on alternative care of children, wills and dissolution of estates, and consumer issues; labour cases involving labour disputes, injury at work and unemployment insurance benefits; and social cases of delinquency, school problems, substance abuse, cultural beliefs, poverty, elder abuse, teenage pregnancy and missing persons. The most common type of case is domestic violence.

Figure 8-3 below shows the total number of cases recorded by the Madadeni CAO from 2009 to 2011 and the proportion of domestic violence cases relative to other cases. Domestic violence is the most prevalent problem, comprising 45% of all cases from 2009 to 2011. This explains the role of the paralegal in assisting women as victims of domestic violence, and indicates that the situation on the ground remains one of violence in the home.

In terms of age and gender 58% of the clients were female and 32% male as depicted by Figure 8-3. Similar to the Ixopo CAO, the biggest problem for adult females that approach the Madadeni CAO is domestic violence. Women make up the majority of the people who use the services of this office. The Madadeni statistics also reflect the correlation between case categories and gender, and between target population groups by gender correlated with case category. As in Bulwer and Ixopo, it was not possible to draw these

correlations specifically for domestic violence cases due to time constraints; the available data combined all categories.

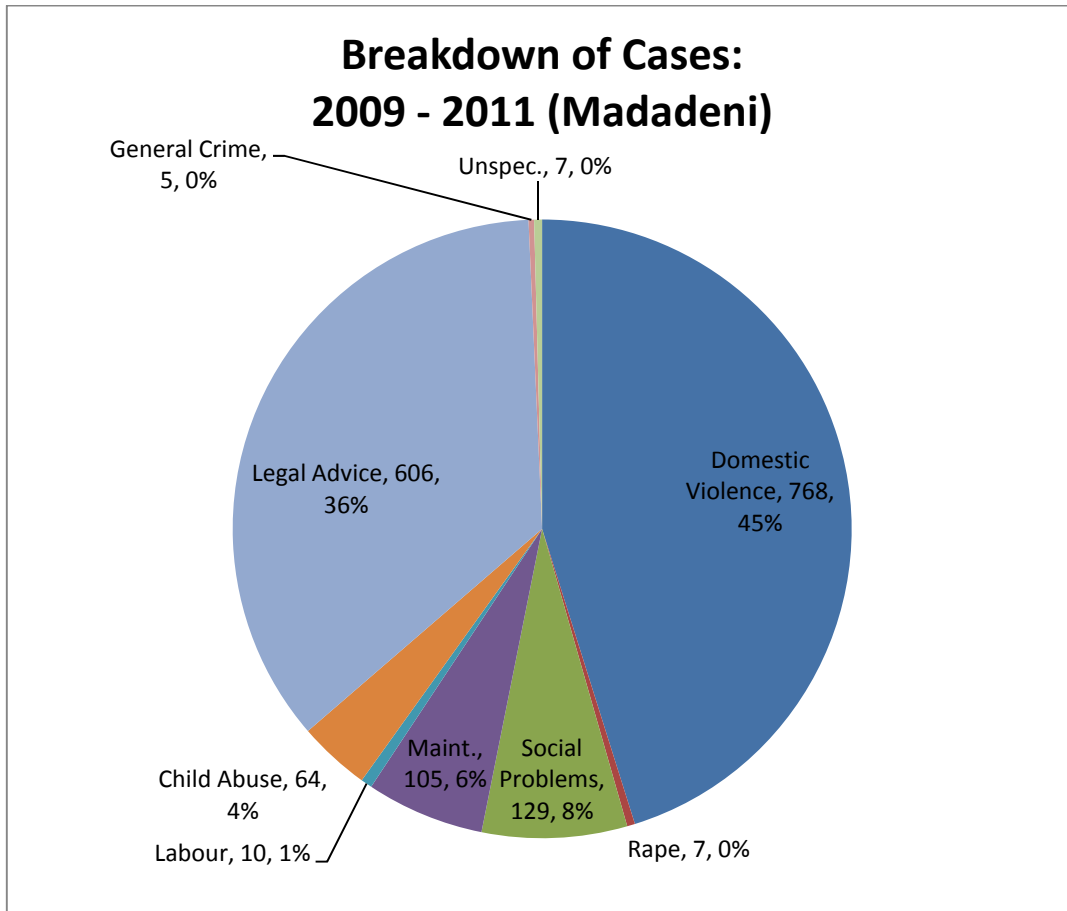


Figure 8-3 Number of cases recorded in Madadeni (2009 – 2011)

From 2009-2011, 58 physically disabled clients visited the centre. It is noteworthy that more than 20% of service recipients were girls. Database statistics show that the majority of rape cases presented at the CAOs are filed by girls between the ages of eight and fifteen. This may account in part as to why girls comprise 20% of the CAO target population. Domestic violence is further discussed below.

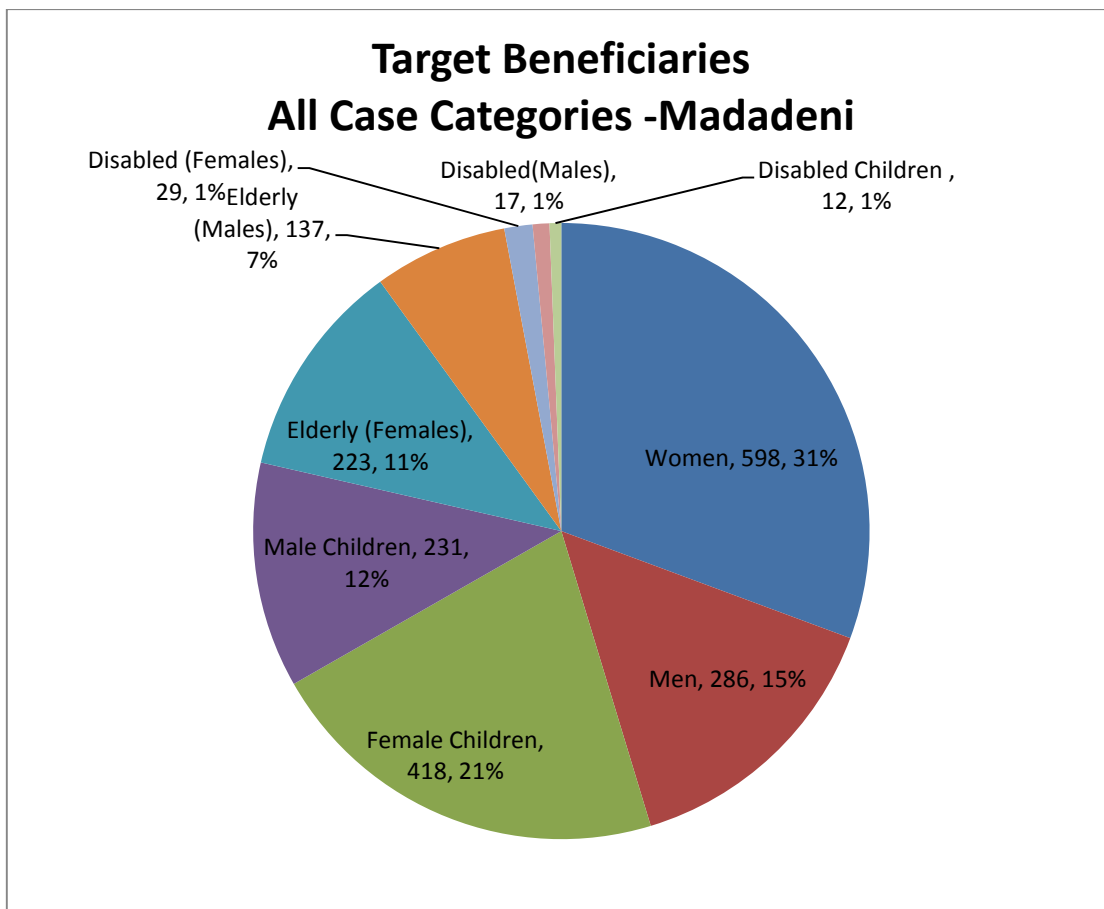


Figure 8-4 Target beneficiaries for all case categories in Madadeni (2009 - 2011)

#### 8.3.1.2 Domestic violence

The Madadeni CBP report (2007) revealed “that domestic violence is a major problem in Madadeni”. According to the Madadeni CBP, “No matter how hard I try to tackle it, no matter how I communicate with the people during presentations, workshops and display information, the highest number of cases is always domestic violence in my bi-monthly reports. These are new cases involving people who have never been to the centre before. I always ask myself why this is the case”.

Domestic violence cases handled at the Madadeni CAO include physical, emotional, economic and verbal abuse in a domestic relationship. The majority of cases are between spouses, which is the focus of this study. Mediation and the court process are used to tackle domestic violence cases. The mediation process investigated is Victim Offender Mediation (VOM), discussed in the literature review.

### 8.3.1.3 The community restorative justice process

In 2009, the office dealt with 262 cases of domestic violence. A hundred and ninety one cases were resolved through mediation, and 165 of these were recorded as having been successfully resolved (Smithers *et al*, 2009-2012) Success is defined as when both parties are satisfied with the outcome of the mediation and the agreement is still in place after a month or more. It is also related to the paralegal feeling that something successful has been achieved and is happy with the progress of the case (Freedman and Kubayi, 2008) In 2010, 236 domestic violence cases were handled. Of these, 229 were resolved through mediation, and 159 were recorded as having been successfully resolved. In 2011, there were 271 cases of domestic violence, and 241 of these were resolved through mediation, with 216 recorded as having been successfully resolved.

The Madadeni CAO handled a total of 768 cases of domestic violence. Six hundred and sixty one were mediated, representing 86% of all domestic violence cases. The paralegal reported a success rate of 82%.

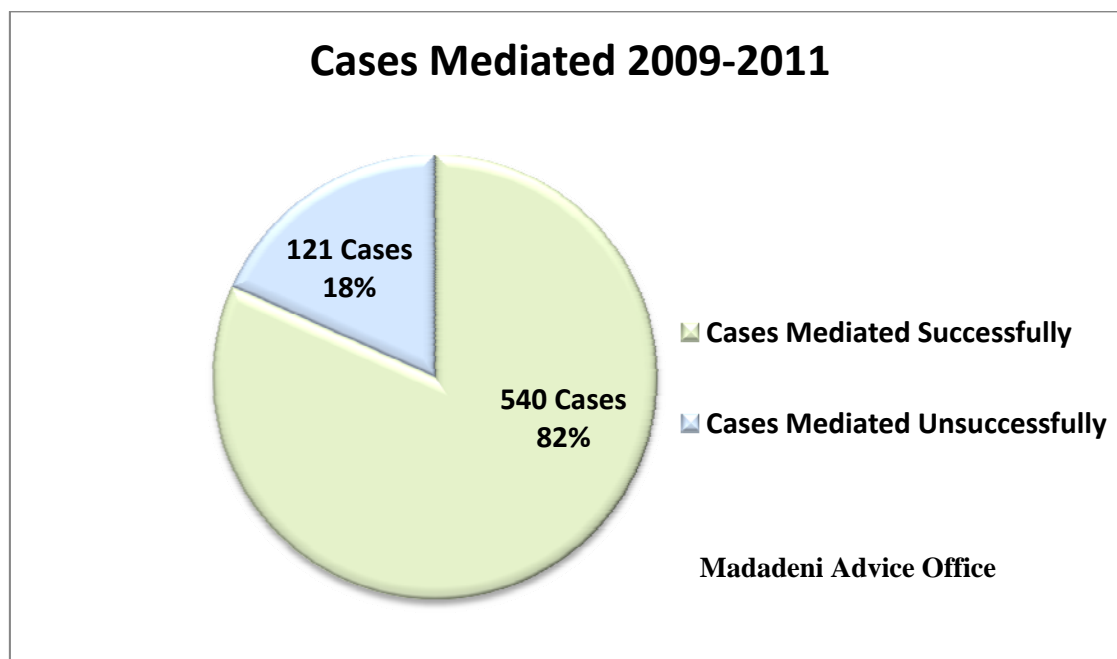


Figure 8-5 Domestic violence cases mediated at Madadeni

Figure 8-5 shows the proportion of cases resolved through mediation from 2009 to 2011, and how many were successful. The unsuccessful cases refer to cases that were mediated but the outcome was unsuccessful. Many of these cases were then referred to court for Protection Orders. Only 70 cases went through the court



process (see Figure 8-6 below). The number of cases successfully mediated is high, showing that CBPs are effective in applying this approach. They are resolving domestic violence disputes in a manner that preserves the relationships and dignity of the victim and the offender; mediation has become a popular method of addressing domestic violence.

#### 8.3.1.4 Protection orders

According to information obtained from the Madadeni CAO and verified by the records kept by the CCJD, in 2009, 26 cases were recommended for Protection Orders. Of these, 12 Interim Protection Orders were granted and seven were finalised or confirmed. In 2010, 23 cases were recommended for Protection Orders; nine Interim Protection Orders were granted and four were finalised or confirmed. In 2011, 21 cases were recommended for Protection Orders, and of these 11 Interim Orders were granted and six were confirmed or finalised.

Therefore, a total of 70 cases were referred for a Protection Order from 2009 to 2011, comprising 9% of all domestic violence cases. Of these, 32 were granted an Interim Order, and 17 were later confirmed.

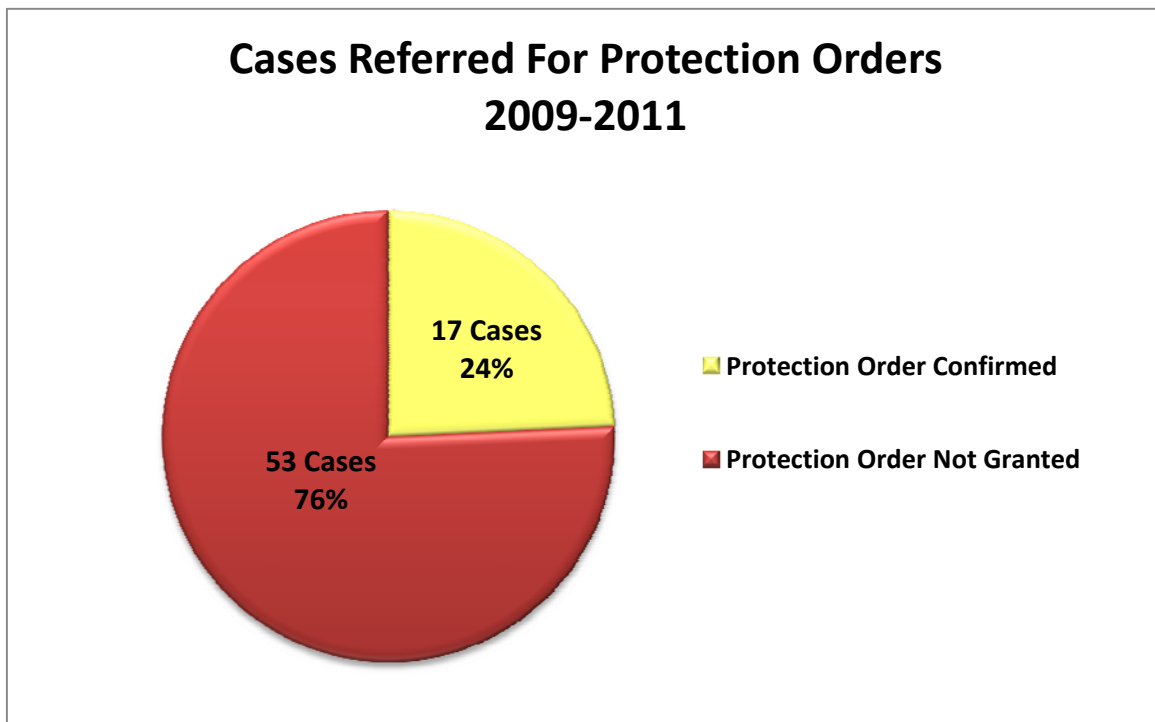


Figure 8-6 Protection order referrals for clients in Madadeni

Figure 8-6 shows the number of cases referred to court for a Protection Order, a small number compared to the cases mediated. This indicates that clients do not like to use Protection Orders to resolve their disputes. This represents court time saved by the paralegal, who mediates the majority of cases presented at the CAO. The success rate with referrals from Protection Orders is high, indicating that when the paralegal determines that a case requires court intervention, the prognosis is confirmed by the court decision in granting the Interim Order. Follow-up by the paralegal revealed that at least 71 of the Interim Protection Orders were finalised, a rate of 76%.

The following matrices, which display qualitative data, carefully retain the voice of study participants while briefly discussing the responses in relation to the literature, research objectives and research questions. This discussion is further explored in chapter 10, which provides a comparative cross-case (non-doctrinal) analysis of the social science data followed by doctrinal analysis, which integrates domestic violence law and case precedents with the findings from the social science data.

### **8.3.2 Qualitative data from an interview of a paralegal and a focus group of service recipients**

As undertaken in chapters 6 and 7, this section of chapter 8 presents data adduced from paralegals and focus groups. It is organised under sub-headings related to (1) mediation procedure and process administered by paralegals, (2) access to justice, (3) use of the DVA in Madadeni and (4) the role of the Madadeni CAO in CRJ. One or more matrix displays narrative obtained during data collection. There is a separate matrix on mediation procedure and process for each case study. These particular matrices were co-created by the researcher and the CBPs who participated in the study. In the column on procedure, the researcher devised the list based on interview responses, and some are devised from the list of approaches to mediation programme design discussed by Landrum (2011:448). However, in the column on mediation process, the researcher makes every effort to preserve the voices of the respective paralegals. CBPs at different support centres often provided the same or similar descriptions of procedures and responses on process. A coding system is used to identify the respondents and a particular CAO. There is one paralegal in Madadeni, therefore narrative from a paralegal is from that one paralegal. The code for focus group narrative is MDFG. The matrix display of interview responses regarding mediation procedures and processes is followed by a series of matrices that are aligned with the sub-headings and that show relevant narrative from interviews and focus groups from this case study. Throughout matrices 8-2 to 8-8, the column on the left depicts narrative from focus group discussions and the column on the right, narrative from paralegal interviews. In other words, as with other case study chapters, this chapter displays, describes and interprets data from the paralegals and CCJD service recipients at a single CAO, while chapter 10 uses cross-case synthesis (Yin,

2009:156) to compare and contrast the results across paralegals from all four CAOs and respective service recipients across all advice offices.

**8.3.2.1 Mediation procedures and processes in Madadeni**

The mediation process investigated is VOM, discussed in chapter 3. The data from the interview with the CBP is reviewed, followed by matrices that depict narrative from the CBP and focus group participants relative to the sub-headings of this section. Matrix 8-1 presents the mediation procedures and processes for the Madadeni CAO. Again, the CBP in this office works alone, therefore the code MDP1 will be used only once, as the responses are all from one individual. From Matrix 8-1 it is evident that the Madadeni CAO subscribes to the same mediation procedures as the Bulwer and Ixopo CAOs. However, some processes are unique to Madadeni. For example the office always informs the victim that the mediation procedure requires full participation and commitment; the paralegal stated that she does not want to take a case and have the victim disappear. These procedures and processes help clarify the role of paralegals in CRJ when dealing with domestic violence cases. The literature identifies the victim’s safety as a problem for restorative justice cases but, as noted in the processes below, this problem can be resolved by a proper screening procedure. The paralegal maintains that the location of the CAO facilitates safety for the victim in addition to follow up after mediation. Hooper and Busch (1993:29) argue that caution should be exercised in “using restorative justice practice in cases of domestic violence” and “the process should only be attempted in rare cases and then only after special protocols have been followed to ensure the victim’s free and informed consent and safety”. Fulkerson (2001:355) notes that “domestic violence is a criminal justice issue that affects hundreds of thousands people” each year and has an economic, social and psychological impact that is staggering to the individuals involved, their communities, and the nation as whole. The criminal justice means of addressing this enormous social problem have not proven satisfactory to victims, offenders, or society.

Matrix 8-1 Mediation procedures and processes in Madadeni

<b>Mediation procedure and process for Madadeni community advice office</b>	
<b>Procedure</b>	<b>Process</b>

<b>Mediation procedure and process for Madadeni community advice office</b>	
<b>Procedure</b>	<b>Process</b>
<p><b>Referrals</b> The office takes referrals from the police, courts, traditional courts, and social welfare. Some seek the mediation process after attending educational workshops, or after having seen or read our pamphlets, while relatives, friends and neighbours refer others. Some come when they see a sign outside the door written 'Madadeni Community Advice Centre'.</p>	<p>"In Madadeni, before they refer a client for mediation the court calls my office, saying the client does not want a Protection Order. Similarly the police bring clients to my offices who do not want to open a case but want the offender to be given a warning but not a drastic one such as the Protection Order." (MDP provided all responses)</p> <p>"Sometimes women who visit the Home Affairs office see a poster and a sign on my door. They come and enquire about my work and I explain. Always the women will say, 'I am in an abusive marriage, I had no idea where I could go because I know how the police operate, and I do not want to attract that kind of attention to my family.' In this case I assist but this confirms to me that the majority of domestic violence incidences are not reported. Perhaps what is reported is less than five per cent."</p>
<p><b>Voluntary participation</b> Participation by the person seeking mediation is voluntary.</p>	<p>"With a victim who has been referred, most have already made a decision not to go the court route. Offenders by the time they present themselves in my office have in the majority of cases already decided to cooperate because of my calling letter."</p>
<p><b>Case intake</b> A preliminary interview helps the paralegal to make an assessment to decide whether to take a case or not. The office always informs the victim that this procedure requires full participation and commitment. The paralegal does not want to take a case only to have the victim disappear.</p>	<p>"I open a case file and record information on our case intake form designed specifically for domestic violence cases." "In many instances I will concentrate on listening, and the victim will ask me, 'Why you are not writing, I want you to write everything down'."</p> <p>"The questions I ask in the first interview of the victim include the following: Has the case been reported before? Am I am the first person contacted/consulted outside the family? If this is a case of domestic violence, what steps has she taken on her own? Have other family members been involved in the dispute. Who else is affected by the abuse?"</p>
<p><b>Counselling</b> This is done prior to mediation, to help a victim who has suffered trauma, fears the offender, or is very angry. This is an important procedure because sometimes a victim cannot talk because she is crying.</p>	<p>"Sometimes there are clients who just want counselling, especially the ones that have experienced violence for the first time. A victim will say to me: 'I have been advised by so many people to leave, because if your husband beats you for the first time it is the beginning and he will not stop and therefore I must leave, while others say I must open a case against him. I do not want people to tell me what to do; they must leave me to make my own decision. I just want to talk, let off steam then I will decide what I want to do. I just want counselling for now to cope with the situation and decide what steps to take because it is for the first time he beat me'."</p>
<p><b>Case selection</b> They are several factors that are considered in deciding whether a participant's case is suitable for mediation.</p>	<p>"I look at the seriousness of the case. In the process I establish if the client is willing to work with me until the matter is resolved. It has... happened that sometimes after the initial contact the client does not come back. I always inform my clients that if I open a case file, I expect participation and commitment."</p>
<p><b>Ground rules and responsibilities</b> The rules are: the victim and the offender must give each other a</p>	<p>"I inform the participants how mediation works and how I conduct the process. I also emphasise that no inappropriate language is allowed. There should be no interruptions, even if the other party is saying what</p>

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<b>Procedure</b>	<b>Process</b>
chance to talk, with no interruptions. They must listen carefully to what is being said, and cell phones must be switched off.	you do not want to hear.” “I normally introduce myself, and then state the rules that will be followed during the process. I am friendly and welcoming, and explain to the parties the issue of confidentiality and that I will take notes as they speak.”
<p><b>Mediation logistics</b> If the victim chooses mediation, the office contacts the offender, determines whether he agrees to participate and schedules a hearing date and time that is suitable to both.</p> <p>If the paralegal fails to control the shouting, she proposes to meet with them separately and explains that it is in their interests to be able to communicate and listen to one another. Thereafter they come together and they proceed.</p>	<p>“The mediation process is informal, and is conducted in my office. Mediations are arranged at times when there are no clients waiting to be attended, and this is usually in the afternoon. People in rural areas come to the office in the morning. Offenders and victims have a face-to-face meeting.”</p> <p>“The victim tells the story first, and then gives the offender a chance to talk. Thereafter, they can ask each other questions. This is where I play a very important part as a mediator and guard the process so that it does not become a shouting match. The participants are allowed to argue, and during this time I take notes of important points, which I share with them and for them to further discuss. At this time common sense normally prevails and they are ready to deliberate on solutions of their problem.”</p> <p>“The mediation process might involve separate meetings with each client. This is done if the parties are unable to communicate.”</p>
<p><b>Telling their stories</b> The victim is given an opportunity to tell the story of how the domestic violence has affected her and as well as others, for example, children. The offender is given an opportunity to tell his side of the story.</p>	“Victim stories are usually very long; sometimes the offender does not even remember the events (maybe this is because it did not affect him). It is healing to provide the victim enough time to tell her story from when it began to go wrong and how it affected the victim for all these years. However, sometimes if the offender is expected to go back to work after mediation, I request that the victim start by talking about what brought her to the office.”
<p><b>Solutions from each party</b> The paralegal does not take decisions for victims. They are the ones who come with a solution. She is there to guide the process and help the victim and the offender to communicate.</p>	“It pleases me to hear the participants saying ‘We are here to find a solution to our problem’ or the participants asking each other why they are here.”
<p><b>Discussion of solutions</b> The office assists the victims and the perpetrators to discuss their problem with an aim of reaching a mutually agreeable settlement.</p>	<p>“By the time the participants start discussing solutions, the healing process begins. The victim and the offender relax and in between crack some jokes.”</p> <p>“Discussions of solutions can take long if one party is stubborn and does not want to compromise. That is when the other party will say, ‘Why are we here?’”</p>
<p><b>Victim safety</b> Victim safety is important, and is the first thing that the paralegal</p>	“I inform the offender to relax and that he is not charged. Sometimes I go further to inform the offender that the victim desires privacy from a family situation hearing, and that she is not confident that family

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<b>Procedure</b>	<b>Process</b>
<p>establishes at the initial individual contact with both the victim and the offender.</p> <p>The office has an advantage because it is on the same premises as the police station.</p>	<p>members will be neutral in the discussions. Therefore the process is free of bias.”</p> <p>“Offenders themselves are aware that the area is protected. I also inform both the victim and the offender that I will make a follow-up after the mediation.”</p>
<p><b>Victim/ offender satisfaction with procedure and process</b></p> <p>There is always tension at the beginning of mediation, and this is expected. Thereafter they relax and participate freely because both parties want to engage with each other in resolving the domestic violence issue.</p>	<p>“The offender receives a letter calling him to present himself to a community advice office based at the police station, which puts fear in the offender, because all he thinks of is arrest.”</p> <p>“The majority of cases have a success story, and personally I am a fan of mediation, I do not like mediation to fail. When mediation is successful I am also motivated to do more. I am not a fan of Protection Orders, I believe Protection Orders, do not solve the problem, it makes the situation worse. Most clients do not up to today understand the purpose of a Protection Order. It provides a drastic measure, which does not leave a room for reconciliation. However when it is used together with mediation its potency is reduced.”</p>
<p><b>Citizen satisfaction with agreement</b></p> <p>The victim and the offender do reconcile, and the offender shows remorse.</p>	<p>“I am known in Madadeni for successful mediations. Many times when offenders see me in town they tell me that my office is achieving great things. Many women have settled with their families. What has been broken has been repaired.”</p>
<p><b>Case follow-up</b></p> <p>Parties are contacted by telephone and home visits; I ask the victim if things are okay, if the offender is honouring the agreement, and the state of their relationship. I always enquire about the children. They are asked if they were satisfied with the hearing, was it conducted fairly, they say everything they want to say.</p>	<p>“Sometimes I receive positive feedback from offenders themselves who take initiatives and call before I call. They tell me about how satisfied they were with the mediation meeting, and how it was conducted fairly without fear or favour. They mention that they did not realise how their conduct had hurt their wives and children. It is humbling for me, it boosts my confidence in what I am doing.”</p> <p>“I find out from the victim if the problem is continuing. My clients are honest, because they will tell me the situation has improved. Obviously it takes time for the situation to return to normal quickly, and both are still working on their relationship. Others say they are enjoying the attention they are getting from their husbands after mediation. I do not do follow up on unsuccessful mediations. But I follow up on the ones where the victim was supposed to come back for further action but did not come back - this is so that I can close the file.”</p>
<p><b>Refusal to participate or comply with agreement</b></p> <p>Most of the offenders participate and abide by the agreement because they would rather avoid going to court and the humiliation of being arrested in front of their children or at work.</p>	<p>“I inform the offender especially of the consequences of non-cooperation. Sometimes I will say to the offender, ‘Is it because I am a woman that you do not want to participate?’ Some will say, ‘Yes, because I do not want to be told what to do by a woman’. When they say that, I cannot help it but laugh because I know they do not want to be arrested. After explaining what steps the woman is entitled to take in terms of the Domestic Violence Act, I get their full attention. Sometimes they are more attentive than the victims during mediation. Those that walk out</p>

<b>Mediation procedure and process for Madadeni community advice office</b>	
<b>Procedure</b>	<b>Process</b>
	come back and apologise.”
<p><b>Unsuccessful mediations</b> There are parties who refuse to compromise or reach an agreement.</p>	<p>“Some come to the advice office thinking I will take their side and if I show neutrality they become very angry and then fail to comply.”</p> <p>“Sometimes mediations are not successful because the parties are not telling the truth or are not honest with one another. Sometimes one party will expect me to take sides, it does happen. With unsuccessful mediations I do not take chances, especially if the offender walks out of the mediation. I refer for Protection Orders because I do not know what will happen when the victim arrives home.”</p>
<p><b>Access to justice</b> Mediation brings stability and harmony in the house. Parties learn to communicate. It is easy for mediation to reconcile, but difficult to reconcile once you involve the police. Women want to preserve their marriage and they do not want court interference. They are often still in love with the offender, and he is the breadwinner. They say they do not want people from their village to know their private matter. If the police come to the homestead it arouses curiosity from in-laws and victimisation. Older children encourage parents to resolve the problem outside court. Cultural considerations (<i>vivinyo zase mshadweni</i>) say it is normal in marriage to experience all sorts of abuse.</p>	<p>“Many women that I have assisted have settled with their families. My mediation is comprehensive in that we also assist with issues of maintenance if we establish that is also contributing to the problem. If the woman needs to go the maintenance court, the problem gets sorted out at the same time”.</p> <p>“An offender once said to me, ‘If it was not for your intervention and the manner in which you conducted our mediation I would not be with my wife, I was almost out of the door’. Mediation saves people from divorcing when it is not necessary. In a way it restores the relationship and trust, like in this case.”</p> <p>“In some cases you find that a client is no longer cooking for her husband because he believes she will poison him. Others, if they are a married couple are no longer sleeping together. After mediation they reconcile and a sexual relationship resumes. Mediation has really proved to be working based on the responses I have got from my clients”.</p> <p>“In mediations I tackle the underlying factors that are contributing to the problem. Criminal justice only looks at the problem before the court.”</p>
<p><b>Factors contributing to success</b> The procedure enables the victim and the offender to deal with underlying issues holistically and acknowledge that violence does not solve anything. The office also deals with maintenance and cultural issues, which also get successfully resolved.</p>	<p>“It is an advantage that my office is located in the same premises as the police station and just less than 150 meters away from the magistrate’s court. This elicits cooperation by the offender; an offender that does not cooperate is issued with the Protection Order. My experience and training also contributes, I have been doing this since 1998.”</p> <p>“Mediation works and that is why people who have been through the mediation process refer other people to my office. There is no language and cultural barrier as I speak the same language as my clients, I understand the culture as I am from the same culture.”</p>
<p><b>Appropriateness of mediation in cases of domestic violence</b> Women come to our offices and</p>	<p>“Mediation personally I think is appropriate and effective for domestic violence. It is not appropriate for cases where there has been serious assault and extreme violence. But women who have suffered violence that</p>

<b>Mediation procedure and process for Madadeni community advice office</b>	
<b>Procedure</b>	<b>Process</b>
choose mediation. Mediation ties in very well with our traditional system of justice, as they both promote reconciliation. Both parties are encouraged to present their side of the story in a way that promotes <i>Ubuntu</i> .	I consider serious still opt for mediation. I respect the choice that the victim makes not to charge the offender and opt for mediation. So many people, especially married women, they do not want Protection Orders, unless they are ready to divorce and move out of the house - here a Protection Order works.”  “Women are also aggressive and when that happens they expect us not to condemn that. I think violence is unacceptable irrespective of whom it comes from. You cannot justify violence at all nor defend it, especially when a woman commits it. Men do not report violence from women because they are afraid the police will laugh at them - therefore the mediation route is more comfortable.”
<b>Record-keeping</b> The office keeps case registers, an electronic database, an index book of cases, and intake forms.	“Now I am going to organise agreement forms that will have the stamp of the office and that of the police and courts to make agreements formal. The agreement between parties has always been an oral agreement.”
<b>Post-mediation</b> The paralegal asks her clients to see if the problem is continuing, and encourages them to come back and assists in taking further steps.	“Mediation helps people who do not want Protection Orders; it works in the majority of cases. The relationship might not be completely restored but it gives people an opportunity to work on that process. The feedback from clients attests to this.”

On the one hand, matrix 8-1 shows how the paralegal perceives her role in the VOM procedure and process. On the other, it provides evidence of how she uses restorative justice initiatives in domestic violence cases, whether the restorative justice intervention is appropriate in such cases, and whether CBP-led initiatives increase access to justice. In addition narrative from the paralegal identifies factors that contribute to the success or failure of restorative justice practices such as VOM. Data from this matrix, like other matrices on mediation procedures and processes help answer the research question: “Do community-based paralegals use restorative justice initiatives in cases of domestic violence?”

Narrative in matrix 8-1 indicates how the CBP examines and evaluates a case to determine its fitness for mediation (Landrum, 2011:448). The CBP plays a service role, not just through interaction with other justice stakeholders (Pigou, 2000:5) but also by intently listening to “story-telling” and assisting women with “settling with their families” since CBPs handle a wide range of disparate cases (Buckenham, 2014:6; Golub, 2003:26) which may underly violence in the home. Based upon evidence depicted in matrix 8-1, restorative justice theories in motion in Madadeni include universal pragmatism and communicative action (Barrett, 2013:337); social and moral development (Johnson and Van Ness 2011:16); and reparation or



restoration (Sharpe, 2011:27). As was the case with other CBPs, the Madadeni paralegal seems to use communication in a pragmatic way – even allowing parties to argue during the mediation encounter as well as to question each other but the CBP disallows a shouting match. How the CBP handles the communication component of the process appears to be that which works under the circumstances to achieve common ground (Barrett, 2013:355). The fact that the Madadeni CBP receives positive feedback from offenders and victims, such the offenders’ indication of being unaware of how their respective conduct hurts the wife and children; and the victims’ statement that they are “enjoying the attention they are getting from their husbands after mediation” suggests that social and moral development have taken place. This comports with Johnson and Van Ness’ (2011:16) contention that learning from one’s mistakes as a result of the restorative justice process can bring transformation to individuals and families.

Interestingly, and not unlike other CBPs, the Madadeni CBP abashedly uses the threat of issuance of a PO to engage offenders – especially since the CAO is located in the police station. This technique aligns with Barton’s (2000:5) and Daly’s (2000:48) argument that retribution and punitive elements can be part of the restorative justice process. In other words, avoidance of enforcement power of the criminal justice system encourages ‘voluntary’ participation in the restorative justice system. The Madadeni CBP appears to dispel the belief in the literature (Cappelletti, 1992:35) that mediation facilitators lack the guarantee of independence since cases involving violence by aggressive women against men is treated the same as violence of men against women. Unlike other CBPs the Madadeni CBP plans to reduce agreements between parties to writing and to have the agreement counter-stamped by the CAO, the police and the courts – demonstrating her role in partnering with criminal justice system personnel (Golub, 2003:35).

The results from the quantitative data and the mediation procedures and processes employed indicate that restorative justice interventions by the Madadeni and other CBPs are appropriate for the majority of cases of domestic violence, with a small number indicating the contrary. These are cases where the parties cannot reconcile and the victim obtains a Protection Order to manage the violence. A comparison of the number of cases successfully mediated, and the number of Protection Orders confirmed, combined with referrals of cases of domestic violence from criminal justice institutions such as the police and the courts in Madadeni, provides a measure of the impact of the paralegal on victims of domestic violence. The data is evidence of the extension of access to justice for rural women through CBPs. Matrix 8-1 shows that, after consulting with the victim, the police and courts in Madadeni refer cases to the CAO. Likewise, Dissel and Ngubeni’s (2003: 5) research found that the magistrate’s court referred the majority of cases to a VOC programme.

The focus now shifts from the interview data only to a comparative analysis of data from the interview with the CBP and the focus group with survivors of domestic violence. While the interview data displayed in matrix 8-1 is presented and analysed in accordance with the mediation procedure and process, the comparative responses from CBPs and focus group participants are organised similar to the focus group guide under the sub-headings of (1) access to justice, (2) use of the DVA and (3) CAOs and restorative justice. Focus group participants were drawn from the community; they were recruited based on the fact that they had received services from the office.

### 8.3.2.2 Access to justice in Madadeni

In terms of access to justice, Robb- Jackson (2012:5) observes that, “one mechanism to promote citizens’ access to justice is a community-based paralegal program” which can improve service delivery and “stimulate the legal literacy of communities”. In rural and remote areas, the majority of people rely on traditional courts and the services of CBPs for access to justice and avoid the formal justice system. However, for those that choose the formal system route, the justice system that is applied to assist them is the Judi care system whereby the state refers “cases that qualify for state assistance to private practitioners” (McQuoid-Mason, 2007:97-116). However this system administratively overloads the South African Legal Aid Board. It is not the formal legal system that affords access to justice to poor people in rural areas. Instead “non-lawyers remain the only conduit for indigent and marginalised communities to access justice” Dugard and Drage (2013:41).

The data captured in Matrix 8-2 shows how access to justice could be improved. Comparative responses from the CBP and rural women survivors of domestic violence indicate that “the Eurocentric justice system is not meeting the justice needs of all citizens” (Stapleton, 2007:6).

Matrix 8-2 Comparative responses on practical ways to improve access to justice for rural female Victims of domestic violence in Madadeni

Focus group discussion	Community-based paralegal
“They must give us financial support, grants or employment if you are a victim of domestic violence.” MDFG	“In Madadeni there is a high rate of unemployment. I think if women could be financially independent that will begin to address domestic violence. However the situation could be reversed where women become abusers if she is a breadwinner. I have seen evidence of this in my office”.

Focus group discussion	Community-based paralegal
<p>“Paralegal offices should be located in every village, we are confident this will control domestic violence. Our husbands fear and respect paralegals.” MDFG</p>	<p>“Mediation should be part of the justice system, to provide women with choices”.</p> <p>“Mediation is also used with other remedies such as Protection Orders, and counselling, this is tailored to suit each individual case”.</p> <p>“Each and every village should have a paralegal advice office. I have seen the benefits and impact of having such an office. Unfortunately I cannot reach everyone”.</p>
<p>“Paralegals and justice must work together; the state must subsidise paralegal work without paralegals becoming part of the state.” MDFG</p>	<p>“It will restore confidence in the justice system, but paralegals should be allowed to operate independently with subsidy from government.”</p>
<p>“Education of court officials and police needs to be victim-centred, they need to visit our villages and found out what kind of justice we desire”.</p> <p>“I went to court on several occasions but I did not get help, instead I was humiliated, they do not even listen nor give me a chance to explain. Mediation is the best, paralegals listen and are very patient, they do not get tired, and maybe it is their training.” MDFG</p>	<p>“It can be improved by conducting more awareness-raising workshops, especially in deep rural areas. Organise more community gatherings (<i>Izimbizo</i>) for women and men focusing on domestic violence. The purpose will be to create a platform for women to speak out against domestic violence”.</p>

Matrix 8-2 shows that expansion of CAOs and CBPs to remote villages, integrated services from CBPs/CAOs and criminal justice system, financial assistance for victims of domestic violence, education of court personnel in the formal justice system, and community mobilisation around domestic violence discourse would improve access to justice in rural areas. Such expansion of CAOs and CBPs comports with Maru’s (2006b:470) proposition that due to “their familiarity with local communities, paralegals are often more capable than lawyers when it comes to straddling formal, informal and customary legal systems”. While the lack of statutory regulation of the paralegal profession is troubling (Kahn-Fogel, 2012:776), data in matrix 8-2 reflect that the promise of state recognition should be balanced against pitfalls that may disconnect CBPs from the communities they serve (Franco, *et al*, 2014:29) such balancing is a safeguard to consider in delivering formal integrated service delivery from CAOs and the criminal justice system combined. Focus group responses are aligned with gender-specific barriers identified in the literature such as lack of financial independence of women which perpetuates a cycle of violence (Robb-Jackson, 2012:18) and womens’ negative perceptions of legal institutions and litigation (De Meene and Van Rooil, 2008:10-11) which may be overcome through education and training on applying victim-centred approaches. The

Madadeni paralegal's interest in community mobilisation points not only to her developmental (Golub, 2000:303) and human rights (Fine, 1992: 7) roles but also to Franco *et al's*, (2014:30) argument that victims of domestic violence are "unlikely to challenge their attacker without strong support from the community". The community, according to Rubin (2010:98), should also "make resources available to women who are victims of domestic violence".

The discussion now turns to the use of the DVA in Madadeni.

### 8.3.2.3 Use of the Domestic Violence Act in Madadeni

In this section from Matrices 8-3 and 8-4, it appears that the formal justice system is not meeting the justice needs of rural women in KZN. In terms of the Criminal Procedures Act No 51 of 1977 (1977) Sec 40 (1) (q) (as amended by Sec 41 of Act 129 of 1993 and Sec 4 of Act 18 of 1996) (as added by Sec 20 of the Domestic Violence Act No 116 of 1998), a police officer may arrest an offender without a warrant of arrest at the place where an act of domestic violence has been committed if he reasonably suspects, that an offence has been committed which has an element of violence against the victim. The DVA (Act 116) provides for Protection Orders to be issued. This is a judicial measure introduced to protect victims (mainly women) from harm. The judicial measures set out in the Act aim to give victims swift and effective protection. The procedure is meant to be readily available and is thus applicable at the level of the magistrate's court. Interpreting the responses from domestic violence survivors in light of the DVA, the results suggest that the participants view domestic violence as a private matter. Scholars have debated this issue. In terms of the public/private divide, Hanna (1996: 1868) contends that domestic violence is a public crime; therefore, the state has a responsibility to intervene aggressively. This sends and follows through on the message that the state will not tolerate violence of any sort. This argument is rooted in the feminist principle that, when the state refuses to intervene using the rationale that domestic violence is a private family matter, the state not only condones but also promotes such violence. For decades Hanna (1996: 1869) has argued that shielding women who do not want to proceed "through the criminal justice system reinforces the idea that domestic violence is a private crime" without social consequences and ultimately, marginalises and isolates women who are not expected to respond to the violence on a broader scale. Presser and Gaarder (2000:179) contend that perpetrators of domestic violence support the view that domestic violence is a private matter. It is argued that the "internal affairs of the marriage" are inappropriate material for regulation by a regime of formal, act-oriented rules. Nancarrow (2006:118) notes that feminists "concerned about gender inequalities in the justice system acknowledge that the criminal justice system is often not effective in delivering what women want, and need, for protection and validation".

Matrix 8-3 Comparative responses on the use of the Domestic Violence Act for protection in Madadeni

Focus group discussion	Community-based paralegal
<p>“We do not believe in the justice system, they just take decisions about our future without back-up support when things go wrong”. MDFG</p> <p>“My husband was abusive, he will insult and assault me on a regular basis. I did not want to go to the police. I wanted to protect my children and keep my marriage together. My sister went to court to get a Protection Order; her husband got angry and stopped talking and supporting her and her children. He told my sister to go to court, court will give her everything”. MDFG</p>	<p>“There is so much pressure applied by family members if you decide to open a case against your husband”.</p>
<p>“We do not want to publicise our private affairs by going to the police”. MDFG</p>	<p>“Generally rural women do not understand the purpose of the Domestic Violence Act; those that are aware of its intention do not want to use it for their protection. The measures of the Act are too drastic. Victims see court as a kind of public humiliation”.</p> <p>“Rural women are afraid of the stigma attached to abuse; therefore reporting is attracting attention to what she perceived is a private matter”.</p>
<p>“We have a problem because the courts do not care what happens after the court case. Who is going to pay maintenance, what about our relationship, who is going to give us shelter when we are chased away from our homes by our husbands?” MDFG</p>	<p>“Victims may be uninterested in prosecution not only out of fear, but also out of love, or economic concerns, or consideration for children, or concerns about what will people say”.</p> <p>“A Protection Order on its own is not enough. If you depend on your husband for support it does not work”.</p>
<p>“Domestic violence has been with us for many years, generation after generation has been impacted by it, which is not something that the law can address because it is too complicated. Mediation is the only way to go”. MDFG</p>	<p>“The criminal justice is very harsh, it is a painful process, there is little scope for addressing violence between intimates or family members who wish to remain in a relationship, which is one reason that domestic violence victims may opt out of the system”.</p>

Matrix 8-3 reflects study respondents’ dissatisfaction with rule of law orthodoxy for domestic violence cases; namely, the DVA. Narrative in matrix 8-3 illuminate the public/private divide when it comes to filing and processing domestic violence cases. While Presser and Gaarder (2000:179) argue that is the perpetrator who seeks to make domestic violence a private matter, Madadeni rural female victims of domestic violence likewise seek that these matters be handled in a private forum. Although Braithwaite (2003:159) argues that family violence is “profoundly public” and restorative justice approaches to domestic violence cases “might

fail to treat them seriously”, Madadeni service recipients as well as service recipients from all CAOs subject to this study, disagree. On the one hand, according to Frederick and Lizdas (2010:49) restorative justice as a “private process could actually leave many women unprotected and could inadvertently slow the progress toward ending domestic violence”. On the other hand, Madadeni respondents, as well as other service recipients who participated in focus groups indicate that a private-based model is best suited for domestic violence cases. Respondents’ perceptions show that they are more interested in family sustainability than criminalising their husbands through the DVA which they perceive as not publicly holding their partners accountable but tearing their families apart. Simultaneously, data show that respondents choose their reporting strategies based on consequences and benefits of reporting to different justice systems which is called ‘rational forum shopping’ (Sandefur and Siddiqi, 2011:116) and that mediation may be supported by a PO. Braithwaite (2000:118) is concerned with stigma attached to an offender being reintegrated into a community, respondents in this study are pre-occupied with being stigmatised by taking domestic violence cases to court. It appears that “the victims often feel guiltier than the offender” (Graef, 2001:31) and Madadeni victims seem to be faced with mixed loyalties among family members (Daly and Stubbs, 2006:17).

Madadeni service recipients are dissatisfied with the lack of follow-up with victims of domestic violence – only using victims as witnesses (Zehr, 2005:3). Matrix 8-3 not only depicts citizen satisfaction with mediation and the subsequent follow-up through home visits but also domestic violence victims’ perceptions that mediation is too complicated for the rule of law orthodoxy to handle. This latter factor is not found in the literature and therefore advances the debate about the fitness of restorative justice practices to handle domestic violence cases.

Next, matrix 8-4 presents narrative related to problems with the criminal justice system when it comes to domestic violence cases.

Matrix 8-4 Comparative responses on problems with the criminal justice system regarding domestic violence in Madadeni

Focus group discussion	Community-based paralegal
“We hate to make our private matter public ( <i>ihlazo lasekhaya alikhulunywa kubantu</i> ); you do not hang your dirty linen in public”. MDFG	“The women we work with believe it is a taboo to expose your family issues in public. Going to the police means public exposure of private marital issues”.
	“Rural women are adamant that domestic violence is a

Focus group discussion	Community-based paralegal
“Police are not discreet when they visit our homestead”. MDFG	private matter; this view is also supported by their husbands who always comment about the privacy of mediation. There are very few men who are comfortable talking about private matters in public”.
“Justice does not protect you after the hearing or trial, it separates families; families are torn apart.” MDFG	“In other cases Protection Orders work to protect the victim from further violence, but the majority of cases of successful protection are those of women who have already decided to leave a relationship.”
“The court turns things upside down, for the victim and the offender, especially if he gets arrested, life is never the same. You become bad luck, even the ancestors can’t protect you”. MDFG	“Rural women are still subjected to oppressive cultural practices. For example if you report your husband to the police you are expelled from your marital home”.

Narrative in matrix 8-4 revolves around the public/private divide. The criminal justice system perceives domestic violence as a public matter. The criminal justice approach coincides with punishment of the offender. Scholars complain that relegating domestic violence as a private matter to be processed in a informal restorative justice forum “re-privatises male intimate violence after decades of feminist activism to make it a public issue” (Daly and Stubbs, 2006:18); “reinforces the idea that domestic violence is a private crime without social consequences” (Hannah 1996:1870); and it “threatens to reverse progress by pushing domestic violence back into the realm of the ‘private’”. This weight of evidence is contrary to the perceptions of rural female victims of domestic violence who participated in this study. Rather, narrative in matrix 8-4 shows that these indigenous female victims of domestic violence who seek to save their respective marriages and sustain familyhood, prefer a private-based model. Nancarrow’s (2010:143) study also showed that indigenous women prefer a private-based model for domestic violence case and Nancarrow purports that “community involvement in administering justice does not represent the privatisation of crime”. Based upon data in matrix 8-4 and literature, other factors that seem to problematize the criminal justice system for domestic violence victims in rural areas are related to cultural beliefs and practices – such as concern for the ancestors’ preference of family sustainability, flexibility of a private-based model (Shepland, Robinson, and Sorsby, 2011:78) and the fact that the public-based model “downplays or ignores the personal and interpersonal aspects of domestic violence” (Zehr, 2002:12) which is outside the scope of *ubuntu*.

#### 8.3.2.4 **Madadeni community advice office and community restorative justice in Madadeni**

Community advice offices in South Africa were discussed in chapter 4 as well as challenges of CAOs and categories of CBPs in the country. In view of “gross economic inequalities and the law’s remoteness from most people’s lives” (Dugard, 2006:266), CAOs were created to meet constitutionally mandated justice needs of South African citizens on a wider scale. There are approximately two hundred and eighty-six COAs in South Africa (2013:7-11). Among the challenges identified are lack of consistent funding including salaries for CBPs. The NADCAO study commissioned to CCJD regarding eight CAOs in four provinces found that six of the eight CAOs were without donor funding yet “CBPs are the pillars of CAOs” but “without salaries CAOs will collapse” (Buckenham, 2014:9). Nevertheless, Buckenham (2014:9) found that all CBPs in the eight CAOs continue to come to work and provide legal services to the communities in which they live. Other challenges of CAOs include the fact that neither law nor development is static (Franco *et al*, 2014:30) and that CAOs work with women and children regarding cases of domestic violence, child abuse and rape. Hence CAOs and CBPs are expected to keep apace of changes in law and development while dealing with complex issues confronted by vulnerable populations. In Madadeni, as previously shown by figure 8-4 in section 8.3.1.1, women and female children comprise more than half the population served. Although donor funding is erratic, the Madadeni CBP continues to dispense legal advice and carry out her developmental role as well as other roles in delivering CRJ practices. The Madadeni CAO is located in the police station.

In this section, as was the case in previous chapters, matrices 8-5 and 8-5 present narrative in answer to the question of whether there is a need for CAOs and CBPs and identification of the role of CBPs in the restorative justice process. Data in matrices 8-7 and 8-8 shed light on interaction between CRJ the criminal justice system and CBPs as well as study participants’ experience of restorative justice in Madadeni.

An interpretation of data in matrices 8-5 suggests that the Madadeni paralegal applies restorative justice theories of engagement and empowerment (Sawin and Zehr, 2011:53) while performing human rights (Pigou, 2000:7), developmental (Golub, 2003:35) and service (Maru, 2006b:450) roles.



Matrix 8-5 Comparative responses on the need for community advice offices and community-based paralegals in Madadeni

Focus group Discussion	Community-based paralegal
<p>“There is still a need for community-based paralegal services; they are playing a very important role that cannot be replaced by other service providers. Without their services some of us would have been on the street, divorced and destitute”. MDFG</p> <p>“They bring harmony within our families, happiness and joy in our lives which no other service provider has done before”. MDFG</p>	<p>“The impact of my work, especially mediation, has brought harmony in the homes, change in gender relations in cases of domestic violence, money in the home, and my clients feel empowered”.</p>
<p>“We are not yet fully aware of our rights. Paralegals educate us about issues that affect us in our rural communities”. MDFG</p>	<p>“We have been promoting access to justice for years, our educational and awareness raising community workshops are legend in our communities; even stakeholders depend on us to organise and conduct community workshops.”</p> <p>“We are so used to educating people that people always request more workshops. Our workshops increase knowledge of rights, law, and life skills.”</p>
<p>“They treat us with respect and have patience to listen to our problems, they are different from other institutions, paralegals live with us.” MDFG</p>	<p>“In Madadeni I have become an important role player in that other stakeholders refer cases that they have failed to resolve. Most people who get help from my office have seen other people but did not get help. In my office nobody is turned away”.</p>

Matrix 8-5 reveals that paralegals fulfil legal, social, and economic needs that are not met by public institutions (Stephens, 2009:145). While Sawin and Zehr (2011:53) question “who is doing the empowering or engaging in a restorative justice event”, narrative from the Madadeni CBP indicates that she is doing so in performance of a human rights role which includes organising and conducting community education workshops (Golub, 2000:298). Performance of her service role by accepting referrals from other stakeholders is another effort toward empowerment and engagement of victims of domestic violence. In addition, no clients are turned away and human dignity is honoured (Buckenham, 2014:4, 7). As with other CAOs subject to this study, executing strategies that promote family sustainability is a key role played by the Madadeni CBP. These factors suggest the continued need for and expansion of CAOs and CBPs.

Narrative presented in matrix 8-6 further highlights the role of CBPs in community restorative justice. Themes suggested from this matrix include how CBPs deal with unequal power relations of parties (Stubbs,

2010:92), and implement a non-adversarial approach (Maru, 2006:470) with a flexible set of tools (Makec, 2007:135).

Matrix 8-6 Comparative responses on the role of paralegals in the restorative justice system in Madadeni

Focus group discussion	Community-based paralegal
<p>“In this office you talk about everything, you are free and equal in this office”. MDFG</p>	<p>“The victim is given an opportunity to ‘tell her side of the story’ of how the domestic violence has affected her and as well as others, for example children, in an environment that is conducive for her to speak freely”.</p>
<p>“Paralegals know what our legal needs are, and they do not chase us out but they listen to us and welcome us with a smile before we say anything”. MDFG</p>	<p>“As paralegals our work is flexible and is designed to suit each individual case. If we worked within the formal system, we would be restricted by the rules and procedures. For example we conduct our work not only at the office, we visit homes, workplaces to attend to clients”.</p>
<p>“They give us support even after mediation, by checking how we are coping”. MDFG</p>	<p>“Because paralegals are closer to the people, people do not have to travel long distances in order to access justice”.</p>
<p>“Paralegals know what they are doing when it comes to domestic violence.” MDFG</p> <p>“My life was a mess when I found out that my husband brought back a woman from Johannesburg and she is staying with my in-laws. I was afraid to confront him and I went to the police and the police told me that he does not love me that I must go and look for another man. I love him and I was unemployed. I did not want my children to be hurt and neighbours were laughing at me. I was confused. I got help from this advice office - she was so professional and extremely skilled in the way she conducted the mediation. The other woman was sent packing, I was able to keep my husband and I am so happy.” MGFG</p>	<p>“The police, the courts and the traditional courts are not women-friendly, presiding officers in the main are men. I work with traditional courts; they refer domestic violence cases to me because they do not understand the dynamics of domestic violence”.</p> <p>“Protection Orders work where the couples are no longer in love and no longer staying together”.</p>

The literature suggests that a potential problem with CBPs is that they may be unable to address unequal power relations between the victim and perpetrator (Stubbs, 2010:92; Morris and Gelsthorpe, 2003:130). Evidence displayed in matrix 8-6 suggests that the CBP applies techniques that make service recipients feel that parties to the mediation encounter are on equal footing. Similarly, Dissel and Ngubeni’s (2003:8) study of African women in rural and urban areas revealed that “VOC gave them an opportunity to speak on an equal basis with their partners”, whereas at home they were silenced by the threat of violence. However, Hudson (2003:185) notes that the facilitator needs to carefully establish ground rules to ensure that

restorative processes are not dominated by a powerful individual, which was indicated by the Madadeni paralegal in matrix 8-1. The Madadeni CBP confirms Schonteich’s (2012:26) and Golub’s (2003:26) contentions that one reason that CBPs are instrumental to restorative justice in local communities is based on the proximity of the CAO to sub-local areas and CBPs’ physical, cultural, political and socio-economic connection to the communities in which they live and work. Also evident from narrative in matrix is that her set of non-adversarial tools are flexible enough to tailor outcomes that meet individual needs of clients (Daly and Stubbs, 2006:18).

Taken as a whole, in matrix 8-7 data from respondents indicate that CBPs should continue to conduct mediation and to work with the police and formal courts.

Matrix 8-7 Comparative responses on interaction between community restorative justice, the criminal justice System, and the community-based paralegal in Madadeni

Focus group discussion	Community-based paralegal
<p>“We are very comfortable with mediation and it works. My marriage was saved by mediation and others too. I know because I was referred by a friend in a similar situation who benefited from mediation”. MDFG</p>	<p>“The court process is not used much since people prefer visiting the advice office on domestic violence because the process is quicker. The courts are used for serious cases of domestic violence, but in our case only if the victim chooses to go the court route”.</p> <p>“Restorative justice promotes unity; disputes are resolved immediately before matters get worse”.</p> <p>“Restorative justice is free and user-friendly because paralegals conduct the process in clients’ own language”.</p>
<p>“Paralegals command respect in the community, are trusted; they must conduct more workshops on mediation, and more people will come out and report abuse”. MDFG</p>	<p>“Rural women are afraid of the stigma attached to abuse; therefore reporting is attracting attention to what she perceives is a private matter”.</p>
<p>“Paralegals should continue working with the police and courts as they have been doing, work in similar circumstances just like paramedics work with doctors”. MDFG</p>	<p>“I believe working for the state will limit our work in a sense that as paralegals we deal with every case that is brought to our attention, and we use various approaches in dealing with cases such as mediation. We do not only deal with specific problems; every client that comes to our offices has to be assisted”.</p>
<p>“Paralegals listen to you, they always insist on hearing the other side of story when we report abusive behaviour by our husbands”. MDFG</p>	<p>“There is so much pressure applied by family members if you decide to open a case against your husband”.</p>

To elaborate on what focus group respondents meant by “paralegals should continue working with the police and courts as they have been doing” this means that the CBP assists victims of domestic violence to

complete affidavits and statements that are filed with SAPS. Referrals are made from SAPS to the CAO for further investigation or for mediation. The CAO makes home visits on behalf of SAPS or on their own volition depending on the nature of the case and when the latter occurs SAPS provides transport. The SAPS and the Madadeni co-conduct community workshops on domestic violence and other legal matters including how the criminal justice system operates. The SAPS and the Madadeni CBP have regular briefing sessions regarding safety in the area. This demonstrates how the CBP straddles multiple justice systems (Robb-Jackson, 2012:23; Harper, *et al* 2011:179). Although the CAO and SAPS have a close working relationship, restorative justice practices remain within the purview of the CBP. As matrix 8-7 shows some victims of domestic violence choose the restorative justice system out of fear of stigma attached to them as a result of laying criminal charges against a partner which could result in “collateral consequences” such as “reduced income or retaliation” (Gaarder and Presser, 2006:484). While the Madadeni paralegal works with the criminal justice system, not unlike other CBPs who are part of this study, there is a concern that working for the state will limit their flexibility and wide range of tools to assist service recipients. This concern of the CBPs is supported in the literature by Pigou (2000:24) who contends that incorporation of CBPs into South African legal aid programmes will disconnect CBPs from the community environment and create an elite group. Similarly, Franco, *et al* 2014:31 warns that statutory recognition with or without incorporation into the formal justice system “would undermine the vibrancy and dynamism of the paralegal and alternative law movement”.

Next, data in matrix 8-8 present respondent experiences of restorative justice processes. From this matrix it appears that the Madadeni paralegal applies such restorative justice theories as social and moral development and engagement and empowerment.

Matrix 8-8 Comparative responses on experiences of restorative justice processes in Madadeni

Focus group discussion	Community-based paralegal
<p>“I came to the office for mediation, because I heard from my friend about this service. The source of domestic violence was finance; my husband was not supporting us. After mediation my husband agreed to buy food and pay for other expenses and on top of that he agreed to pay me an allowance of R700 per month. We are still staying together and he is doing everything as agreed”. MDFG</p>	<p>“We don’t just consider the criminal justice issues. We look at deeper problems that may contribute to the criminal justice case. That is the value of restorative justice”.</p>
<p>“The way I was treated at the office, it was very respectful and the explanation on what steps to take was very clear and I was able to explain it to my</p>	<p>“Mediation works and that is why people who have been through the mediation process refer other people to my office. There is no language and cultural barrier</p>

Focus group discussion	Community-based paralegal
abusive husband who immediately agreed to go for mediation. After the mediation the paralegal phoned to find out how we were coping.” MDFG	as I speak the same language as my clients, I understand the culture as I am from the same culture”.
“We swear by the mediation process. Our husbands know what will happen if they do not stop violence”. MDFG	“Offenders respect the mediation process and they are very grateful for the choice their wives have made instead of going to court. This accounts for the success of mediation. Their apology I can see is genuine and they do show remorse”.
<p>“We love the paralegal office, it is known in our community by those who have had contact with the office, but not everyone knows about it. For us we talk about this office at every opportunity”. MDFG</p> <p>“My husband was divorcing me. I came to this office and my marriage was saved and more follow-ups were done and I am happy even today. I get respect and support from my husband and the family is closer than before”. MDFG</p> <p>“We are able resolve our problems without going to court”. MDFG</p>	“I find out from the victim if the problem is continuing, my clients are honest, because they will tell me the situation has improved. Obviously it takes time for the situation to return to normal so quickly; both are still working on their relationship. Others say they are enjoying the attention they are getting from their husbands after mediation”.

Narrative from focus group participants in matrix 8-8, particularly the first response demonstrates that the Madadeni CBP engaged and empowered the parties such that they developed solutions for their own problems enabling them to sustain their relationship. This comports with Zehr’s (2002:15) assertion that the involvement of parties in their own cases can facilitate empowerment – in this case a man financially supporting his family post-mediation but not before mediation. In one of the last responses, a focus group participant indicates that a husband and wife are closer to each other, post mediation. This suggests that the parties have learned from mistakes and moved forward in family unity through social and moral development (Schellenberg, 2010: 61) after the mediation encounter. One of the techniques used by the CBP to empower the parties and facilitate social and moral development could be, as she states, examination of deeper problems underlying the situation and not just surface level domestic violence (Zehr, 2002:22).

Taken as a whole, matrices 8-5 to 8-8 respond to the research objective of narrowing the gap in the literature on the role of CBPs in using CRJ to handle cases of domestic violence in a number of ways. For example, the focus group participants said that: “paralegals know what our legal needs are and they know what they are doing when it comes to domestic violence”; “We are very comfortable with mediation and it works”; “we are able to solve our problems without going to court”; and “paralegals insist on hearing the other side”. The responses from the paralegal and focus group participants are sometimes similar; although they did not

use the same words. Their statements generally do not make divergent points. These responses help answer the research question on the role of CBPs in restorative justice in KZN and how restorative justice initiatives are increasing access to justice in rural areas.

The focus now shifts from the interview and focus group data from the paralegal and survivors of domestic violence to data obtained from paralegal interviews regarding their involvement in the traditional justice system.

### **8.3.3 Qualitative data as to linkages between the traditional justice system and the community-based paralegal in Madadeni**

The Madadeni CBP has had dialogues with traditional leaders and council members from the three traditional courts with which she works. “I enjoy working with traditional leaders; they appreciate the way I raise awareness on issues affecting women and children. They listen, and they ask questions. The traditional leaders requested that I should plan a workshop with community members on customary law where they will participate and inform the people about customary law, not only about the Domestic Violence Act., etc.” Chopra and Isser (2012:351) observe that many training programmes have failed because they are one-way, top-down, “sensitization or awareness” of human rights, rather than “contextualized dialogue that engages socio-political realities”. The matrix below indicates collaboration or the working relationship between the Madadeni CAO and its paralegal and traditional courts and traditional leadership in the area. Unlike the other advice offices that have two paralegals, the Madadeni CBP works alone; therefore she can only work with three traditional courts.

#### **8.3.3.1 The composition and operation of traditional courts**

In KwaZulu-Natal the “*uMkhandlu*” is the knowledge base of the traditions and customs applied in traditional courts. Criteria for nominations to the traditional council include knowledge in customary law (Makec, 2007:136), experience and wisdom, good listening skills and good command of local dialect (Dexter and Ntahombaye, 2005:11-12). Traditions and customs across African ethnic groups have similarities and differences. In South Africa, for instance, the Zulu traditions are not the same as Sotho, Venda, Tsonga, Tswana or Xhosa traditions and customs, though they may appear similar, each custom is unique to a particular ethnic group. In KZN customary law is applied under Zulu culture and in response to different situations (Nyamu-Musembi, 2003:12; Ndulo, 2011:117).

In matrix 8-9, as was the case in other chapters, the column on the right presents the views of paralegals in relation to components listed in the column on the left. These components include public aspect of traditional courts, court fees, presiding officers of traditional courts, jurisdiction of traditional courts, procedure of traditional courts, legal representation, language, and restorative nature of the traditional court process.

Matrix 8-9 Paralegal's comments on composition and operation of traditional courts

<b>Relevant sections of the proposed Traditional Courts Bill or the literature</b>	<b>Paralegal comments on traditional court current practice</b>
<p><b>Public aspects of traditional courts</b> Section 1 of the TCB</p>	<p>"I work with three traditional courts; all of them are open courts. Domestic violence matters are dealt with inside the traditional court but everyone is allowed to attend. In another area there is no courthouse; proceedings are conducted under a tree. There is no privacy. However not all members of the community respect the traditional court. In one case I have observed a community member and respondent who was disrespectful to the <i>Induna</i> and he left saying that their court is a 'Mickey Mouse court'".</p>
<p><b>Court fees</b> Ubink and Van Rooij (2010:3)</p>	<p>"Members of the community pay R100 to open a case at the traditional court".</p>
<p><b>Presiding officers of traditional courts</b> Section 1, clause 4 of the TCB</p>	<p>"Court 1 has 27 presiding officers "<i>uMkhandlu</i>"; women are represented in the council and they do participate in proceedings. Court 2 has 25 presiding officers including <i>Inkosi</i>. Court 3 has 28 council members including <i>Inkosi</i>."</p>
<p><b>Jurisdiction of traditional Courts</b> Section 5 of the TCB</p>	<p>"Traditional courts deal with cases of domestic violence, customary marriages, witchcraft, land issues, pregnancy outside the marriage, insults, stolen goats, cows sold which was meant for the bride's price, and inheritance and maintenance cases".</p>
<p><b>Legal representation</b> Section 9, clause 9 of the TCB</p>	<p>"There are no lawyers representing the parties. Male relatives or husbands represent women, even if the complaint is against the husband".</p>
<p><b>Procedure of traditional courts</b> Section 9, clause 9 of the TCB</p>	<p>"Community members are familiar and knowledgeable with procedures. The offender is also aware of the sanctions for such conduct. The Headman presides over cases; there are certain cases that he refers to <i>Inkosi</i> for judgement. <i>Inkosi</i> is the one who refer cases to the magistrate's court; parties can appeal to the court of <i>Inkosi</i>".</p>

Relevant sections of the proposed Traditional Courts Bill or the literature	Paralegal comments on traditional court current practice
<b>Language</b> Kane <i>et al</i> (2005:11)	“Language used is isiZulu. Women in particular are asked degrading questions in isiZulu by everyone at the court and are expected to answer using the same words to describe private events”.
<b>Outcome of court cases</b> Sections 11,12 and 13 of the TCB	“Outcome of court case is a fine, compensation, family cleansing or expulsion from the village. Some of the fines are excessive. I had a case where a poor woman was fined two goats and was told to present the goats within a week. There is no way she could have paid. I pleaded on her behalf that she is not in a position to pay the fine and that was accepted. <i>Inkosi</i> is responsible for enforcing decisions from the headman’s court. Parties can appeal the decisions taken by <i>Induna</i> to <i>Inkosi</i> , if they are not happy. The headman complains that community members do not respect the decisions of the traditional court. Most people do not want to pay damages”.
<b>Restorative nature of the traditional court process</b> Section 3 of the TCB	“The traditional court justice approach is community restorative. Sometimes a woman is further victimized by <i>uMkhandlu</i> . The principles of restorative justice practice are not fully observed. The council ( <i>uMkhandlu</i> ) attends to cases in the form of arbitration. There is no time and patience to listen to a long story; participants are told to hurry since there are other cases to be dealt with. That is the reason they refer some of the cases to the advice office for mediation”.
<b>Recording of cases</b> Section 18 of the TCB	“Traditional courts keep simple records; just particulars of the participants and the offence. Mostly secretaries write letters to respondents, conveying decisions and stipulating compensation to be paid. Secretaries are paid a daily rate. I was asked to be a secretary for the day”.

It is interesting to note the comment by a paralegal that a member of the community was disrespectful to the presiding officer, and left the court. Tamanaha (2011:7) has taken note that “the contention that traditional courts are of the community does not mean that they are for the entire community; nor is it always the case that everyone in the community respects them”. Similarly, Stapleton (2007:18) observes that there are many challenges with the traditional courts, not everyone is satisfied with the decisions and the processes of the courts and there is a “tendency to maintain the status quo particularly where women are concerned”.



The Madadeni paralegal mentions that there are no lawyers representing people at traditional courts. According to Walsh (2010:25) lawyers are not allowed to appear on behalf of clients in traditional courts. Makec (2007:134) contends that the traditional court system is not designed for lawyers; the traditional council plays the “dual role of investigator to elicit the necessary evidence based on the facts and advisor to the *Inkosi* on the decision to be taken.” According to Makec (2007:134), the “inquisitorial system under customary law is suitable when parties are not represented by a trained lawyer”.

The requirement of the traditional court according to Madadeni paralegal is that women who appear before the traditional courts should be represented by their husband, even if the complaint is against the husband or male relatives. Literature review reveals that this is happening not only in KZN. Simojoki’s (2011:38) research found that husband or male relatives represent women, as participants, decision-makers, witnesses or victims, in Somalia. In other words women are not allowed to set foot in the traditional court at all. Chopra and Isser (2012:344) explain that this is because “Somali local norms prohibit women from directly accessing courts, requiring that she be represented by her husband or a male family member, who may have interests at odds with hers”. Harper *et al* (2011:17) argue that “situations where men speak on behalf of spouses or male relatives perpetuate communal prejudices and deny women justice”. In terms of section (3)(b) of the TCB, a “party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law”. Mnisi-Weeks (2012:153) is of the view that the position of the TCB appears to be entrenching the discrimination against women in the traditional justice system.

#### **8.3.3.2 Case referrals from traditional courts to the Madadeni community advice office**

The traditional justice system is a recognised and legitimate justice system for majority of women in rural areas. Women continue to seek protection from traditional courts despite the patriarchal nature of the court and the fact that the traditional court processes and administration seem to favour the interest of men over those of women (Ubink, 2011: 52). Paralegals report challenges faced by rural women, such as where women are prevented from benefiting from estates of the deceased. The issue of intestate succession under customary law is linked to the status of women, whether they are married by customary marriage or by common law marriage (Lankhorst and Veldman, 2011:96). The Recognition of Customary Marriages Act (RSA, 1998c) discussed in chapter 2, further complicates the situation of women in rural areas (Herbst and Du Plessis, 2008:14)

Data in matrix 8-10 indicate different types of domestic violence cases referred from the traditional courts to the Madadeni CAO. Cases that come from the traditional courts involve physical violence, sexual, and

economic abuse. The emotional abuse case category also involves problems surrounding customary marriages and intestate succession issues.

Matrix 8-10 Cases referred by traditional courts to the Madadeni community advice office

Cases referred by traditional courts to the community advice office	Reasons for referral
Domestic violence: Sexual abuse	“The <i>Inkosi</i> has encouraged the community members to use our offices to report sexual abuse before approaching the traditional courts. Rape in marriage is not taken seriously in the traditional court. The court takes the side of a man, and says he paid <i>lobolo</i> , so he has a right to sleep with his wife without her consent whenever he wants to. During the dialogue the <i>Inkosi</i> mentioned that he usually tell the wife to go and sleep with her husband because he paid <i>lobolo</i> ”.
Domestic Violence: Physical violence	“Traditional courts refer cases of domestic violence for counselling and Protection Orders.”
Domestic violence: Economic abuse	“Widows and unmarried women are not given land in our area unless there is a male relative who qualifies to be given land. Women are still expected to have a male figure in order to obtain land or a site in the rural area”.
Intestate succession	“They refer these cases, because these issues are complicated by the Customary Marriages Act. Sometimes the council members refer the cases to the court and other times they give family members an opportunity to decide what should be done per traditional custom. Council members have admitted that they have taken wrong decisions many a times. <i>Inkosi</i> and council members mentioned during dialogues that they believe the man is always the heir no matter what, everything belongs to the man. We believe that if the wife has a son, she must leave everything to the son. If the son dies everything then goes to the parents”.
Domestic violence: Customary marriages - polygamy (“ <i>Isithembu</i> ”)	<p>“Registration of customary marriages is still an issue; men marry women without the consent of the first wife as required by the Act. The other woman will quickly register the marriage and the first wife becomes the second wife. Women in polygamous marriages defame each other and they take each other to the traditional court. Usually the courts dismiss these cases as women’s squabbles and they came to the advice office for assistance.</p> <p>I know how to handle these cases; we deal with them a lot. What I have discovered during my dialogue with the council members is that up until today, they do not know about the Customary Marriages Act. They still tell you about customary practices they know and not what is in the Act. They are not even aware of the requirement to register customary marriages. Council members raised a concern as</p>

	to why it is so important to register the marriage. It is not part of the culture, and why must they ask for permission to marry a second wife because it is their cows that are paying for the second wife?"
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As data in matrix 8-10 shows, there are situations where neither the formal nor the customary justice system, as they currently exist, can respond to every justice need in rural areas (Carfield, 2011:39). The Madadeni paralegal uses restorative justice practices to handle cases referred by traditional courts when the courts are unable to resolve or does not wish to handle a case – such as sexual-related cases. Chopra and Isser (2012:353) explain that due to the vacuum that exists when cases do not fit fully within formal or customary justice systems, women navigate various systems and take advantage of forum shopping.

The MDP mentions that the formalisation of customary marriages is creating problems for women as well as men in rural areas. The rule of law orthodoxy of concern is the Recognition of Customary Marriages Act, 120 of 1998 (RSA, 198c). Rural women are still grappling with this law. That is the reason why in all the advice offices, there are referrals to and from traditional courts and CAOs on the issue of the registration of customary marriages. Herbst and Du Plessis ((2008:14) note that “traditionalists have criticised the Recognition of Customary Marriages Act on the ground that it has interfered with traditional practices and customs”.

The next section presents data regarding cases referred from the Madadeni CAO to traditional courts.

**8.3.3.3 Case referrals from Madadeni community advice office to traditional courts**

The Madadeni paralegal mentions that the CAO does not facilitate payments of damages to the wronged party, and that she recognises that the traditional courts are better at handling and solving these problems. However, since paralegals are of the same culture as their clients, CBPs do suggest and recommend cultural solutions to problems. Sound decision-making and process-facilitation are enhanced by knowledge of culture, customs and practices (Vorster, 2001:54)

Data in matrix 8-11 show types of cases referred by paralegals to the traditional courts and reasons for referring these cases. For example, CBPs refer cases where women seek damages and cultural cleansing. For these cases, traditional courts are deemed to be an appropriate forum.

Matrix 8-11 Cases referred by the Madadeni community advice office to traditional courts

Cases referred from community advice office to traditional courts	Reasons for referral to traditional courts
Damages sought for pregnancy:	“Cases where clients seek damages: I refer cases that need traditional courts’ intervention, e.g., “ <i>inhlawulo</i> ” because we do not take the damages or let people pay in our offices”.
Witchcraft:	“Witchcraft: we do not touch these cases unless they are one of the underlying issues in a domestic violence case”.
Registration of customary marriages:	“Permission to take a second, third or fourth wife. An <i>Induna</i> referred a case after training of a man who was staying with a woman for 25 years. He paid <i>lobolo</i> and they have five children together. The man refused to seek permission from his wife as required by the Act and went ahead and married the second wife. The <i>Induna</i> said the Act is complicating traditional practices but he understands that women need to be protected”.

Referring cases to the traditional court shows that paralegals are confident with traditional court adjudication on cultural related matters. For example, the case of a woman refusing to recognise her husband’s cultural right to take a second wife. Harper *et al* (2011:175) argue that the working relationship between paralegals and the traditional courts ensure that women are treated with dignity (Buckenham, 2014:7; Wojkowski and Cunningham, 2010:97) and parties are given an opportunity to tell their story.

Traditional courts have a role to play in rural areas. Despite challenges of the traditional courts, rural people use traditional courts and this is a factor paralegals recognise. Skelton (2007:229) explains why traditional courts are important, traditional courts “are accessible and acceptable to community members. The presiding officers are people with roots in the community who are familiar with local customs; they consequently resolve disputes in a manner that is culturally acceptable to both parties”.

Outside of cross-referral of cases, there are other ways in which CBPs interact with traditional courts. Some of these situations are next discussed.

#### 8.3.3.4 Interaction between traditional courts and the community advice office through Madadeni paralegal’s observation and advice

The Madadeni paralegal makes presentations to traditional authorities on how the CAO operates and attends traditional court hearings on invitation by traditional authorities. She is invited as an interested party on the case, or invited to offer advice to traditional courts. The information provided below shows that she takes advantage of these invitations, she deals with the abuse of processes through negotiations with presiding officers and raises awareness about abuse and discrimination taking place at the court. The Madadeni paralegal identifies with the cultural practices in her area and works within the traditional justice system to help reduce gender inequality (Bond, 2010:427).

Once the Madadeni paralegal was requested to record council proceedings in the absence of the court secretary. Observing local customs such as sitting on a grass mat to make presentations and covering her head with a scarf were required. In her own words,

*“I have a big stomach and I am not comfortable presenting sitting down. At the meeting wherein Inkosi and Izinduna are presiding you are not allowed to stand in front of men if you are a woman. I also do not like wearing a scarf on my head, but I was told to wear it at the council meeting”* (MDP).

Narrative from the paralegal continues in matrix 8-12. In the column on the left is narrative indicative of the paralegal’s observation of cases. The column on the right reveals the paralegal’s comments about cases and advice given to traditional court personnel and at times, parties to a dispute.

Matrix 8-12 Madadeni paralegal’s interaction with traditional leaders and traditional courts

Observation of traditional court proceedings	CBP’s comments about and advice to courts
<p><b>Case 1: Emotional and economic abuse - land issues</b></p> <p>“A woman reported that her two sons emotionally abused her. They did not want their mother to have access to and a say in the land allocated to the family prior to her husband’s death. The traditional court said the boys were right to deny her a voice on the land allocated to the family. The woman was not happy with the decision of the court; she approached the advice office for assistance.</p> <p>Due to the good relationship the advice office has with the traditional court, I am free to approach the court and offer advice on cases they have dealt with like in this case. Sometimes cases that are dealt with by the local traditional court end up in my office for review because the parties or one party is not happy with the</p>	<p>“I contacted the presiding officer and advised him how he should have dealt with the matter. I requested a retrial and my request was granted. I informed the presiding officer that I am supporting the court and want to restore the respect and dignity of the traditional court.</p> <p>I made him aware that I could have assisted the old lady to approach the magistrate’s court to review his decision. This case would have resulted in the traditional court and its council not being respected by the community they serve. My advice was taken well and the matter was resolved. This requires an understanding of the legal and cultural aspects around the issue, which is a source of dispute between the parties”.</p>

Observation of traditional court proceedings	CBP's comments about and advice to courts
decision of the court and <i>uMkhandlu</i> ".	
<p><b>Case observation 2: Assault</b></p> <p>"I was invited to advise the traditional court on a case involving an assault with grievous bodily harm (GBH). The family of the victim and the perpetrator had agreed (privately between families) to pay damages, and the victim did not open a case with the police. The payment did not materialise after numerous promises. Later the family of the victim decided to go to the traditional court to enforce the private agreement the families had with each other".</p>	<p>"The problem was the criminal act happened a long time ago. The victim's scars were barely visible, and the traditional court could not ascertain that they were as result of the assault in question. I could not as well tell if the scars were as a result of the assault. The only thing I could do was to offer advice that in future, in such cases the victim must approach the police and open a case as soon as possible; however I advised the family that they could still pursue the matter through the courts".</p>

The issue presented in Case 1 comports with a finding in Ubink's (2011:52) study in Namibia that "land ownership is often vested in men while women exercise only derived rights". Case 1 confirmed this; the mother was denied access to land but was given a proper hearing by the traditional court. Hence, customary law in KZN does not deny women access to be heard, but the vesting of land rights appears to be gender determined even where the husband is alive. Carfield's (2011:136) research in Uganda indicates that, "Women report land related issues to the traditional leaders because they know history of land; they know the area in dispute, and the people who own the land. This is seen as a key advantage for traditional authorities, particularly in mediating land disputes".

Also, case 1 makes evident the paralegal's knowledge of land issues in that she referred the case back to the traditional court and advised the traditional leader on how to solve the problem while threatening to take the case on review, which would undermine the authority of the presiding officer. In terms of the CBP's advice to the court, Harpet *et al* (2011:176) note that paralegals can be a valuable path for empowering the community through individual mediations and CBP interaction with the traditional court. The authors agree that a threat of formal action by a well-informed paralegal can result in a positive outcome for the aggrieved party.

According to Ndima and Ntlama (2009:12), however, this option to have a traditional court case reviewed by the magistrate's court marginalises the traditional justice system. The proposed TCB seeks to protect the traditional leadership by making the appeal process difficult. Section 16 of the TCB requires those who are not satisfied with the traditional court process to lodge a complaint with the Director-General against the presiding officer on the grounds of incapacity, gross incompetence, or misconduct. Ntlama and Ndima

(2009:24) argue that, since the TCB fails “to consider that litigants in customary courts tend to live in regions with higher rates of illiteracy”, the complaints procedure is not likely to facilitate participation, and can increase the risk of abuse; the traditional court process is thus unlikely to be challenged.

Nevertheless, it appears that the paralegal might have exerted power over the traditional leader. According to Kahn-Fogel (2012:778) one of the criticisms against paralegals, based upon a study conducted in Zambia, is that there is no criterion to determine the eligibility of local people to operate as paralegals or to dispense legal advice.

Case 2 indicates that CBPs not only advise the courts but also advise families of their forum choices.

The next section presents data on traditional courts and domestic violence cases in Madadeni.

### 8.3.3.5 Traditional courts and domestic violence cases

Traditional courts handle cases of domestic violence despite claims against them of patriarchy and gender bias, lack of female presiding officers and specific rules governing domestic violence cases (Curran and Bonthuys, 2004:8; Ubink and Van Rooij, 2010:5; Mnisi-Weeks, 2012:153). Scholars are of the view that precisely for these reasons traditional courts are not suitable to settle domestic violence cases (Williams and Klusener, 2013:287; Gasa, 2011:28; Wojkowska 2006:24; Kane *et al*, 2005:14). In South Africa, it was hoped that the TCB would develop rules and procedures for traditional courts to deal with domestic violence.

This single case divided into two parts in matrix 8-13 demonstrates from two different perspectives the problem of the attitude of traditional court authorities toward women – both the woman who was a complainant and the woman who was the alleged adulteress.

Matrix 8-13 Handling of domestic violence cases by traditional courts

Domestic violence case	CBP's observation of traditional court case deliberations
<p><b>Case 1a: Emotional abuse of the complainant by her husband</b></p> <p>“I observed the following case. A married woman (alleged adulteress) was accused by a complainant of having an affair with complainant’s husband. This was the claim of emotional abuse of the complainant by her husband. The complainant approached the traditional court to seek compensation from the</p>	<p><b>Case deliberations:</b></p> <p>“I observed a female complainant who approached the traditional court and accused another married woman of sleeping with the husband of the complainant. The adultery issue is not taken seriously, but according to my observation, is entertaining for the council. Old men of uMkhandlu become animated and ask inappropriate questions and expect answers to</p>

Domestic violence case	CBP's observation of traditional court case deliberations
<p>alleged adultress for loss of affection from the husband of the complainant (alleged adulterer)". MDP</p>	<p>humiliate the parties. During the proceedings even community members who are not part of the case question parties".</p> <p>"The outcome of the case was that the man charged with adultery (husband of the complainant) must pay 'iguqa', to the husband of the adultress. This is compensation to the so-called adultress' husband since the adultress' husband paid 'ngquthu' – beast when he first married the alleged adultress. The alleged adultress was told to pay the wife (complainant) of the accused adulterer for pain and suffering. The alleged adultress was told to go back home and request her family to cleanse her marital home. Similarly, the alleged adulterer was told to cleanse his marital home". MDP</p>
<p><b>Case 1b: Emotional abuse of the alleged adultress by the traditional court council</b></p> <p>"The case mentioned above also involved emotional abuse of the alleged adultress by the traditional court council".</p> <p>"The alleged adultress was summoned to appear before the traditional court with her boyfriend (the husband of the complainant). On the day of the trial, the complainant told the court about the affair, how she got to know about it, her confronting her husband and that her husband did not deny the affair". MDP</p>	<p>"The respondents of the above case are the alleged adultress and the husband of the complainant – adulterer – is the second respondent. Before the alleged adultress could answer the allegation against her, the council asked her to explain how she had sex with her boyfriend the "married man" (complainant's husband). These are the questions that were asked in isiZulu "nabhebhana kanjani" – how did you sleep with each other? "walivula kanjani igolo lakho"- how did you open your vagina? "Wakuchamela kanjani"- how did he release his sperm? "wezvani"- how did you feel? "wachama kangaki"- how many times did he release his sperms? "nanikuphi"- where were you? "Wakuncikisa esihlahleni, noma obondeni"- was it against a tree or against a wall?"</p> <p>"So by being asked these questions, the alleged adultress is treated in an undignified manner and is not even allowed to explain or tell her side of the story. There are women in the council but they do not protect women; sometimes they too take part in humiliating the woman and side with men".</p> <p>"I think the purpose was to humiliate the alleged adultress as a deterrent against adultery now that I think of it. I was so shocked when the council members were firing questions at the respondent. The man was not asked these kinds of questions, only the woman". MDP</p>

Narrative in matrix 8-13 further shows how language is used not just to empower but also to disempower women – irrespective of whether a woman is a complainant or a respondent. Various scholars mention



language as one of the positive attributes of the traditional justice system; arguing that court deliberations conducted in local language engage and empower individuals and communities (Ntlama and Ndim, 2009:18; Kane *et al*, 2005:17; Moul, 2005:20; Johnstone, 2011:18). Wojkowska and Cunningham (2010:97) contend that, in traditional and informal justice systems, language is very important in traditional justice deliberations. The fact that presiding officers speak the local language makes the traditional justice system more accessible and acceptable to the people it serves.

Just as the Madadeni points out in matrix 8-9 that isiZulu is used to ask women degrading questions during court proceedings, matrix 8-13 shows how language can be used to further victimize the female victim and humiliate the female respondent. This is consistent with Barrett's (2013:340) proposition that language can be used to further conflict. It is for this reason that scholars are of the view that traditional courts should not handle cases of domestic violence (Ubink and Van Rooij, 2010:5; Curran and Bonthuys, 2004:20; Wojkowska, 2006:21; Gasa, 2011:28).

Ubink and Van Rooij's (2010:5) assessment of what can go wrong with traditional justice systems points to gender bias "as an incorrigible trait such that one can advocate for a complete disengagement with the traditional justice system". Mnisi-Weeks (2012:153) too observes that, "women have tended to be unjustly dealt with by patriarchal customary courts that have not shown sympathy for their vulnerability and struggles". The problem with case 1a and case 1b is not as much the application of customary law as it is the attitude of the members of the traditional council toward women. Curran and Bonthuys (2004:17) note that traditional leaders' attitudes toward women "will influence the ways in which they deal with domestic violence".

In the next section the views of the Madadeni paralegal on whether traditional courts should handle domestic violence matters are presented.

#### **8.3.3.6 Views of a paralegal on domestic violence cases being handled by traditional courts**

While earlier sections have thus far presented evidence from the Madadeni CAO on the composition and operation of traditional courts, cross referrals between traditional courts and the Madadeni CAO, interaction between the CAO and traditional courts and types of domestic violence cases handled by traditional courts; this section presents counterarguments made by the CBP as to whether traditional courts should handle domestic violence.

Matrix 8-14 Views of paralegals on whether traditional courts should handle domestic violence cases

Arguments against traditional courts handling domestic violence cases	Arguments in favour of traditional courts handling domestic violence cases
<p>“The traditional courts are currently handling some of the cases of domestic violence but they are biased against women; they do not listen to women’s stories”. MDP</p>	<p>“Traditional courts could be appropriate places for handling domestic violence cases with our help. We could guide them if the parties want their cases to be dealt with by the traditional court. Some cases of domestic violence can be handled customarily without going through the formal courts”. MDP</p>
<p>“A big NO on cases of rape. “According to the bill my understanding (MDP) is that, there will be no <i>Induna</i> taking part in the traditional court, only an <i>Inkosi</i>. There will be no appeals on decisions taken by a traditional court. This bill guarantees bias against women; this is what we were fighting against.</p> <p>Women should be heard and respected; with the current TCB, women will be further abused and victimised by men. A case of adultery has to be dealt with harshly; a woman is subject to explaining in detail how she had sex. We have not seen a man being required to give details on how he had sex with a woman”. MDP</p>	<p>“There is willingness to improve the handling of domestic violence. For instance, some <i>Induna</i> have asked to observe the mediation process, especially in cases they have referred to the office. I agreed in some cases so that they can learn the proper process of conducting mediation. But the down side is they want to interfere with the process”.</p> <p>“They also want to learn more about the Act and some want to become better mediators”. MDP</p>

Some scholars argue – explicitly or implicitly – that traditional courts should not handle cases of domestic violence (Williams & Klusener 2013:286; Mnisi-Weeks, 2012:153; Gasa 2011:28; Curran and Bonthuys 2004:2). These scholars agree that one of the reasons that traditional courts should be disallowed from hearing domestic violence matters is the alleged patriarchal nature of the court and supposedly discriminatory treatment of women by the court. On the one hand narrative from the Madadeni paralegal tends to support the weight of the literature in this regard. On the other hand, the CBP has learnt from practical experience that traditional courts are a suitable forum for domestic violence disputes and that there is a willingness among traditional court authorities to learn more about the DVA and to become better mediators. This comports with Ubink and Van Rooij’s (2010:13) contention that capacity-building for traditional administrators in mediation or gender equality could improve the traditional justice system. Yet, the question remains as to whether gender inequality in traditional courts – whether pertaining to women as court authorities, complainants or respondents – is of the present-day traditional courts’ own doing or a result of colonial and western missionary external influence (Ubink, 2011:55). Becker (2006:34) and Nzegwu (2012:15) reveal that precolonial complementary dual-sex systems of African societal organisation facilitated gender equity. This gender equity was not based upon comparable worth, in the western sense,

but egalitarian in the African sense (Nzegwu, 2012:15). This suggests that the question of how traditional courts can be improved turns on whether sufficient study is undertaken to identify precolonial culture and heritage – including the role of women as queens, headwomen and members of councils of elders – and thereafter reshape the traditional justice system in a contemporary manner that fits the African context. The plausibility of this suggestion is borne out by the narrative presented in various chapters whereby CBPs interact with traditional courts and share advice with traditional authorities out of respect and maintenance of dignity of traditional courts.

Taken as a whole, matrices in this section on linkages between traditional courts and the Madadeni CBP indicate that the CBP's strategy is useful since traditional court authorities appear willing to listen and to heed her advice and collaborate with training offered by the CAO. As Johnstone (2011:18) argues the traditional justice system should be locally driven and owned by various stakeholders including paralegals; the "locals will be the most powerful in influencing the interpretation and application of the law, as well as moulding attitudes. This creates an opportunity for legal empowerment and access to justice" (p.19).

#### 8.4 Chapter Summary

In this chapter, the context of the Bulwer CAO was presented including the geographical location of the Bulwer sub-local area and socio-economic conditions of CAO service beneficiaries. The results of data collection were segmented into three sections. The first section provided results of secondary quantitative data comprised of descriptive statistics. The descriptive statistics were concerned with creating a better understanding of qualitative data rather than statistical inferences. The quantitative data, presented in Figure 8-3 to Figure 8-6 showed the number, types and outcomes of cases handled by CBPs. These figures further demonstrated that CBPs are resolving domestic violence disputes using both the restorative justice approach and Protection Orders issued by the courts to access justice depending on choice exercised by complainants. The highest numbers of cases are resolved through mediation.

The other two sections presented qualitative data. One section presented narrative from an interview of the Madadeni paralegal and a focus group of service recipients. The other section highlighted data that demonstrate linkages between the traditional justice system and CBPs. Matrix analysis and interpretive principles were used to interpret data in relation to narrative and the literature. Matrix 8-1, which was co-created by CBPs and the researcher, presented mediation procedures and processes as explained to the researcher by CBPs. Matrices 8-2 to 8-8 presented a comparative analysis between narrative from CBPs and from focus group participants that shed light on perceptions regarding, for example, interaction with the

formal and informal justice systems, the need for CAOs and the role of CBPs in CRJ. Matrices 8-9 to 8-14 provide evidence that the Madadeni paralegal is promoting access to justice not only within the criminal justice system and through CRJ but also within the traditional justice system in collaboration with local power structures. Hence, the CBP straddles plural justice systems. In this chapter, data also showed whether the CBP believes that traditional leaders and traditional courts should handle domestic violence before the chapter concluded.

## Chapter 9: The Case of New Hanover Community Advice Office

### 9.1 Introduction

The previous chapter explored the context of the Madadeni CAO along with the findings from the quantitative and qualitative data. This chapter explores the context of the New Hanover CAO followed by a presentation of data from case intake, interviews with paralegals and focus groups of citizens who received services at the CAO.

### 9.2 Context of New Hanover Community Advice Office

#### 9.2.1 Location of New Hanover community advice office

The New Hanover CAO is situated in Umshwathi local municipality that is part of UMgungundlovu district municipality in the KZN Midlands. The district municipality covers an area of 4 320 sq. km, and has a population of 200 331. Established in 1997, the advice office is located in a farming area, in the precinct of the New Hanover Magistrate's Court.

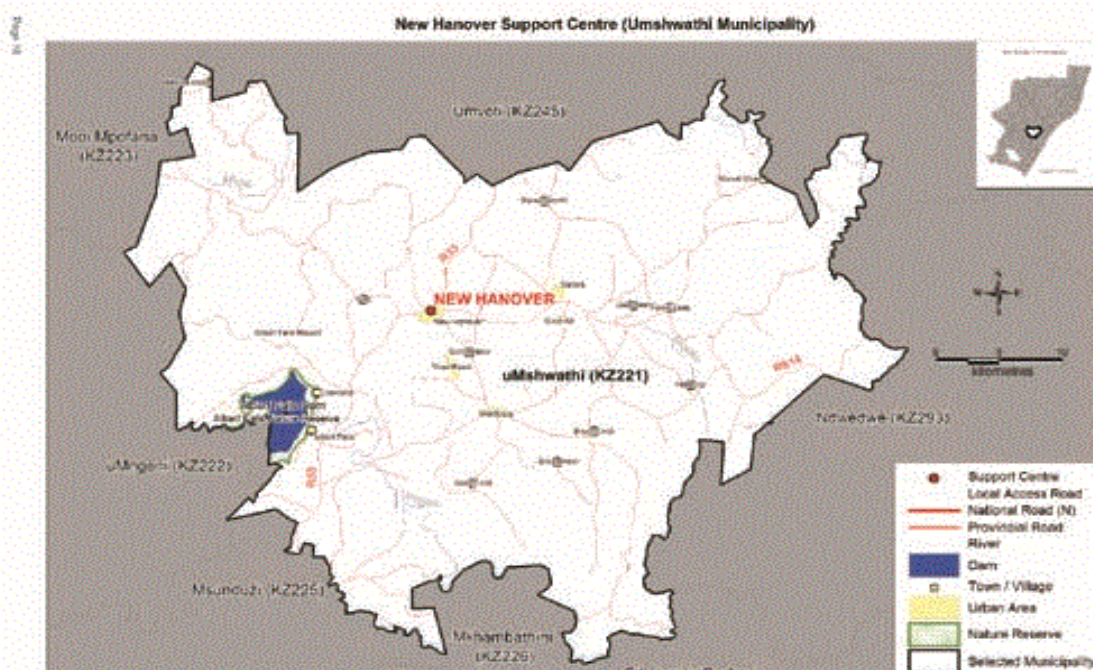


Figure 9-1 Location of New Hanover community advice office (Source: UKZN Dept of Geography)

The office serves farming communities and traditional villages under the leadership of Nkosi Gcumisa. It is run by two female CBPs that together have 25 years' experience and have paralegal qualifications from the former University of Natal. One of the paralegals is the founding member of the office. The infrastructure in New Hanover is basic and mainly serves the needs of commercial farmers. The office serves 48 farms and 23 traditional communities, including Swayimane, which consists of several small villages, referred to as wards, and the Trustfeed informal settlements. New Hanover is approximately 50 kilometres from Pietermaritzburg, and has two suburbs: Albert Falls, which is mainly inhabited by whites, and Cool Air, a predominantly Indian area. There is dual system of local governance in New Hanover: the traditional council, with traditional councillors and the local municipality, where municipal councillors represent communities. Public transport is scarce and expensive, and the majority of farm workers travel by truck with farmers to town on pay day to do their shopping.

In the words of NHP1, "Most of our clients are farm workers and farm dwellers. Our clients from traditional villages are receiving social welfare grants; they survive on the old age pension, child support grant, and foster care grants. There are also Indians in our area. They consult us. However, the majority of our clients are Zulu-speaking." Seventy five per cent (75%) of the clients who consulted the New Hanover CAO from 2009 to 2011 were farm workers and farm dwellers. Sixty one per cent were unemployed, while only 12% were working, 18% were housewives, 8% were students and 19% were pensioners. Seventy per cent of the clients were female and 30% were male. Clients under the age of 18 are recorded as children, and those over 60 are noted as pensioners.

## 9.2.2 Socio-economic conditions of service beneficiaries

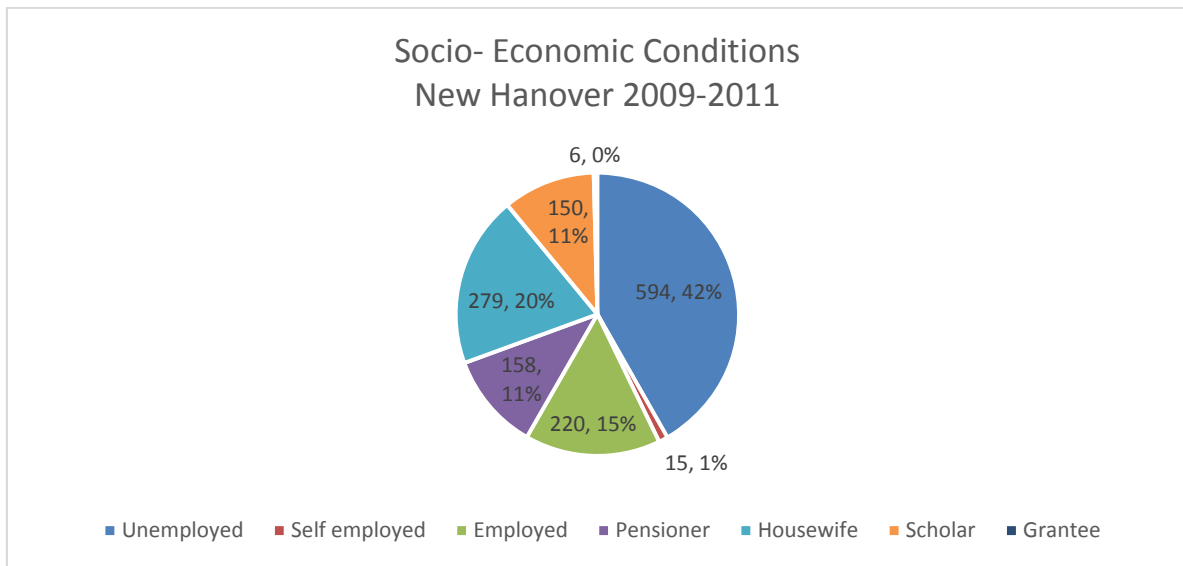


Figure 9-2 Socio-economic background of New Hanover clients

According to NHP1 and 2, a large number of farm workers are excluded from the opportunities and protection of the legal system. In the eyes of the law, these people simply do not exist, and their lack of legal identity makes it impossible for them to access basic services. Employers (farmers) are not obliged to pay the minimum wage or observe the “provisions of the Basic Conditions of Employment Act” or indeed any of the labour laws because, officially, these employees do not exist. Farm workers earn less than R1 000 per month, along with a bag of maize meal and beans (*ilesheeni* in isiZulu). Most have never seen a salary slip. There are high levels of unemployment and poverty in New Hanover. Farmers employ additional labour during harvesting.

Domestic violence is high in farming communities. The causes reported by paralegals include alcohol abuse and poverty. Many people living on farms are isolated and some have never been visited by government organisations. They remain ignorant of the law and the benefits available to them. Farm workers and farm dwellers continue to experience violations of their labour and human rights, and live in extreme poverty with limited access to basic services. Farm owners use systematic dismissal. They will employ a farm worker and towards the end of the month, come up with an excuse, such as accusing the farm worker of drinking on the job or stealing in order to dismiss them. The worker is dismissed a few days before pay day and the farmer refuses to pay them for the days worked. Some will give the employee documents to sign and later inform the employee that he or she has resigned. Others make the employee sign for fewer hours than they have

worked. Most farm workers are not paid for overtime (Martins, 2011). These employment conditions may explain the poverty levels and alcohol abuse reported by paralegals as common issues confronting offenders that perpetrate domestic violence.

### **9.3 Results of Data Collection**

#### **9.3.1 Quantitative data**

This section begins by presenting the statistics on case intake followed by an indication of whether domestic violence cases were handled through community restorative justice (CRJ) or the criminal justice system.

##### **9.3.1.1 Case intake**

The statistics on case intake are viewed in conjunction with the qualitative data yielded by the CBPs and survivors of domestic violence who participated in the focus groups. A case often involves two or more clients; for example, in cases that involve the restorative justice approach, whatever the nature of the problem, paralegals tend to involve family members and their extended network. In total, 1 692 cases were recorded from 2009 to 2011.

Figure 9-3 shows the number of cases recorded by New Hanover CAO from 2009 to 2011 and the proportion of domestic violence cases compared with other categories. The New Hanover CAO handles an average of 500 cases a year, with the most common being domestic violence cases, which comprised of 61% of cases recorded from 2009 to 2011 (Smithers *et al*, 2009-2012). Legal advice made up 17% of cases; these included obtaining identity documents for clients and accessing payments such as pensions, grants, and unemployment and death benefits. The office provides assistance with labour matters including allegations of unfair dismissal, non-payment of salaries and wages, overtime pay, leave and sick leave disputes, insurance benefits and injury at work. They conduct mediations between the disputing parties, and negotiate with employers on behalf of employees and former employees. The New Hanover CAO also handles maintenance cases, child abuse and social problems, and HIV and AIDS-related matters.

Figure 9-3 further reflects the proportion of domestic violence cases compared with other cases, and depicts that domestic violence is the most prevalent problem, representing 61% of cases from 2009 to 2011. This points to the paralegals' role in assisting women who are victims of domestic violence.



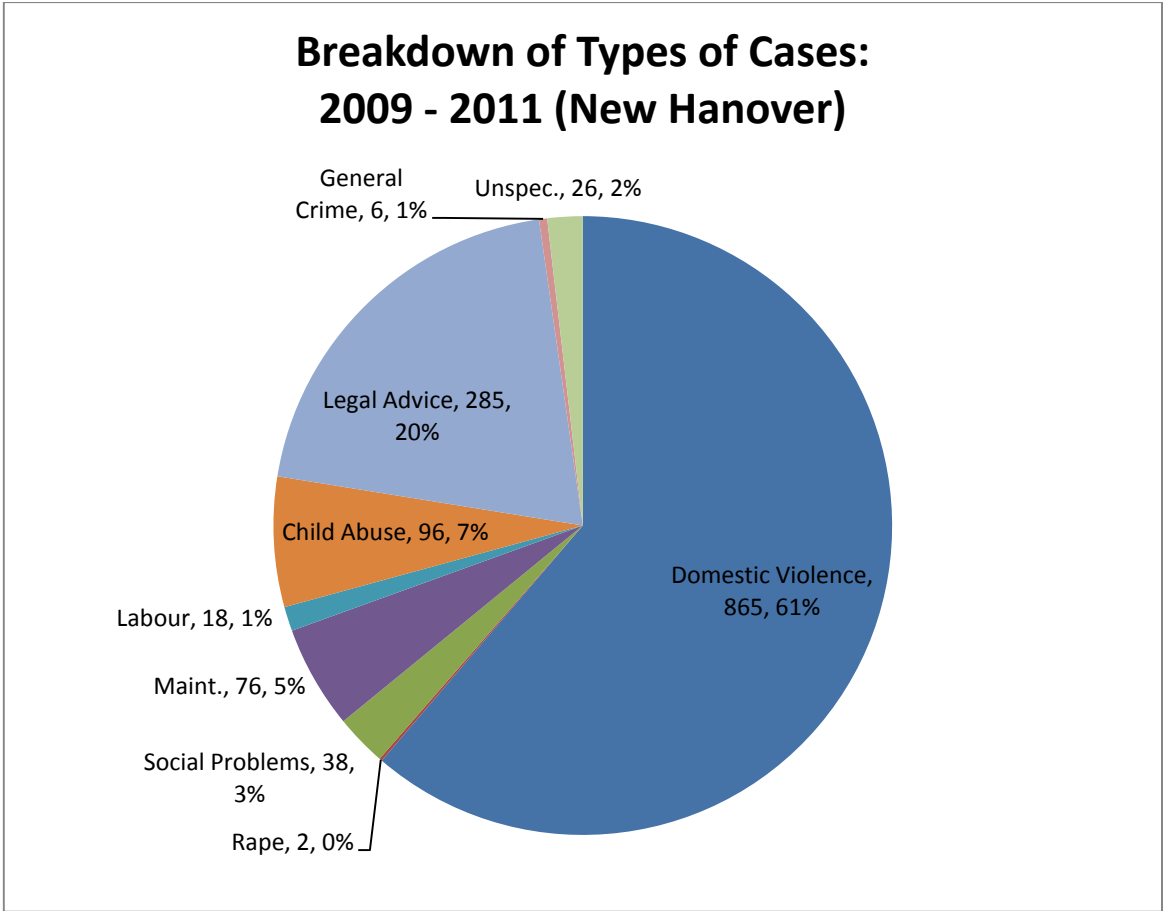


Figure 9-3 Number of cases recorded in New Hanover 2009 - 2011

As to target beneficiaries, Figure 9-4 indicates that, in terms of gender, 78% of the clients were female and 22% male from 2009 to 2011. Similar to the Ixopo CAO, the biggest problem for adult females that approach the New Hanover CAO is domestic violence. The survey of New Hanover statistics also reflects the correlation between case categories and gender, and between target population groups by gender and case category. As with the other CAOs, it was not possible to draw these correlations specifically for domestic violence cases due to time constraints; the available data combined all categories.

From 2009 to 2011, 55 physically disabled clients visited the centre. Domestic violence as a focus of the CAO is further discussed below.

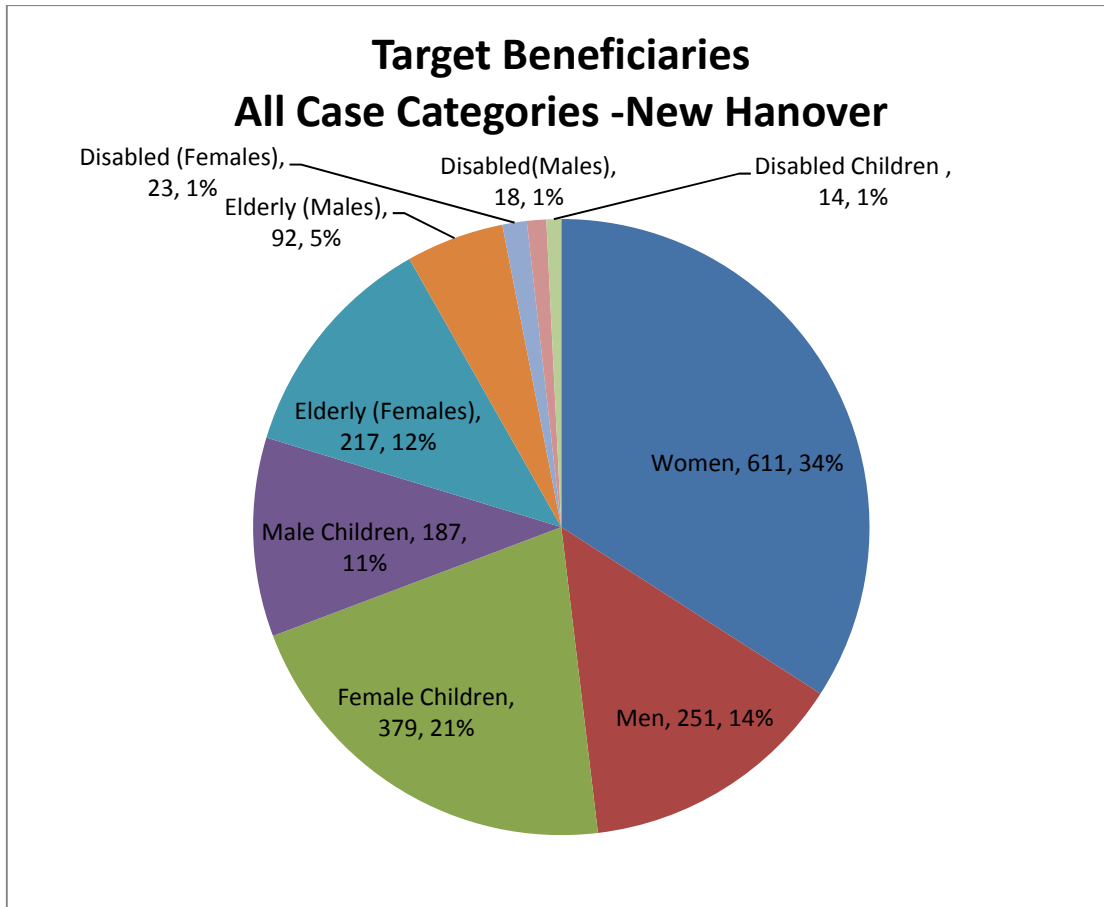


Figure 9-4 Target beneficiaries for all case categories in New Hanover (2009- 2011)

#### 9.3.1.2 Domestic violence

Domestic violence cases handled at the New Hanover CAO include physical, emotional, economic and verbal abuse in a domestic relationship. NHP1 and NHP2 reported that 70% of the domestic violence cases reported involve physical abuse. They explained that the CAO serves farmworkers and farm dwellers, and that there are many shebeens (drinking houses) in the area. Emotional, sexual, and economic abuse represent 10%, respectively, of domestic violence cases. In New Hanover the majority of cases are between men and women, which is the focus of this study. The cases are dealt with through mediation and the court process.

Figure 9-4 shows the number of cases recorded by the New Hanover CAO from 2009 to 2011 and the proportion of domestic violence cases compared with other cases. It indicates that domestic violence is the most prevalent problem, making up 61% of all cases from 2009 to 2011.

Figure 9-4 explains the role of paralegals in assisting women who are victims of domestic violence from a quantitative standpoint. At the same time, the statistics show that the level of abuse is high, indicating that the situation on the ground remains one of violence in the home.

### 9.3.1.3 The community restorative justice process

In 2009, 303 domestic violence cases were handled, of which 226 were dealt with through mediation, and 194 cases were recorded as having been successfully mediated (Smithers *et al*, 2009-2012). These are cases where the paralegal carried out mediation and did follow-up after a month or more. Mediation is regarded as successful when the client is happy with the outcome of the mediation, and the paralegal feels that a positive result has been achieved. (Freedman and Kubayi, 2008) Of the 283 domestic violence cases handled in 2010, 149 were dealt with through mediation and 106 cases were recorded as having been successfully mediated. In 2011, the office dealt with 273 cases of domestic violence; of these, 181 were dealt with through mediation and 107 cases were recorded as having been successfully mediated.

In total, the New Hanover CAO dealt with 865 cases of domestic violence from 2009 to 2011. Of these, 556 were mediated, representing 64%. The paralegals reported that 73% of the mediations were successful as shown in Figure 9-5.

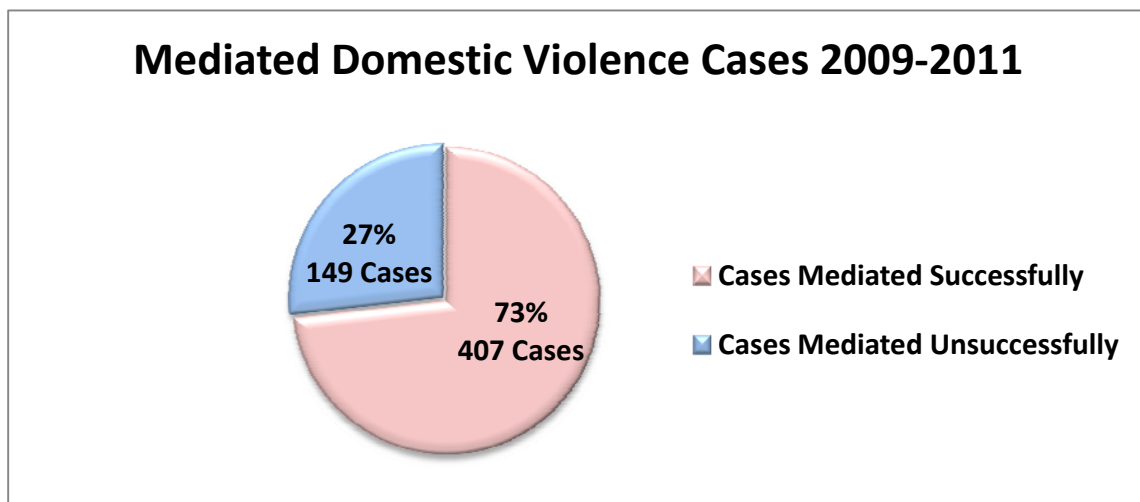


Figure 9-5 Domestic violence cases mediated at the New Hanover CAO

Figure 9-5 reflects the proportion of cases resolved through mediation, and how many were successful. The unsuccessful cases refer to cases that were mediated but the outcome was unsuccessful. These cases were referred to the court for Protection Orders. Only 93 cases went through the court process (see Figure 9-6 below) in this three-year period. The success rate of cases mediated is high, which shows that CBPs are resolving domestic violence disputes in a manner that preserves the relationships and dignity of both victim and offender. The results show that mediation is gaining popularity in cases of domestic violence.

#### 9.3.1.4 **Protection orders**

The Domestic Violence Act (DVA) (Act 116) provides for the issuing of Protection Orders. This judicial measure was introduced to protect victims (mainly women) from harm. It aims to give victims swift and effective protection. The procedure is meant to be readily available and thus applicable at the level of the magistrate's court. A victim only needs to submit an affidavit, along with medical evidence in the case of physical violence, to the clerk of the court. Based on the affidavit, a magistrate will then issue an Interim Protection Order to the victim. An Interim Protection Order has no effect until it has been served on the offender. The alleged offender is given a court date to state his case and show cause "why the Interim Order should not be made a final order of" the court. If the offender does not respond and the court is satisfied that proper service of the Interim Protection Order or the prescribed notice was given to the respondent, "the court must issue a Protection Order".

When the court issues a Protection Order, it remains in force until the court sets it aside. The court may include in the Protection Order a prohibition of the offender committing "acts of domestic violence or entering a residence shared by the victim and the offender; order the offender to pay rent or make mortgage payments owing by the offender"; pay emergency monetary relief to the victim, "the order of monetary relief has the effect of a civil judgment of a magistrate's court; and seize any arms or dangerous weapon in the possession of, or under the control of the offender". In the case of other remedies available to the victim, in the interests of justice, the court will make any provision part of the Protection Order so that the person concerned will be able to seek relief/enforce their rights, in terms of the relevant law; this includes the Maintenance Act No 99 of 1998 (1998).

According to the information obtained from the New Hanover CAO and verified by the CCJD records, in 2009, 33 cases were recommended for Protection Orders. Of these, 29 Interim Protection Orders were granted, and 25 were finalised or confirmed. In 2010, 21 cases were recommended for Protection Orders and of these 18 Interim Protection Orders were granted and 15 were finalised or confirmed. In 2011, 39 cases

were recommended for Protection Orders; of these 38 Interim Protection Orders were granted and 31 were confirmed or finalised.

In total, 93 cases were referred for a Protection Order during this period. This represents 11% of the total domestic violence cases. Of these, 85 (or 91%) were granted an Interim Order and 71 orders (84%) were later confirmed.

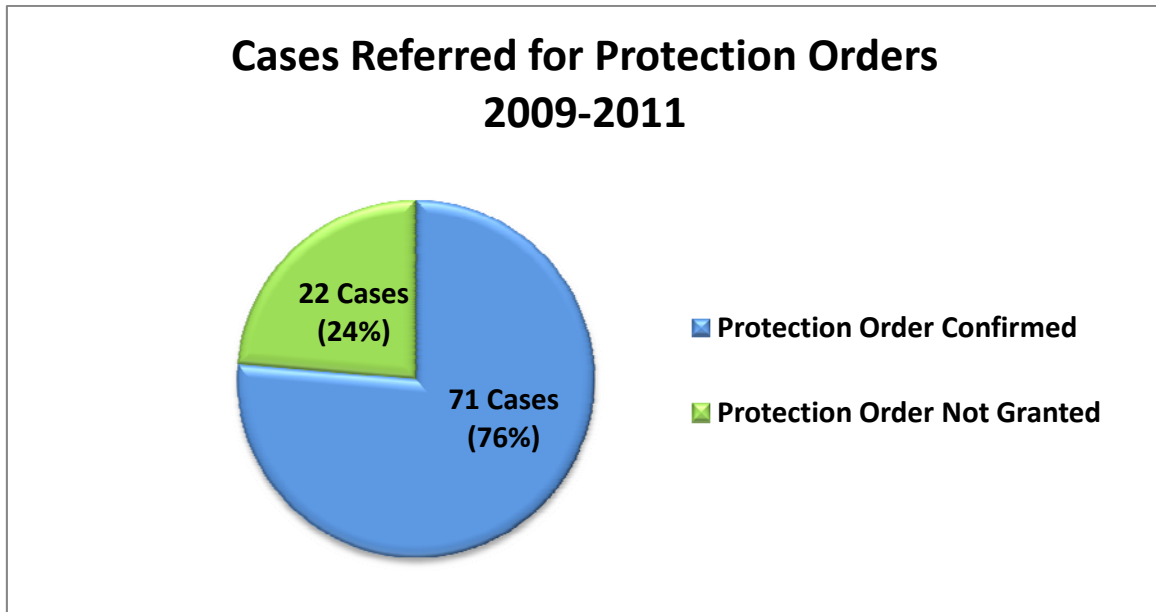


Figure 9-6 Protection order referrals for clients in New Hanover

The number of cases referred to the court for Protection Orders is far less than the cases that were mediated. This represents significant court time saved by the paralegals, who mediate the majority of cases that present at the office. The success rate of cases referred for Protection Orders is high, which suggests that when a paralegal determines that a case requires court intervention, this is confirmed by the court decision in granting the Interim Order. The follow-up undertaken by the paralegals reveals that at least 71 of the Interim Orders were finalised. This indicates a rate of 76% of Interim Orders finalised.

As with the earlier case studies, the following matrices display qualitative data that carefully retain the voice of study participants while briefly discussing the responses in relation to the literature, research objectives and research questions. This discussion is further explored in chapter 10, which provides a comparative

cross-case (non-doctrinal) analysis of the social science data followed by doctrinal analysis, which integrates domestic violence law and case precedents with the findings from the social science data.

### **9.3.2 Qualitative data from interviews of paralegals and a focus group of service recipients**

As undertaken in chapters 6, 7, and 8, this section of chapter 9 presents data adduced from paralegals and focus groups. It is organised under sub-headings related to (1) mediation procedure and process administered by paralegals, (2) access to justice, (3) use of the DVA in New Hanover and (4) the role of the New Hanover CAO in CRJ. One or more matrix displays narrative obtained during data collection. There is a separate matrix on mediation procedure and process for each case study. These particular matrices were co-created by the researcher and the CBPs who participated in the study. In the column on procedure, the researcher devised the list based on interview responses, and some are devised from the list of approaches to mediation programme design discussed by Landrum (2011:448). However, in the column on process, the researcher makes every effort to preserve the narrative of the respective paralegals. Community-based paralegals at different support centres often provided the same or similar descriptions of procedures and responses on process. A coding system is used to identify the respondents and a particular CAO. The code starts with the first letter of the CAO followed by a number – for example, NHP1 for a paralegal interviewed in New Hanover, NHP2 for another paralegal in New Hanover. The code for focus group narrative is NHFG. The coding process is the same as that used in the three preceding case study chapters with identifiers of CAOs changed as appropriate. The matrix display of interview responses regarding mediation procedures and processes is followed by a series of matrices that are aligned with the above-mentioned sub-headings and that show relevant narrative from interviews and focus groups from this case study. Throughout the matrices 9-2 to 9-8, the column on the left depicts narrative from focus group discussions and the column on the right, narrative from paralegal interviews. In other words, as with previous case study chapters, this chapter displays, describes and interprets data from the paralegals and CCJD service recipients at a single CAO, while chapter 10 uses cross-case synthesis (Yin, 2009:156) to compare and contrast the results across paralegals, CAOs and focus group participants from all four locations.

#### **9.3.2.1 Mediation procedures and processes in New Hanover**

One of the questions raised in this study is whether the CRJ practices used by CBPs increase access to justice for victims of domestic violence in rural KZN. Matrix 9-1 helps answer this question in relation to the New Hanover CAO. According to respondents, among the ways that mediation procedures and processes increase access to justice is that the process is private and brings peace and harmony. People tell their side of the story clearly in the language that they are comfortable with. “The fact that we are aware of

cultural practices and beliefs and are able to address cultural issues (such as paying compensation, sacrificing an animal) contributes to our success” (NHP1). If a mediation agreement does not hold, the client is empowered to approach the courts and seek a Protection Order. When CBPs assist the client to access multiple justice systems, the CBP is straddling plural justice systems as an intermediary (Schonteich, 2012:26). According to Fernandez *et al* (2009:45), Dugard and Drage (2013:38) and McQuoid-Mason (2007:113) CBPs carry out mediation in a way that promotes access to justice among people from all walks of life. Matrix 9-1 sheds light on how New Hanover undertake mediation procedures and processes from screening of cases to post-mediation activities.

Matrix 9-1 Mediation procedures and processes for New Hanover

Procedure	Process
<p><b>Referrals</b> Paralegals take referrals from the police, courts, traditional courts, and social welfare. Others seek the process themselves after attending educational workshops, some having seen or read our pamphlets. Relatives, friends and neighbours also refer clients.</p>	<p>“There is regular consultation between the police and us. The reason they refer cases is that the police and mediation do not mix”. NHP2</p> <p>“The majority of cases that are brought to the court for Protection Orders are referred to our advice office first for screening to reduce the number of Protection Orders that are withdrawn. If both parties do not come to court on the day of hearing, the Protection Order is withdrawn”. NHP1</p>
<p><b>Voluntary participation</b> Participation by the person seeking mediation is voluntary.</p> <p>If the victim chooses mediation, we contact the offender, determine whether he agrees to participate and schedule a hearing date and time that is suitable to both.</p> <p>It is voluntary, but one party may participate only because he is afraid he will be arrested.</p>	<p>“The victim makes a choice; if she chooses mediation, the offender is given a calling letter to come. We find out from the victim how best a calling letter can be delivered to the offender. Sometimes the victim chooses to hand deliver the letter herself. Others ask us to call the offender, if they are not comfortable to give him the letter”. NHP2</p> <p>“Calling letters are also delivered by the police. Sometimes our calling letter is a deterrent: we have had a report from our clients that calling letters stop the violence immediately”. NHP1</p> <p>“Our clients participate freely. One client mentioned that, by choosing mediation we actually are doing offenders a favour because we could have charged them. Therefore we are aware that participation by offenders is not completely free because is motivated by the fear of arrest. But once they realise the value of mediation, they are happy to participate”. NHP2</p>
<p><b>Case intake</b> The CBPs use individual interviews to screen cases that are suitable for mediation and those that will be referred to the court. At New Hanover they screen all domestic violence cases that are brought to the magistrate’s court.</p>	<p>“The magistrate’s court in New Hanover has requested that we screen all cases to minimise case withdrawals at a later stage by the victims as they normally do. The screening process helps the courts to issue Protection Orders that are not going to be withdrawn”. NHP2</p> <p>“Our screening process helps us to determine which cases could benefit from mediation, and where reconciliation is still a possibility”. NHP1</p>

Procedure	Process
<p>The information is then recorded on a domestic violence case intake form.</p>	<p>“We mediate cases as well as assisting the victims who want Protection Orders to fill in the Protection Orders form”. NHP1</p> <p>“Alcohol always contributes to domestic violence. Women report this abuse; they do not want to go to court for a Protection Order, they prefer mediation. Men also report domestic violence but they are fewer because they think that people will laugh at them”. NHP2</p>
<p><b>Counselling</b> Paralegals provide counselling sessions for the victim prior to the mediation to reduce the victim’s fear and anger towards the offender.</p>	<p>“During this session we emphasise the importance of reporting the problem when it begins so that it does not escalate into serious injury or death of one of the parties”. NHP1, 2</p>
<p><b>Case selection</b></p> <p>They are several factors that are considered in deciding whether a participant’s case is suitable for mediation.</p>	<p>“We look at the level of violence, the history of the violence, how long has the violence been taking place, how complicated the case is and the possibility of reconciliation”. NHP2</p> <p>“The victim herself will raise the reason for her choice – for example a concern about her children, the employment status of the husband. They say things like, ‘my husband is a casual worker who does not have a pay slip’, and ‘if I leave, how I will claim maintenance?’” NHP1</p>
<p><b>Ground rules and responsibilities</b> Paralegals tell the victim and the offender to listen to each other without interruption and give each other a chance to speak, and that they should treat each other with respect throughout the mediation process.</p>	<p>“We lay down the ground rules that will be followed during the mediation process and state what is expected from them, in a friendly manner, and we say that their discussions must be conducted with due respect to each other”. NHP2</p> <p>“We properly welcome the participants and introduce ourselves, we do it to such an extent that it relaxes them”. NHP1</p>
<p><b>Telling their Story</b> During the first visit to the office, the victim is given an opportunity to tell her story of what happened, and what brought her to the Centre. The offender is also consulted to prepare him for the mediation. In the second visit she can tell the story of how the conduct of the offender affected her in his presence.</p>	<p>“People tell their side of the story in the own language that they are comfortable with. We are so used to listening to long stories, which is why we are here and have time for that”. NHP1</p> <p>“People who have a relationship have a unique way of communicating with each other and we tell them to feel free, we encourage that”. NHP2</p>
<p><b>Mediation logistics</b> If the victim chooses mediation, paralegals contact the offender, determine whether he agrees to participate and schedule a hearing date and time that is suitable to both. If she applies for a Protection Order, paralegals see the offender on the day of the court hearing. The normal procedure in New Hanover is, if the</p>	<p>“When Victim Offender Mediation takes place, the victim and the offender have a face-to-face meeting”. NHP1, 2</p> <p>“The victim and the offender can talk how they feel regarding their problem, and this is a very important step for our clients”. NHP1</p> <p>“The mediation process is informal. The mediation process might involve separate meetings with each client. We check the flow of information between the offender and the victim; take notes on</p>



Procedure	Process
<p>offender turns up for the hearing the matter is referred to the office to speak to both parties. The court wants to give the offender an opportunity to tell his side of the story (not condone his behaviour) and to check if the woman is sure that she wants a Protection Order or has changed her mind.</p>	<p>important points for further discussion and clarity”. NHP1</p> <p>“We help the clients to learn to talk to each other. If our clients are shouting at each other we meet with them separately and explain that it is in their interests to be able to communicate respectfully and listen to one another”. NHP1, 2</p>
<p><b>Solutions from each party</b></p> <p>The paralegals do not take decisions for their clients - they are the ones who come with a solution. The office is there to guide the process and help them to communicate.</p>	<p>“The victim and the offender have a dialogue, come up with a solution that suits them. If not they are also informed of the court process and alternative solutions that may address the interests of the two parties”. NHP1, 2</p> <p>“Some of the solutions during mediation result in the victim applying for a Protection Order as well to stop the violence from continuing. It has worked for those that combined this process with mediation as we explain how the protection will work in their situation”. NHP1</p> <p>“In other cases the offender will insist and say, ‘I cannot stay with someone who has a Protection Order against me’. In this case it is difficult to come up with a solution because the victim will also insist on a Protection Order as a backup. The process fails here and therefore the relationship ends. It really depends on each case as we have seen”. NHP2</p>
<p><b>Discussion of solutions</b></p> <p>Paralegals assist the victims and the perpetrators to discuss their problem with the aim of a mutually agreeable settlement.</p>	<p>“Our experience of a combined 25 years doing this work, including constant training by our supporting organisation, the Centre for Community Justice and Development, helps us guide discussions of solutions. Therefore failure is not based on the decision-making capacity of the victim and the offender; it is because the relationship is bad, irreparable and reconciliation is not possible”. NHP2</p>
<p><b>Victim safety</b></p> <p>If the victim chooses mediation, paralegals sometimes suggest an application for a Protection Order as another remedy to safeguard the safety of the victim based on their assessment of the situation. Counselling for both the victim and offender minimises further violence. Paralegals also refer the offender for treatment for alcoholism and other problems.</p>	<p>“We make these other remedies available to run concurrently, if we have a positive response from the victim and the offender. We network with other service providers: if alcohol consumption is the cause of domestic violence and if he agrees during mediation that he has a problem and that he needs assistance during mediation, we refer the offender for treatment”. NHP1, 2</p> <p>“In New Hanover because we service farm workers and farm dwellers there is a problem of alcohol abuse in the area. 70% of cases involve physical violence”. NHP1</p> <p>“I think the location of the Centre helps, as the offender gets an impression of the seriousness of the matter as we are based at the magistrate’s court. Any threat of further violence, the offender will be immediately arrested”. NHP1</p>

Procedure	Process
<p><b>Victim/offender satisfaction with procedure and process</b></p> <p>Men sometimes bring their gender stereotypes to the mediation process, and some are strongly prejudiced against women.</p>	<p>“Even though our services are free, it is not cheap justice. In court the victim does not participate much in the deliberations, whereas in our offices the victim is given an opportunity to say everything that is troubling her and through our mediation process the offender and the victim get to the root causes of their conflict”. NHP1</p> <p>“Offenders are very satisfied with our mediation process, the manner in which we handle their cases satisfies them, unlike the tension they experience in court”. NHP2</p>
<p><b>Satisfaction with agreement</b></p> <p>The victim and the offender do reconcile, and the offender shows remorse. Paralegals make other remedies available that run concurrently.</p>	<p>“The parties abide by the agreement: I have kept a couple together for ten years, and they are still together”. NHP1</p> <p>“The majority of our mediations are completed in much less time than the courts. The court can give you a far off date for your hearing and this creates added stress and trauma for both parties, because the victim wants to resolve the problem as quickly as possible and move on with her life”. NHP2</p>
<p><b>Case follow-up</b></p> <p>Parties are contacted by telephone and home visits. This is done to ensure that the offender’s promise to mend his unacceptable behaviour towards the victim is not just a way to get out of a difficult situation.</p>	<p>“I conduct follow-ups through home visits and contact my clients by telephone. Sometimes clients come to the office to thank me and say how grateful they are for what I have done for them. Not only is the victim grateful but also the offender”. NHP1</p> <p>“I make follow-ups through home visits in special circumstances, and I conduct the majority of follow-ups by telephone. They say they live in harmony following mediation, when I do follow ups”. NHP2</p>
<p><b>Refusal to participate or comply with agreement</b></p> <p>Paralegals have no authority to enforce the agreement, but they have credibility because they are located at the magistrate’s court. Most of the offenders abide by the agreement because they would rather avoid going to court and avoid the humiliation of being arrested in front of their children or at work.</p>	<p>“It does happen, even though it is not something that usually happens. Only 1% of offenders do not come for mediation, we know because we keep records”. NHP1, 2</p> <p>“In very few instances they refuse to come but those that refuse end up coming to the office the following day. They come because of the fear of arrest”. NHP1</p> <p>“This occurs occasionally, and on very few occasions”. NHP2</p>
<p><b>Unsuccessful mediation</b></p> <p>The parties refused to compromise or reach an agreement, deciding that they would like a Protection Order or wish to separate.</p>	<p>“In such cases we assist the victim to apply for a Protection Order if she wishes to do so”. NHP1, 2</p> <p>“In these cases mediation does not help since the relationship had gone to a stage where it is less possible to mend, or make the parties reconcile”. NHP1, 2</p>
<p><b>Access to justice</b></p> <p>If a mediation agreement does not hold, the client is empowered to approach the courts and seek a Protection Order.</p>	<p>“Most of the victims just want the violence to stop. They say, ‘Just talk to him and tell him to stop him beating me’”. NHP1</p> <p>“We work differently than the criminal justice system because we know how to look at the underlying factors of the problem; sometimes parties have not yet connected domestic violence to problems beneath what is in</p>

Procedure	Process
	plain view”. NHP2
<p><b>Factors contributing to success</b> The procedure enables the victim and the offender to deal with underlying issues holistically and acknowledge that violence does not solve anything. Often the offender says he did not know how much he hurt the victim. The parties bring to the dialogue incidents that happened a long time ago.</p>	<p>“The victim and the offender are able to deal with underlying issues ”. NHP1, 2</p> <p>“We understand cultural issues such as paying compensation, sacrificing an animal, it contributes to our success. It is an advantage that we are based at the magistrate’s court. Parties know we mean business, and an offender that does not cooperate is issued with the Protection Order. Mediation works for the majority of cases we have handled on domestic violence. People live in harmony after mediation”. NHP1</p> <p>“The fact that we are aware of traditional cultural practices and customs and we are able to help our clients better this contributes to our success”. NHP2</p>
<p><b>Appropriateness of mediation in domestic violence</b> Women come to the office and choose mediation. Mediation ties in very well with the traditional African system of justice, as they both promote reconciliation and living together afterwards.</p>	<p>“Women have a greater say in mediation, and many prefer mediation to the court process. The court is known for turning the wheels of justice very slowly and the courts are confusing for rural people”. NHP1, 2</p> <p>“It is not appropriate for cases where there has been serious assault and extreme violence. But we respect the choice that the victim makes not to charge the offender and opt for mediation. A Protection Order works where the couples are no longer in love and no longer staying together”. NHP2</p> <p>“They come here and say ‘I want a Protection Order, I do not want to stay with him anymore, and I do not love him anymore. I just want him to leave me alone.’ In this situation a Protection Order works”. NHP1</p>
<p><b>Record-keeping</b> We keep case registers, and use an electronic database, index book of cases, and intake forms.</p>	<p>“In New Hanover, because we service farm workers/dwellers there is a problem of alcohol abuse in the area. 70% of cases involve physical violence. We know because we keep records”. NHP1, 2</p>
<p><b>Post-mediation</b> We ask our clients to see if the problem is continuing, and encourage them to come back and we assist in taking further steps.</p>	<p>“After mediation it is rare for violence to start again. In New Hanover we mediate and sometimes encourage applications for a Protection Order as a guarantee, and explain to the offender how it works, to deal with the myth that a Protection Order is like a hangman’s noose”. NHP1, 2</p>

As matrix 9-1 indicates, New Hanover CBPs partner with SAPS and the criminal justice (Golub:2003:35). There are cross-referral of cases between SAPS and New Hanover CBPs and police deliver calling letters to offenders on behalf of the New Hanover CAO. In addition New Hanover CBPs provide initial screening on behalf of the magistrate’s court – determining a suitable forum for the domestic violence case and gauging the victim’s safety. There does not appear to be direct evidence in the literature of police ‘serving process’ to an offender on behalf of a CAO. Nor does there appear to be empirical evidence of CBPs at independent

advice offices screening cases on behalf of a magistrate's court. A number of the strategies applied by New Hanover CBPs throughout the mediation encounter are evident in the literature reviewed such as establishing ground rules that encourage expression of emotions (Wallis and Tudor, 2008:60); the right of the parties to be "meaningfully involved in the discussion and decision-making process" (Johnston and Van Ness, 2011:9), and the recurring theme of how the lack of financial independence of women make them reluctant to report domestic violence (Robb-Jackson, 2012:10). Matrix 9-1 brings to bear the service role of CBPs. Golub (2000:301) suggests that CBPs "combine skills of psychologist, social worker, public servant and paralegal". This is evident in the New Hanover CBPs efforts to tackle underlying issues such as alcoholism and fashioning concurrent remedies to suit individual needs of clients. Also evident in matrix 9-1 is the theory of universal pragmatics and communicative action (Barrett, 2013:358). The pragmatic side of language and forms of non-verbal communication appear to lie deeper than the fact that CBPs and the parties speaking isiZulu. Rather, communication pragmatism of the New Hanover CBPs not only create a flexible environment in which to communicate and speak the same language of the parties but also keep a careful eye on communication between parties and then apply techniques based upon the way parties communicate with each other to help resolve conflict. This is an example of what Barrett (2013:340) and Habermas (1984:8) mean when they refer to 'what language does' as opposed to 'what language says'. The action element of communicative action seems to stem from the way CBPs conduct the mediation encounter to the subsequent action of the couple staying together in a violence-free environment.

The theory of reparation from a local cultural perspective is also found in narrative from New Hanover CBPs as presented in matrix 9-1. For example, animal sacrifice to restore a relationship can be seen as symbolic reparation since the ancestors of the victim would have been appeased and family sustainability an opportunity. Lastly, the practice and emerging theory of forum shopping in an environment of legal pluralism. Scholars argue that forum shopping may improve access to justice for women (Chopra and Isser 2012:353; Sandefur and Siddiq, 2011:113; Harper *et al*, 2011:179). Chopra and Isser (2012:353) contend that "women's rights requires engaging with legal pluralism rather than seeking its demise". Focus group participants in New Hanover as well as those in Madadeni, Ixopo and Bulwer all seem to engage in forum shopping across justice systems. Forum shopping is seen as a means of empowerment for rural women victims of domestic violence and CBPs are well positioned to facilitate such empowerment (Harper *et al*, 2011:179). In the context of legal pluralism, unlike Benda-Beckmann's (1981:117) finding that state and non-state justice officials in West Sumatra, Indonesia compete for disputants, findings from this New Hanover case study suggest that CBPs, SAPS and criminal justice courts cooperate in the midst of victims' forum shopping so that the victim maximises her benefits through cross-referrals.

The results from the quantitative data and the procedures and processes employed indicate that restorative justice interventions by paralegals are appropriate for the majority of cases of domestic violence, with a small number indicating the contrary. These are cases where the parties cannot reconcile and the victim decides to take out a Protection Order to manage the violence. A comparison of the number of cases successfully mediated, and the number of Protection Orders confirmed, combined with referrals of cases of domestic violence from criminal justice institutions such as the police and the courts in New Hanover, offers a measure of the paralegals' impact on the victims of domestic violence. The data provides evidence that CBPs promote access to justice for rural women.

The focus now shifts from the interview data to the focus group data. This section blends the qualitative data from the interviews with the CBPs and focus groups with survivors of domestic violence. While the interview data are displayed in accordance with the procedure and process of the mediation process, as was the case in previous chapters, the data from the focus groups are organised according to the sub-headings (1) access to justice, (2) use of the DVA and (3) restorative justice. Focus group participants were drawn from the community, with participants were recruited on the basis that they had received services from the office. The focus group and paralegals narrative are compared and contrasted to show where the paralegals and their clients are in agreement or differ in perceptions. The matrices are discussed in relation to the literature, and the research objectives and research questions, guided by the meta-conceptual framework of the problems and benefits associated with restorative justice and problems and benefits associated with CBPs.

#### 9.3.2.2 Access to justice in New Hanover

In rural areas, access to justice presents a complex problem.

In rural areas, access to justice presents a complex problem. There is insufficient empirical evidence on how restorative justice practices administered by CBPs can improve access to justice, particularly in remote areas. The data presented in matrix 9-1 above and 9-2 below helps fill this void by showing how the restorative justice practices administered by CBPs can improve access to justice, particularly in remote areas. New Hanover CAOs and CBPs work closely with the New Hanover magistrate's court. On the one hand, CBPs screen cases on behalf of the court. On the other hand, once a verbal agreement is reached between the parties during the mediation encounter, the magistrate's court reduces the agreement to a court order (Dugard and Drage, 2013:39). The study by Dugard and Drage (2013:39) found evidence that "this type of settlement provides a more sustainable solution than the court could implement by itself" and that CRJ "promotes harmonious reconciliation, and clients go to court with a settlement agreement" (p. 39). The data

in Matrix 9-2 reveal that participants are open to utilising the formal justice system if a domestic violence case could be conducted in privacy.

Matrix 9-2 Comparative responses on practical ways to improve access to justice for rural female victims of domestic violence in New Hanover

Focus group discussions	Community-based paralegals
<p>“Domestic violence cases’ hearings should be held in private if we decide to go the court route”. NHFG</p>	<p>“It can be improved by conducting more awareness-raising workshops especially in deep rural areas. For example we visited a deep and isolated area called Mbambongalo under Umzinyathi Municipality and we were informed by the women themselves that in their area there is no such thing called domestic violence”. NHP1</p>
<p>“Mediation should be part of the justice system”. NHFG</p>	<p>“The criminal justice system is very harsh, it is a painful process, it separates families, and it causes hardships and division within families. Mediation should play an important role in the justice system, but in my opinion it must remain informal, because once it is included in the statute books it will come with rules and regulations. It is going to defeat its purpose because the idea is to forgive, reconcile and normalise the situation, without the interference of courts and rules”. NHP1</p>
<p>“Paralegals and the justice system must work together; the state must subsidise paralegal work without paralegals becoming part of the state”. NHFG</p>	<p>“Justice will have to engage with the people, listen to the justice needs of the people, and raise awareness of rights. This in turn will enable people to report any form of abuse since they will be aware what to report and where to report. As paralegals this is what we are doing and cannot reach everyone because of limited resources”. NHP2</p>

Narrative in matrix 9-2 suggest that making domestic violence a public problem does not address their legal needs. This re-opens the public/private debate regarding the handling of domestic violence cases. Some scholars favour the public-based criminal justice model of intervention in intimate partner (Daly and Stubbs, 2011:159; Mills and Grauwiller, 2006:366; Gulich, 2010:251) whereas others contend that CRJ retains the privacy of female victims of domestic violence (Graef, 2001:31; Morris and Gelsthorpe, 2003:129; Dissel and Ngubeni, 2003:9). Participants in this study tend to agree with the latter as well as Coker’s (2002:131) proposition that, if given a choice, women prefer privatising their problems rather than the public model which “controls and disempowers poor women”. Hence, the public-based criminal justice model is problematic for these study participants. Focus group participants indicate that the formalisation of CRJ and

the inclusion of CBPs in the formal CJS would not improve access to justice, and they prefer collaboration not co-optation. It is argued in literature review that “the inclusion of CRJ in the CJS will undermine the philosophy of CRJ and perpetuate the existing system instead of challenging it” (Zernova and Wright, 2011:96). Based on matrix 9-2, New Hanover CBPs believe that awareness-raising promotes access to justice for rural women which would help overcome the problem of moral disengagement (Barton, 2000:3). For example, women denying that in their village there is no domestic violence suggests moral disengagement, yet to be reversed. The human rights role (Buckenham, 2014:4) of CBPs could help overcome this community problem.

The next section considers the use of the DVA in New Hanover.

### 9.3.2.3 Use of the Domestic Violence Act in New Hanover

This study seeks to contribute to the debate on the question of whether the DVA meets the needs of women. The DVA is designed to protect and uphold the rights of the victim. Part Four Section 10 of the DVA states that a victim and an offender may apply in writing to have a Protection Order set aside. If the court is satisfied that the victim has shown good reason for setting aside the Protection Order and that the application has been made freely, such an order may be granted. Furthermore, in terms of section 18 of the DVA, the prosecutor is not permitted to refuse to institute a prosecution, unless authorised by the Director of Public Prosecutions (the legislature used the imperative word “shall” – this means that it must be done; there is no choice).

The data in matrices 9-3 and 9-4 identify the problems associated with using the DVA and do not indicate that women feel protected by the DVA. While Hooper and Busch (1993:11) argue that restorative justice practices contribute to the “trivialisation of domestic violence and the creation of a veil of secrecy since it focuses on individual and marital privacy and the desire to preserve the family as an intact unit”, it appears that study participants prefer family sustainability which may be disrupted by use of the DVA is used. Although Curtis-Fawley and Daly (2005:603) criticise restorative justice practices for domestic violence “because the process and outcomes are not sufficiently formal or stringent, and victims may be re-victimised” study participants seem to disagree.

Matrix 9-3 Comparative responses on the use of the Domestic Violence Act for protection in New Hanover

Focus group discussions	Community-based paralegals
<p>“We call the police and they do not come.” NHFG                      “Police officers at the charge office are males, they are not sympathetic and they are not adequately trained to handle domestic violence situation”. NHFG</p> <p>“The attitude of the police further victimises us”. NHFG</p> <p>“There is no privacy at the police station charge office”. NHFG</p> <p>“They lack passion for their work, no listening skills. For them it is a job, not a calling”. NHFG</p>	<p>“Community members are not satisfied with the services of the police and their attitude towards women who are victims of domestic violence, because sometimes the Protection Order is not served until the date of the domestic abuse hearing”. NHP1</p>
<p>“With reporting to the police, the problem persists and it does not go away”. NHFG</p>	<p>“Protection Orders are not the solution rural women who are victims of domestic violence want, despite the abuse. They know the implication of a Protection Order; they have seen what problems it causes to the people they know. If they still want to continue with the relationship, it is not an appropriate remedy, even though in cases of extreme violence we think it is a deterrent. It works if the parties are no longer in love and they intend to separate”. NHP1</p>
<p>“We do not like to take our private matter and make it public; this is what happens when we involve the police, we do not want to please our enemies as well.” NHFG</p>	<p>“Some members of the community are not satisfied with the police as being the ones serving Protection Orders in the community because of the issue of privacy”. NHP2</p>

Narrative presented in matrix 9-3 shows that victims are dissatisfied with police at the forefront of responding to domestic violence because of the issue of privacy, similarly paralegals point out that the issue of privacy is the problem that detracts their clients’ use of the DVA (Tshehla, 2004:4; Shapland, *et al* 2011:39). Data indicate that the problem of using the DVA goes beyond privacy, according to female victims of domestic violence, the attitude of the police further victimises them in that the police are not adequately trained to respond appropriately to victims’ problem. The training of the police “on the needs of victims increases sensitivity to the problem” (Fiftal-Alarid and Montemayor (2012:460). There is scholarly evidence that “the police, prosecutors and judges discredit womens’ accounts of their abuse” (Morei, 2014:928; Grauwiller and Mills, 2004:54).



While matrix 9-3 displayed narrative from focus group participants and CBPs about the use of the DVA by rural women victims of domestic violence for protection, matrix 9-4 provides narrative on problems with the criminal justice system regarding domestic violence in New Hanover.

Matrix 9-4 Comparative responses on problems with the criminal justice system regarding domestic violence in New Hanover

Focus group discussions	Community-based paralegals
<p>“We hate to make our private matter public. The police are not discreet when they visit your homestead. The sight of the van attracts curiosity from neighbours and we do not want that.” NHFG</p> <p>“The justice system does not protect you after the hearing or trial. If he goes to jail what happens when he comes out, what about the intimidation from family members, my children? Where would I go because as soon as I charge him I need to leave the homestead, the majority of this depends on the men?” NHFG</p>	<p>“Privacy has been commented on by almost every victim of domestic violence seeking mediation as an alternative to applying for a Protection Order in terms of the Domestic Violence Act.” NHP1</p> <p>“By the time we see them some have attempted to resolve the matter within the family but failed, and say family members take sides. Others they do not even want family members to know the details of her conflict with her husband.” NHP2</p> <p>“But if she goes to court the whole family rallies around the offender, because it becomes public knowledge that she has charged her husband or she has involved the police.” NHP1</p> <p>“Mediation provides the privacy the victim desires. Others inform me when I follow up to check how are things, that no one knows that we came here, they are surprised why all of sudden we are so friendly with my husband, and he appreciates this discretion.” NHP2</p> <p>“Most women who are victims of domestic violence do not want to see a breadwinner arrested. All they want is for the violence to stop; they want a change in attitude towards them and their children. The process like mediation is preferable because it gives the woman her dignity back, without the stigma of having criminalised the father of their children.” NHP1</p> <p>“The criminal justice system does not provide a space for dealing with domestic violence situations involving people who are still in love and want to continue with their marriage.” NHP2</p>

Data in matrix 9-4 indicate that, other than the issue of privacy and lack of follow-up by courts with the victim after court proceedings, problems with use of the criminal justice system for domestic violence centre on surfacing of mixed loyalties (Van Wormer, 2009:108). This factor confirms Van Wormer’s (2009:108)

contention that “it is the criminal justice procedures of arrest and prosecution that create problems of mixed loyalties, not restorative justice”. It is further problematic when families rally around the offender once the victim files criminal charges (Smith, 2010:259). Before concluding this section it is worth noting that although victims of domestic violence may be reluctant to utilise the DVA and even though they may find aspects of the criminal justice system problematic, the criminal justice system still seems to hold some value for respondents – even if it is the strategic location of CAOs within criminal justice buildings. The strategic location of CAOs in magistrate courts and police offices affords the threat of arrest to perpetrators who may then opt for restorative justice practices. In addition, CBPs often facilitate concurrent use of the criminal justice system and the informal restorative justice system when victims obtain Protection Orders after mediation.

Having presented and interpreted data on use of the criminal justice system, the study now turns to a discussion of whether the need for CAOs and CBPs remain.

#### **9.3.2.4 New Hanover community advice office and community restorative justice**

Despite the progressive steps taken by the democratic South African government since 1994, it is still difficult for many people to access their constitutionally guaranteed rights. This is especially true for people who live in remote rural areas and are financially unable to retain lawyers (Dugard and Drage, 2013:1). Community advice offices and CBPs who operate and manage them while employing restorative justice practices were designed to help address this problem. Yet, Tamanaha (2011:8) points out that “informal and traditional justice systems cannot act as substitutes for the formal justice system” since “they do not address or enforce state legal norms” and “their coercive power is limited”. Scholars claim that CBPs may “divert pressure being applied to improve the training of lawyers” (Noone, 1991:34); “have limited training and understanding of the law” (Robb-Jackson, 2013:54); and “either compete with lawyers or lower the standards of services that qualified lawyers provide (Walsh, 2010:19). Nevertheless, Dugard and Drage (2013:17), contend that “CAOs occupy the central territory in terms of community development and the legal empowerment of the poor by working to erase the apartheid legacy and the current conditions of poverty experienced by many South Africans”.

The New Hanover CAO is located in the magistrate’s court for that jurisdiction. To understand CAOs and CRJ, this section considers whether there is a need for CAOs and CBPs; the role of CBPs in CRJ; interaction among CRJ, the criminal justice system and CBPs; and the experience of CRJ by study participants in New Hanover. The pragmatic worldview assisted the researcher to examine the views and perceptions of CBPs as well as victims of domestic violence in terms of what works. The case statistics provide a description of

what aspects of restorative justice work, and under which circumstances restorative justice does and does not operate successfully.

Interpreting Matrices 9-5 to 9-8 through the lens of a pragmatic worldview, the data suggest that gender-based barriers are a motivating factor as to why the CAO and CBPs’ restorative justice approach is more appealing to victims of domestic violence than the formal justice system.

Matrix 9-5 Comparative responses on the need for a community advice office and community-based paralegals in New Hanover

Focus group discussions	Community-based paralegals
<p>“Paralegals protect us, and they go out of their way to make sure that justice is done; you cannot get that kind of dedication and commitment from other stakeholders. We need them more, now that we are aware of our rights but still experience problems in enforcing those rights. For example, I called the police after my husband assaulted me and he wanted to chop me with an axe, but they did not come. They said were no vans at the police station at that time.” NHFG</p>	<p>“As paralegals our work is flexible and is designed to suit each individual case.” NHP1, 2</p> <p>“We provide legal advice to clients, provide counselling, and conduct mediation and awareness-raising. The cases that are beyond our scope are referred to relevant agencies. We provide empowerment to communities. We understand the community dynamics as we live in the communities that we serve.” NHP1</p> <p>“Our role is to guide the community we serve to access justice, through awareness-raising workshops, information presentations in communities, mediation, counselling, and also to provide free legal advice.” NHP2</p>
<p>“Police are not sympathetic to women who are victims of domestic violence and they are not trained to handle domestic violence situations. They lack passion for their work, no listening skills. This office is needed; even if the police could improve their services, it will not be the same service rendered by paralegals.” NHFG</p>	<p>“It is going to take a long time for the police to be responsive to victims of domestic violence. To some they rather concentrate on other priority crimes, such as murder and rape than domestic violence.” NHP1</p>
<p>“The service rendered by this Centre is highly appreciated not only by communities but by other service providers. The police said they could not help us; that we must go to the office next to the magistrate’s court and the paralegal will help us. The police do not help us as they should.” NHFG</p>	<p>“The magistrate’s court in New Hanover has requested that we screen all cases to minimise case withdrawals at a later stage by the victims as they normally do. The screening process also helps the courts to issue Protection Orders that are not going to be withdrawn.” NHP2</p>

Narrative in matrix 9-5 suggests that police are ill-equipped to address gender-based needs of victims. Other factors that show the continued need for CAOs and CBPs are the service role (Stephens, 2009:145) and

human rights role (Franco *et al*, 2014:7) performed by CBPs. Moreover, victims of domestic violence seem to favour restorative justice over criminal justice processes in view of the speaking and listening and opportunities afforded CBPs and victims by CRJ (Barrett, 2013:335). Besides screening cases to determine appropriateness for restorative justice practices, New Hanover CBPs uniquely screen cases on behalf of the magistrate’s court. The manner in which CBPs attest to guiding the community they serve to access justice confirms Golub’s (2000:306) contention that CBPs are in “touch with community dynamics in ways that even the best-intentioned lawyers often cannot be”. According to Kigodi (2013:89) CBPs “undeniably play a significant role in eradicating gender injustice” by meeting community demands.

Matrix 9-6 continues with identification of roles of CBPs in CRJ.

Matrix 9-6 Comparative responses on the role of paralegals in the restorative justice system in New Hanover

Focus group discussions	Community-based paralegals
<p>“They conduct mediation, you talk about everything, you are free, and they treat everyone the same.” NHFG</p>	<p>“We arrange and conduct mediation; most of them are completed in much less time than the courts. The restorative justice model that we use is Victim Offender Mediation and Family Group Conference. Family Group Conferencing has been applied mostly to my Indian clients, and they have been successful - after the last one we had we were invited to the couple’s wedding anniversary.” NHP1</p>
<p>“The remorse shown by our husbands is genuine; the violence stopped obviously based on what he was told during mediation, that should he repeat he will be arrested. My husband now buys food, he now says good things about me and I love my husband.” NHFG</p>	<p>“Offenders are very satisfied with our mediation process, the manner in which we handle their cases satisfies them, unlike the tension they experience in court.” NHP2</p>
<p>“The mediation process of the paralegals builds homes: today we are laughing, sharing our stories with you because of these two ladies. I have nine children; where will I go if I leave my husband and how will I support all these children? So it made sense for me to choose mediation and I benefited from the mediation process conducted by NHP1, so they are playing a very important role in the community and their mediation has strengthened many marriages”. NHFG</p>	<p>“Our screening process assists us to determine which cases of mediation have a chance of success and where reconciliation is still a possibility.” NHP1</p>

Data contained in matrix 9-6 identify such roles of CBPs in CRJ as conducting mediation, levelling power imbalances between parties, positively impacting offenders, and the CBPs role in family-sustainability. Community-based paralegals conduct mediation (Golub, 2003:33). In connection with the mediation encounter the New Hanover CBPs seem to address the problem of unequal power relations of the parties (Wojkowska, 2006:20; Stubbs, 2010:92); as focus group respondents indicate that everyone is treated the same. While Daly and Stubbs (2006:17) argue that CRJ “may do little to change offender behaviour”, data in matrix 9-6 from focus group participants indicate that, post-mediation, victims’ husbands showed genuine remorse and fulfilled financial obligations for their families. This suggests that CBPs applied techniques indicative of restorative justice theories such as moral and social development and restoration and repair which can be considered precursors to family sustainability. Simultaneously, Walgrave (2011:562) points out that the private-based CRJ employed by paralegals “ignores the public dimension of the crime” and removes public accountability by the offender. As discussed in chapter 3, whether domestic violence cases are a public or private issue remain an unsettled debate.

Next interpreted are data in matrix 9-7 that contains narrative about the interaction between the informal and formal justice systems and CBPs followed by matrix 9-8 which reveals respondents’ experience of CRJ.

Matrix 9-7 Comparative responses on the interaction between community restorative justice, the criminal justice system and community-based paralegals in New Hanover

Focus group discussions	Community-based paralegals
“If paralegals become part of the state, their work will be compromised.” NHFG	“The courts will tell us that we cannot conduct Victim Offender Mediation for three hours as there will be other people to attend to. We will not be able to perform some of the tasks that we engage in to help our clients.” NHP1, 2
“Paralegals command respect in the community, are trusted.” NHFG	“People are more comfortable with the mediation process.” NHP1, 2
“Paralegals should keep working with the police and courts to help us access our rights.” NHFG	“I believe working for the state will limit our work in a sense that as paralegals we deal with every case that is brought to our attention, and we use various approaches in dealing with cases such as mediation. We do not only deal with specific problems – we assist any client that comes to us.” NHP1

As Dugard and Drage indicate (2013:39), CBPs “are aware of the value of creating authentic, lived solutions at grassroots level” which may contribute to the respect demanded and trust earned in the communities served. A recurring theme about the interaction of CRJ, the criminal justice system and CBPs is fear raised by CBPs and service recipients alike that if CBPs are fully incorporated into the criminal justice system diminished services will result. While scholars (Wojkowska, 2006:14; Van Rooij, 2012:293) disagree on the viability of informal justice systems, respondents in this study seem content with CRJ as delivered by CBPs including working with but not for the criminal justice system. On the one hand Van Rooij (2012:293) argues in support of “non-state normative and justice systems” as these systems are “closer to the weak and the poor”. On the other hand, Wojkowska (2006:14) is concerned about “the risk of institutionalisation of low quality of justice for the poor.” Thus far, economically poor rural women who participated in this study do not seem to perceive CRJ services delivered by CBPs as low quality justice.

Matrix 9-8 presents data from focus group participants and New Hanover CBPs on their CRJ experience.

Matrix 9-8 Comparative responses on experiences of restorative justice processes in New Hanover

Focus group discussions	Community-based paralegals
“We save time by coming to this office and it is less expensive in that you do not have to go to court so many times and take time off work.” NHFG	“Our mediations are resolved within a shorter space of time than the courts, and in special circumstances mediations are conducted at the home of the victim.” NHP1, 2
“It helps us to resolve our problem on our own and in future to communicate better. We have a place to come to, and we are free to express our feelings during mediation.” NHFG	“We create safety platforms for the offender and the victim to feel free to communicate and for the victim to express her true feelings about the offender’s behaviour or conduct.” NHP, 2
“They bring respect and <i>Ubuntu</i> . It brings peace and trust to our families. They bring happiness and laughter in our homes. Mediation restores our relationships and marriages.” NHFG	“We restore and build interpersonal relationships and marriages.” NHP1, 2

Narrative in matrix 9-8 shows that CRJ services conducted by New Hanover CBPs are cost-effective and easily accessible (Robb-Jackson, 2012:12; Pigou, 2000:25). Focus group participants point out that receiving services from local CAOs allows them to avoid bearing travelling expenses incurred from going to court (Wojkowska, 2006:16; Kane *et al*, 2005:10). The wide and flexible set of tools employed by CBPs (Moorhead, 2003:765) and non-adversarial strategies executed by CBPs (Maru, 2006b:470) enable service recipients to shape their own solutions to their problems. Application of the theory of restoration or repair is

evident from narrative presented in matrix 9-8 as well as the fact that CBPs operate in accordance with *ubuntu*, thereby honour human dignity and exercising moral authority while performing a human rights role (Buckenham, 2014:4, 7). Hence, it appears that, through professionalism and sensitivity, New Hanover CBPs help victims of domestic violence to overcome their reluctance to report violence against them by husbands and partners. Yet, as scholars point out, paralegals “have to be constrained and regulated to ensure that they do not encroach upon the real practice of the law” (Franco *et al*, 2014: 28); “either compete with lawyers or lower the standards of services that qualified lawyers provide” (Walsh, 2010:19); and “may divert pressure being applied to improve the training of lawyers” (Noone, 1991:34). Nevertheless, whether qualified, trained and culturally competent lawyers are available and willing to serve rural populations generally unable to pay for legal services rendered remains unclear.

The focus of the study now shifts to paralegals’ involvement with the traditional justice system.

### **9.3.3 Qualitative data as to linkages between the traditional justice system and community-based paralegals in New Hanover**

As has been shown in earlier case studies, traditional courts are community-based and are accessible to every community member. The majority of traditional villages in rural KZN have geographical access to traditional courts but, as scholars note, residents of rural villages would have to travel long distances to access formal courts (Tamanaha, 2011:7; Ubink and Van Rooij, 2010:3; Makec, 2007:134). The traditional justice system is regarded as a community-based justice system (CBJS) by Nyamu-Musembi (2003:12). The CBJS system, by virtue of its location in the community it serves, is relevant, disputes are resolved quickly, and the traditional justice system can adapt in a way that is responsive to community needs.

The data in matrix 9-9 show collaboration between the New Hanover CAO and its paralegals with traditional courts and the traditional leadership in the area of New Hanover. Proposed provisions of the TCB which did not pass Parliament is compared with traditional court practice as observed by CBPs. The area of jurisdiction under New Hanover is geographically expansive. There are fifteen traditional courts in the area and the CAO works with eight of these courts.

#### **9.3.3.1 The composition and operation of the traditional courts**

Narrative in matrix 9-9 presents the views of New Hanover paralegals relative to public aspects of the traditional court, court fees, presiding officers of traditional courts, jurisdiction and procedure of traditional courts; issues of legal representation, language, and restorative nature of the traditional court process. Matrix 9-9 was co-created by the New Hanover CBPs and the researcher. The column on the left lists various

components of the proposed TCB while the column on the rights presents narrative from the CBPs regarding current practice in traditional courts.

Matrix 9-9 Paralegals' comments on composition and operation of traditional courts

<b>Relevant sections of the proposed Traditional Courts Bill or the literature</b>	<b>Paralegals' comments on traditional court current practice</b>
<p><b>Public aspect of the traditional court</b> Section 1 of the TCB</p>	<p>“There is no privacy; cases are dealt with in the presence of more than 50 people. The traditional court has a podium where <i>Inkosi</i> and council members seat during the court proceedings. There are two boxes at the front on the left and right of the court where the complainant and the respondent stand during the court proceedings. Both the complainant and respondent start by making an oath that they will speak the truth in front of the court. There are chairs where the community members sit and listen to the cases”. NHP1</p>
<p><b>Court fees</b> Ubink and Van Rooij (2010:3)</p>	<p>“Members of the community pay R100”. NHP1</p>
<p><b>Presiding officers of traditional courts</b> Section 1, clause 4 of the TCB</p>	<p>“Women are part of the council (<i>uMkhandlu</i>). Women do not seem to be independent; they always want assurance from men on each decision taken by the court. <i>‘Babeka imibono ukuze Inkosi zigcizele kwimibono yabo’</i>”. NHP1</p>
<p><b>Jurisdiction of the traditional Courts</b> Section 5 of the TCB</p>	<p>“Traditional courts deal with cases of domestic violence, adultery, insults of the elderly, credit and debt issues, customary marriages, witchcraft, land issues, pregnancy outside the marriage, inheritance and murder”. NHP2</p>
<p><b>Legal representation</b> Section 9, clause 9 of the TCB</p>	<p>“Male members of the family represent women in terms of the hierarchy. If the woman is married her husband represents her. If unmarried, her father or the eldest brother, or even adult male children”. NHP2</p>
<p><b>Procedure of traditional courts</b> Section 9, clause 9 of the TCB</p>	<p>“Members of the community know the rules and sanctions of traditional courts. Sometimes sanctions are excessive, and the treatment of women is terrible. It is the behaviour and the decision making process that spoils the rules of customary law”. NHP1, 2</p>
<p><b>Language</b> Kane <i>et al</i> (2005:11)</p>	<p>“A woman reported a case to the traditional court. The man refused to answer questions asked by a woman, one of the council members. He said <i>‘angikhulumi nomfazi owophayo’</i>”. NHP2</p>



<b>Outcome of court cases</b> Sections 11,12 and 13 of the TCB	“The outcome of a court case is a fine, compensation, or expulsion from the village”. NHP1
<b>Restorative nature of the traditional court process</b> Section 3 of the TCB	“The traditional court justice approach is community restorative. The <i>uMkhandlu</i> do not mediate, they just listen and decide without giving the other party a chance to talk. They always request people to be short and to be straight to the point. They tell people they were wrong for doing what they did”. NHP2
<b>Recording of cases</b> Section 18 of the TCB	“Traditional courts keep simple records, just particulars of the participants and the offence. Mostly secretaries write letters to respondents, conveying decisions and stipulating compensation to be paid. Secretaries are paid a daily rate”. NHP1, 2

The New Hanover paralegals note that domestic violence cases are conducted publicly in full view of everyone. Vorster (2001:53) confirms that the traditional court process is public – open to all adults. Simojoki (2011:36) observes that in Somalia, customary courts called Xeer are generally open to the public, and participation is open to all with the exception of women, relations of the parties involved, persons with a personal grievance against any of the parties, and any persons who have previously sat in judgement over the case. Both New Hanover CBPs contend that many issues are discussed relating to domestic violence, some of which the paralegals believe, should not have been discussed in public. Unlike in Somalia where the above exceptions are standard, in KZN any people – including women – are allowed to ask questions during the proceedings. Makec (2007:135) explains that the purpose of “open courts is to ensure that justice is seen to be done”. In contrast, Roche (2004:201) cautions that “respecting the privacy of restorative justice deliberations may also hide abuses, which can occur within the private-base process itself. Due consideration should be given to the ways privacy needs can be reconciled with those of accountability”.

Moult’s (2005:21) research in South Africa found that the private/public discourse in traditional justice is a matter of discretion. Some *Induna* are sensitive to the fact that many people are not comfortable with talking about their issues in public. In such cases, “community members are cleared from the meeting and proceedings resume with just the parties and the mediator present” (p. 21).

Curran and Bonthuys (2004:9) contend that “rather than bringing the issue to public attention by approaching the traditional leader. Many women share their families’ reluctance to expose issues of domestic violence to the public gaze and are thus unlikely to seek outside assistance”. To these scholars women in traditional communities wish to retain privacy about domestic matters. Bringing domestic violence cases to public forum may not just publicly expose domestic problems but also give the appearance

that one's family is failing to remedy family problems and family solidarity is at the centre of traditional communities.

Turning to gender of presiding officers in traditional courts, New Hanover CBPs feel that women's participation in *uMkhandlu* is just a token. Men, who appear before the council, sometimes disrespect women members of the traditional council. Harper *et al's* (2011:175) research in Namibia which evaluated participation of women on traditional councils or as presiding officers revealed "mixed results, in that some appointments have not been followed by meaningful participation, and in others, prevailing social attitudes have constrained appointees freedom to act independently".

With respect to language, while everyone understands the language used in the traditional courts Ntlama and Ndima (2009:18), language is not always used to the benefit of women complainants and respondents. Instead, language may be used to verbally abuse women; it appears that such use of language is a deliberate move to discredit women telling their stories before the traditional court. Scholars agree that language can be used to "evoke positive and negative responses, understanding as well as intolerance (Parenzee *et al*, 2001:106); and to further conflicts or advance strategic action (Barrett, 2013:340). The New Hanover paralegals add that the language used by males whether court authorities, parties or spectators and the attitudes of males towards females – whether presiding officers, council members, complainants or respondents – in the traditional court have nothing to do with restoring relationships.

### 9.3.3.2 Case referrals from traditional courts to New Hanover community advice office

The referrals from the traditional court to the New Hanover CAO show that presiding officers recognise their limitations in some of the cases, however paralegals point out that this is not the case with all the cases referred. Paralegals are of the view that traditional court officers are not comfortable handling sexual related cases especially where the person reporting is a woman. Paralegals welcome such referrals to spare the woman from humiliation by presiding officers and ordinary people who are in attendance but are not part of the case (Ubink and Van Rooij, 2010:5).

Data in matrix 9-10 indicate different types of domestic violence cases referred from traditional courts to the New Hanover CAO. Some of the cases that come to the CAO from traditional courts often involve physical violence, sexual, and economic abuse. The emotional abuse case category also involves problems around customary marriages and intestate succession issues.

Matrix 9-10 Cases referred by traditional courts to the New Hanover community advice office

Cases referred to community advice office from Traditional Courts	Reasons for referral
Domestic violence: Physical violence	“The traditional courts are aware of Protection Orders. They refer cases involving physical violence to our advice office. We deal a lot with domestic violence cases referred by the traditional courts that require a Protection Order and counselling”. NHP2
Domestic violence: Sexual abuse	“Issues of sexuality are taboo, especially if it is a woman reporting dissatisfaction with her husband. The problem is, women who are in polygamous marriage are sexually frustrated, because today’s men are no longer strong enough to satisfy multiple partners. Women in rural areas are vulnerable to AIDS. Men do not want to use a condom. When a woman complains, she is told the man paid <i>lobolo</i> ”. NHP1
Domestic violence: Economic abuse - maintenance	“Men in rural areas do not want to support their children. They think the child support grant replaces maintenance. In one case a man refused to sell his some of his livestock to support his family. The traditional court referred the case to our office”. NHP2
Domestic violence: Emotional abuse	<p>“Not happy with the way the traditional court determines the issues of paternity using hands and genitals in the case of a boy”. NHP1.</p> <p>Women are not happy that culturally they are expected to accommodate children born out of wedlock; sometimes they are brought to the house to be raised by the wife. Women feel it is unfair that there is even a law that protects children outside marriage”. NHP2</p>
Domestic violence: Emotional abuse Customary marriages - polygamy (“ <i>Isithembu</i> ”)	<p>“A case was referred to the advice office to assist with mediation involving three wives. Their husband had been fair in terms of visitation. He would visit each wife for a week”. NHP1</p> <p>“Most people in rural areas are not registering their customary marriages. Their husbands who are working in towns and big cities meet other women and marry them and register their marriage at Home Affairs. Most of the time, rural women discover the existence of the second marriage when the man dies. And it causes so much hardship”. NHP1</p> <p>“The fight was that during each stay the wife concerned must wash the clothes; the husband must not move with dirty clothes from one wife to the other. I had to mediate the case. Additionally the husband must eat his meal with the wife he is visiting, not eat</p>

Cases referred to community advice office from Traditional Courts	Reasons for referral
	from wife 1 and go sleep with wife 2 and wife 3 washes clothes from a visit with wife 1 and 2". NHP1

Traditional courts refer cases of domestic violence involving physical violence, in most cases women apply for protection orders. Curran and Bonthuys (2004:2) explain that this is because there is no provision for traditional courts to issue protection orders, yet “there are 1500 customary courts operating in South Africa” (p. 2). Similarly maintenance orders are enforced in magistrate courts. Paralegals indicate that traditional courts do not want to deal with domestic violence cases involving sexual abuse. Paralegals are of the view that this is due to either efforts of traditional courts to protect male interests or because traditional authorities do not regard sexual offences as serious. On the one hand, Chopra’s (2008:19) research in Northern Kenya reveals that sexual offences are not considered serious in some local communities. On the other hand, Artz’s (2011:6) research findings indicate that women who have suffered sexual violence fear reporting to the criminal justice system. Hence, it appears that with sexual abuse cases neither formal nor traditional courts meet the needs of the victims.

Further, narrative in matrix 9-10 reveals the dynamics of customary marriages and infighting among women in polygamous marriages. According NHP1, to an outsider, this might seem a trivial matter that is time consuming. However, when such matters are brought to the CAO, “you have to treat it like any other case and listen and come up with a solution. It is understandable why the traditional court will send such matters to the advice office” (NHP1). When a New Hanover CBP asked an *Induna* why such a matter was not dealt with at the traditional court, he said that he does not have time to deal with women’s squabbles. It appears that traditional courts see CAOs as a forum for handling cases with which they do not wish to deal. Walsh (2010:25) explains that because “paralegals are village-based and are concerned with dispute resolution generally”; CBPs do not turn people away although other stakeholders who could provide access to justice decline to assist some justice-seeking community members.

**9.3.3.3 Case referrals from the New Hanover community advice office to traditional courts**

Just as traditional courts refer cases to the New Hanover CAO, so does the New Hanover CAO refer cases to traditional courts. New Hanover paralegals point out that cases with cultural overtones are referred to traditional courts, such as violence in the home that is based upon a husband or male partner accusing a woman of directing witchcraft toward the man. Community-based paralegals are not equipped to deal with cases involving accusation of witchcraft. Paralegals indicate that part of the outcome and sanctions of

adultery cases involve cleansing of the spouses' household and payment of damages by the respondent to the wronged party. Traditional courts are deemed to handle such cases very well.

Narrative from paralegals in matrix 9-11 show types of cases referred by paralegals to the traditional courts (column on the left) and reasons for referring these cases (column on the right).

Matrix 9-11 Cases referred by New Hanover community advice office to traditional courts

Cases referred from community advice office to the traditional court	Reasons for referral to traditional courts
Domestic violence - extra marital affairs:	"If a woman wants compensation for pain and suffering we refer her to the traditional court". NHP2
Damages sought for pregnancy:	"These cases are so common, especially young women. They fall pregnant and the boy cannot pay, but her parents will expect the boy's family to pay damages". NHP2
Return of <i>Lobolo</i> :	"We rarely deal with these cases; during mediation if the husband demands a return of <i>lobolo</i> we refer him to the traditional court. We do not express an opinion on these matters". NHP1
Customary marriage - Emotional abuse:	"Cases where a woman does not want " <i>Isethembu</i> "; we refer because it is a culture thing". NHP1
Witchcraft:	"We refer cases of witchcraft to the traditional court. These cases can be tricky". NHP1

As narrative in matrix 9-11 shows, New Hanover CBPs refer cases related to damages for pregnancy and polygamy related matters. Paralegals' knowledge of culture helps them determine which cases to refer to the traditional court. As Vorster (2001:54) points out "knowledge of the cultural context of the customs, ideas and practices is essential". He submits that in the field of customary law, such knowledge might promote justice and harmonious relations between people. Harper *et al* (2011:179) observe that "paralegals refer cases that would be more effectively dealt with by the traditional courts" and CBPs serve as the link between community and the services provided by the traditional courts, CBPs provide the same role on behalf of community members with formal courts. The referrals to traditional courts show that CBPs respect the authority of the traditional courts. Bennett (2011:1055) explains that rural people respect customary law; people may find it difficult to obey laws that depart too far from their traditional norms.

**9.3.3.4 Interaction between traditional courts and the community advice office through New Hanover paralegals’ observation and advice**

The examples provided in this section come from observations of traditional court proceedings made by paralegals on the invitation of traditional court authorities. Traditional courts, according to Makec (2007:135), because of their flexibility may seek outside help or give permission to experienced persons from the audience to participate in the proceedings by offering evidence or asking questions. This study demonstrates that traditional court authorities invite CBPs to offer advice during court proceedings. This provides paralegals with an opportunity to mitigate some of the negative attributes of traditional courts (Kane-Fogel, 2012:774). The negative attributes of the traditional courts include perceived gender inequality and violation of human rights of women (Ubink and Van Rooij, 2010:5). Johnstone (2011:17) maintains that it is not traditional law, culture or custom that is the source of discrimination by traditional court authorities. Rather, it is the presiding officers who apply and interpret the law in a way that further victimizes women. Skelton (2011:476) points out that the traditional justice system’s main characteristic is restorative in nature and that the display of negative attributes is a result of the traditional courts’ departure from original core values since true characteristics of traditional courts have been weakened by colonisation.

Data in matrix 9-12 demonstrate the interaction of New Hanover paralegals with traditional courts. Paralegals provide two examples of cases observed relating to compensation for wrongful death, and another one relative to parental accountability. Case observations are presented in the left column and comments and advice-giving by CBPs in the column on the right.

Matrix 9-12 New Hanover paralegal’s interaction with traditional leaders and traditional courts

Observation of traditional court proceedings	CBPs’ comments about and advice to courts
<p><b>Case observation 1:</b></p> <p>“I was invited by the traditional court to give advice on a murder case. A community member stabbed a man to death, accusing him of having stolen his cows. The family of the deceased did not report the case to the police; instead they approached the traditional court requesting that perpetrator pay the bereaved family compensation for wrongful death. They demanded payment in the form of seven cows and five goats. They wanted the payment immediately. The traditional court requested both us paralegals to assist the court in this matter. The presence of the office plays a vital role between <i>Inkosi</i> and paralegals’</p>	<p>“The family was not interested in the criminal court process. They said that the accused will be sentenced to imprisonment and no benefit will be derived from the process. They were not going to get their family member back. The paralegals requested time to consult, and one of the people they consulted was the magistrate. The magistrate advised paralegals that the matter should be dealt with by the magistrate courts and thereafter the family could pursue a civil claim against the offender. The family did not like the advice given. The perpetrator did not refuse to pay compensation, as it was better than prison. The family knew that the perpetrator could afford to pay the compensation demanded as he had enough livestock”.</p>

Observation of traditional court proceedings	CBPs' comments about and advice to courts
services". NHP1	NHP1
<p><b>Case observation 2</b></p> <p>"In one case a boy had committed murder and his parents were brought to the traditional court to account in front of 56 people who were allowed to pose questions". NHP2</p>	<p>"The father could not respond, only his wife, the boy's mother. Other men in the court were surprised and disappointed that the wife had taken charge and was responding to all the questions. The men turned on the husband and asked why he was not taking charge and allowing himself to be led by his wife. They started calling him names; he was said to be <i>isithithi</i> and humiliated in the worst possible manner". NHP2</p>

<p>"The traditional leaders in our area work very well with the advice office. They do not hesitate to ask for advice, and they are also hungry for knowledge. They attend our educational workshops together with community members. There has always been tension between local traditional leaders and municipal counsellors. Our office is sometimes a go-between these two structures in the community. We are invited to offer advice to the courts".</p>	<p>"The traditional leaders requested the New Hanover advice office to be part of the committee that was overseeing site allocations by municipalities. NHP1 was tasked with coordinating committee activities".</p>
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The interaction between the New Hanover and local traditional courts is demonstrated by two different murder cases in case one and case two. Walsh (2010:25) observes that interaction between paralegals and traditional courts add the human rights dimension into the work of traditional leaders and similarly add the cultural dimension into the work of paralegals. Case one shows the existence of different concepts of justice in rural areas. Chopra (2008:21) explains that formal justice is based on a conceptual understanding of justice that differs from both informal and traditional justice systems. The family of the deceased in case one was not interested in the arrest and prosecution of the alleged perpetrator. Instead, they were only interested in implementing their own solution – along with the offender – to address the murder of their son. The families adopted non-adversarial action with the help of the traditional court. As Chopra notes traditional courts allow parties to design their own solution in accordance with their own concepts of justice (p.21). The family also came to the traditional court after having determined with the offender how to materially restore and repair the harm caused by the death of their son (seven cows and five goats). Sharpe (2011:27) observes that reparation can take many forms. In general, it is described as being material or symbolic, although the two categories overlap to a large extent. Reparation requires that if a person commits a serious wrong against another person, an injustice arises which needs to be put right. The harm that the crime has caused to people and relationships needs to be repaired (Johnson and Van Ness, 2011:12). The offender must demonstrate

genuine repentance and willingness to make amends for the wrongdoing. Barton (2000:10) emphasises that “material reparation results in a final settlement between the offender and victim and typically consists of a specific agreement on compensating the victim”. It is clear from the case presented that the family of the deceased had an interest in receiving direct material compensation rather than proceeding with the criminal trial of their son’s alleged killer, “which may leave the family with no tangible benefits” (Chopra, 2008:25).

According to the paralegals, case two reflects typical gender stereotyping in rural communities and procedures in traditional courts whereby men and not women are supposed to speak on behalf of parties to a dispute (Simojoki, 2011:38; Chopra and Isser 2012:344). This case shows that men can also suffer public humiliation at the hands of traditional courts. Similarly, Gasa (2011:27) acknowledges that men seldom report domestic violence against them by women out of fear of public humiliation and being portrayed as weak. Likewise, during interviews by the researcher, CBPs indicated that men do not report violence against them by women because the police laugh at these men. Paralegals further disclosed that during workshops CBPs inform men that men too can be assisted through restorative justice practices, traditional courts, the DVA or all three justice systems.

Interaction of New Hanover CBPs with traditional courts and traditional leaders extend beyond case observation. This is true across all CBPs and CAOs that are the subject of this study. While some of these instances may not bear directly on domestic violence cases, the way in which the CBPs work in tandem with local power structures is worthy of note. It signals the depth of interaction between CBPs and traditional authorities. According to one New Hanover paralegal:

*“The traditional leaders in our area work very well with the advice office. They do not hesitate to ask for advice, and they are also hungry for knowledge. They attend our educational workshops together with community members. There has always been tension between local traditional leaders and municipal counsellors. Our office is sometimes a go-between these two structures in the community. We are invited to offer advice to the courts”.* (Interview of NHP2, May 2013)

There are other ways in which New Hanover CBPs assist with collaboration between municipal councillors and traditional leaders as revealed by a CBP:

*“The traditional leaders requested the New Hanover advice office to be part of the committee that was overseeing site allocations by municipalities. I was tasked with coordinating committee activities”.* (Interview of NHP1, May 2013)

The focus now turns specifically to traditional courts and domestic violence cases.



### 9.3.3.5 Traditional courts and domestic violence cases

Women who suffer domestic violence do not want to wait long periods for assistance because domestic violence has an emotional impact on the entire family. The traditional justice process is quick and traditional customs emphasise family-sustainability. According to Vorster (2001:53) the customary legal process is “designed to react immediately in order to heal strained relations between the husband and the wife”. Scholars have reservations about the intervention of traditional courts in domestic violence cases (Chopra and Isser, 2012:345; Sandefur and Siddiqi, 2011:124; Robb-Jackson, 2013:51). However, these scholars point out that women living in rural areas appear to have no other choice than to seek assistance from traditional courts. As discussed in chapter 2 there are barriers to accessing justice from the formal justice system as well as unwanted consequences of case outcomes from the criminal justice system such as the way the DVA may divide families (Chopra and Isser, 2012:345; Sandefur and Siddiqi, 2011:124; Robb-Jackson, 2013:51). These factors underlie reasons that rural women rely upon the traditional justice system.

Data in matrix 9-13 show that women who suffer domestic violence report the crime to traditional courts. The column on the left presents vignettes of domestic violence case scenarios while the column on the right presents observations by CBPs of traditional court case deliberations.

Matrix 9-13 Handling of domestic violence cases by traditional courts

Domestic violence cases	CBPs’ observation of traditional court case deliberations
<p><b>Case 1: Domestic violence – Economic abuse</b></p> <p>“An abused woman approached the traditional court seeking maintenance from her husband. Her husband had left her and seven children behind to stay with another woman”. NHP1</p>	<p><b>Case deliberations:</b></p> <p>“The husband denied that he was not supporting his wife and children. When she asked to respond to the husband’s arguments she was shouted at by traditional council. Nobody was interested in listening to her side of the story, only that of her husband. The <i>Induna</i> sided with her husband and she was humiliated in front of community members. The court decided that what her husband claims to be paying her is enough. What is worse for the woman was her husband was a taxi owner and was giving her only R1 000 per month to support seven children”. NHP1</p>
<p><b>Case 2: Domestic violence – Sexual abuse</b></p> <p>“In this case a man demanded sex from his wife and she refused because she wanted her husband to use a condom. She felt that she is at risk of contracting HIV&amp;AIDS. He accused her of having an affair; that is the reason she is refusing him his conjugal rights.</p>	<p><b>Case deliberations:</b></p> <p>“The council took the husband’s side. The men who were at the court were allowed to ask questions and joined the <i>uMkhandlu</i> and insulted the woman in support of the husband. The court informed the wife that he is entitled to his conjugal rights; he must get</p>

Domestic violence cases	CBPs' observation of traditional court case deliberations
<p>She approached the traditional court seeking protection from having sex with the husband without the use of condoms". NHP2</p>	<p>his rights whenever he wants because he paid <i>lobolo</i>. Men do that all the time because they believe <i>lobolo</i> gives them power over women. The abuse the woman in this case was subjected to was terrible. The court process is always biased in favour of men". NHP2</p> <p>However in some courts the presiding officers are sensitive to women's issues. In one area the <i>Inkosi</i> is the darling of community members. I have worked with him for years. He does not tolerate bad behaviour by his council members. NHP1</p>
<p><b>Case 3: Domestic violence – Emotional abuse</b>          "A young woman impregnated by her live-in boyfriend approached the traditional court with her family to seek damages for impregnation. The respondent refused to marry the complainant and denied paternity and he is not paying damages because he is contesting paternity". NHP1</p>	<p><b>Case deliberations:</b>          "She was made to publicly explain how she got pregnant, "did she lean against the wall or was she in the bush", and she was made to motivate for the payment of "<i>imali yeguqa</i>". Seeking justice through the traditional court can be a traumatic experience. The <i>uMkhandlu</i> could be abusive, like in this case". NHP1</p>

Not unlike the breadth and depth of actions that constitute domestic violence under the DVA (RSA, 1998a), the traditional justice system treats a wide range of matters as domestic violence. The information presented in matrix 9-13 shows that women turn to traditional courts for different types of domestic violence cases (Weilenman, 2007, 91). Johnstone's (2011:27) research in New Guinea found that women support and use traditional courts, despite the challenges highlighted in the literature that traditional courts are not suitable to handle domestic violence cases (Williams & Klusener 2013:286; Mnisi-Weeks, 2012:153; Gasa 2011:28). Johnstone's (2011:27) study further showed that, "Women were consistent with the view that empowerment does not require a rejection of the customary justice system or its processes. However, they maintain that a re-examination of norms and processes is necessary to address the problems they face when trying to obtain equitable solutions".

These three vignettes of cases in matrix 9-13 support Kahn-Fogel's (2012: 769) assertion that customary law can result in shocking justice for women. Case one regarding economic abuse where a husband refused increase maintenance payments reflects that traditional courts are not sympathetic to women's struggle to maintain a home and look after children with the necessary support. The New Hanover area consists mainly of farmworkers and farm dwellers. Many of the male workers are seasonal employees who are not registered employees with bank accounts. Therefore, filing civil actions in magistrate courts against non-paying or inadequately-paying husbands is fruitless where the court cannot garnishee wages and women do not want

their men imprisoned as has been revealed in all four case studies. Women in rural areas are structurally dependant on the men in their lives (Smythe and Artz, 2005). Yet when rural women bring such matters to traditional courts, the court does not always see the value of womens' claims.

Case two represents a very controversial issue. For generations, *lobolo* has been understood by some who practice the cultural custom as a passport to abuse. The findings of Curran and Bonthuys' (2004:8) study on this issue concur with the paralegals' observation that the customary practice of *lobolo* is abused. According to Curran and Bonthuys (2004:8), "*lobolo* potentially increases women's vulnerability to domestic violence and decreases their ability to resist or flee abusive situations". Simultaneously, Kane *et al* (2005:13), Ubink and Rooij (2010:5) and Mnisi-Weeks (2012:152) support the proposition that traditional courts tend to support male disputants.

In Zulu culture, traditional custom permits payment of damages by the suspected father of the child to an unmarried pregnant women. Case three presents this scenario. It is likewise evident from the paralegal's comments that female complainants may be subjected to public humiliation (Ubink and Van Rooij, 2010:5) even when bring cases about cultural beliefs and practices to traditional courts.

As one of the New Hanover paralegals state:

*"The attitudes of some members of the traditional courts, makes it hard for women to report cases of domestic violence to the traditional court. Those that know about our advice office come directly to our office and report domestic violence. However others' circumstances force them to subject themselves to the traditional court"*. (Interview of NHP2, May 2013).

Yet, in contravention the other paralegal indicates:

*Not all traditional courts are terrible; sometimes they are fair. The good thing is anyone can approach the traditional court. The process is quick.* (Interview of NHP1, May 2013).

Kigodi (2013:18) argues that paralegals "stand out as the best alternative to people living without legal protection. Some legal professionals like lawyers and advocates regard them as intruders and unprofessional workers, unqualified to handle legal matters despite paralegals visible role".

The discussion now turns to views of CBPs on whether domestic violence cases should be handled by traditional courts.

### 9.3.3.6 Views of paralegals on domestic violence cases being handled by traditional courts

New Hanover paralegals believe that traditional courts have the potential to handle domestic violence cases. While traditional courts deal with such cases customarily, the courts tend to accept guidance from paralegals. Chopra and Isser (2012:351) and Simojoki (2011:45) point out that top-down sensitization and awareness-raising of justice providers have failed, and top-down reforms may or may not yield results. Chopra and Isser (2012:351) suggest that “contextualized dialogue that engages socio-political realities” in an environment of legal pluralism is well suited to improve access to justice.

Narrative in matrix 9-14 presents counter-arguments by both New Hanover CBPs regarding whether traditional courts are suitable to handle domestic violence cases. The column on the left reflects arguments in favour of traditional courts handling domestic violence cases and the opposite positions are displayed in the column on the right. The New Hanover CBPs discuss the TCB in relation to the handling of domestic violence cases by traditional courts.

Matrix 9-14 Views of paralegals on whether traditional courts should handle domestic violence cases

Arguments against traditional courts handling domestic violence cases	Arguments in favour of traditional courts handling domestic violence cases
<p>“So many people do not know about the TCB. Some traditional leaders even though they are aware about it, are not fully informed about how it will work”. NHP1,2.</p> <p>“At the same time, we are cautious of interference with the traditional way of doing things. We are proud of our African heritage. If it is implemented we could be part of the process to defend women’s rights”. NHP1, 2</p>	<p>“The problem is the protection of women’s rights”. NHP1, 2</p> <p>“This is a dangerous Bill. Women’s participation in the traditional court has not improved; the TCB is really taking us back”. NHP2</p> <p>“We heard though that the traditional courts could still have jurisdiction to deal with domestic violence cases. Nothing is going to change. If traditional leaders are allowed to deal with domestic violence and rape, it means a man who is wealthy with livestock can be a repeat offender. So traditional leaders must not be given power to deal with these issues”. NHP1</p>
<p>“When the <i>Inkosi</i> invites his community members for the meeting (<i>umhlangano wesizwe</i>) we are also invited to be part of that meeting to do a presentation about our office and the services we offer and he encourages the community members to use our office. “The <i>Inkosi</i> asked us if we could enlighten their members about the TCB”. NHP1, 2</p>	<p>“No one came to our area to consult about the TCB. That is why some of <i>Izinduna</i> do not know much about it but are aware that it exists”. NHP1, 2</p>

New Hanover paralegals have mixed feelings about the TCB. On the one hand, the CBPs recognise that the TCB as proposed could distort the traditional dispute resolution mechanism. On the other hand, if the TCB is implemented the CBPs will continue to play a role in the protection and advancement of women's rights. Data in matrix 9-14 reflects that these paralegals have engaged with the TCB to a greater degree than paralegals in the other three case studies.

The New Hanover paralegals indicate that there was a lack of consultation in the geographical area on the TCB. The Izinduna who were aware of the TCB but who do not know much about it turned to the CBPs to assist in familiarising community members with the TCB. Mnisi-Weeks (2012:138) argues that the issue of the lack of consultation with ordinary people in rural communities was one the most controversial issues surrounding the TCB. According to Mnisi-Weeks (2012:138) "traditional leaders formed the largest bloc of those consulted". However, data in matrix 9-14 reveal that not all traditional leaders were consulted about the TCB.

Taken as a whole, New Hanover CBPs took issue with the TCB and are concerned about power imbalances between parties when traditional courts hear cases of domestic violence.

#### 9.4 Chapter Summary

In this chapter, the context of the New Hanover CAO was presented including the geographical location of the Bulwer sub-local area and socio-economic conditions of CAO service beneficiaries. The results of data collection were segmented into three sections. The first section provided results of secondary quantitative data comprised of descriptive statistics. The descriptive statistics were concerned with creating a better understanding of qualitative data rather than statistical inferences. The quantitative data, presented in Figures 9-3 to 9-6 showed the number, types and outcomes of cases handled by CBPs. These figures further demonstrated that CBPs are resolving domestic violence disputes using both the restorative justice approach and Protection Orders issued by the courts to access justice depending on choice exercised by complainants. The highest numbers of cases are resolved through mediation.

The other two sections presented qualitative data. One section presented narrative from interviews of paralegals and a focus group of service recipients. The other section highlighted data that demonstrate linkages between the traditional justice system and CBPs. Matrix analysis and interpretive principles were used to interpret data in relation to narrative and the literature. Matrix 9-1, which was co-created by CBPs and the researcher, presented mediation procedures and processes as explained to the researcher by CBPs. Matrices 9-2 to 9-8 presented a comparative analysis between narrative from CBPs and from focus group

participants that shed light on perceptions regarding, for example, interaction with the formal and informal justice systems, the need for CAOs and the role of CBPs in CRJ. Matrices 9-9 to 9-14 provide evidence that New Hanover paralegals are promoting access to justice not only within the criminal justice system and through CRJ but also within the traditional justice system in collaboration with local power structures. In this chapter, data also showed whether CBPs believe that traditional leaders and traditional courts should handle domestic violence cases before the chapter concluded.

## **Chapter 10: Comparative Findings and Analysis across Community Advice Offices**

### **10.1 Introduction**

The previous four chapters explored the respective contexts of the Bulwer, Ixopo, Madadeni, and New Hanover case studies along with the findings from secondary quantitative and primary qualitative data. The context was followed by the presentation of data from case intake, interviews with CBPs and focus groups of female victims of domestic violence who received services at the four research sites (CAOs).

This chapter begins by comparatively analysing the quantitative data on case intake and outcome from the four case studies. It then compares the paralegals' responses to the lines of inquiry as a whole, followed by thematic focus group responses. This is followed by an analysis of how the collective findings across CAOs are consistent with or detract from the social science meta-conceptual framework. The chapter goes on to analyse the social science data in relation to the Domestic Violence Act (DVA) and case law, extending to the socio-legal framework. Before concluding and based on the cross-case analysis of narratives derived through empiricism and the socio-legal framework, the study offers considerations for process theory-building.

### **10.2 Comparative Analysis of Quantitative Case Intake and Case Outcome**

As indicated in Figure 10-1 below, domestic violence was one of the most prevalent community problems over a three-year period (2009-2011) for each case study.

The Ixopo office had the most cases of domestic violence in each of the three years. As the most rural area, this is interesting, because it means that people whose rights are abused have recourse to CAOs and if necessary, to other justice institutions. Another reason may be that there are very few agencies in rural areas, and that the CAOs serve as an important catchment for marginalised people who have no other options. Simultaneously, the qualitative evidence suggests that women prefer traditional courts or the restorative justice system offered by CBPs as opposed to the criminal justice system.

Both the police and the courts are criminal justice institutions involved in domestic violence incidents, with the courts perhaps being most involved, given that Protection Orders are applied for and granted at court. The police are involved when physical violence requires a charge of assault, and when Protection Orders are violated. Figure 10-1 below shows the proportion of domestic violence cases compared with other cases.

Domestic violence accounted for 49% of all cases recorded from 2009 to 2011 across all the CAOs. Legal advice occupies second position, at 29%. This explains the role of paralegals in assisting community members in rural areas to access justice.

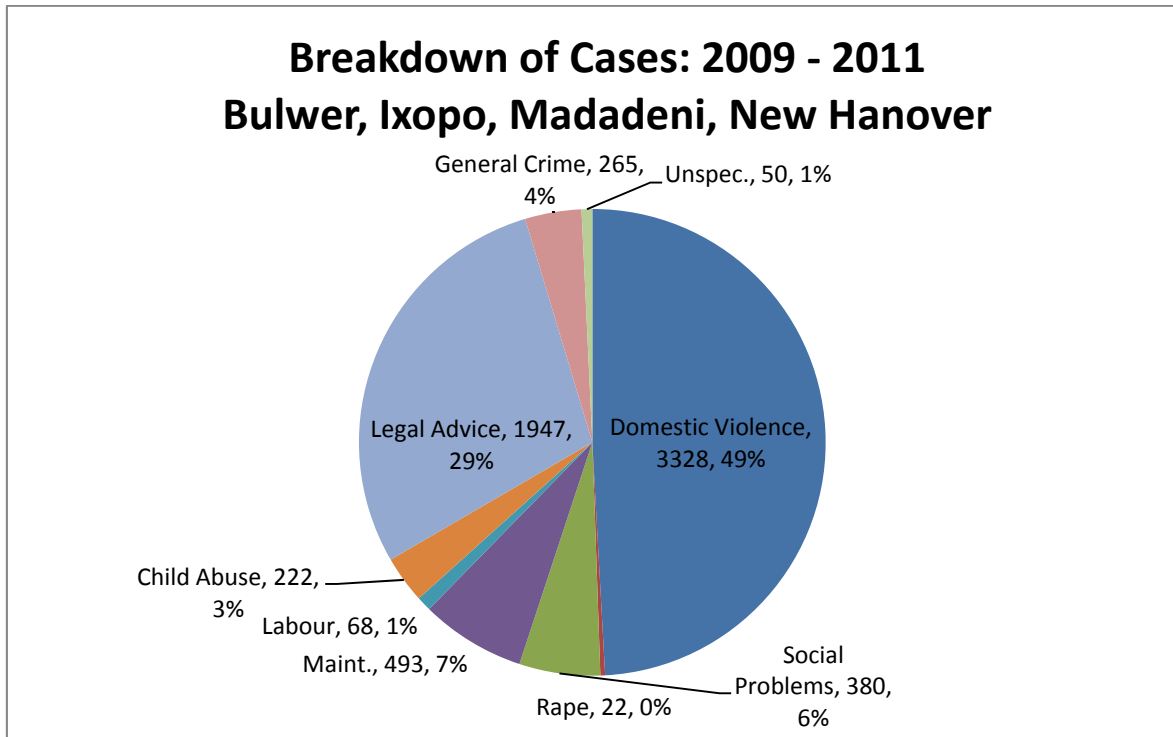


Figure 10-1 Breakdown of cases across all community advice offices



Table 10-1 Cross-case comparative quantitative analysis of case intake and outcome

<b>Cross-case comparative quantitative analysis of case intake and case outcome</b>											
<b>Case intake</b>	No of cases from 2009-2011			Mediation process			Court process				
Community advice offices	Overall case intake	Other cases	Domestic violence cases	No of domestic violence cases mediated	No of cases mediated successfully	No of cases not mediated successfully	No of cases referred for protection orders	No of interim protection order	No of protection orders confirmed	No of protection orders withdrawn	No of cases (where clients just sought advice
<b>Bulwer</b>	1175	821	353/ 30%	233/ 66%	203/-87%	30/ 13%	25- 7%	17- 68%	10- 40%	15- 60%	96
<b>Ixopo</b>	2587	1146- 44%	1441- 56%	1153- 80%	999-87%	154-13%	197-14%	177-90%	163-83%	34-17%	191
<b>Madadeni</b>	1664	895-54%	769-46%	661-86%	540-82%	121-18%	70- 9%	32- 14%	17- 24%	53- 76%	88
<b>New Hanover</b>	1412	547-39%	865-61%	556-64%	407-73%	149-27%	93- 11%	85- 91%	71- 76%	22- 24%	216

The success rate in resolving cases of domestic violence through mediation is extremely high in each of the CAOs, with an overall rate of 82%.

- Combining all the cases from the four CAOs, 385 cases were referred for a Protection Order. This is a small number (11%) compared with the number of cases mediated. This represents court time saved by the paralegals that are able to mediate the majority of cases that present at their offices.
- Of all the cases referred, 311 were granted an Interim Protection Order. This relatively high number (80%) suggests that when the paralegals determine that a case requires court intervention, the prognosis is confirmed by the court decision in granting the Interim Order. Follow-up by the paralegals revealed that at least 261 of the Interim Orders were finalised. While not all the cases could be identified from the available statistics, this represents a high success rate of at least 84%.

The case intake shows CBPs' level of involvement in restorative justice at community level in resolving cases of domestic abuse. The study only considered one model of restorative justice used by the paralegals, namely Victim Offender Mediation (VOM). This quantitative evidence demonstrates that CBPs are deeply involved in community restorative justice (CRJ), and are applying this process in cases of domestic violence. Furthermore, the evidence indicates that women choose to pursue their cases through restorative justice processes. The paralegals are acceding to these choices; the next section examines whether these are reluctant choices made by rural women or the result of coercive circumstances in domestic relationships (Hoyle and Sanders, 2000:29).

As noted in the literature review, there is on-going debate on the use of the CRJ approach for intimate partner abuse cases and the use of mediation processes and procedures to deal with domestic violence situations (Hargovan, 2010: 31). Advocates for women's rights have argued CRJ is not a suitable approach for domestic violence cases, as it is unfair and unsafe for victims (Daly and Stubbs, 2006:18; Fulkerson, 2001:355; Hooper and Busch, 1993:1). Supporters of mediation are of the opinion that CRJ empowers and is effective for minor cases of domestic violence (Edwards and Haslet, 2011:902; Belknap and McDonald, 2010:374). Others believe that the appropriateness of mediation should be assessed on a case-by-case basis (Morris and Gelsthorpe, 2003:132); while some scholars feel that effective justice for cases of domestic violence might involve models that are not limited to either restorative justice or criminal justice (Stubbs, 2010:985; Moulton, 2005:19; Vorster, 2001:53). The quantitative evidence presented above contributes to this debate; it is clear that victims are opting for alternatives to the formal justice system. The following section discusses paralegals' views on access to justice, their role in CRJ, and their contribution to the debate on the

appropriateness and effectiveness of the restorative approach to domestic violence, and the CJS contribution to addressing the issue of domestic violence.

### **10.3 Comparative Analysis of Views of Community-based Paralegals**

This section is divided into twenty-four brief sub-sections. Broadly stated, these sub-sections include access to justice, the need for community advice offices and CBPs' views on the formal justice system, traditional justice system and the informal justice system of restorative justice as well as whether paralegals should receive state recognition. Section 10.3.15 to section 10.3.23 comparatively examines processes of restorative justice followed by CBPs as drawn from the first matrix in each case study chapter. The final sub-section assesses the extent to which data from interviews of paralegals answers research questions and achieves research objectives.

#### **10.3.1 Views on access to justice**

The CBPs reported that community members' common understanding of access to justice is access to the formal justice system. Figure 10.2 displays CBPs' views on whether access to justice should include the formal and informal justice systems. The responses from all seven paralegals indicate that access to justice should include formal and informal justice; this is echoed by Dias (2009:5), who contends that access to justice (both formal and informal) should be affordable and inclusive and that paralegals could play a role.

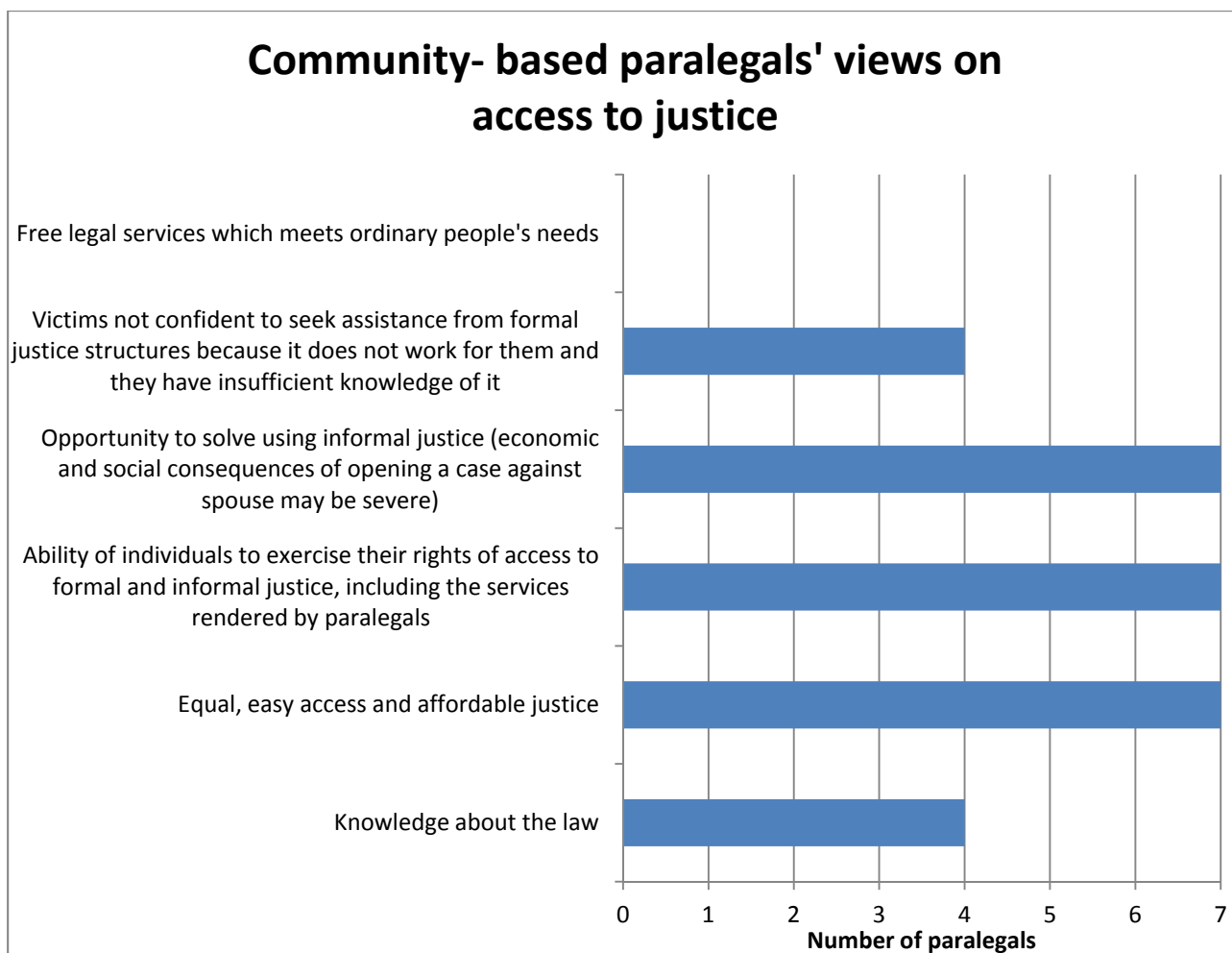


Figure 10-2 Community-based paralegals’ views on access to justice

A paralegal from Bulwer stated that, *“the law can apply to people if they know about it, and if it works for them; the problem with access to justice is that people are not confident to seek assistance from formal structures of justice because it does not work for them”* (BWP1). A paralegal from New Hanover added, *“For ordinary people access to justice means access to free legal services that meet their needs”* (NHP2).

Stapleton (2007:5) points out that officials in the justice sector view access to justice as the sole responsibility of the formal justice system; in contrast, some people do not trust the CJS and avoid using it. The paralegals’ responses indicate that they understand access to justice from a broad perspective inclusive of multiple justice systems while their main focal point is informal restorative justice.

**Finding:** Access to justice should be free, equal, and affordable and include access to informal justice facilitated by CBPs for those that need it.

### 10.3.2 Barriers to accessing justice

The CBPs were clear that the barriers they listed hinder community members, especially victims of domestic violence, from accessing justice; hence the reluctance of domestic violence victims to go to court. There was consensus on a number of the issues listed in Figure 10-3. Only three paralegals felt that lawyers could increase access to justice if they were available in rural areas. The rest felt that the majority of people's legal problems do not necessarily require a lawyer. Two did not say anything about the formality of court as an intimidating factor that limits access to justice.

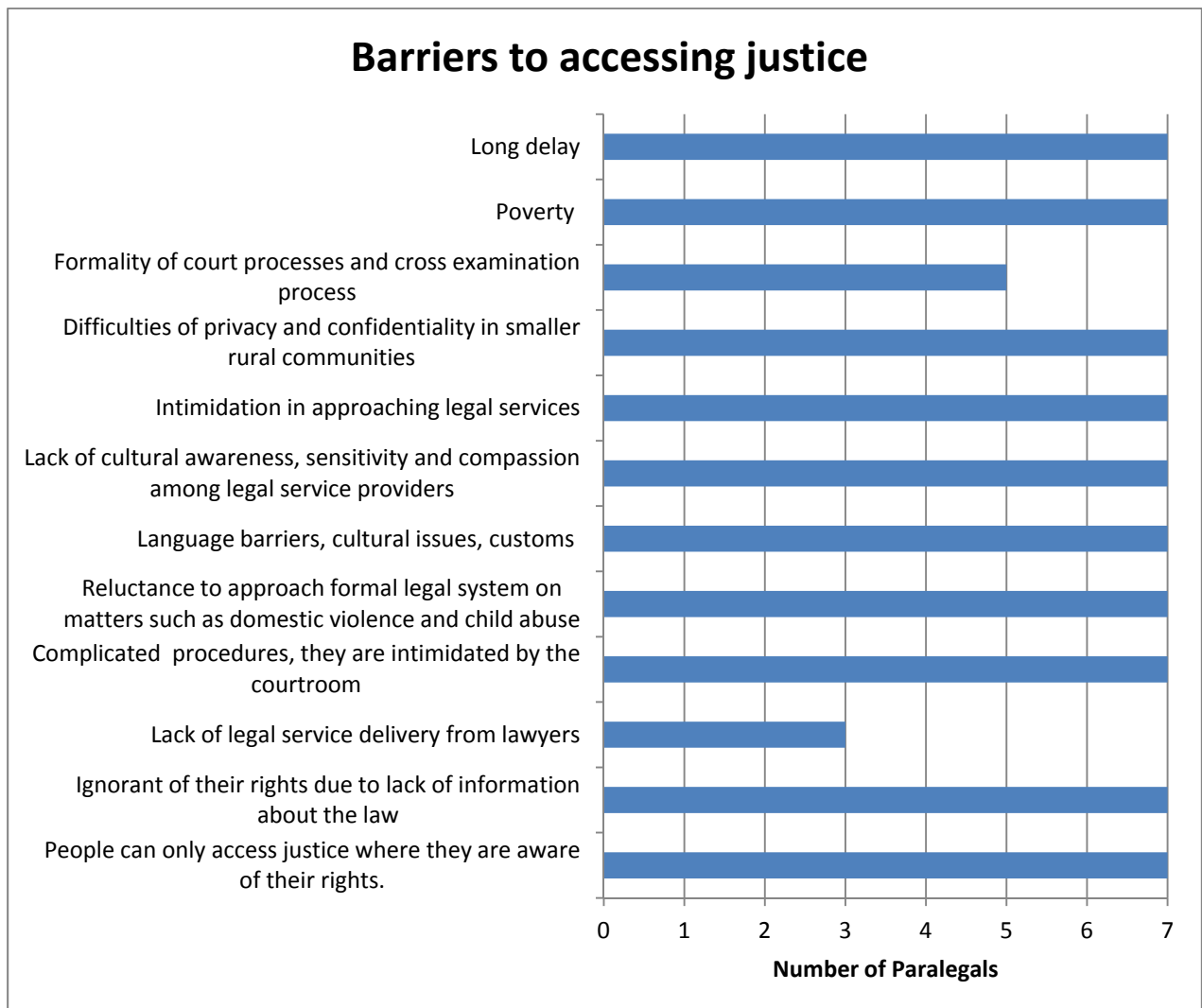


Figure 10-3 Barriers to access to justice

The CBPs' views concur with the findings in the literature about barriers to access to justice (Kigodi, 2013:38; Dugard and Drage, 2013:38; Parenzee *et al*, 2001:85). For example, Parenzee *et al*'s (2001:85) research on the implementation of the DVA confirms the paralegals' unanimous views on culture and language; the authors found that when handling cases involving different cultures, it

benefits the client if the person assisting is aware or has knowledge of the cultural practices that contradict the legal system.

**Finding:** Formality, lack of privacy, complicated procedures, and delays in the justice system, including culture and language barriers, hinders access to justice by victims of domestic violence.

### 10.3.3 Community-based paralegals' role in promoting access to justice

The paralegals' approach is to resolve legal problems without litigation; the interview responses indicate that, their knowledge of the law assists them to conduct interviews and they are able to sift what the client wants from a long story. Based on the cumulative responses, there is evidence that CBPs are playing a crucial role in access to justice.

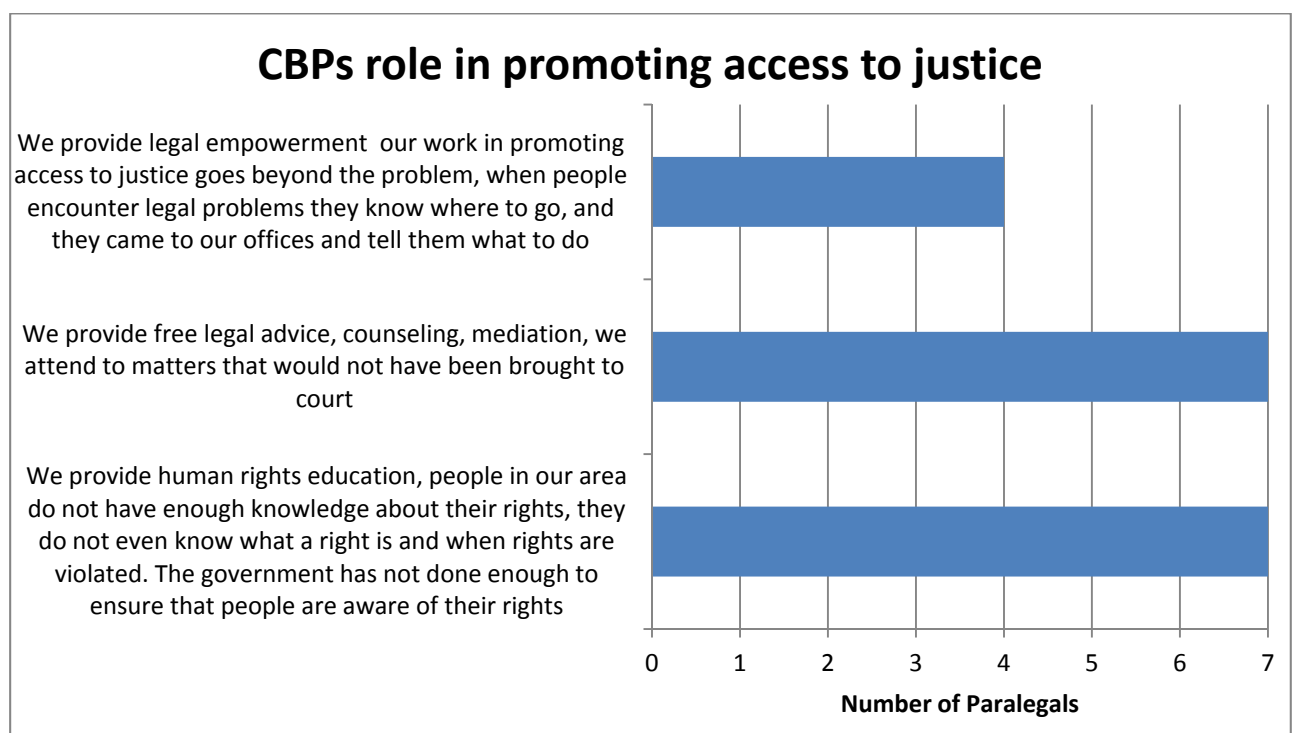


Figure 10-4 Role of community-based paralegals in promoting access to justice

All the paralegals said that they attend to matters that have not been brought to court because not everyone wants litigation. Golub (2000: 297-298) states that CBPs resolve the majority of cases and consider litigation as a last resort. Furthermore, all the paralegals stated that they promote awareness of rights in rural communities. Likewise scholars (Golub 2000:298; Maru, 2006a:16, 2006b:448) observe that CBPs conduct awareness raising workshops for community members to know and claim their rights and have increased awareness of rights to disadvantaged groups.

**Finding:** Access to justice can be enhanced through restorative justice approaches and rights education, not only through the formal justice system.

### 10.3.4 Practical ways to improve access to justice for rural women who are victims of domestic violence

The paralegals expressed confidence that the informal justice system that is preferred by the majority of the women that are victims of domestic violence will encourage women to confront such violence. Furthermore, the CBPs recommended that they should be part of this effort. Golub (2000:298) notes that paralegals have an advantage because they are “in touch with community dynamics in ways that even the best intentioned lawyers often cannot be”.

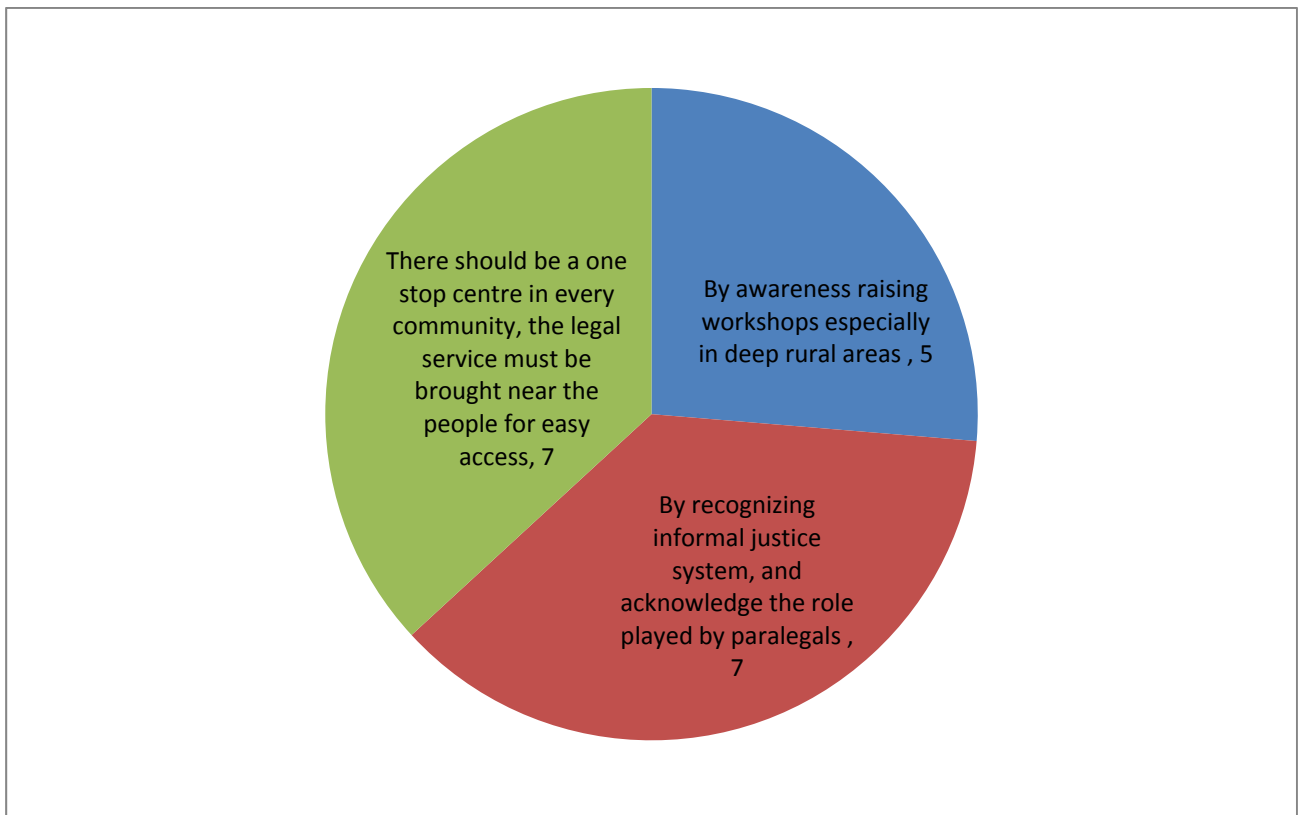


Figure 10-5 Paralegals’ responses on ways of improving access to justice for victims of domestic violence

**Finding:** Recognise the value of the informal justice system and the role of paralegals in this system.

### 10.3.5 The need for community advice offices and community-based paralegals to promote access to justice in rural areas

While the paralegals responded differently to this question, their responses complement one another. Other points were made in a different context.

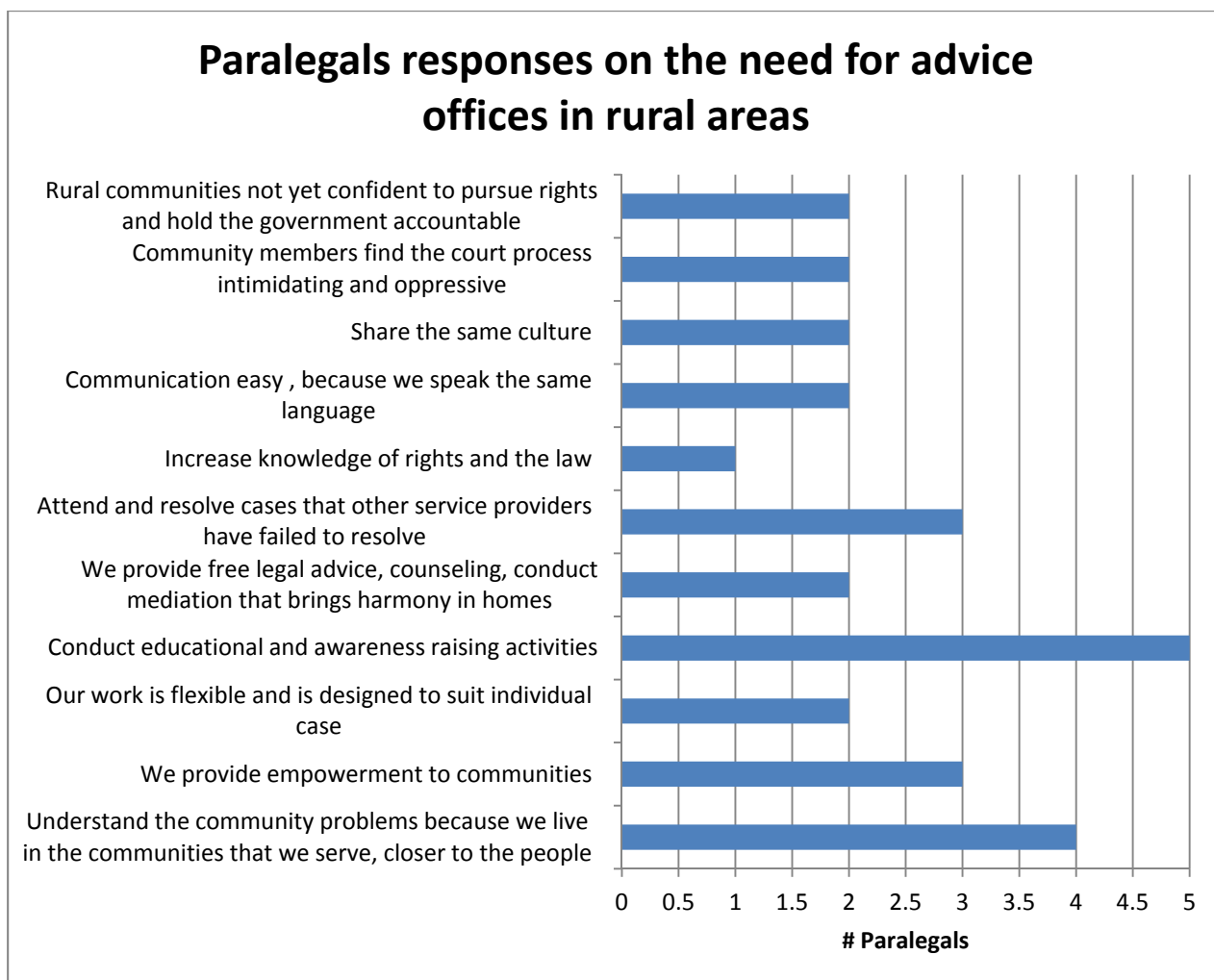


Figure 10-6 Paralegals’ responses on the need for advice offices in rural areas

Paralegals perform various functions in the community. They are educators, legal advisers, mediators, peace brokers, interpreters and translators and they perform these functions outside the formal structures of the justice system in order to fill the service delivery gap. The impact and effectiveness of the services provided at the advice offices is due to the fact that the paralegals come from the same community, are of the same culture, and speak the same language as their clients. Presser and Gaarder (2000:184) explain that community involvement in curbing domestic violence also means, among other things, the involvement of organisations that employ a community-oriented approach.

**Finding:** The community finds the court process intimidating and oppressive. Community members want a flexible process that is provided by people from their community who speak the same language and are familiar with their culture.



### 10.3.6 The role of paralegals in the restorative justice system in KwaZulu-Natal

All the paralegals said that they afford their clients privacy and confidentiality; that the location of the CAOs offers safety and that the restorative justice process is flexible and quick. Scholars agree over the decades (Dugard and Drage, 2013:32; Moorhead, 2003:765; Presser and Gaarder 2000:186; Cappalletti, 1992:35) that CRJ approaches are flexible and the process acceptable to women are not comfortable with the justice system.



Figure 10-7 The role of paralegals in the restorative justice system

Five of the paralegals who were interviewed observed that a one-size fits-all approach is not appropriate in domestic violence cases. Sokoloff and Dupont (2005:50) note that, while similar, each case has its own dynamics; each solution should therefore reflect these differences.

**Finding:** Restorative justice approaches are flexible and are tailored to fulfil individual justice needs.

### 10.3.7 Choice of restorative justice processes

Figures 10-8 and 10-9 demonstrate the reasons put forward by the paralegals as to why women who are faced with issues of domestic violence choose restorative justice processes instead of the formal criminal justice system. All spoke of the fact that community members are comfortable with CBPs assisting them; language compatibility increases the accessibility of those rendering the service. However the data indicates that, the reason for choosing an alternative to the court process is not that the system is not working. There are other considerations such as language, and the cultural stigma attached to domestic violence.

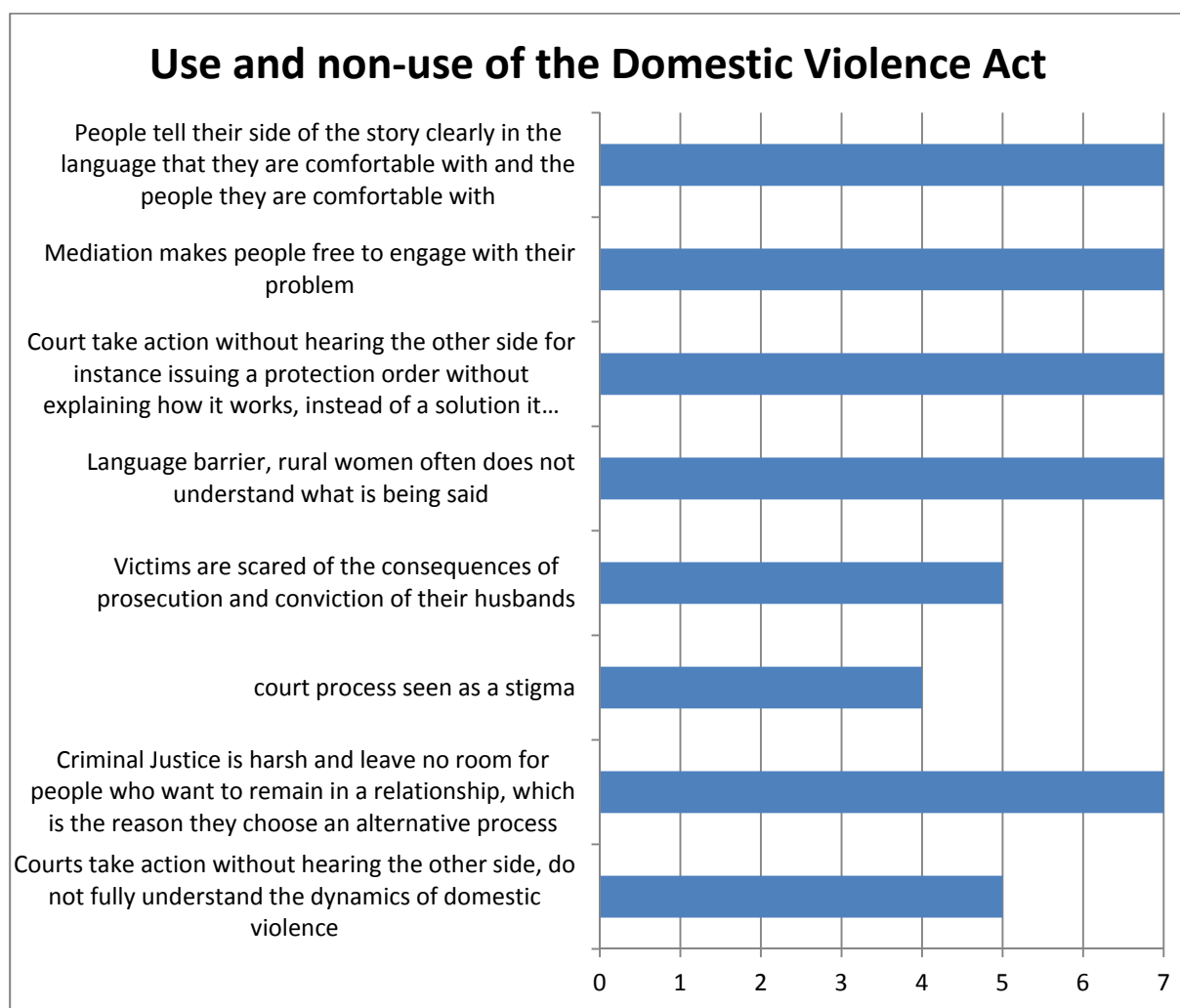


Figure 10-8 Use and non-use of the Domestic Violence Act

Others factors that deter victims from using the formal courts include the fact that formal courts do not give the victim and the offender an opportunity to engage with the problem, the desire to remain

in the relationship, poverty and financial dependence. Scholars argue that giving women a say in the legal process potentially empowers women to seek help that will address their survival needs and to move away from abusive relationships (Robb-Jackson, 2012:10; Van Wormer, 2009:111).

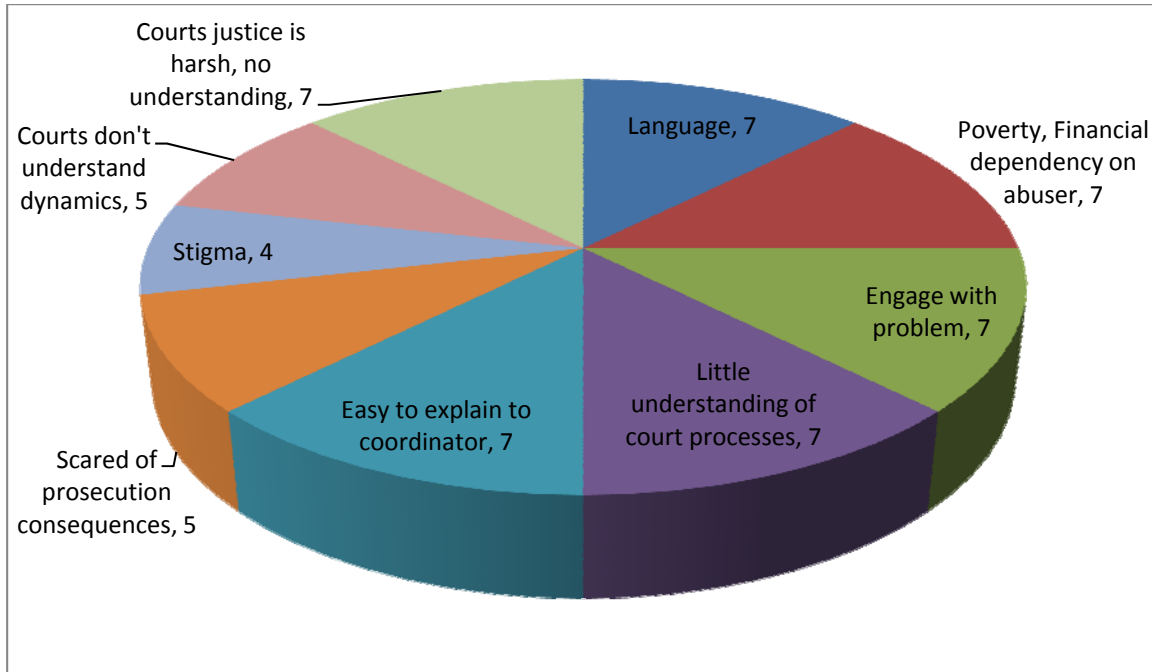


Figure 10-9 Reasons why women prefer to use restorative justice practices

The above responses demonstrate the dynamics of domestic violence as experienced by CBPs. Women do not want their husbands to be taken to jail due to the consequences of domestic violence. Hanna (1996:1871) concurs, observing that, “a woman may not want to send her partner to jail, break up her family, or subject herself to the criminal process”. All seven paralegals cited language as a barrier in accessing formal court. Perenzee *et al* 2001:106 and Barrett, 2013:340 note the role of language in engagement with victims and offenders. Language can be a problem if the service provider and the service beneficiary speak different languages. Four of the paralegals spoke of stigma. According to Grauwiller and Mills (2004:63), “stigma may cause some women to feel the need to hide their involvement in an abusive relationship from friends and family”.

**Finding:** Victims of domestic violence should choose the process they prefer as a response to their victimisation.

### 10.3.8 Views on the formal justice system

Figures 10-10 and 10-11 provide further evidence of the paralegals' perceptions of why individuals choose the informal restorative justice system; the CBPs also identified the problems that women encounter with the DVA.

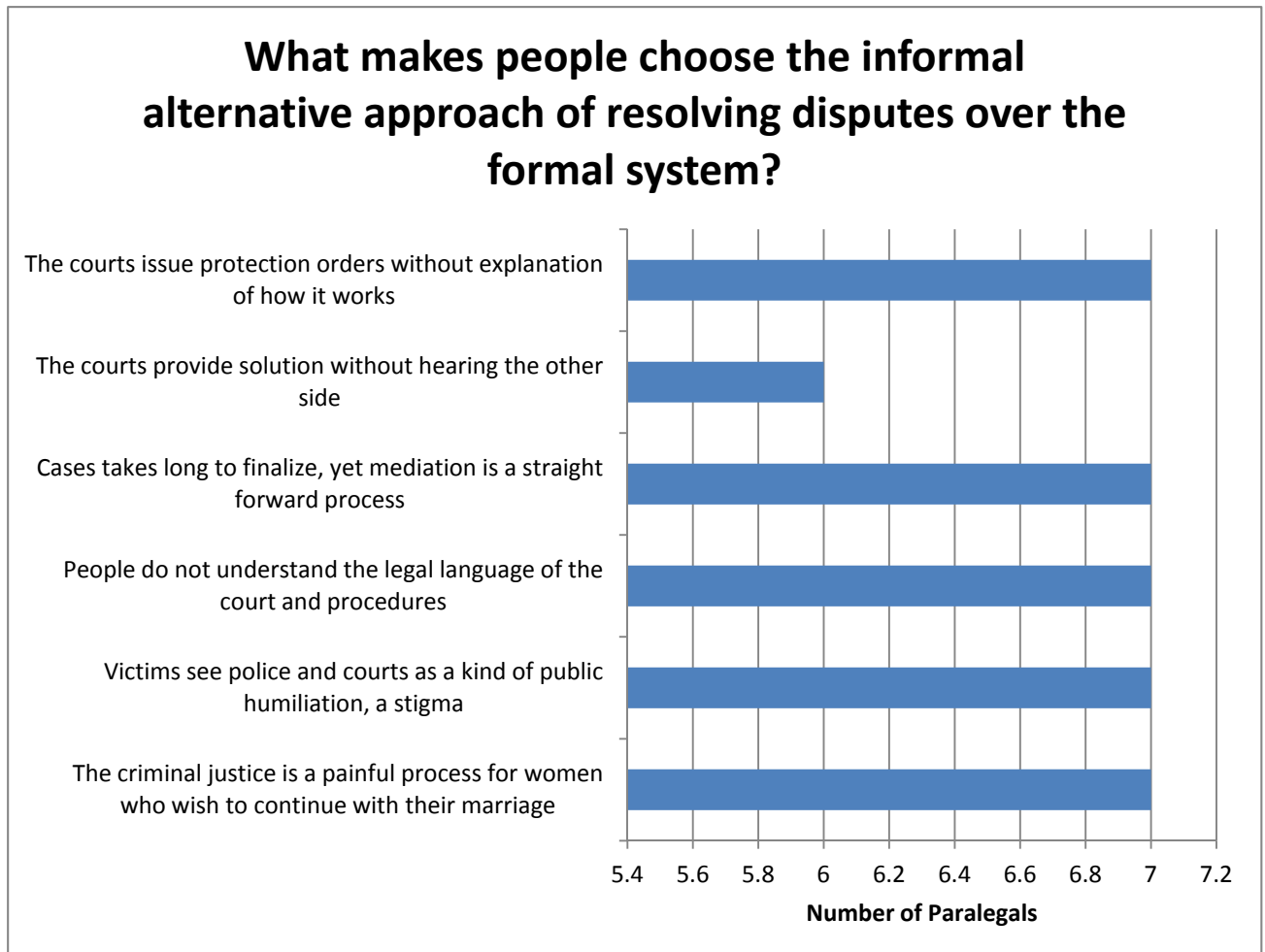


Figure 10-10 Choice of informal dispute resolution over formal system

The issues of stigma and humiliation surface again; all the paralegals cited these factors. Zehr (2004:309) notes the presence of humiliation or shame in most conflicts and that suggests that any informal and formal justice must take note of the fact that shame and humiliation affect the victim and the offender and may influence their respective responses to the offence. Relationship building and family sustainability feature strongly in the restorative approaches undertaken by CBPs.

**Finding:** The formal justice system does not meet the needs of women who want to continue having a relationship with the offender after the trial.

**10.3.9 Problems with the formal justice system, regarding domestic violence**

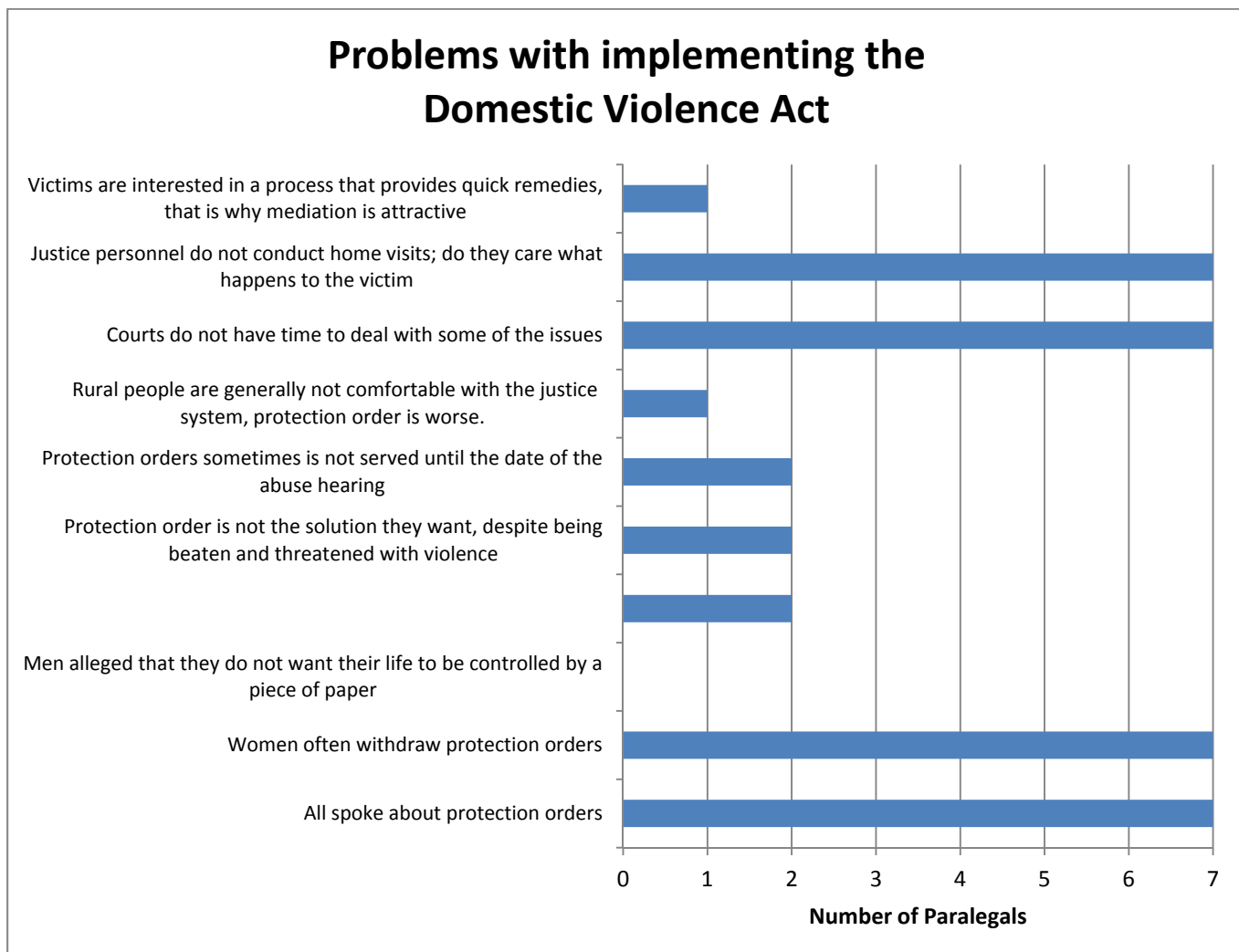


Figure 10-11 Paralegals’ responses to problems encountered with the Domestic Violence Act

The information detailed in figure 10-11 represents responses from individual advice offices. Although there was general agreement, it is important to record all the information even if it was restricted to one person. All the paralegals cited Protection Orders as the main problem with the DVA and the fact that no after care service or protection is provided after a Protection Order is issued.

**Finding:** Protection orders are not always the desired option in cases of domestic violence.

**10.3.10 Interaction between community restorative justice, the formal justice system and community-based paralegals**

As shown in Figure 10-12, all seven CBPs interviewed operate within criminal justice institutions; criminal justice personnel such as the police and courts refer cases to the advice offices for mediation. They conduct mediation alongside the criminal justice system, using the system as back up for failed mediation, and in some cases simultaneously assisting victims to apply for a Protection Order and conducting mediation. All CBPs explained in the individual case studies that victims are informed during mediation about how the criminal justice system works and the criminal justice system's response to domestic violence cases. While the CBPs work within the informal justice process and justice personnel work within the criminal justice system; the study revealed that the two are working together in response to what victims choose. Often, victims in rural areas would rather not report domestic violence cases if this means going through the criminal justice system. However, the fact that CBPs work with police and courts as well as with traditional authorities provide victims with options. Justice systems working together helps people get the kind of justice they relate to and need. Pranis (2004:138) concurs, "responding to intimate partner violence through CRJ, saves time, resources and spread the work load of stakeholders working with survivors of violence, not just the criminal justice system".

## The role of community restorative justice in the formal justice system

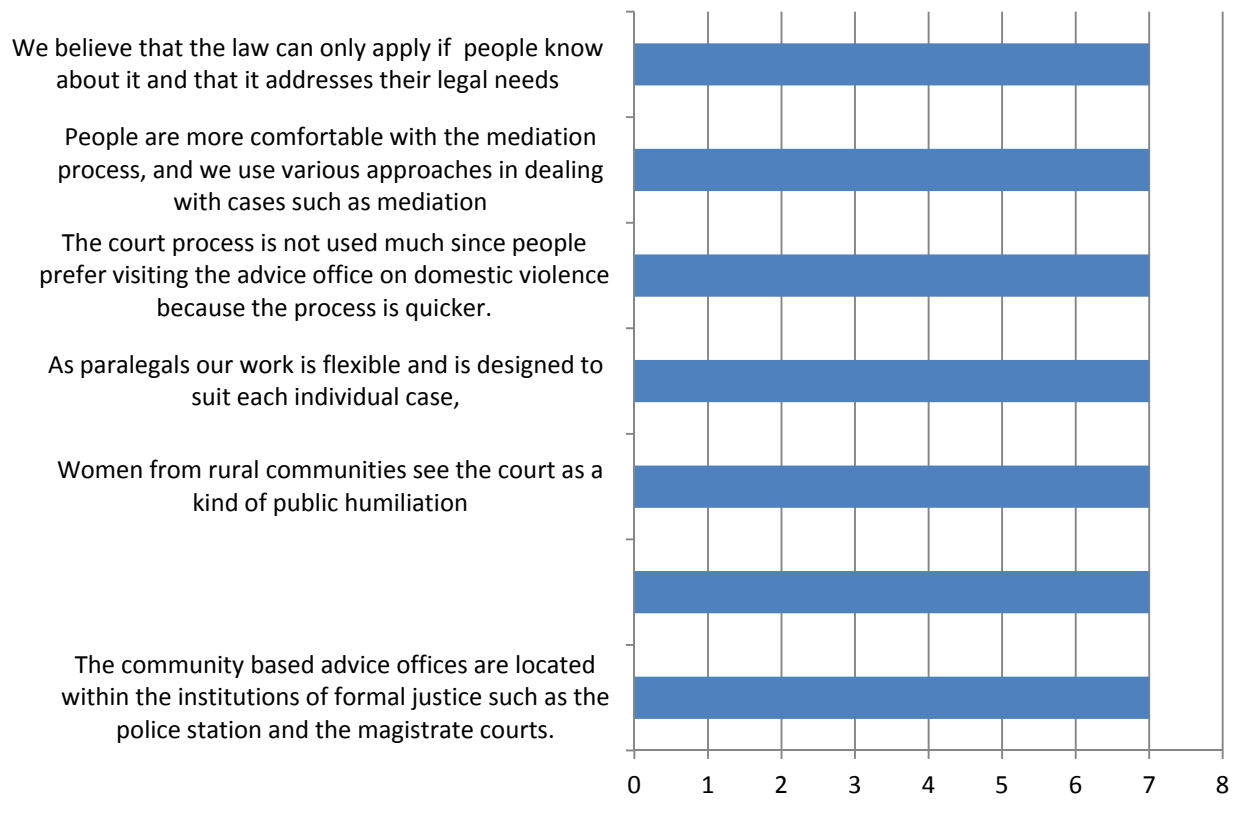


Figure 10-12 Interaction between community restorative justice and the formal justice system

All the CBPs reported that women in rural areas are reluctant to seek intervention from the police; those that do are disappointed with the service rendered. Indeed, this study found that some women are even subjected to secondary trauma. According to Sokoloff and Dupont (2002:55), the poor treatment that victims get from the police create tensions and influence the decision victims make about whether they seek state intervention to protect them from abuse in their homes or to refrain from reporting to the institution that further victimises them.

**Finding:** Restorative justice harmonises the tension within the formal justice system.

**10.3.11 Community-based paralegals, the formal justice system and community-based paralegals' recognition by the state**

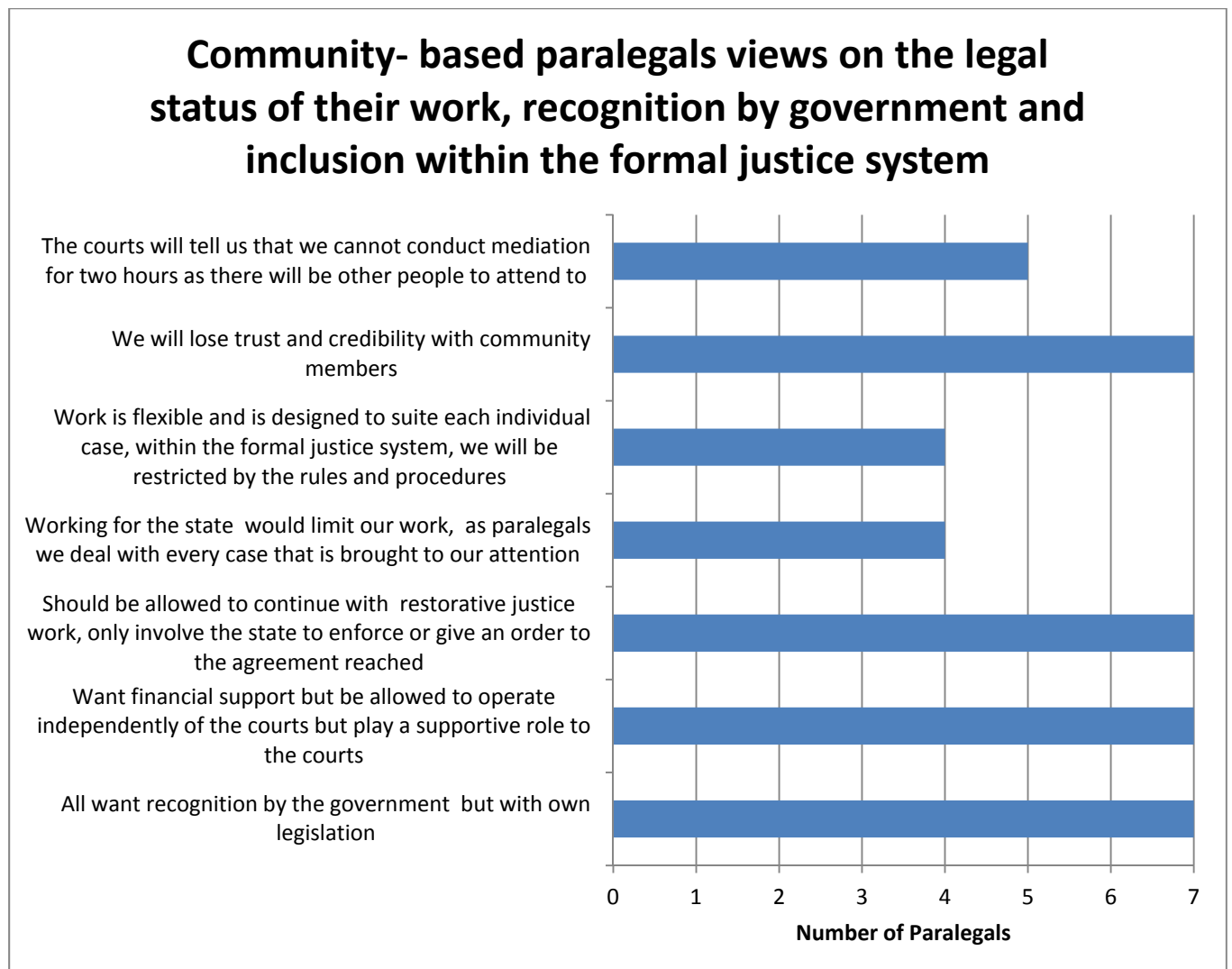


Figure 10-13 Recognition of paralegals by government

Unlike paramedics or auxiliary social workers, South African statutes do not regulate the work of CBPs. Therefore they do not have official recognition. Yet, as stated in the introduction to this study, from the 1950s, paralegals have helped people to deal with repressive apartheid laws. Figure 10-13 reflects the reasons why paralegals believe that they should be accorded legal recognition.

**Finding:** CBPs should continue to play a supportive role to the formal criminal justice system, but with state recognition and without being co-opted by the formal justice system.



### 10.3.12 Community-based paralegals’ views on domestic violence cases in traditional courts

The foregoing sub-sections presented cross-case analysis of narratives obtained from CBPs who deliver restorative justice services and service recipients who are domestic violence survivors. In each of the four case study chapters, a section examined the linkages between the traditional justice system and the respective CBPs within the CAOs studied. In this sub-section a brief cross-case analysis of the CBPs’ narratives synthesises these linkages. The CBPs commented on the composition and operation of TCs against the background of relevant sections of the non-enacted TCB. Furthermore, the CBPs explained the types of cases referred between CAOs and TCs, as well as the interaction between CAOs and TCs in relation to observation of TC proceedings and advice given by CBPs. Only the matrices in the respective case study chapters that relate directly to domestic violence are considered in this chapter. Those matrices presented (1) vignettes of the types of DV cases handled by TCs and (2) CBPs views on whether TCs should handle DV cases. This section comparatively analyses these responses.

The types of cases domestic violence listed in matrix 10-1 show that rural women continue to approach the traditional courts, when they suffer abuse themselves and when their children are abused. Emotional abuse of domestic violence victims figured prominently across all cases.

Matrix 10-1 Cross-case analysis of types of domestic violence cases heard at Traditional Courts

Domestic Cases at Traditional Courts	
Community Advice Office	Types of domestic violence cases observed by paralegals at Traditional Courts
Bulwer	Economic abuse
	Emotional abuse
	Physical abuse
Ixopo	Child abuse
	Emotional abuse
Madadeni	Emotional abuse
New Hanover	Emotional abuse
	Financial abuse
	Sexual abuse

According to Bennet (2011:1053) one the reason that rural women approach traditional courts in cases of domestic violence is that criminal justice courts administered by the state are not accessible to the majority of people living in rural areas. The inaccessibility is in terms of distance, legalistic and complicated procedures, and alien language, which many people do not understand. In contrast, the traditional courts present an affordable means for resolving disputes according to familiar language, procedure and the law. Various scholars are of the view that, traditional courts appeal to women for

various reasons, even if barriers that have been identified could be removed it does not mean that rural women will flock to the formal courts to report domestic violence (Harper, *et al* 2011:172; Johnston, 2011:18; Moulton, 2005:21; Nyamu-Musembi, 2003:12)

**10.3.13 Cross-case analysis of community-based paralegals’ views on traditional courts handling domestic violence cases**

Wojkowska (2006:23) and Wojkowska and Cunningham (2010:98), are of the view that restorative justice approaches by the traditional court may be unsuitable for certain disputes that are important such as domestic violence. Other scholars similarly express the same view that so long as patriarchy and ageism remain deeply rooted in the interpretation of customary law; needs of victims of domestic violence will not be met (Moulton, 2005:19; Ubink and Van Rooij, 2010:5; Kane *et al*, 2005:11).

.Matrix 10-1 shows the types of cases of domestic violence reported at the traditional court despite the fact that traditional courts have been known to be perceived as repressive to women (Sandefur and Siddiqi, 2011:124; Ubink and Van Rooij, 2010:5). Curran and Bonthuys (2004:19) point out that women continue to use the traditional courts “because it is easily accessible, and it is an important part of the administration of justice in rural South Africa”. Data from this study reveal discriminatory practices against women by the traditional court. Scholars (Ntlama and Ndima, 2009:23; Vorster, 2001:53) acknowledge that women will continue to use the traditional court as it is part of their heritage. Moreover, pre-colonial African societies featured complementarity of male and female roles in the justice and political arenas (Becker, 2006:34; Nzegwu, 2012:15). Hence, findings from empirical inquiry into the traditional courts’ pre-colonial norms would help women to benefit from the contemporary court’s protective measures as highlighted by Ndima and Ntlama (2009:23) and Johnston (2011:18) in the literature review.

Narrative in matrix 10-2 shows comparative counter-arguments among paralegals – often with the same CBP weighing the factors on each side of the question as to whether TCs should handle domestic violence cases. From time to time, paralegals place the handling of such cases by traditional courts in the context of the TCB.

Matrix 10-2 Community-based paralegals’ views on handling of domestic violence cases by traditional courts

Community Advice Office	Arguments against traditional courts handling DV cases	Arguments in favour of traditional courts handling DV cases
Bulwer	TCs humiliate women, diminish their stories and undermine their rights. TCs should not handle cases of physical violence.	There is potential with proper human rights training to protect women’s rights. We have provided such training.

Community Advice Office	Arguments against traditional courts handling DV cases	Arguments in favour of traditional courts handling DV cases
Ixopo	TCs are biased against women and the TCB would give <i>Amakhosi</i> more powers to silence women's voices. TCs should not handle DV cases.	The victim's forum of choice should govern. Some victims have had successful outcomes. We conducted training for <i>Amakhosi</i> on the law.
Madadeni	TCs are biased against women. Rape cases should not be handled. The lack of appeals in TCs abuses and victimises women. In adultery women must describe how they had sex, but not men.	TCs could be appropriate for handling DV cases with our continued guidance and training. There is interest among some <i>Induna</i> to learn and practice mediation and to learn more about the DVA.
New Hanover	There was a lack of consultation on the TCB and if TCs can deal with DV cases a man wealthy with livestock can be a repeat offender. TCs should not handle these cases.	The <i>Inkosi</i> invite us to their meetings; ask us to enlighten community members. We are proud of our African heritage; do not want to disturb tradition. If the TCB is passed as is we will still defend women's rights.

Scholars (Chopra and Isser, 2012:346; Bond, 2010:427) suggest that the approach to problems in the traditional court as shown in matrix 10-2 could be addressed by eliminating negative features, while building on their positive aspects such as flexibility of procedures. Paralegals similarly point out that with training, the traditional courts could play a meaningful role and handle cases of women who are reluctant to approach the formal courts. Narrative from paralegals in chapters 6 to 9 demonstrate the flexibility of traditional courts, and the courts' capacity to review its own decision and therefore not be subject to *stare decisis* (Makec, 2007:135; Skelton, 2007:235).

Overarching finding: Traditional courts should not handle cases of domestic violence, involving physical violence but could handle domestic violence cases involving other types of domestic violence, provided traditional court presiding officers receive training on how to deal with these cases.

The next section provides comparative evidence of paralegals' experience of CRJ practices. Actual comparative processes that CBPs carry out to effectuate these practices are presented in a subsequent sub-section of this chapter.

#### **10.3.14 Paralegals' experience of community restorative justice practices**

Earlier sub-sections presented cross-case analyses of CBPs' views on access to justice followed by their views that relate to CBP involvement with the criminal justice system and traditional justice system. In this section a comparative cross-case analysis of the CRJ experience of CBPs is presented. The common practices of restorative justice used by paralegals are VOM and family group conferencing. The study mainly focused on VOM as reflected in figure 10-14. When the thematic responses in matrix 10-3 are read in conjunction with figure 10-14, it is evident that VOM offers a holistic approach to CRJ. The CBPs note that the aim of VOM is to assist the victim to heal from the offence (Hooper and Busch, 1993:3). Uotila and Sambou (2010:190) explain that for "both parties,

this is an opportunity to discuss their feelings”. Community based-paralegals have been facilitating mediation process for victims of domestic violence since 1997. One New Hanover paralegal pointed out that, “*I have been trained in conducting mediation, and have been conducting VOM since 1997*” (NH1). All CBPs indicated that they have experience in mediation; they can read between the lines during the mediation encounter. They know the law and communication is easy because of the language and the CBPs ability to gauge non-verbal communication. They further stated that they can sift truthful from false allegations.

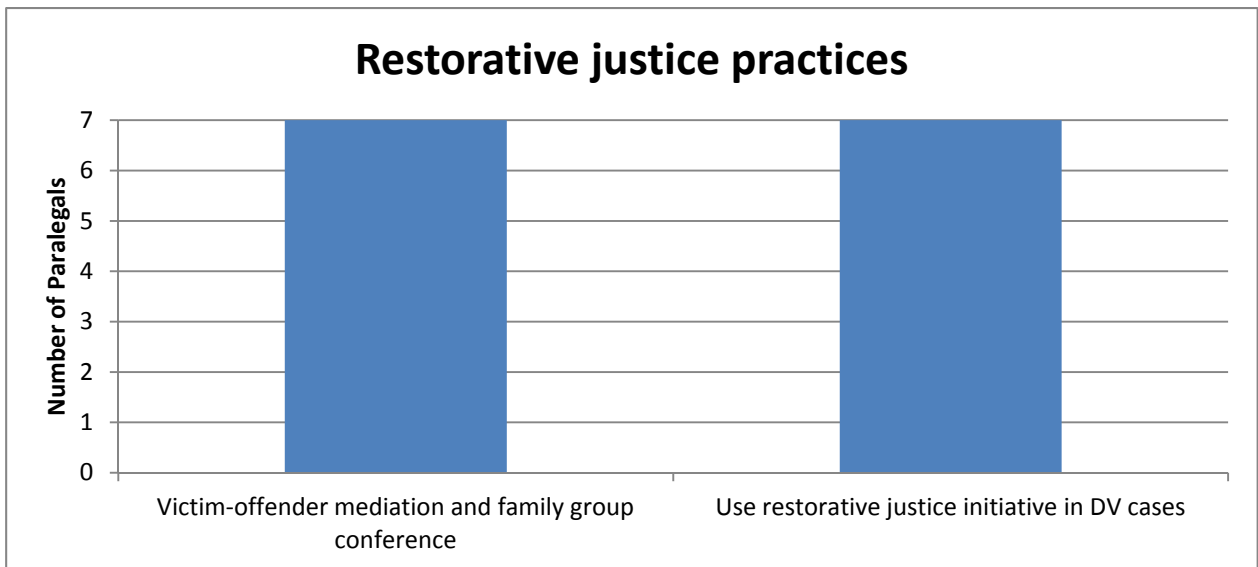


Figure 10-14 The restorative justice practices used by paralegals in cases of domestic violence

All seven paralegals interviewed said they conduct VOM and family group conferences in cases of domestic violence. In addition, as comparative interview data reflect in matrix 10-3, cultural competency plays a significant role in delivery of these restorative justice practices.

Matrix 10-3 Culturally competent holistic approach to victim-offender mediation for domestic violence cases

<b>Thematic Response:</b> Culturally competent victim-offender mediation offers a holistic approach to community restorative justice.	<b>Number in agreement</b>
The benefit of mediation is that the victim and offender are able to deal with underlying issues that have contributed to their fight.	7
The fact that we are aware of cultural practices and beliefs and are able to discuss and address cultural issues contributes to our success.	4
Counselling is part of us providing a holistic service to women who have suffered trauma.	7
Follow-up that we conduct, including home visits means that we care for our clients and their welfare and this provides victims with a sense of security.	7
We give people time; our mediation process is not rushed, in some instances a	7

<b>Thematic Response:</b> Culturally competent victim-offender mediation offers a holistic approach to community restorative justice.	<b>Number in agreement</b>
mediation process takes several sessions.	
As a mediator who speaks the same language as my clients, I could quickly grasp the hidden meaning in words that are spoken between the offender and the victim.	7
If you do not know the culture of the people you are dealing with, you will not understand why the said culture should cause conflict, and could be something that caused them to fight over.	5
Combining cultural knowledge and practice with my knowledge of the law is what makes our mediation a success.	6
The fact that we are aware of cultural practices and beliefs and are able to address cultural issues (such as paying compensation, sacrificing an animal) contributes to our success.	7

Across all CAOs, there is strong emphasis on understanding culture and being of the same culture. Sokoloff and Dupont (2005:51) and Presser and Gaarder (2000: 186) concur and argue that, mediators who are familiar with their clients' cultures achieve breakthroughs in cases of domestic violence. The police and court officials may not understand the importance of cultural factors in the lives of survivors and perpetrators or may misinterpret what a particular culture represents.

**Finding:** While VOM is the most common model used for restorative justice in cases of domestic violence, a family group conference is sometimes used by paralegals.

**Finding:** Cultural competency of CBPs is central to CBPs' success with restorative justice practices.

Thus far, this chapter has presented a comparative analysis on quantitative case intake data in section 10.2. This section, 10.3 has provided a comparative analysis of CBP views from a variety of components including access to justice, barriers to access to justice, the CBPs' role in promoting and improving access to justice as well as the need for CAOs. In addition CBP views on straddling the formal, traditional and informal justice systems with specific reference to domestic violence have been comparatively highlighted.

This section of chapter 10 now turns to the mediation procedures and processes followed by paralegals. These procedures and processes are followed irrespective of whether clients come to CAOs independently or through referrals from the criminal justice of traditional justice systems. As indicated from the outset of the case studies, this list was co-created by the interviewees and the researcher during separate interviews at each CAO. The procedures and processes are detailed in chapters 6 to 9 as the first matrix in each chapter. As demonstrated in each case study, paralegals' procedures for approaching domestic violence cases are common across the CAOs. Therefore, in this section, only processes are outlined; some differ across cases, while others are similar or the same

across cases. The processes are: appropriateness and effectiveness of mediation in domestic violence (figure 10-15); case intake and selection (matrix 10-4); voluntary participation (matrix 10-5); telling stories (matrix 10-6); discussion of solutions (matrix 10-7); victim safety (matrix 10-8); unsuccessful mediation (matrix 10-9); victim offender satisfaction (matrix 10-10); and post mediation (matrix 10-11). This section concludes with a brief discussion of how CBPs' narratives respond to the research questions and research objectives.

Towards navigation of this chapter, in subsequent sections, narratives from focus group participants are displayed in matrices. Each matrix reflects how the focus groups responded and the matrices are at times discussed relative to the literature. Thereafter, the conceptual framework for CRJ adapted from Daly and Stubbs (2006) as table 3-1 and the framework for CBPs adapted from Noone (1991), Maru (2006) and Wojkowska (2006) as table 4-1 are used to demonstrate how the data from each case study responded to the meta-conceptual framework. This is followed by the doctrinal analysis component of the study before concluding the chapter with a number of theoretical propositions that emerge from this study.

The cross-case comparative analysis of mediation processes is next presented.

### **10.3.15 Appropriateness and effectiveness of mediation in domestic violence**

These data are provided as a figure instead of matrix because of the overall sameness of the responses. All seven paralegals interviewed said that "the restorative justice approach is appropriate for cases of domestic violence and that it is effective".



Figure 10-15 Appropriateness and effectiveness of domestic violence mediation

Participants mentioned that one of the benefits of CRJ is its informality (Fawley and Daly 2005:620). In reviewing the potential for restorative justice as an effective and safe form of justice for victims of domestic violence, paralegals’ responses indicate that victims choose restorative justice precisely due to survival needs. Due to needs such as housing, employment, poverty, safety and other considerations, mediation is the best option. Hoyle and Sanders (2000:29) contend that if the choice is based on survival needs, then these choices are reluctant choices, a product of their coercive family situation and relationships. Although legal needs have been canvassed in the literature, survival needs have received less treatment in the literature (Stubbs, 2010:980). According to Morei (2014:938) many women in rural areas are unemployed and they remain in abusive relationship for economic reasons, Morei note that in order for the DVA to achieve its objective, attention need to be given to survival needs of women as well. For victims to leave their abusive partners in many cases will require financial support.

The following matrices present the restorative justice processes implemented by paralegals at each of the four advice offices that constitute the case studies. The thematic responses are presented first, followed by the various positions that led to the thematic responses along with the number of paralegals in agreement with a certain position.

### 10.3.16 Case intake and selection

It is important to capture their exact description of the assessment they make in selecting cases suitable for mediation. This demonstrates paralegals' specific thought processes and approaches. However, it is clear from the responses that the victim's choice weighs heavily in the paralegals' assessment of whether a case is ripe for mediation – victim's choice is tantamount to forum shopping. On their own admission, paralegals indicate that some cases ought to be handled by the police and courts. Paralegals note that they make this assessment during the preliminary meetings prior to mediation.

Matrix 10-4 Thematic response: Victim's choice is central to the mediation process

Assessment of victim's choice of forum	Number in agreement
The level of aggression by the offender determines case intake and selection, and injuries sustained by the victim in the attack, but we do not take a decision for the client. If the client wishes to use the mediation route, we have never refused to organise a mediation request by the victim.	3
We also take cases for mediation post-protection order if the victim approaches us.	4
We look at the characteristics of the offender, such as if he would come for mediation and whether he owns a gun, the level of fear from the victim, if she is afraid of the offender.	2
We do not take the case further if we discover that the victim's story has changed from when she initially came to report.	2
Our screening process helps us to determine which cases could benefit from mediation, and where reconciliation is still a possibility.	4
The questions I ask in the first interview with the victim include the following: Has the case been reported before? Am I the first person contacted/consulted outside the family? If this is a case of domestic violence, what steps has she taken on her own? Have other family members been involved in the dispute? Who else is affected by the abuse?	1
The victim herself will raise the reason for her choice of mediation – for example a concern about her children, the employment status of the husband.	6

Not one paralegal mentions refusal to mediate a domestic violence case. They refer cases for Protection Orders only if the victim is agreeable. Scholars disagree on the suitability of this approach. Pranis (2004:136) is of the view that CRJ should not be confined to minor offences only, it could benefit other offences and mediators should take advantage of this approach. Similarly, Hooper and Busch (1993:3) guardedly concede that restorative justice practices have been used to “address the effects of more serious offences, but this occurred only after extensive case preparation and the



imposition of a sentence”. For the paralegals under study, the choice of whether a case should be mediated or not is up to the victim.

Landrum (2011:427) points out that the screening process deals with the question of whether domestic violence cases are suitable for mediation, and additional training provided to mediators assists in managing difficult domestic situations.

It is apparent from data in matrix 10-4 that the victim’s choice seems more important than a CBP’s assessment of the victim’s wellbeing. Edwards and Sharpe (2004:15) acknowledge that “the dynamics of domestic violence render the dynamics of restorative justice in this context complicated”. Even if the outcome of a CBP’s assessment requires that the victim approach the courts for formal protection due to concerns regarding their safety and psychological well-being, the responses reveal that the CBPs do not have decisive authority to force a client to take this route if the victim chooses a flexible process such as restorative justice. Rather, CBPs use their moral authority (Buckenham, 2014:7) to advance the choice of the victim.

**10.3.17 Voluntary participation**

Paralegals use the threat of arrest and fear of going through the criminal justice court to secure the cooperation of the offender, deter further violence, and to lay the foundation for the victim to negotiate a satisfactory arrangement during mediation (Hoyle and Sanders, 2005:30).

Matrix 10-5 Thematic Response: Participation in restorative justice process must be voluntary

Participation must be voluntary	Number in agreement
Participation is voluntary but the offender may participate because of fear of the formal court and arrest.	7
Since mediation is informal, and conducted in private it encourages people to feel free to participate and to speak to us.	5
Participation in some cases is coerced in a subtle way by indicating to the offender the consequences of non-participation.	4
In some cases, paralegals’ calling letters for mediation are a deterrent, and stop violence.	5
Victims’ participation is voluntary and they are not coerced, since they choose mediation for various reasons.	7

Zehr (2005:197) is of the opinion that “offenders often need strong encouragement or even coercion to accept their obligations”. However, to say that there may be strong pressure to cooperate is not to say that there is no element of voluntary participation. The CBPs claim that VOM is voluntary; it relies on

both coercive external pressure toward an offender and on the individual’s decision to participate. In support of this approach, Presser and Gaarder (2000:187) caution that a victim “should not be coerced in any way, including deciding whether to participate in a restorative justice intervention; the victim should be informed of all available options and should choose the one she is comfortable with”. In contrast, the location of CAOs in police stations and magistrate courts suggest a subtle coercion toward the offender to choose mediation rather than be arrested. The threat of arrest means that restorative justice takes on potentially retributive and punitive elements (Barton, 2000:55; Daly, 2000: 48).

### 10.3.18 Telling their stories

The paralegals feel that it is important to take the time to discuss past events and feelings during a mediation encounter. According to Barrett (2013:345) and Hudson (2003:180), this is extremely important in mediation because it enables an agreement to be reached on future conduct.

Matrix 10-6 Thematic Response: Victims of domestic violence are given a voice

Victims of domestic violence are given a voice	Number in agreement
Offenders and victims have a face-to-face meeting.	5
It might involve separate meetings with each party. This is done if the parties are unable to communicate with each other.	2
Victim is given opportunity to talk and discuss past events and how hurt she is by the offender.	5
Victim and offender are given all the time they require to talk about their problem.	7
It is healing to provide the victim enough time to tell her story from when it began to go wrong and how it affected the victim for all these years.	5
People tell their side of the story clearly in their own language, and each couple has a unique way of telling their stories.	2

Five of the paralegals said that it is healing for parties to have an opportunity to discuss the past. The mediation encounter provides an opportunity for offenders to “express remorse” and to “discharge the same they feel” (Roche 2004:10). Stubbs’ (2010:981) critique of restorative justice argues that the VOM process requires communicative competence between the victim and the offender. The CBPs note that public communication of intimate details is not favoured by the majority of women in abusive relationships and added that they had not come across people who were not able to communicate; all they require is a conducive, private environment, guided by a mediator (Schiff, 2011:232; Van Ness and Strong, 2010:77).

Through the underlying worldview of advocacy/participation, matrices 10-7 and 10-9 reveal that participation in restorative justice processes must be voluntary; victims of domestic violence are given a voice both through this study and in the mediation process for domestic violence cases. Generally, scholars agree that restorative justice offers an opportunity for victims to be heard, the potential to be empowered by confronting the offender, and to gain strength and resilience by actively participating in deciding on the responsible action to be taken by the offender (Edwards and Haslett, 2011:3; Daly and Stubbs, 2006:18; Pranis, 2002:136; Presser and Gaarder, 2000:183).

### 10.3.19 Discussion of solutions

Each paralegal’s response indicates that the victim and the offender are given an opportunity to talk and take decisions that are in their best interests (Johnson and Van Ness, 2011:10).

Matrix 10-7 Thematic Response: Decisions taken by parties themselves, are in their best interests

Decisions taken by parties themselves, are in their best interests	Number in agreement
Breaks in between discussions give parties time to reflect on what is being discussed.	2
The victim and the offender reach a level where they begin to discuss solutions to their problems in an environment that is not oppressive.	2
The victim and offender do not prolong making a decision that is in their interests.	2
The decision results in the offender apologising for the hurt and harm done.	2
The victim apologises for the part she played which brought them to the Centre.	2
When the victim and the offender start discussing solutions, the healing process begins.	1
Failure to find a solution is not based on negotiation and the decision-making capacity of the victim and the offender; it is because the relationship is bad, irreparable and reconciliation is not possible.	2

Johnson and Van Ness (2011:7) contend that the mediation encounter offers parties the opportunity to be involved in post-crime decisions and to take advantage of “transformative potential”. However, Stubbs (2010: 982) notes that one limitation of the CRJ approach is the power inequality between the victim and the offender and dynamics of control that are typical in most domestic partnerships. In contrast, the paralegals contend that it is not just about the capacity to negotiate or make a decision, but also the state of the couple’s relationship. It might have deteriorated to such an extent that is not possible to agree. This acknowledges that mediation does not always result in agreement. Parties can agree to disagree (Uotila and Sambou, 2010:196).

Data from paralegals show that they hold separate sessions if they notice that parties are having difficulties communicating and the other is domineering during mediation sessions in order to facilitate a “teachable moment” (Schellenberg, 2010:61). The CBPs contend that they apply such techniques to ensure that parties find their own solutions since female victims of domestic violence do not want to see their partners arrested or sent to jail; rather they seek an opportunity to restore the relationship and live in peace and harmony.

Narrative in matrix 10-7 indicates that the CBPs feel that a decision taken by parties themselves is in their best interests. Most of the women in the study expressed the view that they want to be involved in making a decision on what is to be done with the offender and to exercise their right whether or not to withdraw the charges to give reconciliation a chance. Participation in decision-making of the outcome is a core principle of restorative justice (Pranis, 2001:288) and an option unavailable in the criminal justice system. Moreover, Grauwiler and Mills, 2004:52) point out that VOM is meant for couples who want to remain in the relationship even when violence has taken place. With this point respondents in this study agree.

### 10.3.20 Victim safety process

The responses from the CBPs demonstrate awareness and support of mediation on the part of the police. It is acknowledged that mediation could be an effective tool in solving domestic violence cases. The police’s willingness to be on standby to protect the safety of both the victim and the paralegal attests to this cooperation. The CBPs’ experience in VOM gained over the years might have increased official trust in mediation; this also supports paralegals’ professional conduct.

Matrix 10-8 Thematic Response: Restorative justice is a practical alternative in dealing with cases of domestic violence

Restorative justice is a practical alternative in dealing with cases of domestic violence	Number in agreement
Victims feel safe because we are located at the police station. Sometimes we alert the police to be on standby if we feel that the offender is aggressive.	4
Offenders are aware the area is protected.	7
The offender is informed of follow up to find out how things are going. We think this could be a deterrent to further violence.	6
In other instances we mediate and recommend a Protection Order as measure to protect the victim, if there is a positive response from both the victim and the offender.	4
Sometimes paralegals go further to inform the offender that the victim desires privacy from a family hearing, and that she is not confident that family members will be neutral in the discussions.	7

From the thematic responses in Matrix 10-8 it is clear that restorative justice is a practical alternative to deal with cases of domestic violence. Most scholars agree that restorative justice practices are communicative and flexible (Daly and Stubbs, 2006:18; Curtis-Fawley and Daly, 2005:609; Van Ness and Strong, 2010:77).

### 10.3.21 Unsuccessful mediation process

The paralegals report that referring cases to court for Protection Orders backs up unsuccessful mediation. Two paralegals mentioned that they expect women victims to also take responsibility if they have contributed to the violence (Grauwiler and Mills, 2004:61).

Matrix 10-9 Thematic response: Use criminal justice approaches only as a back up to restorative justice

Use criminal justice approaches only as a back up to restorative justice	Number in agreement
Some of the solutions during mediation result in the victim applying for a Protection Order as well to stop the violence from continuing.	7
Based on our experience, unsuccessful mediations are sometimes blamed on the victim, because we do not allow lies, and we deliberate on facts and the truth.	5
We look at both angles of the conflict and the underlying issues that have caused the conflict, and if the victim has a part in that conflict we point that out.	3
The mediation is unsuccessful because the victim and offender refuse to accept responsibility.	2
Our mediation is victim and offender-centred. It is our job to assist the woman to take responsibility as well; she cannot hit the offender with a pot and not expect an immediate impulse reaction.	2
Some come to the advice office thinking I will take their side and if I show neutrality they become very angry and then fail to comply.	3
I do not take chances, especially if the offender walks out of the mediation. I refer for a Protection Order because I do not know what will happen when the victim arrives home.	7
The relationship had got to a stage where was not possible to reconcile.	7

Data in matrix 10-9 shows that criminal justice approaches are used as a back up to restorative justice. Daly and Nancarrow (2010:170) also raise the issue of responsibility, arguing that CRJ processes can subject the victim to secondary trauma when the perpetrator does not take responsibility for the offence. This point is debated in the literature. Female victims of domestic violence do not all have the same perspective on the use of restorative justice.

### 10.3.22 Victim/offender satisfaction

The CBPs' responses reflect strong support for restorative justice; they indicate that restorative justice provides an opportunity for victims to tell their stories and participate in determining an agreement on how the harm should be redressed. They argue that this process is empowering and healing for victims and enables the parties to deal with the root causes of the problem. Stubbs (2010:977) concedes that CRJ has produced positive results with respect to processes and procedures.

Matrix 10-10 Thematic Response: Restorative justice is cost effective, private, quick and deals with the root causes of the problem

Restorative justice is cost effective, private, quick and deals with the root causes of the problem	Number in agreement
The victim and the offender express satisfaction with the way we handle their cases. Unlike the tension they experience in court, we provide an avenue for them to see how to keep the family together.	7
Clients tell us they do not want to go court because they do not want to make their problem public. They appreciate mediation because the discussion takes place in private.	3
If the mediation agreement does not hold, the client is empowered to approach the courts and seek a Protection Order.	4
The people who have been through our mediation are so impressed with the procedure and process; they have praised our professionalism during mediation.	7
Most clients do not up to this today understand the purpose of a Protection Order.	7
Even though our services are for free, it is not cheap justice. In court the victim does not participate much in the deliberation, whereas in our offices the victim is given an opportunity to say everything that is troubling her and through our mediation process the offender and the victim get to the root causes of their conflict.	7
The majority of our mediations are completed in much less time than the courts. The court can give you a far off date for your hearing and this creates added stress and trauma for both parties.	7

As data in matrix 10-10 show, restorative justice is cost effective, private, quick, and deals with the root causes of the problem. Restorative justice frames domestic violence in a manner that has the potential – enabled by laws against domestic violence – to attack the root causes of the problem, including social inequities and norms, individuals and families' isolation, and neutralisation of blame. The CBPs' female clients were not pressured into using CRJ approaches. According to CBPs, victims of domestic violence were not just concerned about the relationship between the victim and offender but also the sustainability of their family relations (Pranis, 2011:59).

### 10.3.23 Post-mediation

The literature notes that relationship repair is one of the benefits of restorative justice (Daly and Stubbs, 2006:977; Diesel and Ngubeni, 2003:8). The CBPs state that, in some cases, restorative justice could break a cycle of abuse (Uotila and Sambou, 2010:202) The CBPs indicate that they conduct telephonic follow up and home visits in some of the cases they have mediated, to establish whether or not the agreement is holding and whether more problems developed after the mediation.

Matrix 10-11 Thematic Response: The relationship might not be completely restored, but it gives people an opportunity to work on repairing their relationship

The relationship might not be completely restored, but it gives people an opportunity to work on repairing their relationship	Number in agreement
Sometimes the offender phones a paralegal and expresses satisfaction with the mediation and says 'I know where to come, if there is problem I will be the first one to come'.	5
Sometimes clients come to the office to report back post-mediation, and we also phone or go and visit clients.	7
After mediation it is rare for violence to start again. If it does happen, we encourage the victim to approach the courts and apply for a Protection Order.	4
Mediation has proven in some cases that it can break a cycle of abuse.	7
The relationship might not be completely restored but it gives people an opportunity to work on that process.	5
Others say they are enjoying the attention they are getting from their husbands after mediation.	7
No home visit to follow up on unsuccessful mediations, follow-ups through home visits is conducted in special circumstances; the majority of cases are followed up through the telephone.	5

The CBPs felt strongly that a woman should be allowed to decide the course of action she prefers to address her unique domestic situation with her spouse. Data in matrix 10-11 show that, while the relationship might not be completely restored, mediation gives people an opportunity to work on repairing their relationship. Restorative justice strives to respect a victim's wishes, including repairing the relationship. Mills and Grauwiller (2006:366) and Presser and Gaarder (2000:183) recognise that women's partnerships matter to them, even when the relationship is abusive.

This section of chapter 10 has presented a range of comparative views based upon data displayed and interpreted in each case study. The next section presents a cross-case analysis of the focus group responses.

## 10.4 Cross-case Analysis of Focus Group Responses

This section contains matrices and tables that display the comparative findings on the responses from the focus groups. Four focus groups were held, each with six participants, giving a total of 24 individuals. The tables reflect phrasing, that is either verbatim from at least one participant and was echoed by others or is combined into a statement from multiple groups with every precaution taken to maintain the original meaning. The focus groups were conducted in isiZulu and translated into English during transcription. The code next to the contributions from the focus groups shown in Matrices 10-12 to 10-20 indicates the focus group(s) from which the contribution emerged. A separate column shows the number of participants in agreement with a specific contribution. Based on the responses from the focus groups, the researcher combined the responses to reach an overarching finding with regard to overall thematic responses. Following the overarching findings from the thematic responses of focus groups is a discussion of how those findings respond to the research objectives and research questions. The conceptual framework for restorative justice adapted from Daly and Stubbs (2006) as Table 3-1 and the conceptual framework for CBPs adapted from Noone (1991); Maru (2006), and Wojkowska (2006) as Table 4-1 are used to display how the data from each case study responded to the meta-conceptual framework in a way that triangulates the study. This chapter then turns from the non-doctrinal (social science) component to the doctrinal analysis, which interprets statutory and case law in relation to the findings from the social science data.

### 10.4.1 Use of the Domestic Violence Act for protection

As indicated in Matrix 10-12, 18 of the 24 participants did not want people to know that they were victims of domestic violence. A participant from the New Hanover focus group (NHFG) stated that, “*we do not want to please our enemies, because they can come to court and listen to our problems discussed in public. It is humiliating*”. (Zehr ,2004:309, Grauwiler and Mills, 2004:63). This finding supports the findings in the literature.

Matrix 10-12 Focus group thematic responses on use or non-use of the Domestic Violence Act

<b>Overarching finding:</b> Rural women do not feel they are protected by this legislation.	Number in agreement
Reporting domestic violence involves the police. It is humiliating for people to know that I am a victim of domestic violence. BWFG, NHFG, IXFG	18
Once the matter goes to court, you cannot fix it. We do not want to take our husbands to formal court. NHFG	6
Poverty is what makes us not to approach the formal courts. NHFG, BWFG	12
Protection order is worse, because offenders leave home and even stop supporting	12



<b>Overarching finding:</b> Rural women do not feel they are protected by this legislation.	Number in agreement
the children. A protection order means that he leaves the home and that is usually followed by divorce. BWFG, MDFG	
There is pressure from the in-laws when reporting to the police; the whole family turns against you. A protection order on its own is not enough, if you depend on your husband for support it does not work. BWFG, MDFG, NHFG	18
But we do not want the formal court option, it is harsh and that is not what we want. BWFG	6
From the cultural perspective we also do not want to upset our ancestors. Our culture is not compatible with the DVA. MDFG	6
We do not believe in the formal justice system, that justice does not give us a chance as victims, to protect our families, our marriage, or give us the kind of support we receive from paralegals. MDFG	6
There is a stigma attached to being a victim of domestic violence, we do not want to diminish our husbands' status in the community, we will undermine them by going to the police. NHFG, BWFG, IXFG	12
There is no privacy at the police station charge office. BWFG, NHFG	12
Domestic violence has been with us for many years, generation after generation has been impacted by it, which is not something that the law can address because it is too complicated for the law. MDFG	6
We do not believe in the justice system, they just take decisions about our future without back-up support when things go wrong. NHFG, MDFG	12
With reporting to the police, the problem persists and it does not go away. We do not like to take our private matter and make it public; this is what happens when we involve the police. NHFG, BWFG, MDFG, IXFG	24

One of the reasons participants state for rejecting the criminal justice system (in this case the DVA) is that they are not comfortable with the public nature of this system. Hooper and Busch (1993:11) challenge this assertion, noting that “there is a danger that the outdated paradigms of secrecy and marital privacy may be legitimised by the confidentiality of the mediation process at a time when they seem to be losing their hold”. Respondents in this study disagree. Stubbs (2010:972) “criticises the notion that restorative justice promotes victims’ needs and interests; she argues that these aspirations of restorative justice are difficult to meet in practice”. Again, respondents disagree; they were unanimous in their concern about the impact of a Protection Order and prefer the private-based model offered by community restorative justice practices.

#### 10.4.2 Problems with the criminal justice system, especially regarding domestic violence

The participants' responses show concerns about victimisation and the lack of court protection post-trial and lack of privacy (Shapland *et al* 2011:139; Braithwaite 2003:159)

Matrix 10-13 Focus group thematic responses on problems with the formal justice system and domestic violence

<b>Overarching finding:</b> The criminal justice system is not meeting the justice needs of victims of domestic violence. The system is alien to their culture and their comfort.	Number in agreement
Language is a problem, if the magistrate could speak isiZulu instead of through the interpreter it would be better; the court intervention makes the situation at home worse, instead of ending violence. BWFG, NHFG, MDFG, IXFG	24
We hate to make our private matter public. You do not hang your dirty linen in public ( <i>Ihlazo lasekhaya alikhulunywa kubantu</i> ). MDFG	6
The courts do not have time to listen to the background of the problem; you are expected to answer questions asked only. The courts do not protect you after the trial, no follow up. NHFG	6
The courts do not protect you against victimisation when the trial is over, it separates families, and families are torn apart. If he goes to jail what happens when he comes out, what about the intimidation from family members? BWFG, IXFG, NHFG	18
The formal justice system alone is not suitable for domestic violence; we use it as the last resort, and only when you are prepared to face retaliation for your action. NHFG, MDFG	12
The court turns things upside down for the victim and the offender, especially if he gets arrested, life is never the same. You become bad luck; even the ancestors can't protect you. MDFG, BWFG, IXFG	18
The police are gender-biased, police at the charge office are males, and too young to deal with our marital problems. It is difficult to cooperate under these circumstances; you leave the police station disappointed. NHFG	6
We are financially dependent on our husbands, we need shelter and maintenance. If we leave, justice does not give this kind of support. Poverty is the problem. BWFG, MDFG	12
The attitude of the police further victimised us. NHFG	

The participants stated that financial dependency is a contributory factor in rejecting state intervention in domestic violence (Smythe and Artz, 2005:25). Smythe and Artz (2005:25) point out that “money problems are a leading factor in precipitating intimate partner violence and other types of abuse”. Bonthuys (2014:111) argues that the DVA has not been able to respond to the economic manifestation of domestic violence. Bonthuys suggests that the financial remedies in the DVA “such as emergency

monetary relief, contribution towards the cost of housing, and the power to evict the offender from home have not been successfully implemented”. Zehr (2004:309) is of the view that women know what they want and what works and does not work for them, therefore their voices need to be heard regarding how the financial remedies provided by the DVA could be improved. It is for this reason that the pragmatic worldview is useful in this study in terms of what works under the circumstances of women seeking relief under the DVA.

#### 10.4.3 Practical ways to improve access to justice for rural women who are victims of domestic violence

The participants felt that interference by the formal justice system in their private lives could be victimising rather than protective. They alluded to the fact that, if the criminal justice system desires to meet their justice needs, they should participate in the decision-making that will have an impact on the whole family. This proposition from study participants supports Johnston’s (2011:55) contention that victims and offenders should have a say in the criminal justice process as to whether sending an offender to jail may prevent the offender from earning money to compensate the victim. Unlike the criminal justice system, restorative justice places “power and responsibility in the hands of those directly involved” while leaving “room for community involvement” (Zehr, 2005:203).

Matrix 10-14 Thematic responses on improving access to justice for rural female victims of domestic violence

<b>Overarching finding:</b> The justice system should include mediation as study participants have experienced it at the community advice offices. Justice personnel must know the culture and circumstances of people who live in rural areas.	Number in agreement
Domestic violence hearings should be private if we decide to go the court route. BWFG, NHFG, MDFG, IXFG	24
Victims of domestic violence should be allowed to participate in the court proceedings as to how the offender should be punished. NHFG	6
Mediation should be part of the justice system, to provide women with choices. It will restore faith in the justice system, but paralegals should be allowed to operate independently with subsidy from government. NHFG	6
At the moment there is no culture of people caring, the culture makes them lazy, too comfortable because they have a job, some of them do not enjoy what they are doing, and to them it is just a job. IXFG	6
Education of court officials and police needs to be victim-centred, they need to visit our villages and found out what kind of justice we desire. Paralegals and justice must work together. NHFG, IXFG	12

Based on the focus group discussions, the participants are very clear on the role of criminal justice and restorative justice. The idea is for the two systems to work together rather than one replacing the other.

#### 10.4.4 Role of paralegals in community restorative justice and the formal justice system

Data in matrix 10-14 illustrates the interaction between paralegals, CRJ and the formal justice system across CAOs. All 24 participants said that paralegals command respect in the community; CBPs are trusted, and if CBPs were to conduct more workshops in the community, many more women would report abuse. All the participants endorsed the paralegals' work within the criminal justice system and their restorative justice approach in the informal justice system. This suggests that the paralegal sector is active in promoting and increasing access to justice in the community, which would not have been the case if they were not rendering this service in rural communities in KZN.

Matrix 10-15 Focus group thematic responses on interaction between community restorative justice, the formal justice system and community-based paralegals

<b>Overarching finding:</b> Restorative justice approaches should be integrated with the justice system, with paralegals as mediators.	Number in agreement
We trust and respect paralegals; they fill the justice gap the government cannot close. MDFG, NHFG	12
Paralegals we are told are not part of the police and justice. But to us in the community we see them as part of the police because they are located at the police station, we are happy with the way they assist us, and we are aware there is some collaboration with the police here and the formal court in Hlanganani. BWFG, NHFG	12
There should be a provision in the justice system for us to try and solve the problem first through mediation, and if we fail to resolve our problems or violence continues then the matter should go to formal court. NHFG, IXFG	12
Social workers and lawyers should not do mediation. The police and courts should continue what they are doing, and refer mediation cases to the paralegals. We do not want change. Most of us do not want to open a case against our husbands. IXFG, NHFG, IXFG	18
Paralegals should be a link with formal justice but they should continue to conduct mediation. They should carry on with their mediation work, and give legal advice because this is what they do best. Paralegals do not take sides. MDFG, BWFG	12
We are very comfortable with mediation and it works. If paralegals work with justice, it will restore our confidence in the justice system. IXFG, NHFG, BWFG	18
Paralegals command respect in the community, are trusted; they must conduct more workshops on mediation, and more people will come out and report abuse. MDFG, NHFG, IXFG, BWFG	24

These statements comport with Schonteich’s (2012:25) point that countries such as Malawi and Sierra Leone have enacted a 2012 legal aid law that promotes paralegals within the criminal justice system. In South Africa, Walsh (2010:26) envisages paralegals as “‘first aid’ in access to justice”. While Noone (1991:35) argues that paralegals could only make a minor contribution to increasing community access to justice and recommends alternative dispute resolution, although not necessarily implemented by paralegals; study participants believe that CBPs make a substantial contribution to access to justice.

#### 10.4.5 Experience of restorative justice processes and benefits

Participants reported positive experiences of restorative justice, which are displayed in matrix 10-16. Grauwiler and Mills (2004:550) are of the view that because of community involvement in CRJ, initiatives and problems of domestic violence are handled holistically with the recognition that parties share a history together including children.

Matrix 10-16 Focus group thematic responses on experiences of restorative justice processes

<b>Overarching findings:</b> Rural women have a voice in restorative justice. The participants unequivocally and unanimously stated that they have had positive experiences with mediation. Part of this positive experience is that they had someone they could talk to and financial matters improved after the mediation encounter.	Number in agreement
Paralegals are neutral people. We had a positive experience of restorative justice. NHFG, BWFG, IXFG	24
Paralegals here are 100% good. Paralegals phone to find out what happened afterwards. BWFG	
Other people find our problems entertaining, our problems were treated seriously at CAO, and we were given the attention we needed. They do not talk about our problem because they stay in the same community with us. MDFG	6
Paralegals know what they are doing, and we can see that they are well trained and experienced. BWFG, NHFG	12
We receive counselling and support throughout the process of mediation. They always secure cooperation from our husbands; we do not know how they do it. IXFG, MDFG	12
Husbands became more supportive financially. Husbands appreciate the presence of the advice office in the area. BWFG, IXFG, MDFG	18
We save time by coming to this office and it is less expensive in that you do not have to go to court so many times and take time off work. NHFG	6
The process does not create enemies, the process was empowering; it opened our eyes. MDFG, NHFG	12

#### 10.4.6 Responses on the need for community advice offices

As Matrix 10-17 shows, even though they did not use the same words, the study participants were very positive about the role of CAOs and CBPs. An important point is that paralegals have a simple way of explaining the law to rural community members (Golub,2000:303)

Matrix 10-17 Focus group thematic responses on the use of community advice offices

<b>Overarching finding:</b> A unique service offered by community advice offices is that they are meeting the needs of rural women.	Number in agreement
Paralegal advice offices are different from other structures; they are based in our community and are accessible. MDFG	6
Paralegal approach is different to other structures responsible for service delivery. They deliver quality service. NHFG.	6
They listen to our problems, give us enough time to explain our problems and advise us on matters that we will have to pay lawyers for. NHFG, IXFG, BWFG, MDFG	24
Problems are resolved quickly. MDFG, IXFG, NHFG, BWFG	24
A community advice service is important; paralegals are playing a very important role that cannot be replaced by other service providers. NHFG, IXFG	12
Paralegals protect us, and they go out of their way to make sure that justice is done; you cannot get that kind of dedication and commitment from other stakeholders. NHFG, IXFG, MDFG	18
This office is needed; even if the police could improve their services, it will not be the same service rendered by paralegals. NHFG	6
Paralegals educate us about issues that affect us in our rural communities in our language isiZulu, and they have a simple way of explaining the law so that we can understand. BWFG, IXFG, BWFG, MDFG	24

Focus group participants acknowledge that CBPs' intervention is different to other services providers. According to the paralegals most women have sought assistance elsewhere before they approach the CAO. Therefore rural women are able to compare different services offered by various stakeholders . Focus group participants' observe that paralegals are always accessible.

#### 10.4.7 Role of paralegals in restorative justice

Data in matrix 10-18 show that study participants identify with the paralegals. All the participants indicate that paralegals speak the same language as their clients, come from the same community and understand local culture. This contributes to paralegals' acceptance in the community and builds trust and confidence in the services they render. The participants spoke of fairness of process and noted

that CBPs treat participants with respect. Their problem solving process is quick, and they listen and do not take sides. One can conclude from these findings that the use of foreign language and cultural orientation of formal courts as well as delays in the criminal justice system are barriers to access to justice for rural women. Participants also credit paralegals with bringing harmony to their homes.

Matrix 10-18 Focus group thematic responses on the role of paralegals in restorative justice

<b>Overarching Finding:</b> Paralegals remove barriers to access to justice for victims of domestic violence through community-based restorative justice initiatives in the rural areas of KZN.	Number in agreement
They bring us together, provide a safe private place where can talk about our problems, they encourage us to find solutions for our problem, they are welcoming and friendly. MDFG, NHFG, IXFG, BWFG	24
They bring peace and harmony in our homes and communities. MDFG, IXFG	12
We speak the same language and they understand our culture as they are from the same community as us. They use the language that we understand when they explain the law to us. MDFG, NHFG, IXFG, BWFG	24
They help us understand the work of the police and courts in the process of restoring justice. NHFG	6
They resolve problems easily and without us going to court, and without delay. IXFG, BWFG	12
They give us time to tell our story; they listen to both sides of the story and treat us with respect. BWFG, MDFG, IXFG, BWFG	24
They do not take sides; the mediation process is fair. IXFG, BWFG, MDFG, NHFG	24
They provide support after mediation; we have a support group here in New Hanover. NHFG	6

Stubbs (2010:983) argues that, VOM can contribute towards reinforcing the processes of empowerment. However, Stubbs points out that if empowerment has not begun outside mediation and the victim has no resources, VOM does not work. Stubb’s point, combined with the participants’ responses, is useful for designing pragmatic procedures and processes that will enable paralegals to better administer cases in order to promote access to justice.

#### **10.4.8 Benefits of restorative justice**

Data in matrix 10-19 reveal that the participants perceive restorative justice as a working alternative if one wishes to remain in the relationship (Van Wormer, 2009:111). All the paralegals spoke of safety at the advice offices. Two advice offices are based at the magistrate’s court and two are based at a police station. The location of the advice office within a criminal justice institution provides safety for

victims and mediators. Fulkerson (2001:356) points out that this “allows the victim to address offenders in a safe environment, thus providing a forum for expression of their feelings and experiences”.

Matrix 10-19 Focus group thematic responses on the benefits of restorative justice

<b>Overarching Finding:</b> Restorative justice is appropriate for cases of domestic violence.	Number in agreement
It is now known in the community, that if you have a problem of domestic violence, you start at the paralegal’s office. BWFG	6
It opens communication. IXFG	6
If you want to continue your relationship with your husband, restorative justice is beneficial. MDFG, IXFG	12
It brings peace, respect, trust and <i>Ubuntu</i> . MDFG, NHFG, IXFG, BWFG	24
Restorative justice rebuilds our broken marriages and each member of the family become responsible/ restores relationships and marriages. IXFG, MDFG, BWFG	18
Our problems are taken seriously, service is free, and it saves time. MDFG, NHFG	12
We are safe here, and are free to talk about how we feel. BWFG, NHFG, IXFG, MDFG	24
We are assisted to solve our problems, and are empowered to solve problems on our own in the future. MDFG, NHFG	12

#### 10.4.9 Problems with restorative justice processes

Data in matrix 10-19, the final matrix in this section, show different responses from the groups. However, this does not suggest that they encountered any problem with the mediation process; indeed, they swear by mediation. Some participants said that they had referred other people to the office and had themselves been referred. All the participants stated that they had not experienced further violence after mediation. They all commented on how well-trained and experienced the paralegals are, even going a step further to compare them with other service providers in terms of the quality of service they receive from the advice office.

Matrix 10-20 Focus group thematic responses on problems with restorative justice processes

<b>Overarching Finding:</b> Problems, if any, are minimal but the mediation process is not guaranteed.	Number in agreement



We do not see any problems with the process, we swear by mediation. NHFG, MDFG, BWFG	18
No threat, husbands know what will happen if they repeat the violence. IXFG, NHFG	12
The process is not guarantee proof. BWFG	6
We love the paralegal office; they are well trained and deliver an excellent service, better than social workers and the police. NHFG, IXFG, MDFG, BWFG	24

In conclusion, the research findings on the work of CBPs, obtained through the interviews with paralegals, focus group discussions and records of domestic violence cases handled confirm that CBPs are involved in the community-based restorative justice process. Paralegals conduct VOM and family group conferencing. The explanation provided by Presser and Gaarder (2000:181) fits the description of the process undertaken by paralegals. The process and procedures followed by the paralegals could be the subject of another study. This study focused only on their work employing one of the four models of restorative justice, VOM. For the sake of simplicity, the researcher used the term mediation in interviews with both paralegals and focus group participants, although the questions referred to restorative justice. Based on the information from the CBPs that participated in the study, it appears that they practice an indigenous CRJ approach that is unique to rural KZN.

#### 10.5 Additional Information Gathered Informally during Field Research

At the end of each formal focus group session, the researcher asked the group to share what caused domestic violence during an informal session. The causes cited were common across the focus groups; infidelity was at the top of the list. Other causes include children from girlfriends being brought to the homestead to be raised by the wife; financial issues; alcohol abuse; accusations of witchcraft; disregard for gender equality and misconceptions about customs regarding the treatment of wives, among others. HIV and AIDS have grown as a factor in domestic violence and are linked to infidelity. More than half of the women interviewed said they remained in relationships and marriages, enduring violent abuse, because they have no means of self-support. However, further discussions revealed that it is not simply a matter of resources. On further probing, the women stated, amidst much laughter, that women also love their abusers. According to Grauwiler and Mills (2004:55), while a “woman may be in an abusive relationship, she is also possibly a mother, lover, friend, family member, or part of a church or a tradition that has competing claims on her decision to stay or leave”.

The next section discusses the application of the qualitative data to the meta-conceptual framework. The conceptual framework for restorative justice adapted from Daly and Stubbs (2006) as Table 3-1 and the conceptual framework for CBPs adapted from Noone (1991), Maru (2006), and Wojkowska (2006) as Table 4-1 are used to display how the data from each case study responded to the meta-conceptual framework in a way that triangulates the study. This chapter then turns from the non-doctrinal (social science) component to the doctrinal analysis, which interprets statutory and case law in relation to the findings from the social science data.

## **10.6 Application of Data to the Social Science Meta-conceptual Framework**

Both quantitative and qualitative data respond to the meta-conceptual framework. Quantitatively, the number of domestic violence cases that have been dealt with through restorative justice using VOM speak to the fact that women avoid going to court and are comfortable with the alternative approach to justice. In Bulwer, 66% of the domestic violence cases reported had been handled through VOM, with a success rate of 87%. The comparative figures for Ixopo were 80% of domestic violence cases handled through VOM, with a success rate of 87%; 86% of domestic violence cases reported in Madadeni were handled through VOM, with a success rate of 82% and 64% of domestic violence cases reported in New Hanover were handled through VOM, with a success rate of 73%. Fulkerson (2001:357) is of the view that alternative approaches “may be useful in domestic violence cases because of the unique relationship between the victim and the offender”. He adds that, in appropriate cases, the process may serve the beneficial purpose of helping the victim and the offender to heal and become reintegrated into their families and communities (Fulkerson, 2001:367). The numbers speak to the problems and benefits associated with CRJ and the role of CBPs.

Morei (2014:932) submits that “the purpose of the DVA is to afford victims of domestic violence the maximum protection from domestic abuse that the law can provide”. The intention of the Act was to respond promptly taking into account other factors that impact on domestic violence situations. The Protection Order is the main recourse offered by the DVA. The data from this study show that women often do not wish to impose a Protection Order. This suggests that the DVA is not meeting the needs of the women who are attended to by paralegals.

### **10.6.1 Cross-case comparative analysis of problems and benefits of community restorative justice**

Table 3-1 is reproduced below for convenience. Matrix 10-21 shows the cross-case results relating to the problems associated with restorative justice and Matrix 10-22 reflects the benefits associated with restorative justice. Each matrix is followed by a brief discussion of how each case study responded to the community justice prong of the meta-conceptual.

Table 3-1 Conceptual Framework: Problems and benefits of community restorative justice

<b>Problems</b>	<b>Benefits</b>
Pressure on victims	Victim voice and participation
Role of the community	Victim validation and offender responsibility
Mixed loyalties	Communicative and flexible environment
Impact on offenders	Relationship repair
Victim safety	Responsiveness to individual needs of victims
Daly and Stubbs (2006)	

10.6.1.1 Cross-case comparative analysis of problems with community restorative justice

Matrix 10-21 shows a synthesis of how the data respond to the conceptual framework for CRJ. Further explanation of how each problem relates to the four case studies follows.

Matrix 10-21 Conceptual framework: Problems with community restorative justice – comparative cross-case analysis

<b>Community Advice Office</b>	<b>Problems</b>				
	<b>Pressure on victims</b>	<b>Role of the Community</b>	<b>Mixed loyalties</b>	<b>Impact on offenders</b>	<b>Victim safety</b>
Bulwer	There is more pressure on the victims if they go the court route. Once the matter goes to court you cannot fix it.	It is culture that once you get married ( <i>ukugana</i> ) you cannot go back home.	In marriage there are things you cannot share with family and friends.	Apology was genuine and violence stopped.	The location of the office at the police station is a deterrent to further violence.
Ixopo	There is pressure from family members if you involve the police.	It is culture that once you get married ( <i>ukugana</i> ) you cannot go back home.	The decision of the in-laws is always biased in favour of the offender.	It brings peace and trust to our families. Husbands became more supportive financially and violence stops.	The offender is informed that follow-up will be conducted after mediation; this deters further violence.

Community Advice Office	Problems				Victim safety
	Pressure on victims	Role of the Community	Mixed loyalties	Impact on offenders	
Madadeni	Domestic violence is too complicated to be addressed by the law.	It is culture that once you get married ( <i>ukugana</i> ) you cannot go back home.	The in-laws put pressure not to go to the police.	Respect and support from my husband and the family is closer than before.	The offenders are aware the area is protected. Follow-up conducted after mediation deters further violence.
New Hanover	Domestic violence is too complicated to be addressed by the law.	Have established support groups for survivors of violence.	The family turns against you, and the in-laws are a problem.	Offenders apologise and show remorse.	Location gives an impression of the seriousness of the matter because CAO is based at the magistrate's court.
Selected problems as identified by Daly and Stubbs (2006)					

Each problem is discussed in turn in relation to multiple case studies.

### 1. Pressure on victims

Daly and Stubbs (2006:17) argue that “some victims may not be able to advocate effectively on their own behalf. A process that is based on building group consensus may minimise or overshadow a victim’s interests. Victims may be pressured to accept certain outcomes, such as an apology, even if they feel it is inappropriate or insincere. Some victims may want the state to intervene on their behalf and do not want the burden of restorative justice”.

#### Bulwer

The paralegals and focus group participants spoke of victims being pressured not to go to the police to report the offender. This comes from both family members and the offender himself. If victims do go to court, victims are pressurised to withdraw the Protection Order. Study participants all agreed that is very difficult for the parties to reconcile if the court intervenes. However, none of the participants had been pressurised to accept certain outcomes such as an apology as reported by Daly and Stubbs (2006:17). The paralegals concurred that some victims choose the intervention of the criminal justice system and that this is very clear from the start. A woman will state clearly what she wants and

paralegals support that choice; they had never encountered a victim that was pressurised to choose mediation but have had experience of women being pressurised to apply for Protection Orders, which they do not want. Daly and Stubbs (2006:17). speak of a different pressure that is foreign to rural women in KZN who participated in this study, that is being pressured to accept an apology. All the paralegals and focus group participants said that the apology was sincere. Some women say they just want their spouses to be given a warning by the police. When such a desire is not forthcoming, “achieving justice through the legal system is difficult or impossible” (Van Rooij, 2012:293). While violence against women and girls runs rampant, narrative from study participants suggest that “police and courts are largely incapable of providing assistance to poor communities” (Kigodi, 2013:15). Women who choose restorative justice are pressurised by their personal circumstances, such as being financially dependent on the abuser (Van Rooij, 2012:292).

### **Ixopo**

Paralegals and focus group participants from Ixopo said that family members exert pressure if they involve the police. The paralegals stated that victims come to the CAO seeking mediation after having been to the police station. Some come with an affidavit for a Protection Order, saying that the police referred them, because they only want their partners to be given a warning, not to be arrested. The trend in Ixopo is that the majority of cases where court intervention is sought are those of young women from informal settlements; older and married women seek mediation because they wish to remain in the marriage (Fawley and Daly, 2005:616).

### **Madadeni**

The focus group participants said that domestic violence is too complicated to be resolved through the courts. They acknowledged that their interests are overshadowed by their circumstances and cultural beliefs. This group said that, the ancestors would be unhappy if they resolve their domestic situations through the courts. They said if you go to the police and seek a Protection Order against your abusive partner, bad things happen to you. The ancestors will put pressure to you to opt for mediation and accept certain outcomes that you might not be comfortable with, but you accept the mediation decision because you are afraid to upset your ancestors. Mills and Grauwiler (2006: 365) note that one of the “theories underlying restorative justice is that all cultures must adapt their restorative traditions in ways that are meaningful to them”.

### **New Hanover**

New Hanover operates differently from the other CAOs in that the court refers the majority of domestic violence cases. The court asks paralegals to screen all cases to minimise withdrawals and to

determine if they have been pressurised to apply for Protection Orders. The paralegals said that the court was tired of victims opening cases and not attending hearings or confirming the Protection Order for which victims applied.

Schellenberg (2010:62) maintains that restorative justice includes the “maximum amount of voluntary cooperation and minimum coercion, because healing in relationships and new learning are voluntary and cooperative processes”. The findings of the study show that all the participants made their choice of their own free will and all paralegals stated that before mediation CBPs explain all the options available; the victims make a choice based on their unique situations.

## **2. Role of community**

### **Bulwer, Ixopo, Madadeni, Ixopo**

While Schiff (2011:235) contends that the community is the third stakeholder in restorative justice, Daly and Stubbs (2006:17) warn that “community norms may reinforce rather than undermine male dominance and victim blaming. Communities may not be sufficiently resourced to take on these cases”. The focus group participants and paralegals from all the advice offices indicate the relevance of community support but from a decidedly cultural point of view. As one focus group participant stated, “*It is our culture that once you get married (ukugana) you cannot go back home.*” This means that a woman is expected to address her marital issues and sustain the family. All the focus group participants concurred with this statement. The assumption is that, if they go to court, the court would not be sympathetic and would simply apply the law, in this case issue a Protection Order, without considering the cultural implications. However, culture can be used to justify women’s oppression and they endure abuse because culture dictates that they should put up with it. The fact that some communities may side with the perpetrator rather than the victim of domestic violence (Smith, 2010:259) may have cultural overtones.

Participants indicate that they were referred by friends, family members, and neighbours to CAOs as a form of community support for the victim. Community members support one another, but the kind of support has to be in a cultural context that at once advances women’s rights and family-sustainability as a component of cultural beliefs.

## **3. Mixed loyalties**

### **Bulwer, Ixopo, Madadeni, New Hanover**

According to Daly and Stubbs (2006:17) “friends and family may support victims, but may also have divided loyalties and collude with the violence, especially in intra-familial cases”.

All the participants agreed with the statement by Daly and Stubbs (2006:17) that family members and friends have divided loyalty; the main culprits are in-laws. Participants said that they have learned the hard way that “*In marriage there are things you cannot share with family and friends*” (MDFG). On the one hand, it was noted that, firstly, remaining silent avoided the stigma associated with domestic violence and secondly, it avoided victimisation by family members if victims report abuse to people outside the family. On the other hand study participants clarified that turning to restorative justice practices and processes “can sustain care for the victims over time (Schiff, 2011:232).

#### **4. Impact on the offender**

##### **Bulwer, Ixopo, Madadeni, New Hanover**

All the participants said that they were not pressured to accept an apology from offenders. Offenders always offered an apology. However, as Daly and Stubbs (2006:17) caution, “the process may do little to change offenders’ behaviour”.

All the participants agreed that restorative justice brings peace and trust to families. Husbands became more supportive financially and the violence stopped. A participant from Bulwer said, “*Family members have noticed a change in my husband’s behaviour*” (BWFG); while a participant from Madadeni stated, “*I get respect and support from my husband and my family is closer than before*” (MDFG). A participant from New Hanover said “*I get financial support, he buys food which he has stopped doing for a long time*”. However, now and then when he is drunk he takes chances and I had to remind him of the advice office and he keeps quiet” (NHFG). Paralegals and focus group participants believe that offenders’ respective apologies have been sincere. However, Stubbs (2010:982) contends that such apology must viewed from the point that “offenders are typically practiced at offering apologies as a means of buying favour only to reoffend. Apology and forgiveness are themselves highly gendered with strong expectations on women to accept apologies”. Nevertheless, paralegals across all cases reflected during interviews upon instances where offenders accepted responsibility for wrong-doing and thanked the CBPs for mediation intervention. As one offender is said to have put it “*I was almost out the door*” until the mediation encounter (MDP).

#### **5. Victim safety**

##### **Bulwer, Ixopo, Madadeni and New Hanover**

Uotila and Sambou (2010:201) argue that restorative justice is designed to ensure victim safety and a change in offender behaviour. All the paralegals interviewed in this study said that the location of their respective CAOs provides safety for the victim, because they are located at the police station or magistrate’s courts. They all mentioned that follow-up conducted after mediation is a deterrent to further violence. Sometimes, “We alert the police to be on standby if we feel that the offender is aggressive” (BWP1). “I just inform the offender that the police cell is right here” (IXP1). Three paralegals (IXP1, 2 and MDP) agreed that “We have not had a situation where our client was hurt, after mediation. We inform the offender that we are going to make a follow-up to find out how things are going. We think this is a deterrent to further violence”. According to NHP1, “The location of the CAO helps, as the offender gets an impression of the seriousness of the matter as we are based at the magistrate’s court. Any threat of further violence, the offender will be immediately arrested”.

To complete the conceptual framework on restorative justice, the next section continues to analyse the data from the above matrices in order to identify the benefits associated with restorative justice cited by the study participants.

#### 10.6.1.2 Cross-case comparative analysis of benefits of community restorative justice

Matrix 10-22 is followed by a brief description of how data respond to the benefits component of the conceptual framework.

Matrix 10-22 Conceptual framework: Benefits of community restorative justice

Community Advice Office	Benefits				
	Victim voice and participation	Victim validation and offender responsibility	Communi-cative and flexible environment	Relationship repair	More responsive to individual needs of victims
Bulwer	Participation is educational and empowering. Talk about the problem in private.	Opportunity to change behaviour, you hurt someone without realising the impact of that hurt. Violence stops.	It revives communication where parties were no longer communicating.	It’s better if you want to continue with the relationship. Restorative justice brings peace and facilitates reconciliation.	The victim and offender discuss solutions in an environment that is not oppressive.
Ixopo	Given enough time to explain problems. Free	Secure cooperation from offenders.	Provides a safe place to talk. Improves	It restores relationships and marriages. It	Victims are allowed to discuss past events and



Community Advice Office	Benefits				
	Victim voice and participation	Victim validation and offender responsibility	Communicative and flexible environment	Relationship repair	More responsive to individual needs of victims
	to express feelings, talk without fear.		communication and solve own problems.	brings peace and trust to our families.	feeling of hurt.
Madadeni	Patience to listen to our problems. The process is a private affair.	Gain respect and support from offenders.	In future communicates better. Problems are resolved quickly.	Saves marriages. Brings harmony within families.	It is healing for the victims to be able to tell their side of story.
New Hanover	The problem is resolved privately. No victimisation.	Feeling of safety and protection.	Communication is better, resolve own problem.	Brings peace, trust, respect and restores <i>Ubuntu</i> . Restorative justice process builds homes.	Victims have an opportunity to tell their story in their own language.
Selected benefits as identified by Daly and Stubbs (2005)					

Each benefit is discussed in turn to demonstrate overall multivocal (paralegals and service recipients) responses from the case studies generated by this conceptual framework.

### 1. Voice and participation

Green (2011:176) contends that restorative justice aims “to empower victims, providing them with a forum in which their voices are both heard and respected”. Belknap and McDonald (2010:370) argue that “both the victims and offenders must be actively involved in the process; and community groups and/or citizen volunteers must play facilitative and supportive roles”. Study participants respond to these contentions, case study by case study below.

#### Bulwer

Participants know what they want. They stated that any form of justice should accommodate the views of the victim. The mediation process gives them an opportunity to talk about the problem and express their views on how to right the wrong that has taken place in their relationship. The discussions take place in private. What they like the most about the mediation process, is that the offender is given an opportunity to change his behaviour and is able to see the harm that he has caused his wife and the impact of his behaviour on his children.

## **Ixopo**

Focus group participants said that they were given enough time to explain the problem, express how they were feeling, and could talk without fear. They felt safe at the magistrate's court and the counselling provided prior to mediation helped them to stay focused on the issue that brought them to the advice office, and gave them the courage to face the offender on the day of the mediation, the collaboration with the formal justice personnel contribute to the safety of the victim (Fulkerson (2001:356).

## **Madadeni**

According to a survivor of domestic violence "*Our paralegal is very patient; she listens to our long story.*" The participants appreciated that mediation was private; "*we do not like to hang dirty linen in public (ihlazo lasekhaya alikhulunywa kubantu)*". Grauwiler and Mills (2004:63) concur, noting that "the shame and stigma associated with the domestic violence may cause some women to feel the need to hide their involvement in an abusive relationship from friends and family, preventing rather than facilitating support at community level".

## **New Hanover**

Edwards and Haslett (2011:3) note that, in the course of their work with victims of domestic violence, they witnessed victims' willingness to speak not only about their struggle and grief, but also about their resilience and strength. In New Hanover, focus group participants stated that they were not victimised either during or after mediation. The findings from the focus group participants and paralegals indicate that having a place that is safe such as the advice office to tell their story was important to victims.

## **2. Victim validation and offender responsibility**

### **Bulwer, Ixopo, Madadeni, New Hanover**

Bennett (2011:247) observes that "victims rightly feel entitled to vindication from the offender, in which the offender through apology and proportionate amends retracts a wrong".

In this study, all the participants said that they had a positive experience of restorative justice; that telling their story face-to-face with a person that had been hostile to them in the past was healing. They all spoke of the patience of paralegals in listening to long stories. All the paralegals said that they provided guidance during mediation and gave victims and offenders enough time to ask questions in a respectful manner. Female victims of domestic violence from Bulwer stated that they appreciate that restorative justice provides an opportunity for the offender to change his behaviour and

for him to learn how much he has hurt his wife. A participant indicated “*you hurt someone without realising the impact of that hurt*”. In Ixopo, participants noted that restorative justice secures cooperation from offenders; the process makes offenders want to change their behaviour. Participants from Madadeni said they gained respect from their husbands by not reporting to the police. A participant said that reaching out to the advice office and choosing restorative justice instead of going to the police “*showed my husband that, I have a heart and I care about my family*”. Edwards and Haslett (2011:3) contend that “the opportunity to ask questions and express emotions can be very meaningful, particularly when combined with hearing an offender take responsibility for his harmful actions”.

### **3. Communicative and flexible environment**

#### **Bulwer, Ixopo, Madadeni, New Hanover**

Van Ness and Strong (2010:77) identify the function of a mediator which is “to regulate and facilitate communication within the encounter setting and to create a safe environment in which the parties can make their own decisions”. There must be, according to Uotila and Sambou (2010:196) “some capacity for accord, a willingness to be honest, a desire to settle the dispute and some capacity for compromise. Stubbs (2010:982) warns that, due to power imbalances, “the victim of violence does not have the capacity to negotiate freely and fairly with the abuser”.

Findings from this study comport with points made by Van Ness and Strong (2010:77) and Uotila and Sambou (2010:196) but Stubbs’ (2010:982) warning was found to be inapplicable to the rural women victims of domestic violence who participated in this study. All the participants agreed that restorative justice met their needs as victims of domestic violence, since they did not want to go to court as the court would take a decision they might not like. Bulwer participants said that restorative justice revives communication when parties are no longer communicating. In Ixopo, participants stated that the advice office provided a safe place to talk. Paralegals reveal that the CRJ processes and practices applied help the victim and the offender to learn to communicate again. As shown throughout the various case study chapters, victims felt free to express themselves and negotiate an agreement with the offender in the presence of a CBP as mediation facilitator. In addition, the high success rate of mediation across all CAOs demonstrate that the parties were able to solve their problem. Madadeni participants said that the mediation process has helped them and that they would be able to communicate better in the future. They added that their problems were resolved quickly. New Hanover participants also felt that the process provides an opportunity for parties to communicate better going forward and to solve future problems.

### **4. Relationship repair**

## **Bulwer, Ixopo Madadeni, New Hanover**

Findings from this study show that, overwhelmingly, rural female victims of domestic violence are concerned with repair of their relationship with their respective husbands rather than criminalising the husband or partner by use of the DVA. As scholars (Frederick and Lizdas, 2010:40; Sharpe, 2011:29) argue, crime upsets the equilibrium between victim and offender while restorative justice restores the equilibrium. All the study participants agreed with this statement and that restorative justice makes reconciliation possible. They said that if one wants to remain in the relationship, restorative justice is a better alternative. Victims of domestic violence who participated in this study made it very clear that if one goes to court, reconciliation is not possible. Focus group participants from Ixopo and Madadeni said that restorative justice restored their marriages; brought peace and harmony into their households and restored trust that had been lost in their families. In New Hanover, the participants stated that restorative justice processes brought peace and trust, and restored *Ubuntu*; they added that the restorative justice process builds homes.

### **5. More responsive to individual needs of victims**

#### **Bulwer, Ixopo, Madadeni and New Hanover**

Community-based paralegals' response to gendered violence "is guided by the principle of anti-subordination and draws on the expertise of women advocates in the communities they serve" (Stubbs, 2010:983). In so doing, the CBPs who participated in this study give victims the opportunity to tell their stories over and over again in their own language while identifying and addressing the needs of offenders (Zehr, 2005: 191, 200) so that CBPs can be more responsive to individual needs of victims. This includes post-mediation follow-up (Dissel and Ngubeni, 2003:9).

Narrative in matrices across the case studies indicate that meeting such individual needs include maintenance, survival needs, concern for children, and advancement of tailored forum shopping that sometimes makes concurrent use of criminal, traditional and informal justice systems. In addition, offenders who grapple with the disease of alcoholism – such as the farm workers in New Hanover – are referred for assistance. Interaction of CBPs with traditional courts demonstrates that cultural beliefs and practices such as refraining from offending ancestors and making animal sacrifice are taken into consideration when meeting the individual needs of victims.

Not only are solutions tailored to individual needs of victims. Rather, "offenders gain empathy skills, conflict management skills, and accountability for their actions" (Schellenberg, 2010:56) based upon the findings in this study.

### **10.6.2 Summary of cross-case analysis of problems and benefits associated with community restorative justice**

In relation to the problems associated with restorative justice, Stubbs (2010:976) suggests that CRJ justice practitioners must take note of differing positional interest of victims and offender, the differences should not be glossed over. Instead, differences should be attended to during the mediation process. Narrative from paralegals shows that these interests are balanced sometimes by conducting parallel interventions such as mediation and the formal process of protection orders.

Paralegals' processes and procedures indicate that they are able to deal with dominant partners during preliminary interviews, even before the mediation process begins. This sets a scene and indicates to the offender that CBPs know what they are doing and that the offence is taken seriously, even though the process is informal. All the participants, including the paralegals, spoke about the causes of domestic violence. The most important underlying factor – which often makes a woman refrain from reporting violence in the home to police, is women's lack of financial resources, which creates dependency and inequality. A participant from Bulwer acknowledged that if *"I had financial means and not so poor I would have long left my husband, but the reality is I am unemployed and there is no prospect of employment in my rural area"*.

Regarding the benefits of restorative justice, all the participants agreed that restorative justice makes reconciliation possible. They noted that if you want to remain in the relationship, it is a better alternative. They made it very clear that if you go to court, reconciliation is not possible. Domestic violence survivors from Ixopo and Madadeni said that restorative justice has restored their marriages and brought peace and harmony and restored trust that was lost in their families. In New Hanover, the participants said that restorative justice brought peace and trust, and restored *Ubuntu*; they added that the restorative justice process builds homes.

The next section focuses on the second prong of the meta-conceptual framework – problems and benefits associated with the use of community-based paralegals.

### **10.6.3 Cross-case comparative analysis of problems and benefits of community-based paralegals**

Table 4-1 is reproduced for convenience. Data in matrix 10-23 reflect problems associated with the use of CBPs while data in matrix 10-24 show benefits of the use of CBPs. A discussion follows each of the matrices relative to the four case studies.

Table 4.1 Conceptual Framework: Problems and benefits of community-based paralegals

<b>Problems</b>	<b>Benefits</b>
-----------------	-----------------

Second class justice	Capacity to straddle plural legal system
Cheap alternative to justice	Use a wider and more flexible set of tools
Lack the guarantee of independence and consistency	Need not limit themselves to an adversarial approach
Lack of state regulation of services	Cost effectiveness and availability
Divert pressure to improve training of lawyers	CBPs provide culturally competent services
Unequal power relations	CBPs as partners with the formal justice system
Adapted by researcher from Noone, 1991; Maru, 2006; and Wojkowska, 2006	

### 10.6.3.1 Cross-case comparative analysis of problems with community-based paralegals

The data are interpreted in the broadest form in matrix 10-23.

Matrix 10-23 Conceptual framework: Problems with use of community-based paralegals: comparative cross-case analysis

Community Advice office	Problems					
	Second class justice	Cheap alternative to justice	Lack the guarantees of independence and consistency	Lack of regulated quality control	Divert pressure to improve training of lawyers	Unequal power relations
Bulwer	CBPs provide relevant services to suit individual needs.	Paralegals fill the knowledge and legal gap left by formal justice.	We do not take sides; a dishonest victim is not tolerated.	Role played by paralegals should be recognised.	Unlike trained lawyers, paralegals offer a comprehensive service that is quick with no delays due to legal procedures.	Unequal power dynamics between the parties is removed through communication.
Ixopo	They provide swift justice for victims.	Paralegal intervention is designed to meet the	Not easily influenced, our services are for free.	Regulation but independent. Regulation	Their services include counselling, which lawyers	Close the power gap with face-to-face dialogue.

		needs of the victim and the offender.		need not limit our work.	do not offer.	
Madadeni	Successful outcome of cases involves addressing root causes of the problem.	The intervention promotes harmonious relationships . Not a cheap alternative.	Do not take sides; we cannot be influenced because we do not charge for the service.	Regulation will limit our work, since we use various approaches.	Paralegals have time to conduct follow-ups through home visits because they live in the community that they serve.	By building confidence and emotional stability of the victims, the power gap is closed.
New Hanover	Paralegals deal with the problem holistically and directly.	Intervention makes law relevant to the people.	Well respected because do not take sides/ understand community dynamics.	Regulation will limit the scope of our work.	Focus group participants need counselling support after the case, which is not available from lawyers.	Challenge the power dynamics, through engagement with the offender.
Selected problems as identified by Cappelletti, (1992), Noone (1991), Maru (2006) and Wojkowska (2006)						

The problems are next interpreted in relation to data adduced by this study.

### 1. Second class justice

Golub (2000:303) observes that “one could argue that paralegals unfairly condemn the poor to ‘second-class’ legal services”. More than two decades ago Cappelletti (1992:35) noted that the “search for alternatives has represented a fundamental part of what is called “the third wave in the access-to-justice movement. However these alternatives can end up providing second class justice”. However, rural female victims of domestic violence that participated in this study do not consider restorative justice processes and practices delivered by CBPs to be second class justice.

#### Bulwer

The paralegals are confident that CBPs provide relevant service to victims of domestic violence tailored to their individual needs and not second-class justice. Community-based intervention is not second class justice; in fact the focus group participants believe that paralegals provide a service more professional than other institutions. Victims stated that respect, patience and the ability to listen to their problem is what draws them to paralegal services. Grauwiler and Mills (2004:6) explain that “historically, intervention in the area of domestic violence has always started at grassroots level,

through experimentation, advocacy and respect for a diversity of views” and for the service to be meaningful to recipients, the “needs of those who avoid the formal justice system must be taken into account”

### **Ixopo**

Focus group participants who are benefiting from the services of paralegals stated that paralegals deliver quality service, not second class justice, and that the courts have no time to listen to their stories. Paralegals contend that their services are not second class justice; they are capable of bringing about change quicker; their brown envelopes (calling letters to offenders) stop violence immediately, their calling letters are taken seriously and behaviour change begins before mediation even starts. The argument that paralegals condemn the poor to “second-class” legal services does not hold according to CBPs, CAO service recipients and Golub (2000:303).

### **Madadeni**

Paralegals assist the parties to get to the root causes of their conflict, and achieve a better outcome without going to court. Paralegals do not only deal with specific problems; every client is regarded as having a unique problem that requires a unique intervention. Looking at the root causes, the intervention may require multiple strategies to deal with the problem. For example, the problem of domestic violence might include assistance with an application for a Protection Order or assistance with the registration of a customary marriage as well as counselling. This is a comprehensive service, not second hand justice. Restorative justice is designed to allow for a healing process; the counselling offered by paralegals contributes to healing and is evidenced by the developmental role that CBPs display through moral authority and honouring human dignity (Buckenham, 2014:4, 7) as well as valuing cultural identity (Kigodi, 2013:38)

### **New Hanover**

Paralegals provide a comprehensive service, which looks at the problem presented, including dealing holistically with the cause of the problem; this is not second-class justice. Domestic violence might be addressed by looking at the cause such as failure of the husband to pay maintenance to the wife and children. Addressing the maintenance issue stops the violence. Grauwiler and Mills (2004:66) argue that restorative justice provides the “opportunity to address the problem holistically and directly”. Study participants disagree with the tendency of practicing lawyers and bar associations who seek to avoid the use of CBPs to fill justice service delivery gaps (Walsh, 2010:19). Rather, study participants are more aligned with Cappelletti’s (1992:35) point that “there are situations in which, far



from producing a second-class result, restorative justice produces results, which, even qualitatively, are better than ordinary adjudication”.

## **2. Cheap alternative to justice**

According to Robb-Jackson (2012:3), “there are concerns that the type of justice paralegals promote, principally for women may reduce the responsibility of the state to make the justice system more accessible to women. Other concerns raised by critics of CBPs are the limited length of their training programmes and that paralegals do not fully comprehend the law”.

It is clear that paralegals’ work has had an impact in rural communities. All the participants in the focus groups expressed satisfaction with the work of paralegals and added that CBPs go beyond the call of duty when BPs assist community members. Paralegals have an advantage because they speak the same language and share the same culture as their clients. It is said that CBPs promote harmonious relationships in families. Focus group participants said that CBPs have a simple way of explaining the law, making it relevant to the people. Moreover, CBPs and focus group participants pointed to the accredited training that CBPs receive as contributing to success with mediation encounters.

### **Bulwer**

Paralegals disagreed that the interventions they provide are a cheap alternative to justice. Rather, they contend that CBPs fill the knowledge and legal service delivery gap left by the state. The experience and skills acquired by CBPs has shown that they are the first port of call and beacon of hope for Bulwer residents. Focus group participants mentioned that an added benefit is the education they receive from the Bulwer paralegals about issues that affect members of rural communities. As one focus group participant notes “*Our husbands were very happy that we came to the paralegal office to report instead of the police*” (BWFG). Paralegals believe that the criticism that they provide cheap justice because of lack of adequate training amongst other things is not accurate and is too general because they are well trained.

### **Ixopo**

In Ixopo, the programme is designed to meet the needs of the victim and the offender. Paralegals’ approach is different from other structures responsible for service delivery in domestic violence cases. The mediation deliberation is not ‘one-size-fits-all’; it is tailored to suit each individual case and is not a cheap alternative to justice. As an Ixopo paralegal indicated “*Our process is quick but produces results, mediation works; it is definitely not cheap justice. If it did not work we would have stopped mediating domestic violence cases a long time ago. Cases take long to finalise, yet mediation is a straightforward process that is finalised within a period of days.*”

## **Madadeni**

Study participants in Madadeni refute Ptacek's (2010:7, 8) point that scepticism exists about whether offenders can truly be held accountable in informal restorative justice practices. The Madadeni paralegal provided examples of statements made by offenders that mediation intervention promotes harmonious relationships. Paralegals' work has brought harmony to the home, and changes in gender relations in cases of domestic violence, and empowers victims. Paralegals know what they are doing when it comes to domestic violence and other matters, according to Madadeni focus group participants.

## **New Hanover**

New Hanover study participants indicate that paralegals make the law relevant to the people. Their close working relationship with the magistrate in New Hanover brings the law closer to the people; the intervention is not a cheap alternative to justice. Furthermore, New Hanover study participants do not believe that an apology from an offender neglects the victim's primary needs, nor does an effort by CBPs toward offender rehabilitation (such as receiving counselling due to alcoholism) ignore the victim's needs and pressure her into forgiveness (Nancarrow, 2003:16). To the contrary, a focus on both parties, according to New Hanover CBPs and survivors of domestic violence facilitates family unity and sustainability – which is a chief aim of the rural women who participated in this study.

### **3. Lack of guarantee of independence and consistency**

#### **Bulwer, Ixopo, Madadeni, New Hanover**

Community-based paralegals do not charge fees and are not contracted to promote the interests of a particular client; they take a broader view of a case, consider both sides of a dispute and pursue a result that is free from bias and favour (The Community-based Paralegals: Practitioners Guide, 2010:13)

All the paralegals that facilitate mediation and focus group participants who are parties to mediation said that CBPs do not take sides; their services are free, CBPs will abandon a case if a victim lies, and CBPs are trained to detect a dishonest victim. The success rate of CBPs in resolving cases through mediation indicates that they are as professional and neutral as judicial officials. All the focus group participants stated that, based upon observation of the manner in which paralegals attend to their cases, CBPs are well trained, know what they are doing, and treat the parties equally in a mediation encounter and post-mediation. Several CBPs indicated that victims are at times angered when a CBP demonstrates neutrality to both parties to the mediation encounter.

#### **4. Lack of regulated quality control**

##### **Bulwer, Ixopo, Madadeni, New Hanover**

Robb-Jackson (2012:12) points out that, paralegals are said to “often provide substandard services, and lack proper oversight because they are not governed by any regulations”. Similarly Dugard and Drage (2013:33) explain that the “overarching problem in the CBP sector is the unclear regulatory environment within which CAOs operate; however, this can also give them an advantage by allowing a large number of unique, locally specific and dynamic CAOs to emerge. The downside is that there is no comprehensive quality control and assurance”. This proposition is supported by other scholars (Kahn-Fogel, 2012:776; Franco, Soliman, and Cisnero, 2014:31).

While all the paralegals support the recognition and regulation of their work, they are aware that this will come with strings attached and will limit the scope of their work. Franco *et al* (2014:31) are of the opinion that, because paralegals deal with a variety of cases and use multiple approaches to resolve cases, “care should be taken that the standards imposed do not serve as a filtering or excluding mechanism which would undermine the vibrancy and dynamism of the paralegal sector as an alternative to access to justice for those who avoid the formal justice system”. Paralegals believe that other professionals look down on them because they do not have statutory regulation. They are of the opinion that regulation should not compromise the flexibility of their work as their approach is designed to suit each individual case. Domestic violence survivors indicate across cases that CBPs should be recognised by the state but not be co-opted by the state and mediation work of CBPs should not be controlled by the state.

#### **5. Divert pressure to improve training of lawyers**

##### **Bulwer, Ixopo, Madadeni, New Hanover**

Robb-Jackson (2013:23) points out that a potential risk of paralegal programmes “is that they may reduce the responsibility of the state to make formal justice processes more accessible”. Yet, according to Kahn-Fogel (2012: 725) “increasing the number of lawyers would not, in and of itself ensure the availability of legal services to the average person”. To Franco, *et al* (2014:31) it is unlikely “that the number of public interest lawyers will increase substantially in the future, the need for paralegals to reach out to the poorest of the poor will continue in communities suffering from various kinds and degrees of social injustice”. Generally, lawyers are not trained “in communication skills and cultural, race, gender, and class issues” (Noone, 1991:34). Training in positive law through

statutes and case law extricates a situation from its economic, political, and socio-cultural context (Halliday, 2012:1) which is contrary to African epistemologies (Ndima, 2003:334).

Based upon the findings in this study, it does not appear that using CBPs diverts pressure away from the state to provide lawyers to represent clients in far-flung rural areas where a holistic approach is needed to address needs of domestic violence victims who are without means to pay for legal services. In addition legal representation is not required in informal justice systems and prohibited in traditional justice systems – both systems predominate rural areas. Data from this study show that, unlike lawyers, paralegals offer a comprehensive service that is quick, free and without delay. CBP services include counselling, follow-up home visits and telephone calls to parties and CBPs live in the community that they serve, all of which are in further contradistinction to most lawyers. All the focus group participants said that they need the kind of holistic support provided by CBPs and CAOs, which is not available from lawyers trained in rule of law orthodoxy indicative of the formal justice system.

## **6. Unequal power relations**

### **Bulwer, Ixopo, Madadeni, New Hanover**

Wojkowska (2006:20) argues that the traditional justice system does not work to resolve “disputes between parties who possess very different levels of power and authority. Unequal power relations may reinforce existing power hierarchies and social structures at the expense of disadvantage groups. Mediated settlements can reflect what the stronger is willing to concede and the weaker can successfully demand” (Wojkowska, 2006:23).

Paralegals across all cases stated that restorative justice revives communication between the victim and the offender and therefore addresses the unequal power dynamics between the parties. Paralegals assist in rebuilding the confidence and emotional stability that was lost during the period of conflict between the victim and the offender. Face-to-face encounters facilitate dialogue that closes the power gap. This promotes reconciliation and restores emotional stability. Focus group participants contended that paralegals are very experienced and “*we can see they are well trained, they know what they are doing*” (BWFG).

#### **10.6.3.2 Cross-case comparative analysis of benefits of community-based paralegals**

Data in matrix 10-24 reflects how the data respond to the component of the conceptual framework that encompasses the benefits associated with CBPs as perceived by the study participants. Paralegals help communities make formal law and government work for them. Community-based paralegals are

believed by service recipients to hold government personnel accountable, especially when there are failures in service delivery.

Matrix 10-24 Conceptual framework: Benefits of community-based paralegals – comparative cross-case analysis

Community Advice Office	Benefits					
	Capacity to straddle plural legal system	Use a wider and more flexible set of tools	Need not limit themselves to adversarial approach	Cost effectiveness and availability	CBPs provide culturally competent services	CBPs as partners with the formal justice system
Bulwer	Paralegals operate within the plural system. They know the law, customary law and work with traditional authorities and formal courts.	Paralegals handle a substantial amount of cases that are resolved through mediation, and some to a lesser extent are dealt with through the courts (Protection Orders).	By maintaining contact with the victim and involving other stakeholders, paralegals reduce retaliatory violence against women.	Paralegals are community-based, accessible and their services are free.	Paralegals conduct the process in the client's own language and are familiar with the client's culture.	Paralegals serve as a link between the justice system and the community.
Ixopo	Based at the court, clients benefit from knowledge of the law, and tradition and the relationship with the formal justice system.	Clients benefit from a wide set of tools such as mediation, networking skills, power to negotiate and educate.	On-going physical presence in the community makes it easy to conduct follow-up on cases to check on clients. Courts do not have such a system.	The paralegal process is simple and flexible. The formal legal process is confusing and alien to community members.	Understanding local culture is important because it is easy to dismiss another person's culture if you do not live it.	Paralegals remove language barriers between the formal justice system and clients by explaining the legal process in the language clients understand.
Madadeni	Partnership with the traditional authority is an advantage. The CBP	Wide networks to solve client's case/ educate, mediate and use the formal law as a	Paralegals engage with the case until it is resolved without going to	Paralegals are recognised for providing cost-effective, relevant,	What is culturally important might not be important to a person from another	Paralegals' effectiveness and impact on cases is achieved through networks with

	offers advice that covers both the law and customary law.	backup.	court.	services.	culture.	justice systems.
New Hanover	Being based at the court is an advantage combined with knowledge of culture and customs and knowledge of the law.	Paralegal use mediation, Protection Orders, networks to refer cases and empowerment tools.	Paralegals strengthen and complement the formal and the traditional justice systems.	Women have a greater say in mediation. The courts are confusing for rural people.	Paralegals close cultural barriers because they are from the same community.	Collaboration with the formal justice system on a case-by-case basis benefits clients.
Selected benefits as identified by Noone, 1991; Maru, 2006; and Wojkowska, 2006						

Selected benefits are next discussed across cases and in relation to literature.

## 1. Capacity to straddle plural legal systems

### **Bulwer, Ixopo, Madadeni, New Hanover**

According Maru (2006b:470) “paralegals are more capable than lawyers of straddling dualistic legal systems”. Paralegals are familiar with local traditions, customs and cultural practices. They also have a basic understanding of the law. They adopt a holistic approach to problem-solving; for example, a domestic violence case could be resolved through mediation and based on the situation, a client could be advised to apply for a Protection Order at the same time. All the paralegals said that they take cases referred by traditional courts and that clients benefit from their knowledge of the law and tradition. Their advice covers both rule of law orthodoxy and customary law. Chapters 6-9 show that they operate within the plural legal system, assisting clients to navigate various systems.

## 2. Have a wider and more flexible set of tools to do their work

### **Bulwer, Ixopo, Madadeni, New Hanover**

Maru (2006b:470) notes that “paralegals have a wider and more flexible set of tools, including community education, mediation and community organising”. The Community-based Paralegals: A Practitioners Guide (2010:16-22) notes that “paralegals have a repertoire of tools including mediation, negotiation, legal advice, and advocacy” which enable CBPs to tailor remedies to specific needs clients while saving time and resources which poverty-stricken people in rural areas cannot afford.

All the paralegals demonstrated pragmatic skills in handling a substantial number of cases through CRJ. Paralegals handle cases that went through the court system equally well; they demonstrate an impressive success rate with assisting clients with completion of applications for Protection Orders that were subsequently confirmed by the court. Paralegals also link their clients and community members with other service providers; they do the preliminary work such as assisting with paperwork and other requirements. This ensures that their clients receive quality service instead of being sent from pillar to post due to non-compliance with other institutional mandates. Paralegals educate and raise awareness of communities on a variety of issues affecting those communities. All the victims of domestic violence confirmed during focus group sessions that they have been empowered by paralegals; this includes education at the office and attending workshops organised by the paralegals given the flexible set of tools applied by CBPs.

### **3. Need not limit themselves to adversarial approach**

#### **Bulwer, Ixopo, Madadeni, New Hanover**

Maru (2006b:470) observes that paralegals do not limit themselves to an adversarial approach. Schonteich (2012:25) found that paralegals are playing an increasingly important role in enhancing access to justice, largely through a non-adversarial set of tools. Dugard (2006: 263) notes that paralegals “can have highly specialized knowledge of particular areas with which the lawyer may be unfamiliar, such as alternative justice dispute mechanisms and cultural practices”.

Findings from this study show that – across all case studies – CBPs employ techniques during the mediation encounter designed to facilitate family-sustainability when parties seek to salvage their respective relationships. The non-adversarial approach of CBPs is further evident from CBPs’ efforts to tackle the root problems underlying domestic violence in a culturally competent way.

### **4. Cost effectiveness and availability**

#### **Bulwer, Ixopo, Madadeni, New Hanover**

Rural people struggle to access services from legal professionals. This is because fees for legal services are out of the reach of most people who live in rural areas. Lawyers are geographically inaccessible; the majority have offices in town. According to Robb-Jackson, (2012:4) community-based paralegals “are recognised for providing cost-effective, relevant, and proximate justice solutions. They improve the accessibility and delivery of legal services. They are closer to the communities they serve and have been successful in reaching the poor, particularly women and those living in rural areas”.

Findings from this study confirm that CBPs are community-based and accessible, and their services are free. Most community members do not understand the language of the law. Focus group participants state that lawyers have no time to explain the law in simple terms. All the paralegals indicate that even if people understand the law, it is confusing and alien to them. Focus group participants said they are not allowed to have a say in court except to answer the questions asked or to play a role in action taken by the court against offenders. In contrast, the process of restorative justice employed by paralegals allows victims to express their feelings to the offenders and permits offenders to express themselves and take responsibility for their actions so that parties establish communicative action going forward.

## **5. CBPs provide culturally competent services**

### **Bulwer, Ixopo, Madadeni, New Hanover**

Wojkowska (2006:13) found that formal justice systems could be culturally uncomfortable for rural women and that “going through the formal justice system may lead to more problems”. Vorster (2001:54) observes that knowledge of the “cultural context of the customs, ideas and practices is essential”. He submits that in the field of customary law, such knowledge might promote justice and harmonious relations between people.

Focus group participants noted that their culture is not compatible with the DVA and that tradition dictates that problems be resolved within the family before involving outsiders. From the cultural perspective a focus group participant revealed that “*we also do not want to upset our ancestors*” (NHFG). In Zulu culture, not unlike African culture in general, ancestors are concerned with family unity. The use of the DVA has the potential of disintegrating families. Findings from this study showed that, where CBPs are unable to handle certain cultural matters related to domestic violence issues, CBPs refer those cases to traditional courts and may assist traditional courts in resolving cases.

## **6. CBPs as partners with the formal justice system**

### **Bulwer, Ixopo, Madadeni, New Hanover**

According to Schonteich (2012:26), paralegals play a “constructive role as intermediaries between the formal criminal justice, the traditional justice system and local communities who are often suspicious of the rules and processes of formal justice”. Golub (2003:35) points out that paralegals’ effectiveness also depends on their relationships with law enforcement agencies and the political arena in which they operate. Paralegals indicated during interviews that they work closely with the police, courts and traditional authorities. The informal, grass-roots partnership between CBPs and the criminal justice system is a bottom-up relationship, not a partnership achieved through a memorandum of



understanding which may have a top-down on approach to realities on the ground. The informal partnership with the criminal justice system includes CAOs being located in police stations and magistrate courts, police and court personnel serving calling letters on offenders on behalf of CBPs and police providing transport to CBPs for follow-up home visits to clients. In addition, CBPs assist clients to navigate various justice systems as well as other service providers such as government departments.

#### **10.6.4 Summary of cross-case analysis of problems and benefits of community-based paralegals**

Through the use of this conceptual framework, this study has shown that the work of CBPs is having an impact on families in rural communities. All the participants in the focus groups expressed satisfaction with the work of CBPs, adding that CBPs go beyond the call of duty to assist community members. The paralegals in rural KZN have an advantage because they speak the same language and share the same culture as their clients. It is said that they promote harmonious relationships in families. The paralegals noted that they explain the law in a simple way, making it relevant to rural people. Community-based paralegals are recognised for providing cost-effective, relevant, and proximate justice solutions; this improves access to justice. However, paralegals enter the legal system at a low level. Paralegals have used this to their advantage in establishing grass-roots relationships with other front-line service providers. The findings from interviews of paralegals and focus groups of survivors of domestic violence converge.

With the results of the social science (non-doctrinal) data analysis in mind as well as the analytical outcomes relating to the meta-conceptual framework, the following section discusses the application of the DVA and domestic violence case precedents in relation to the results of the social science data analysis. The doctrinal analysis provides the legal component of the socio-legal framework guiding this study.

#### **10.7 Doctrinal Analysis of the Domestic Violence Act and Case Law in Relation to the Social Science Findings of this Study**

This chapter presents a cross-case comparative analysis that shows how the data adduced help achieve the study's research objectives, answer the research questions and respond to the meta-conceptual framework. The social science meta-conceptual framework, along with the figures and matrices that precede it in this chapter, display the social science data. To advance a socio-legal framework, the social science component of the study is analysed in relation to the law that impacts the aims of the

social science research. The DVA and case law pertaining to domestic violence are analysed in relation to the social science data generated by this study. Based on the social science findings from case intake and outcome, the interviews with paralegals and focus groups of survivors of domestic violence, the following questions are posed: Is formal law and traditional justice effective in the rural areas? If so, how? If not, is there a reason based on the findings of this study?

The study of the law is concerned with the South African Domestic Violence Act No. 116 of 1998 (RSA, 1998a), which came into operation in 1999. This law, which is referred to in this section as the “aims to provide maximum protection to victims of domestic violence. The provisions of the DVA were intended to eliminate all forms of domestic violence”. Provisions of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) (RSA, 1998c) and the Criminal Procedure Act No 51 of 1977 (RSA, 1977) are also referenced in this section.

### **10.7.1 Human actions of domestic violence**

The DVA statute sets out a broad range of actions that constitute acts of domestic violence; this is discussed in chapter 2 relating to Part one sections 1 and 2 of the DVA. The social science findings on case intake indicate that in the case of Bulwer, 40% of domestic violence involved emotional abuse, 35% economic abuse, and 10% physical abuse followed by sexual abuse at 5%. In contrast, at New Hanover, 70% of cases involved physical abuse. This was confirmed during the interview with NHP1, *“In New Hanover because we service farm workers and farm dwellers there is a problem of alcohol abuse in the area. Seventy per cent of cases involve physical violence.”*

At the Bulwer CAO, CBPs have been able to address verbal, emotional and psychological abuse through their restorative justice approaches. The literature review shows that these forms of abuse are difficult to prosecute. As noted in chapters 6 to 9, some domestic violence cases brought to the advice offices involve all these forms of abuse, including sexual abuse. Some cases of sexual abuse are referred from the traditional court to the CAOs; paralegals reported that traditional authorities are reluctant to deal with sexual abuse cases. The Madadeni paralegal stated during the interview that community members are told to report sexual abuse cases to the CAO before approaching the traditional court. An Ixopo paralegal notes that traditional courts refer sexual abuse cases, mostly if the complainant is a woman. The reason is that older men are most affected by this problem.

Paralegals note that women rarely apply for protection orders for sexual abuse. Sexual abuse is regarded as private matter for rural women, something that they cannot disclose to anyone unless they trust that person, paralegals are trusted in this matter by some not all women. An application for protection is unlikely to include sexual abuse. Women are aware that verbal, emotional, psychological

and/or sexual abuse in a relationship is difficult to prosecute. The New Hanover paralegals report that the cause of physical violence amongst their clients was alcohol abuse. In *S v Mashelele* (2003) JOL 12274 (T) the accused (offender) beat his wife; the beating happened during the weekend after he had partaken of some liquor. This fact that he was under the influence of alcohol when he committed an act of domestic violence was used as one of the mitigating factors to reduce his sentence. The case is discussed in full below.

### **10.7.2 Judicial measures for domestic violence**

Part Two Sections 3, 4, 5, 6, 7, 8 of the Domestic Violence Act

In terms of the Criminal Procedure Act No 51 of 1977 (RSA, 1977) Sec 40 (1) (q) (as amended by Sec 41 of Act 129 of 1993 and Sec 4 of Act 18 of 1996) (as added by Sec 20 of the Domestic Violence Act No 116 of 1998), make provision for the arrest of the perpetrator by the police officer a without a warrant of arrest at the residence where an act of domestic violence has taken place if he reasonably suspects that an offence has been committed which has an element of violence against the victim.

The DVA (Act 116) provides for the issuing of Protection Orders. This is a judicial measure introduced to protect victims (mainly women) from harm. The judicial measures provided by the Act are intended to give victims swift and effective protection. The procedure is meant to be readily available and is thus applicable at the level of the magistrate's court.

#### **10.7.2.1 Bulwer community advice office (case study one)**

According to the information obtained from the Bulwer CAO, only 7% of the total domestic violence cases handled was referred for Protection Orders. This is a small number compared with the 66% of the cases that were dealt with through the restorative justice approach. The reason for the low number is provided in the qualitative data from the interviews with CBPs. During the focus group discussions, all the participants argued that Protection Orders are not a popular means of providing a solution to domestic violence. BWFG participants reported that, "*A Protection Order means that he leaves the home and that is usually followed by divorce*". This statement is supported by BWP2: "*I had post-Protection Order mediation and the man was adamant he is going to leave his wife if she does not cancel a Protection Order.*" This statement is supported by BW2: "*I had post-Protection Order mediation and the man was adamant he is going to leave his wife if she does not cancel a Protection Order.*" In *S v Rahlau* (2010) JOL 26067 (FB) the defendant, in contravention of the Protection Order, verbally abused and stabbed the complainant with a broken bottle. The counsel for the defence argued that the complainant was passive during the trial and did not demand to be heard, even though she was

entitled to be heard. It was said that the complainant was denied an opportunity to “exercise the choice to testify or not testify against her husband”. The defence contended that the magistrate had failed to explain the provisions of Section 195(1) of the Criminal Procedure Act (CPA) 51 of 1977 (RSA, 1977), which provides “that the wife of an accused person shall be competent to give evidence in support of the prosecution in a criminal case against her husband, but that she cannot be compelled to do so. However, the state pointed to exceptional circumstances where a wife who is, first and foremost, a competent prosecution witness against her husband, is also a compellable prosecution witness against him”. Kruger J explained that prosecutors sometimes “withdraw criminal charges laid by abused wives against their accused husbands. They often do so solely in the interests of their marriage in order to promote domestic peace and possible reconciliation between the parties. They do so at their free and unfettered discretion. An abused spouse cannot, in terms of section 195(1), dictate to the prosecutor that he/she should drop the charges against her husband. On the contrary, the law empowers the prosecutor to compel an abused spouse to testify for the prosecution even if she is unwilling to do so”. Other statutes such as the CPA govern the DVA and prosecution during domestic violence trial and can be used if is necessary to decide a case as pointed out by Kruger J. The quantitative data from Bulwer show a total of 25 cases (7%) were referred for protection orders over a period of three years. Of these cases 17 were granted an interim order by the presiding magistrate and 10 of the 17 protection orders were later confirmed. The CBPs explained that many orders are withdrawn because neither the victim nor the offender appeared in court and the other 8 of the 25 cases did not go beyond the application. The social science data, (the descriptive statistics) confirm that the statutory provisions of the DVA are not providing the solution needed in most cases of domestic violence. The focus group participants noted that, once you involve the courts, reconciliation is not possible and life is not the same. Women do not want to testify against their husbands, if they are compelled to do so they simply do not cooperate. As study participants indicated, following through on protection orders can cause adverse and unwanted, if unintended, consequences for women.

Data in matrix 6-10 reveals that Bulwer paralegals handle cases involving registration of customary marriages; some of the cases are referred from traditional courts. There are problems of domestic violence related to customary marriages especially with the registration of such marriages. For example, a man will marry one woman by customary law and another in a civil marriage. The challenge occurs when the man dies and there are two women, one married through customary and the other through civil marriage both of whom seek inheritance from the estate of the deceased husband.

In terms of the Recognition of Customary Marriages Act (RCMA) 120 of 1998, all customary marriages concluded before the passing of the RCMA have to be registered for the marriage to be

recognised. According to this RCMA customary marriages are concluded in community of property. In *Gumede v President of Republic of South Africa* 2009 (3) SA 152 (CC) Moseneke J points out that “parliament appears to have made a conscious election that all new customary marriages should be marriages in community of property and of profit and loss and that by implication, they are in harmony with the communal ethos that underpins customary law”. If a man decides to marry another wife, a court application must be made and the first wife has to consent to the second marriage. In *Netshituka v Netshituka* 2011 (5) SA 453 the deceased married a fourth wife by civil marriage while his other three marriages were still in existence. Petse AJA explained the implementation of the RMCA as follows “Section 1 of the Act states that (1) a man and a woman between whom a customary union subsists are competent to contract a marriage with each other if the man is not also a partner in a subsisting customary union with another woman. (2) Subject to subsection (1) no person who is a partner in a customary union shall be competent to contract a marriage during the subsistence of that union. Subsection (3) barred a marriage officer from solemnising the marriage unless he has first taken from him a declaration to the effect that he is not a partner in a customary union with any woman other than the one he intends marrying. And in terms of the Act ss (5) a man who made a false declaration with regard to the existence of a customary union between him and any woman made himself guilty of an offence”. Petse AJA “held that the civil marriage conducted in 1997 while the man was partner to an existing customary union concluded in 1956 was null and void”. In practice men are not adhering to the RCMA and they are continuing with the traditional practice of taking wives and untruthfully denying the existence of other customary unions. Men are enabled to take this action because rural women do not register their customary unions and are ignorant about the consequences of non-registration. While the intention of RMCA was to protect the rights of women married under customary law, data from this study show that the practical implementation of the RMCA is interfering with customary marriage practice and is complicating the lives of the very rural women it sought to protect. The case shows a conflict between the rule of law orthodoxy and customary law. This in addition has weakened the jurisdiction of the traditional courts, as discussed in chapter 2 section 2.7.3.3.

#### 10.7.2.2 **Ixopo community advice office (case study two)**

In the case of the Ixopo CAO, 14% of all domestic violence cases were referred for a Protection Order; once again a small number compared with the 80% handled through the restorative justice approach. Some of the cases were resolved through mediation and a Protection Order was also applied for as a back-up. The cases involving Protection Orders involve assault, and by the time they are referred to court the victim is ready to apply for a Protection Order. In this office paralegals mentioned that married women prefer mediation, while young people who are cohabiting, especially

those living in squatter settlements apply for Protection Orders. Ixopo focus group participants made the following statement in relation to approaching the courts for Protection Orders: “*We do not want our husbands to be arrested and lose their jobs*”. In support of this statement, IXP1 said, “*Women do not want their husbands arrested and to lose their jobs. It is difficult to come out of jail and find a job, and they do not want to be responsible for their husband’s criminal record. There is the consideration that he is a breadwinner*”.

In *S v Mashelele* (2003) JOL 12274 (T), the defendant was charged with assaulting his wife. She was not seriously injured and did not require medical treatment. The sentence was R4 000 or eight months’ imprisonment. The defendant was incarcerated because he did not have the money to pay the fine. Du Plessis AJ held that the court had lost sight of the extremely negative impact that the incarceration of the accused must have had on his family. He said there were no serious injuries to warrant such a sentence, and that the defendant’s family was immediately and severely affected by the accused’s inability to earn an income and support them. Furthermore, there was a possibility, if not the likelihood, that the accused would not be employed again after having been incarcerated. He went further to state that the short-term incarceration of the defendant because he could not pay the fine, subjected him to degradation, humiliation and deprivation. The accused had probably lost his employment. His unemployment might destabilise yet another unfortunate group of dependants who have no other source of income. Du Plessis AJ held that an appropriate sentence in the circumstances was caution and discharge.

Although the DVA, according to domestic violence survivors, does not meet the needs of rural women, the judicial decision noted above comports with the views of CBPs, focus group participants and the social science literature. Bonthuys (2014:117) argues that the “reality of poverty of African and black women exacerbates the prevalence and pernicious effects of domestic violence, these women often find it more difficult to access the protection provided by the criminal justice system and to obtain relief in terms of the DVA”. Many people in South Africa operate at survival level, in which their need for housing and food take precedence over their need for a violence free existence. The focus group participants were very vocal on this issue, noting that conditions that lead to poverty such as lack of employment make them vulnerable to men who are abusive. However, Ixopo focus group participants made the following statement in relation to their financial dependency on their husbands: “*We do not want to take our husbands to court, especially when we are financially dependent, we do not like the decisions of the court*”. Du Plessis AJ overturned the earlier court decision in view of the negative impact that lengthy incarceration may have on the offender, the victim and their family.

Turning to the RCMA, narrative in matrix 7-10 shows that this law may be a source of emotional or economic abuse of women since men in rural areas do not comply with the RCMA (RSA, 1998c).

The RCMA requires written consent or approval to be obtained by the man from his existing wives with whom he is in a polygamous marriage before he can take on a subsequent wife. The information presented shows that this process is not followed. A paralegal stated that “*when a man takes another wife who is younger, the younger wife will quickly register her marriage and now the older one has to ask permission from the one that has registered, and they always refuse*” (IXP1). It becomes a problem if the husband dies and the other marriage is not registered.

During a workshop with women in Ixopo on customary marriages, Ixopo paralegals indicate that the majority of women mentioned that they are against the registration of customary marriages by all the wives. They felt that only one wife, the first, must register, as this minimises conflict. “*In the past customary law gave powers to the first wife and polygamy worked well; there was fair distribution of resources and their husband’s conjugal rights. Now the youngest take all*” (IXP1). In *MG v BM and others* 2012 (2) SA 253 (GSJ) C, a woman sought to compel the Department of Home Affairs to register a customary marriage entered into between her and her deceased husband. The deceased’s first wife and the executrix of his estate opposed the application. The refusal by the department was based on the fact that the application was made out of time (it must be registered within three months). Moshidi J held that the deceased failed to apply for the approval of a written contract regulating the future matrimonial property system of his marriages as intended in s 7(6) of the Act. Section 4 (1) of the Act “provides that the spouses in customary marriages have a duty to ensure that their marriage is registered, while it provides that a husband who wishes to enter into further customary marriage with another woman must make an application to the court to approve a written contract which regulates the future matrimonial property system of his marriages which other spouses have to sign”. Failure to do so was fatal to the applicant’s case. Moshidi J “held that the wording of section 7 (6) has resulted in much uncertainty caused by the absence of penalty provisions in the event of non-compliance and that this required the legislature’s urgent attention”. The legal consequences of the RCMA often result in emotional abuse cases which are handled at CAOs since traditional courts are limited in resolving such cases. Herbst and Du Plessis (2008:14) contend that RMCA developed a hybrid approach to customary marriage which has created a confusion among traditional leaders and their people.

#### **10.7.2.3 Madadeni community advice office (case study three)**

Reports from the Madadeni CAO show that, between 2009 and 2011, 9% of the total domestic violence cases were referred for a Protection Order, a small number compared with the 86% mediated. This indicates that the majority of clients are not comfortable with Protection Orders. When the paralegal determines that a case requires court intervention, the prognosis is confirmed by the court decision to grant an Interim Order. Follow-up by the paralegal revealed that at least 71% of the

Interim Orders were finalised, a success rate of 76%. MDFG participants agreed that they are treated respectfully at the CAO. The paralegal's explanations were very clear on, "*what steps to take when you are the victim of domestic violence and what options are available to pursue*". A participant added, "*As a result I was able to explain to my abusive husband who immediately agreed to go for mediation. After the mediation the paralegal phoned to find out how we were coping*". The Madadeni paralegal affirmed, "*Mediation works and that is why people who have been through the mediation process refer other people to my office. There is no language and cultural barrier as I speak the same language as my clients. I understand the culture as I am from the same culture*". Both the paralegals and the focus group participants mentioned the issues of language and culture. Barrett (2013:340) submits that language is more important in domestic violence than in other cases, what is said through language could be constructive and build confidence of the victim or could be destructive and undermine the confidence of the victim to describe what happened, and the impact of the harm done to the victim.

Application of the DVA is demonstrated by the case of *S v Gewula* (2003) JOL 11079 (E) where the defendant allegedly assaulted his wife after a restraining order had been issued against him, which compelled him to leave the marital home. Pickering J had reservations about part of the content of the order, which prohibited the defendant from entering the marital residence, or contacting or communicating with the wife. Pickering J said that, bearing in mind that the couple were married; the Protective Order effectively amounted to an order of judicial separation. He added that the order that obliged the defendant to live apart from his wife was legally enforceable against him. However, the judge held that the sentence of 12 months imprisonment was severe; although he agreed that the assault was severe and called for a salutary sentence, the sentence for contravening the restraining order was too severe and called for a reduction to nine months, half of which was suspended for five years.

In this case, judicial interpretation of the DVA, confirms the views expressed by the study participants that the DVA is complicated and confusing and penalties so severe that families are torn apart. As one Madadeni focus group participant put it "*domestic violence is not something that the law can address because it is too complicated*". Pickering J points out that the measures of the DVA requiring a man to move out of the marital home amounts to an order of judicial separation. A focus groups participant indicated that "*if the formal justice system wants to help they must give us financial support, grants or employment if you are victim of domestic violence, because if we separate who is going to pay maintenance, what about our relationship, who is going to give us shelter when we are chased away from our homes by our husband?*" Another participant from Bulwer stated "*my husband was*



*divorcing me, I came to this office and my marriage was saved and follow-up was done and I am happy today”.*

As was the situation in Bulwer, it is not only the impact of the DVA on rural female victims of domestic violence that is discussed in this study. Also of concern is how the Recognition of Customary Marriages Act (RCMA) impacts victims or even underlies domestic violence cases. Not unlike traditional courts in Bulwer, traditional courts governing Madadeni refer to that CAO cases related to customary law of succession. The MDP stated that the RCMA further complicates the issue of customary law of succession. According to the MDP, the *Inkosi* may refer these cases to civil court, or give family members an opportunity to decide what should be done per traditional custom. Traditional council members have admitted that they have taken wrong decisions many a time. *Inkosi* and council members mentioned during dialogues with the MDP that the man is always the heir no matter what; everything belongs to the man (principle of male primogeniture). The landmark case of *Bhe and other v Magistrate, Khayelitsha and others* 2005 (1) 580 (CC) struck down the principle of male primogeniture. In the *Bhe* case “two minor children, both extra-marital daughters, failed to qualify as heirs in the estate of their deceased father. The father of the deceased was appointed representative and sole heir of the deceased’s estate in terms of section 23 of the Black Administration Act 38 of 1927 (BAA)”. The court held that “the rule of male primogeniture discriminates against female and extra-marital children and is irreconcilable with current notions of equality and human dignity as contained in the Bill of Rights. Accordingly the rule of primogeniture is invalid and inconsistent with ss 9 (3) and 10 of the Constitution. The rule is invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property”.

Ntlama and Ndima (2009:15) argue that the adoption of the “Reform of Customary Law of Succession and Regulation of Related Matters Bill, which seeks to westernise the customary law of succession is the result of the outcome of *Bhe* case that outlawed the rule of male primogeniture”. These scholars add that a communal-oriented principle of customary law was reversed at the insistence of the individual without an attempt to develop, amend or adjust that principle to the Constitution. Customary law was deprived of its remedy and the resultant void was filled by common law. In other words, considering the social science data adduced in this study, consequences of the contradiction between rule of law orthodoxy and customary law may lead to emotional and economic abuse of female victims of domestic violence in rural areas. These women are disinherited or otherwise negatively impacted by legal contradictions where the rule of law is extricated from its socio-cultural and historical context (Halliday, 2012:1). Data from this study indicates that when victims of domestic violence are unable to access to justice from the formal or traditional justice

systems when there is a conflict between rule of law orthodoxy and customary law, CBPs and CAOs seem to fill the gap between between the two justice systems.

#### 10.7.2.4 **New Hanover community advice office (case study four)**

The New Hanover CAO reported that 11% of the total domestic violence cases dealt with were referred for a Protection Order, a small number compared with the 64% mediated. The New Hanover CAO is located at the magistrate's court. Due to the unique working relationship with the magistrate's court, clients also apply for Protection Orders. However 15% of the cases could not be traced in terms of outcome. The New Hanover paralegals together point out that some clients "simply do not come to court on the return date; nor do they turn up for mediation".

Judicial decisions and police attitudes as perceived by study participants help explain the non-use of the DVA by survivors of domestic violence. In *Stuurman v S* (2008) JOL 21937 E the offender was sentenced to six months imprisonment for breach of the Protection Order; he assaulted the complainant by kicking a plate of food out of her hand, which struck her on the chin, entered the home of the victim, and damaged property. On appeal against the sentence, Jones J argued that the sentence was shockingly severe in view of the nature of the assault and the lack of injury. NHFG participants complained not only are they troubled about the way judges decide domestic violence cases. Rather, they are also concerned about the attitude of the police and claimed that they are therefore reluctant to report domestic violence and open a case against the offender. A focus group participant said "*I called the police when my husband was threatening to chop me with an axe; they said to me they do not have transport and that my husband would not carry out his threat*". Morei (2014:936) found that officers responsible for implementing the DVA lack basic knowledge of the remedies available to victims as a result they are passive and disinterested in dealing with domestic violence. The police in defence of their complacency cite high rate of withdrawals because victims were financially dependant on their abusers. Focus group participants stated that "*the police are not sympathetic to women who are victims of domestic violence and they are not trained to handle domestic violence they lack passion for their work, no listening skills*". In the *Stuurman* case, Jones J submitted that correctional supervision should have been considered, because it has the advantage of not disrupting the defendant's employment and avoids the negative consequences of short-term imprisonment. A focus group participant mentioned that "*I have nine children, if I apply for a protection order where will I go if I leave my husband and how will I support all these children, So it made sense for me to choose mediation*".

Generally, this sub-section on doctrinal analysis, the sub-section on application of the social science meta-conceptual framework as well as earlier sub-sections that highlighted narrative from paralegals

and narrative from domestic violence survivors all included a comparative cross-case analysis of the multiple case studies. The study next discusses sources of evidence that allowed for triangulation of the study.

### 10.8 Triangulation of Sources of Evidence

Data triangulation is the use of multiple data sources to help understand a phenomenon (Yin, 2009:114, 116). The qualitative and quantitative data as well as statutory and case law and literature review were triangulated in this study. Scholars agree that triangulation of sources of data and modes of data analysis generate reliability and validity in mixed methods research (Golafshani, 2003:599; Baxter and Jack, 2009:603-604; Richie et al, 2003:43; Yin, 2009:116). According to Tracy (2010:843-844), the credibility of qualitative studies can be achieved through description (where the research shows rather than tells occurrences) and multiple types of data analysis. In addition, Tracy (2010:845) elaborates that “multivocality as a component of credibility means that the multiple and varied voices of respondents are presented and analysed in the study”.

Figure 10-15 displays the sources of evidence drawn upon for this study.

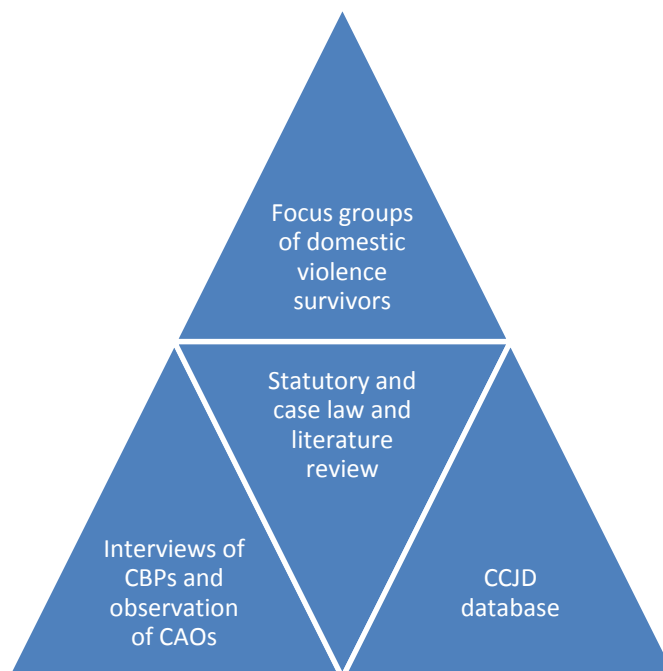


Figure 10-16 Triangulation of sources of primary and secondary evidence for the study

While empirical evidence drawn from interviews, focus groups and the CCJD database converge to answer research questions and achieve research objectives, review of literature shows convergence with perceptions of study participants and is divergent from those perspectives at other times. For

example, contrary to weight of literature, to CBPs victim's choice and not always victim's safety is a priority in deciding whether to mediate a case. Location of CAOs in police stations and magistrate court buildings may support openness of CBPs to mediate a case that may otherwise seem unsafe for victims. Other divergence between data from interviews and focus and the literature include the indication by study participants that apologies from offenders are genuine given the techniques employed by CBPs. Community-based paralegals apply various restorative justice theories such as engagement and empowerment, reversal of moral disengagement, social and moral development to get through to offenders such that violence stops – according to victims of domestic violence. This study produced empirical evidence that is scant in literature – such as use of CRJ for DV cases, a private-based model of CRJ for DV cases, focus on survival needs of domestic violence survivors, engagement of offenders – often through subtle coercion, and acceptance of all clients and not turning them away. Data from study participants show that CBPs in CAOs understudy undergo accredited training, that there is depth in CBPs straddling plural legal systems and receiving support from criminal justice system (service of calling letters by police and magistrate court personnel, transport by police for home visits) and traditional courts (invitations to make presentations on mediation and legal rights awareness-raising, invitations to conduct training with traditional authorities, assisting traditional authorities with projects between traditional leaders and municipal councillors), and the overall strength of CBP interaction with social service stakeholders on behalf of clients.

Primary data shows DVA does not serve purpose intended. Case law shows that judicial reasoning demonstrates an awareness of how severity of penalties under DVA disrupt family-life and economic stability of dependants. Case precedents reflect contradictions between rule of law orthodoxy and customary law in a way that disadvantages cultural and historical practices in traditional communities. Conflict between rule of law orthodoxy and customary law weakens traditional court jurisdiction on the one hand and leads to economic and emotional abuse of domestic violence survivors on the other hand. The CAO seems the forum best suited for rendering legal empowerment to victims of DV when the rule of law orthodoxy and traditional law are contradictory or irreconcilable.

Observation of CAOs by the researcher is another source of evidence used to triangulate the study. In addition, secondary data from the CCJD data base converges with the primary data to demonstrate the number, types and outcome of domestic violence cases handled by the CBPs and CAOs.

Triangulation of multiple sources of data together with multivocality of participants add credibility to this study. Convergence and divergence of data from these sources of evidence help answer the research questions and achieve the objectives of the study as next discussed.

## 10.9 Alignment of Research Questions and Research Objectives with Data

To examine the relationship between interview data and the research questions and objectives, the researcher first aligned the overarching research questions and the four sub-questions with one or more of the four research objectives. In so doing, the researcher considered achievement of which research objective(s) would facilitate answers to which research question. Table 10-2 displays the outcome of this exercise in columns one and two. The third column provides findings from interviews of CBPs which answer the questions and achieve the various objectives as shown in columns one and two of table 10-2. The findings represent a synthesis findings and thematic responses derived from interview data as reflected in the figures and matrices from sub-sections of this chapter. In chapter 11 the findings are discussed in relation to the research questions and research objectives.

Table 10-2 Responsiveness of findings from interview data to research questions and research objectives

	Research questions	Research objectives	Findings from interview data
1	What is the role of CBPs in restorative justice in KZN?	Explore experiences of CBPs' approaches to restorative justice.	Create a platform for victims to choose a justice forum that will respond to their victimization.
			Develop a CRJ process that is flexible and tailored to fulfill individual and family needs.
			Practice CRJ in an environment of legal pluralism.
2	Do CBPs use restorative justice initiatives in domestic violence cases? If so, how? If not, why not?	Examine whether community restorative justice has a role to play in response to domestic violence.	Yes, by using a culturally competent and holistic CRJ initiative in cases of domestic violence per victims' choice.
			CRJ deliberations are <i>ubuntu</i> -driven, conducted in the language spoken by victims, and family outcome-oriented where practical.
3	Is restorative justice intervention by CBPs appropriate for cases of domestic violence? If so, how? If not, why not?	Explore experiences of CBPs' approaches to restorative justice.	Yes, it is appropriate, decisions are taken by the parties themselves, in their best interests.
			In safe space, victims of domestic violence are given a voice and offenders engaged.
			Victims' choice is central to paralegals CRJ process.
		Help narrow the gap in the literature regarding CBPs' use of community restorative justice to handle cases of domestic violence.	Paralegals' CRJ process is a practical alternative to protection orders, that are not always a desired option in cases of domestic violence.
4	Do restorative justice initiatives by CBPs increase access to justice for victims of domestic violence? If so,	Explore experiences of CBPs' approaches to restorative justice.	Yes. Paralegals' CRJ process is informal, private-based, and uses uncomplicated / simple procedures without delay which increases access to justice.

	how?	Contribute to the debate on the question of whether the DVA (116 of 1998) meets the needs of rural women	Paralegals' CRJ process straddles plural justice systems.
			Paralegals' CRJ process empowers victims to make informed decisions.
			The DVA does not meet the needs of rural women.
			Paralegals' CRJ process harmonises the tension brought by DVA. CBPs play a supportive role to the DVA.
5	What factors contribute to the success or failure of restorative justice initiatives for domestic violence cases handled by CBPs?	Help narrow the gap in the literature regarding CBPs' use of community restorative justice to handle cases of domestic violence.	The DVA is used as a back up to restorative justice
			Paralegals' CRJ process is cost effective, private, quick, pragmatic and deals with the root causes of domestic violence.
			Paralegals' CRJ process is not a panacea, does not solve all the problems, but gives the parties an opportunity to work on repairing their relationship and sustaining families.

Table 10-3 displays alignment of research questions and research objectives based upon data obtained from focus groups of rural female victims of domestic violence. As with table 10-2, the alignment is shown in columns one and two with multiple findings per research question and per multiple objectives are depicted in column three.

Table 10-3 Responsiveness of findings from focus group data to research questions and research objectives

	Research questions	Research objectives	Focus group findings
1	What is the role of CBPs in restorative justice in KZN?	Explore experiences of CBPs' approaches to restorative justice.	DV survivors experience a relevant and culturally appropriate CRJ process created by CBPs. Paralegals' CRJ process removes barriers to access to justice.
2	Do CBPs use restorative justice initiatives in domestic violence cases? If so, how? If not, why not?	Examine whether community restorative justice has a role to play in response to domestic violence.	CBPs use CRJ initiatives that take into account socio-economic circumstances of people who live in rural areas. DV survivors suggest incorporation of CRJ process as they have experienced it within the formal justice system, with CBP as mediators but not co-opted by the state.
3	Is restorative justice intervention by CBPs appropriate for cases of domestic violence? If so, how? If not, why not?	Explore experiences of CBPs' approaches to restorative justice.	Yes. DV survivors have a voice in paralegals' CRJ process. Criminalisation of offenders is avoided. DV survivors unequivocally and unanimously have a positive

			experience in paralegals' CRJ process.
		Help narrow the gap in the literature regarding CBPs' use of community restorative justice to handle cases of domestic violence.	Paralegals' CRJ process stops domestic violence from continuing. DV survivors believe paralegals' CRJ process is appropriate for cases of domestic violence.
4	Do restorative justice initiatives by CBPs increase access to justice for victims of domestic violence? If so, how?	Explore experiences of CBPs' approaches to restorative justice.	Yes. DV survivors believe paralegals' CRJ initiatives increase access to justice. Participants have someone they could talk to and their financial matters improved.
		Contribute to the debate on the question of whether the DVA (116 of 1998) meets the needs of rural women	DV survivors feel the protective measure of DVA is alien to their culture and comfort. DV survivors feel they are not protected and their needs are not met by the DVA.
5	What factors contribute to the success or failure of restorative justice initiatives for domestic violence cases handled by CBPs?	Help narrow the gap in the literature regarding CBPs' use of community restorative justice to handle cases of domestic violence.	Paralegals know the culture of victims and circumstances of people who live in rural areas. DV survivors state that the CRJ process experienced at the CAO is unique and meets their justice needs.

In reference to the last research question, table 10-4 provides further case-study specific evidence of factors that underlie the success of mediation as well as factors that may result in the failure of mediation.

Table 10-4 Cross-case display of factors that contribute to success or failure of mediation

Factors that contribute to the success or failure of mediation by community-based paralegals	
Factors that contribute to the success of Bulwer CAO mediations	Factors that contribute to the failure of Bulwer CAO mediations
<ul style="list-style-type: none"> <li>Holistic approach to domestic violence helps parties to deal with other issues that also have an impact on their relationship, such as maintenance, this contributes to success.</li> <li>Awareness of cultural practices and belief in cultural practices makes it easy to discuss and address cultural issues.</li> </ul>	<ul style="list-style-type: none"> <li>Parties refuse to compromise or reach an agreement.</li> <li>It works for some and it fails for others, the reason being the husband will say <i>'I cannot stay with someone who has a protection against me'</i>.</li> </ul>
Factors that contribute to the success of Ixopo CAO mediations	Factors that contribute to the failure of Ixopo CAO mediations
<ul style="list-style-type: none"> <li>Holistic approach, CBPs cover everything that is of concern in the relationship.</li> <li>CBPs consider root problems where other justice providers do not.</li> </ul>	<ul style="list-style-type: none"> <li>Parties refuse to compromise or reach an agreement, deciding either to separate or get a Protection Order.</li> <li>Unsuccessful mediations sometimes are</li> </ul>

<ul style="list-style-type: none"> <li>• CBPs take their time, do not rush and may convene several mediation sessions.</li> <li>• The location of the CAO, based at the magistrate court is an advantage.</li> <li>• Speaking the same language as clients.</li> <li>• Combining knowledge of Zulu culture with basic knowledge of the law.</li> <li>• Twelve years experience in mediation contributes to the success.</li> </ul>	<p>blamed on the victim, because we do not allow lies, and we deliberate on facts and the truth.</p> <ul style="list-style-type: none"> <li>• CBPs do not take sides, they look at both angles of the conflict and the underlying issues that have caused the conflict, and if the victim has a part in that conflict we point that out.</li> <li>• The victim and offender refuse to accept responsibility.</li> <li>• Women may not take responsibility for her actions; she cannot hit the offender with a pot and not expect an immediate impulse reaction.</li> </ul>
Factors that contribute to the success of Madadeni CAO mediations	Factors that contribute to the failure of Madadeni CAO mediations
<ul style="list-style-type: none"> <li>• Location in the same premises as the police station and just less than 150 meters away from the magistrate’s court.</li> <li>• Holistic approach, maintenance issues get attended to during mediation.</li> <li>• Experience and training since 1998</li> <li>• There are no language and cultural barriers;</li> <li>• Speaking the same language and being of the same culture</li> </ul>	<ul style="list-style-type: none"> <li>• Victims and offenders may be angered by the neutrality of CBPs and then fail to comply with an agreement.</li> <li>• Failure of the parties to tell the truth to CBPs or be dishonest with one another during the mediation encounter.</li> </ul>
Factors that contribute to the success of New Hanover CAO mediations	Factors that contribute to the failure of New Hanover CAO mediations
<ul style="list-style-type: none"> <li>• Examination of underlying factors of the domestic violence problem</li> <li>• Understanding of cultural issues and customs such as paying compensation to directly to victims or families, sacrificing animals for ancestors</li> <li>• Location at the magistrate’s court.</li> <li>• Parties’ desire for peace and harmony</li> <li>• Combined experience of 25 years.</li> </ul>	<ul style="list-style-type: none"> <li>• Refusal to compromise or reach an agreement, wishing to seek a Protection Order and terminate the relationship.</li> <li>• Deterioration of the relationship to a stage where it is less possible to mend or for the parties to reconcile.</li> </ul>

The role of CBPs in CRJ is more specifically set out below in table 10-5.

Table 10-5 The role of community-based paralegals in community restorative justice for cases of domestic violence

Role of community-based paralegals in restorative justice for cases of domestic violence
Undertake consultation with clients
Conduct pre-mediation interviews with offenders
Write calling letters for mediation
Contact relatives for inclusion, if requested
Conduct mediation and negotiation through a culturally competent lens
Liaise with employers as necessary



Link clients with other socio-economic and socio-legal service providers
Conduct assessment to decide suitability for mediation
Provide socio-legal advice to parties and families
Empower clients with knowledge and problem-solving skills
Provide information about police and formal courts
Cross-referral of cases between the CAO and the criminal justice system
Provide information about traditional authorities and other stakeholders
Cross-referral of cases between the CAO and the traditional justice system
Fill gaps in services unobtainable elsewhere
Mediate post-Protection Orders
Provide counselling
Conduct awareness raising workshops to facilitate access to justice
Conduct workshops on life skills
Investigate and address clients' underlying problems
Conduct home visits as follow-up on oral agreements
Use understanding of community dynamics to help mend relationships
Screen cases on behalf of magistrate's court as requested
Maintain relationships with clients and families post-mediation
Refer cases to relevant governmental and non-governmental agencies
Accompany clients to banks, clinics, hospitals, pension office, Home Affairs, and other government offices as well as private companies

The two prior sections discussed how triangulation of multiple sources of evidence bolstered the credibility of the study on the one hand. On the other hand the most recent section assessed how data respond to the research questions and research objectives that drove this study. The meta-conceptual socio-legal framework employed guided the study as demonstrated in earlier sections of this chapter. The next section draws upon narrative of CBPs and rural female victims of domestic violence to help build process-theory based upon findings from this study.

#### 10.10 **Towards Process Theory-building through Narrative in a Meta-conceptual Socio-legal Framework**

The meta-conceptual socio-legal framework for this study relied heavily on narrative from the interviews and focus groups to produce knowledge about the role of CBPs in restorative justice, with specific reference to domestic violence cases. Cross-case analysis of narrative data from four case studies together with legal analysis of statutes and case law in relation to narrative lays the foundation for process theory-building on justice forum shopping, communication pragmatism and a private-based restorative justice model for cases of domestic violence. As noted in chapter 3, Pentland (1999:717) contends that narrative is suited to the development of theory since it encompasses sequence, time, the voice of actors and the content and context of phenomena. However, to move beyond the description of a surface-level sequence of events through narrative, a researcher should aim for deeper structure by attempting to explain how and why the process expressed through

narrative is enabled or constrained (Pentland, 1999:717). Maanen, Sørensen and Mitchell (2007:1148) add that such data-based theorising is reiterative and inclusive of a researcher's intuition based on experience as well as the research context.

Researchers should link their results to concepts to generate plausible explanations in meeting the expectation that gave rise to the research project (Maanen *et al*, 2007:1149). Yin (2014:147) refers to explanation-building as an analytic technique which occurs in narrative form and reflects “how” or “why” something happened. According to Yin (2014:68), an analytic generalisation is “a carefully posed theoretical statement, theory or theoretical proposition”. Yin (2014:68) adds that it “is posed at a conceptual level higher than that of the specific case”. Analytic generalisation should not be confused with statistical generalisation. The former involves the logic of extending case study findings to similar situations external to the original case whereas the latter entails the logic of generalising statistical inference to a universe broader than the original sample (Yin, 2014:237, 240). While this study aimed, *inter alia*, to empirically determine the actual role and impact of CBPs in and on the lives of rural women through the lens of handling domestic violence cases, the voices of the respondents reveal the significance of forum shopping, communication pragmatism and a private-based restorative justice model in a plural legal environment. The processes of forum shopping and communication pragmatism are discussed here. A new conceptual model for private-based restorative justice – which is practice-oriented – is suggested in the final chapter. The categories of forum shopping and communication pragmatism are conceptually higher than the four specific cases in this study and yield a number of theoretical propositions whereby process-theory building allows for analytic generalisations about these categories.

Each category is set out below, drawing on narrative from the respondents. The researcher assembled separate matrices of narrative for each category. The matrices are not included in-text (due to space constraints) but are attached as Appendix H and Appendix I for ease of reference.

### **10.10.1 Towards process theory-building on forum shopping**

In terms of how forum shopping occurs, narrative indicates that it exists within the context of legal pluralism and happens through a strategic choice by the complainant. This choice may be unidirectional or multidirectional and sequential or concurrent. It is unidirectional when a complainant sets out on her own volition to a particular justice system or is referred from one justice system to another – such as referrals from CBPs to TCs and *vice versa*. It is multidirectional when a complainant uses multiple justice systems. The choice of forum is sequential when a complainant seeks access to justice from one forum and then additional access from another forum. An example of this is when a complainant seeks access to justice from the formal justice system but is unhappy with the result – such as interaction with police. At this point, the victim may request mediation through a

CAO. Forum shopping becomes concurrent when a victim achieves mediation through a CAO but still obtains a Protection Order under the DVA. However, forum shopping is not a one-way street. Rather CBPs and traditional authorities shop for domestic violence cases through a network of referrals.

The underlying reason “why” the complainant’s choice of forum is made starts with a complainant seeking access to justice. On the one hand, complainants desire a favourable outcome and weigh their choices accordingly – this is confirmed by the literature. On the other hand and contrary to the literature, narrative from this study indicates that there is much more at play than the desire for a favourable outcome. Rather, survivors of domestic violence who participated in this study revealed concerns about how they are treated when accessing justice through a particular forum and the impact of such treatment on decision-making about a forum. While CBPs are said to be caring, educate victims, treat victims with dignity and provide clear instructions, police and TCs are believed by victims to be insensitive and even abusive to complainants. Simultaneously, even if complainants are disparaged by TCs, they seem to prefer TCs to police and the formal courts largely due to cultural and spiritual beliefs. Complainants may use TCs and community restorative justice forums because the domestic violence matter may be related to deeply-held cultural and spiritual beliefs. This element is rarely reflected in the literature. Narrative shows the role of CBPs in encouragement of forum shopping by complainants. How and why complainants undertake the forum shopping process suggest the following theoretical proposition: “Forum shopping and concurrent use of multiple justice systems enhances access to justice”.

#### **10.10.2 Towards process theory-building on communication pragmatism**

Communication pragmatism is a category created by the researcher based on narrative from this study and a cross-section of the literature reviewed. It relates to the informal CRJ forum. Communication pragmatism means communicative action and omission evident through a combination of language, non-verbal communication and cultural competency and that which works well under a given set of circumstances. Using CRJ practice arising from narrative to shape this definition, communication pragmatism extends beyond communication between the parties to a mediation encounter, to family sustainability – communicative action. Rural women who participated in this study do not wish to criminalise their partners. Instead, the study participants generally love their partners and want the violence to stop and their families to be sustained.

How and why communication pragmatism process works is culture-specific. Narrative from this study overwhelming indicates the significance of the use of isiZulu in settling domestic violence disputes. Yet, according to the study participants, in the TCs, for example, isiZulu is at times used to humiliate women. The focus group respondents spoke of the usefulness of CBPs not just in speaking isiZulu to facilitate communication to and between the parties, but also using their home language to explain the

law to their husbands during the mediation encounter. Moreover, paralegals and survivors of domestic violence acknowledge the CBPs' role in using non-verbal communication during mediation encounters. Non-verbal communication is culturally relevant, such as knowing when to make eye-contact and when to refrain and how a woman raises issues with her husband. Concerns about the ancestors' views on how a domestic violence matter is handled are further evidence of non-verbal communication. Narrative indicates that CBPs offset the power imbalance between the victim and offender often noted in the literature by exhibiting cultural competency. For example, unlike accounts in the literature that portray African women as docile, CBPs intuitively recognise that African women are not docile but that culturally, women speak to their husbands in a certain manner different from the westernised context; this is portrayed as a strength, not a weakness in Zulu culture. In addition, narrative shows that CBPs make use of the culturally-specific unspoken word by reminding offenders of their Zulu culture in context, thereby opening space for women to continue to stand their ground. The communication pragmatism process suggests several theoretical propositions. First, "cultural competency is inherent in communication pragmatism". Second, "communication pragmatism facilitates access to justice".

These theoretical propositions are further discussed in chapter 11 in terms of the study's conclusions and modest contribution to knowledge production.

### 10.11 Chapter Summary

This chapter presented cross-case analysis of the data presented and analysed in chapters 6-9. The quantitative data reflect that the success rate in resolving cases of domestic violence cases through mediation is extremely high in each of the CAOs, averaging 82%. The cross-case analysis of social science qualitative data was discussed in relation to the literature, providing various findings and thematic responses that arose from the study participants. The application of the meta-conceptual framework associated with the problems and benefits of restorative justice on the one hand and problems and benefits associated with CBPs on the other hand was presented. Cross-case findings about how CBPs function across plural legal systems was highlighted. Tables were presented to show how responses from CBPs and service recipients helped answer the research questions and achieve the research objectives of the study. The DVA and other statutes along with case precedents were applied to the social science data to provide the socio-legal framework for the study. Based upon the findings, a number of theoretical propositions were introduced using narrative for process theory-building. In the following chapter the findings are synthesised and policy implications and recommendations on the role of CBPs in restorative justice for the handling of domestic violence cases are highlighted.

## **Chapter 11: Conclusions, Policy Implications and Recommendations**

### **11.1 Introduction**

This chapter presents the conclusions drawn from the findings of the study as well as the lessons learnt. The conclusions are discussed in relation to the research questions and research objectives which were answered and achieved through the use of a mixed method socio-legal research design. Lessons learnt from the social science meta-conceptual framework and doctrinal evidence are detailed. Implications and recommendations for law and policy regarding the role of paralegals in restorative justice are set forth. The recommendations suggest a way forward for the use of CBPs in restorative justice. The knowledge produced by this study is highlighted, including theoretical propositions for forum shopping and communication pragmatism and an empirically-based conceptual model for private-based restorative justice practice for CBPs' handling of domestic violence cases. The limitations of the study and suggestions for further research are presented.

### **11.2 Conclusions drawn from the findings of the study**

Community-based paralegals are not new to the South African landscape. However the role of CBPs in advancing access to justice is under-studied. Despite their long-term community engagement toward legal empowerment CBPs are not statutorily recognised and the legal profession is sceptical about the functionality of CAOs and CBPs. The research problem identified in chapter 1 revolves around the lack of access to justice for rural female victims of domestic violence in the Republic of South Africa. With specific reference to rural women in the province of KZN, this study raised five research questions and sought to achieve four research objectives. The research questions and objectives are aligned in tables 10-2 and 10-3. Those tables also display an assessment of how multiple sources of evidence respond to the research questions and research objectives. In this section, adapting the research questions as sub-headings, the linked research questions and objectives are discussed in relation to conclusions drawn from the findings. Other conclusions drawn from the findings are the usefulness of legal pluralism, forum shopping, communication pragmatism and a private-based model of restorative justice for handling of domestic violence cases by CBPs.

#### **11.2.1 The role of community-based paralegals in restorative justice in KwaZulu Natal**

The overarching research inquires into the role of CBPs in CRJ and that research question is linked to the research objective of exploring experiences of CBPs' approaches to restorative justice. The variety

of roles performed by CBPs in using community restorative justice for cases of domestic violence is displayed in table 10-5. It is concluded that CBPs' practice of restorative justice takes place in an environment of legal pluralism. Service recipients tend to prefer the informal justice system because it gives a woman back her dignity, without the stigma of having criminalised the father of her children and women have a greater say in what happens to an offender as well as the ultimate outcome of the mediation process. The main approach by CBPs is victim-offender mediation with use of family conferences as necessary. There is an active and productive interaction between the CBPs, formal and traditional justice systems. Cross-referrals between CAOs and the criminal justice system as well as cross-referrals between CAOs and the traditional justice systems not only benefit victims and offenders but also the state itself when it comes to democratic entitlements of access to justice. The CBPs' mediation process is tailored to fulfil individual and family needs and it is not one size fits all.

So long as all protocols are followed for the survivors of domestic violence, the experiences of CBPs and roles performed by CBPs through CRJ approaches open avenues for survivors and perpetrators of domestic violence to effectively participate in multiple justice systems. A special feature noted by CBPs during the interviews is that they are located within a police station or magistrate's court and CBPs maintain informal partnerships with police and court personnel; therefore mediation is conducted in a safe and protected environment.

This study explored the experiences of CBPs as evidenced by chapters 6-9 as well as the series of comparative cross-case analyses of the multiple case studies in chapter 10. This study has brought empirical evidence of experiences of South African CBPs to the forefront which fills a gap in scholarly research. It is concluded that, through their wide range of experiences, CBP intervention provides a platform for the victim to choose the justice system the victim wishes to approach and CBPs perform a myriad of roles in community restorative justice in KZN as delineated in table 10-5.

### **11.2.2 Use of community restorative justice initiatives by community-based paralegals in domestic violence cases**

The second research question that directed this study is whether CBPs use community restorative justice initiatives in domestic violence cases, and if so, how so. This question is linked to the objectives of identifying experiences of CBPs and examining whether CRJ has a role to play in responding to domestic violence. Both the CBPs and focus group participants regard the restorative justice approach as a practical alternative to responding to cases of domestic violence.

The mediation process outcome generated by CBPs is family-oriented and practical. As evolved by CBPs, the mediation encounter is a culturally competent and holistic CRJ initiative driven by victims' choice of forum. The mediation encounter is designed by CBPs to promote harmonious relationships in families. The participants noted that paralegals understand that victims want to sustain their families and that they apply approaches toward that end. The holistic CRJ intervention takes into account socio-economic circumstances of service recipients and thereby gets at the root of problems underlying domestic violence. All the participants stated that they need and value this kind of support; it is for this reason that focus group participants recommended that CRJ should be integrated within the DVA. All CBPs mediation deliberations are *Ubuntu* driven and conducted in language spoken by victims. Focus group participants stated that restorative justice brought peace and trust; restored *Ubuntu* and built homes. The experiences of CBPs reveal that they conduct post-mediation follow-up through home visits to ensure that mediation agreements still hold. This is achieved because CBPs live in the community that they serve and understand the local context. It is concluded that these are the ways in which CBPs use restorative justice initiatives in domestic violence cases and that, given scant scholarly research that shows linkages between CBP programmes and women's access to justice, this study has contributed to addressing this gap in the literature.

### **11.2.3 Appropriateness of community restorative justice interventions by community-based paralegals in domestic violence cases**

Although this study establishes that CBPs and CAOs use restorative justice interventions for cases of domestic violence, the next research question is whether community restorative justice interventions by CBPs in domestic violence cases are appropriate. This line of inquiry is associated with both aims of this research to explore experiences and CBPs approaches to CRJ and to narrow the gap in the literature regarding CBPs' use of CRJ to handle cases of domestic violence. There is a lively debate in the literature as discussed in chapter 4 regarding arguments for and against the use of CRJ for cases of domestic violence, arguments for and against the handling of domestic violence cases by traditional courts as well as counter arguments as to whether domestic violence cases are a public or private matter.

Focus group participants stated that CRJ is appropriate approach for domestic violence cases. All paralegals stated that CRJ is not suitable for cases where serious assault and extreme violence occurred. Focus group participants stated that maintaining their privacy avoids the stigma associated with domestic violence and also avoids victimisation by family members when they report abuse to people outside the family. The findings of this study indicate that participants who opted for the restorative justice process made this choice of their own free will. All the paralegals stated that before mediation they explain all the options available to the victim and victims make a choice based on their

unique situation. The paralegals noted that women have a greater say in mediation, and many prefer mediation to the court process. The focus group participants and paralegals indicated that having a safe place to tell their stories, such as a CAO located at a police station or magistrate's court, was important. Both the paralegals and focus group participants reported that offenders are aware that the CAO is protected by virtue of its location; all added that by the time an offender reports for mediation, the violence has already stopped because of paralegals' calling letters.

The literature review revealed that, locating the CRJ within the formal justice framework would facilitate acknowledgement of responsibilities by the perpetrators for their conduct in a place that is legally and emotionally significant. This acknowledgement is the first step for perpetrators to change their behaviour and for survivors to heal from the crime and move on with their lives. However, all the study participants said that the restorative justice administered by CBPs engage offenders this restore peace and stops violence. The focus group participants said that they had a positive experience of restorative justice; telling their story face-to-face with the person that had been hostile to them in the past was healing. Restorative justice improves communication and the parties are able to solve their problems. They conduct follow-up after mediation sessions to determine how things are going and to assist with any problems that may arise. Paralegals believe that this is a deterrent to further violence.

The literature review found that the formal justice system and the traditional justice system could be gender biased. Focus group participants complained about gender issues at the police station; they said that young, male police officers do not treat them with respect; that police officers are not sympathetic to victims' situation and that police officers require training on how to handle domestic violence. While focus group participants experienced gender bias in the traditional justice systems, these victims of domestic violence frequently turn to traditional courts in light of strongly held cultural beliefs and practices and allegiance to victims' ancestors.

It is concluded by this study that CRJ interventions practiced by CBPs are appropriate in cases of domestic violence as said interventions appear to be gender neutral, cut across plural legal systems, provide safe space for victims of domestic violence to tell their stories, engage offenders in behaviour change, stop the violence, and allow parties to take their own decisions in the best interests of the parties. While scholars have paid little attention to informal justice approaches to address gender-based violence, findings and conclusions from this study contribute to and narrow this gap in the literature. It is therefore further concluded that this study has shed light on how a pragmatic informal justice system approach to gender-based violence works and this conclusion is bolstered by responses from recipients of such services as to client satisfaction with the CRJ approach employed by CBPs who participated in this study.



#### **11.2.4 Use of community restorative justice initiatives by community-based paralegals to increase access to justice for rural female victims of domestic violence**

The fourth research question is whether use of restorative justice initiatives executed by CBPs increase access to justice for rural female victims of domestic violence. This research question is aligned with aims of this study is to explore experiences of CBP approaches to CRJ and to contribute to the debate on whether the DVA meets the needs of rural women. It is concluded by this study that CRJ initiatives employed by CBPs increase access to justice for rural female victims of domestic violence. It is further concluded by this study that the DVA does not meet the needs of women who want to continue in a partnership with the offender after the issuance of a Protection Order and the subsequent court process. Another conclusion drawn from findings that respond to the research questions and objectives discussed in this section is that CBPs play a supportive role to the DVA, and that the DVA process is used as a back up to the CRJ approach.

The advice given by CBPs to advance access to justice for rural female survivors of domestic violence covers both formal and customary law; and said knowledge is shared not just with service recipients but also with police, the formal courts, and traditional courts in an effort to mete out justice. Clients benefit from CBPs knowledge of rule of law orthodoxy and culture, custom and traditional practices. All the paralegals demonstrated their general practical skills and abilities in handling a substantial number of cases through CRJ. The CBPs handled cases that went through the criminal justice court system equally well; they also demonstrated a high success rate with Protection Orders confirmed by the court. The paralegals are prevailed upon by traditional courts and traditional leaders to conduct workshops and to render advice related to traditional court proceedings. The CBPs explain to service recipient options available from different legal systems in simple terms. All the paralegals noted that, even if people understand the law, it is confusing and alien to their culture and to them.

An important finding from the interviews with paralegals and focus group participants is that formality, lack of privacy, and complicated procedures and delays in the justice system, including culture and language barriers, hinder access to justice for victims of domestic violence. All paralegals state their informal private-based process eliminates these barriers and has a positive influence on the offender. Husbands generally became more supportive financially and the violence stopped. Both sets of participants in the qualitative component of the research study recognised the value of the informal justice system at community/grassroots level and the role of paralegals in this system.

The qualitative data shows that the formal justice and traditional justice process create tensions for rural women between the kind of intervention needed to protect them from abuse in their homes and

the recognition that many of the women most in need of such are often made more vulnerable by criminal justice and traditional justice interventions. The focus group participants spoke about intimidation from family members, who do not want them to involve the police. The literature review also noted that women's family members commonly subvert the justice process and pressure victims for out-of-court settlements, which further undermines women's ability to seek legal redress.

It is clear that the focus group participants are concerned about safety and peace at home and that the DVA is not providing the kind of safety those women need. Furthermore, the measures provided by the DVA in relation to retaliatory violence do not protect women; rather, they make the situation worse. The study revealed that such measures are too harsh, and that women do not want to see their husbands go to jail or be branded as criminals. The focus group participants claimed that approaching the courts for protection makes the situation worse and noted that the justice system does not protect victims after the hearing or trial. Problems and adverse consequences associated with use of the DVA force women to choose between protecting their partners from incarceration, and shielding themselves by relying on a justice system that is not responding to what they desire. Unemployment and poverty in rural areas of KwaZulu Natal is high; the case studies revealed that the majority of women rely on social security grants and are thus in a vulnerable position. They avoid the formal justice system due to the possibility that their partner could be arrested, leaving themselves and their children destitute. Various scholars question whether criminalising domestic violence is helpful or harmful.

It is concluded that paralegals increase access to justice for rural female victims of domestic violence by offering *inter alia* a comprehensive holistic culturally competent service that is quick and fair; that honours human dignity; that is in close proximity to justice seekers; that listens to victims stories over and over again; that is free of charge and that straddles multiple legal systems. It is concluded that the DVA neither protects nor meets the needs of rural women concerned with family sustainability but CBPs may facilitate use of the DVA as a backup to a mediation agreement.

#### **11.2.5 Factors that contribute to success and failures of community restorative justice for domestic violence cases by community-based paralegals**

The final research question inquired into the factors that contribute to the success or failure of mediation. Answering this research questions addresses an aim of this study to help narrow the gap in the literature regarding CBPs' use of CRJ to handle cases of domestic violence. Table 10-4 displays a cross-case synthesis of factors that contribute to success or failure of mediation. Findings from this study show that paralegals help the parties to get to the root causes of their conflict, and achieve a better outcome without going to court. The focus group participants and paralegals agreed that

restorative justice makes reconciliation possible. Victims of domestic violence regard mediation the best alternative for those who want to remain in a relationship. Study participants stressed that going to court makes reconciliation impossible and therefore the avoidance of court is a factor that leads to successful mediation. Findings from this study reveal that victim participation is solely voluntary and that, even where severe violence has been committed against victims, victims may insist on mediation and paralegals accede to this request. Hence, the study found that the victim's choice is more important than a CBP's assessment of the victim's safety – which is risky. Paralegals consider the offender's level of aggression and injuries sustained by the victim in the attack as part of the screening process, but CBPs do not take a decision for the client. If the client wishes to take the mediation route despite the level of aggression, CBPs have never refused to conduct mediation. Location of CAOs in police stations and magistrate courts help safeguard victims and is considered a factor that contributes to successful mediation.

Paralegals are aware that once they secure the attendance and participation of the offender, the rest falls into place, especially when there is a possibility of reconciliation. All the paralegals are of the opinion that the prospect of court action or police involvement may have a substantial coercive effect on the offender. Paralegals use the threat of arrest and fear of appearing before a public court to engage offenders. Hence, the success of mediation could be complemented by the threat of litigation; the possibility of a court trial creates incentive for a recalcitrant spouse to subject himself to the CRJ process and adhere to the mediation agreement. Strong pressure to cooperate does not imply the absence of voluntary participation. It is in this respect that CBPs claim that the VOM is voluntary even for offenders; VOM relies on both coercive external pressure and an offender's voluntary decision to participate. When someone who has benefited from the restorative justice process refers a victim to the CAO, that person sometimes approaches the CAO having already made a decision not to go the court route. The same applies to offenders; when they present themselves at the CAO, the majority have already decided to cooperate because of the calling letters they receive from the CBPs inviting them for mediation. The CBPs report that they encourage victims to confront the root causes of domestic violence rather than sweeping underlying issues under the carpet. However, the paralegals said that they do have cases where victims come and report cases and do not come back for mediation, to apply for a Protection Order or fail to attend criminal justice court proceedings.

The paralegals acknowledge the significance of screening cases in order to determine whether cases are suitable for community restorative justice, criminal justice or traditional justice intervention leads to successful mediation. Paralegals believe that the screening process assists them to determine which cases have a chance of successful mediation and where reconciliation is still a possibility. Generally,

CBPs said that the characteristics of the offender are considered during the assessment as well as other factors such as whether the offender will come for mediation and whether he owns a gun, and the victim's level of fear. The findings demonstrate that no one has authority above that of the woman who has suffered abuse – thereby giving voice to victims of domestic violence; the implication is that the paralegals either help the women with the variety of non-adversarial tools CBPs have or victim's problems remain unresolved because the court route is not an option for women who want the violence to stop but want to remain in the relationship with the offender. The paralegals further reveal that they also mediate cases post-Protection Order if the victim approaches the CAO for this purpose.

Literature discussed in chapter 4 acknowledges survival and justice needs of survivors of domestic violence but points out that it is survival needs that are not adequately canvassed in the literature. Yet according to the paralegals' responses in this study, victims rely on their husbands or partners for financial support and therefore choose restorative justice precisely due to survival needs such as housing, employment, poverty, safety and other considerations. The fact that mediation takes survival needs into account contributes to successful mediation and contributes to the paucity of evidence of the use of CRJ in domestic violence cases to address survival needs of women.

The literature reviewed in chapters 3 and 4 suggests that, given the seriousness and significance of what is at stake in domestic violence cases, it becomes even more important that people who have specialised training in the dynamics of such violence facilitate CRJ processes. This includes assessment of anticipated risks and use of pragmatic techniques during case screening in order to spot the warning signs for future aggression and to deal with the high levels of coercion and psychological problems that might surface. The findings of the study reveal that each paralegal interviewed has more than 16 years of practical and theoretical experience in dealing with the dynamics and complexity of domestic violence. All have received training in mediation by the supporting organisation, the CCJD and also each has their own knowledge of the restorative justice practice indigenous to KZN. All hold paralegal diplomas issued by the former University of Natal. Accredited training of CBPs as well as experience acquired over the years contributes to successful mediation. In addition, the use of a pragmatic approach by CBPs from case intake to post-mediation follow-up as evidenced by this study contributes to successful mediation.

As shown in table 10-4, certain factors underlie failure of mediation. These factors include the recognition by either of the parties that the relationship is irreconcilable, refusal of the parties to compromise, decline of the parties to accept responsibility, dishonesty of a victim or an offender

which CBPs find intolerable, disgruntled victims who are angered by the fact that the CBP will not take sides – that the CBP is neutral and will not side with a woman just because the CBP is a woman.

Therefore, it is concluded that empirical evidence of factors that contribute to success or failure of mediation to address domestic violence cases, as shown in table 10-4 and discussed in this section, are complex and may hinge on actions or omissions of the CBP, the victim and the offender; as such this study achieves its aim to help narrow the gap in the literature regarding CBPs' use of CRJ to handle cases of domestic violence.

Broader than the conclusions drawn from answering research questions and achieving the research objectives of this study, there are conclusions drawn from this study regarding legal pluralism, forum shopping, communication pragmatism, and a private-based restorative justice model which are next discussed.

### 11.3 **Legal Pluralism**

Community-based paralegals' capacity to straddle plural legal systems is benefitting rural women. The community-based paralegals are demonstrating to scholars of restorative justice, traditionalists and sceptics the opportunity to harmonise modern and traditional approaches to justice. In this study, CBPs demonstrated that they value each system of justice and they work on a daily basis to empower women to use various legal systems. The CBPs noted that women should be allowed to define how their own conceptions of justice translate to actual service delivery, not service delivery on paper by introducing legislation that at times hinders service delivery on the ground. KwaZulu-Natal rural women, like women in other indigenous communities, prioritise family unification; they do not want their partners criminalised and do not feel protected from domestic violence by the DVA.

This study has demonstrated and therefore concludes that no justice system exists in isolation. Access to justice in an environment of legal pluralism should be understood from the perspective of the user. The study has demonstrated how women utilise and take advantage of available justice options available to them. Various scholars have argued convincingly in chapters 2, 3, and 4 of this study on the pro and cons of each justice system. Community-based paralegals and their clients are teaching onlookers that the issue is not about creating boundaries for each justice institution, but about choice. Establishing boundaries between the three justice systems will cut off justice options.

It is concluded that community-based paralegals are capable of handling domestic violence cases through restorative justice practices and central to the administration and mediation of such cases are traditional African cultural consciousness, governance and justice. This model is replicable in other

African countries and indigenous communities seeking justice in remote areas worldwide. The study further concludes that straddling multiple legal systems is inherent in the role of CBPs in restorative justice for domestic violence cases in KZN.

#### 11.4 **Forum Shopping**

The availability of plural legal orders in rural KZN has provided victims of domestic violence with an opportunity to select the institution that is more likely to grant them the kind of justice they desire. This study has demonstrated that access to justice is advanced when rural women engage in “forum shopping” to shop for the justice system that affords them the best treatment and/or the most beneficial outcome. As noted in chapters 6-9, the qualitative data suggest that victims and other role players such as the police, magistrate’s courts and traditional courts strategically employ forum shopping. The quantitative research findings revealed that there are rural women who use the formal justice system, traditional justice system, and informal justice system of restorative justice to access justice. The quantitative data also show that a number of women decide to opt out of all three, although this represents a small number. The number of women that applied for Protection Orders, and those that chose to combine Protection Orders and mediation, and others who opted for mediation conducted by CBPs also demonstrates the role of forum shopping in advancing access to justice.

The qualitative findings revealed that there are women who use the traditional justice system, because they value their cultural identity. Furthermore, the literature and findings from this study suggest that women who choose to bring cases to traditional courts do so because of the barriers to access the formal justice system as discussed in chapter 2. Rural female victims of domestic violence who participated in this study established that selection of the informal community restorative justice system is not just based upon easy access and free and speedy legal services. Rather, such a choice of forum is often driven by the neutral, fair, dignified and culturally competent services rendered by CBPs unlike the treatment of victims – in some instances – by police, courts and traditional authorities.

It is concluded that the work of CBPs in facilitating access to justice in rural communities through forum shopping and otherwise, warrants official recognition by the formal justice system without the legal system co-opting and disorientating the methods cultivated by CBPs in conjunction with the communities they serve.

## 11.5 Communication Pragmatism

Communication pragmatism includes the issues of language, non-verbal communication, and agreed behavioural changes by the parties as shaped with party negotiations and paralegal facilitation before, during and after the mediation encounter. Cultural beliefs and practices figure prominently into communication pragmatism. The work of paralegals in restorative justice sheds light on the pragmatic side of communication as discussed in chapters 6-9.

The qualitative data from the paralegals and focus group participants indicate that communication is crucial because parties have been generally unable to communicate with each other for a long time. The paralegals mentioned that they provide a safe platform for the offender and the victim to communicate and for the victim to express her true feelings about the offender's behaviour and the impact of that behaviour on the victim and the family of the parties. The literature review confirmed that restorative justice not only creates a platform for communication but also strikes a balance between the needs and rights of both offender and victim to restore equilibrium in the relationship. The information provided by paralegals indicates that the key to a successful mediation is communication between the victim and the offender where they talk about matters about which they may never have communicated in the past.

Paralegals believe that their restorative justice process teaches the parties how to communicate and they have been successful in reviving communication and thus paving the way for reconciliation. Focus group participants confirmed that paralegals' restorative justice processes have helped them to resolve problems on their own, taught them to communicate better and improved victims' communication with their partners. On the one hand, the literature review revealed that, for the process to be truly restorative in nature there must be opportunities for communication and the parties must be actively involved in the process. On the other hand, literature showed that the victim and offender must be equally competent level to negotiate with each other during the CRJ process, with no domination of the weaker and vulnerable party by the stronger party. It is concluded by this study that CBPs apply pragmatic techniques that level the playing field between parties. The paralegals acknowledged that people who have a history together have a unique way of communicating with each other and CBPs create space for unique communicative attributes of parties, use this strategy for the benefit of parties in a way that leads to successful outcomes. Empirical evidence of such techniques and strategies applied by CBPs is rarely found in literature. Rather, the weight of the literature dwells on unequal power relations and lack of neutrality as problems associated with the use of CBPs.

Language plays an important role in conflict and in resolving conflict situations. Various scholars acknowledge the role and function of language in legal pluralism. The data from the paralegals and

focus group participants reveal that what sets them apart from other professionals is that they speak the same language as their clients and they are able to quickly grasp the hidden meaning of words spoken between the offender and the victim. The literature review suggests that language offers individuals the chance to confront and challenge each other, learn from each other, and try to establish relationships characterised by dignity, respect, and care. This is achieved by means of dialogue that brings together all the parties with a stake in the issue at hand. The literature review in chapter 2 reveals that language is a barrier to access to justice in various legal systems if the parties appearing before these forums do not understand the language used in these forums.

The data indicate that inappropriate use of language as is often the case in traditional courts excludes women from accessing justice. The data reveal the link between communication, language and culture. Focus group participants mentioned that what appeals to them about the paralegal approach to domestic violence is that CBPs speak the same language and understand their client's culture because they are from the same community. Paralegals confirmed that speaking the same language helps to eliminate misunderstanding. Focus group participants were vocal about being misunderstood in the formal justice system.

It is concluded by this study that CBPs not only apply the various CRJ theories discussed in chapter 3 but CBPs also adapt these theories to suit the needs of Zulu cultural beliefs and practices of individuals participating in the VOM. In addition, CBPs draw upon African indigenous knowledge to shape contemporary solutions to matters of domestic violence so as to make a difference in their clients' psychological and emotional wellbeing. In plural legal systems this is very important. Various scholars have noted that language is very important in traditional justice deliberations. The fact that presiding officers speak the local language makes the traditional justice system more accessible and acceptable to the people it serves. Yet use of local verbal language is a double-edged sword. Data from this study showed that traditional court officials may use language to facilitate access to justice or to denigrate female complainants, respondents and even female presiding officers and traditional council members. At any rate, this study concludes that communication pragmatism as used by CBPs, extends beyond language to non-verbal communication, concern for the views of one's ancestors and cultural beliefs that impact decision-making and behavioural changes to gauge and implement that which works best under a given set of circumstances to achieve desired aims – such as family-sustainability.

#### **11.6 Domestic Violence as a Private or Public Matter**

Focus groups participants are very clear that domestic violence is a private matter. They are very vocal about not wanting people to know about their private affairs. For example, they do not like to



make their private matter public by reporting to the police. The paralegals reveal that the majority of women in abusive relationships are not in favour of public communication of intimate details. Paralegals who participated in this study have not come across people who are unable to communicate. Rather, individuals need a conducive, private environment to communicate, guided by an effective mediator.

It is therefore concluded by this study that for justice seekers who perceive domestic violence as a private matter, private-based community restorative justice intervention by trained and experienced CBPs is appropriate for cases of domestic violence.

### **11.7 Lessons Learnt from Application of the Meta-conceptual Socio-legal Framework**

The meta-conceptual socio-legal framework helped the researcher to answer the research questions and achieve the research objectives. The problems and benefits of CRJ and the problems and benefits of CBPs provided the meta-conceptual framework to collect data from multiple sources of evidence, understand and analyse the social science data – both quantitative and qualitative. The quantitative data provide descriptive statistics that allow for a contextual understanding of the socio-economic characteristics of areas and CAO clients, case intake, and the handling of cases to shed light on the role of the paralegal in restorative justice to promote access to justice for rural women who are targets of violence in the home. Quantitatively, the number of domestic violence cases that have been dealt with through restorative justice using VOM speak to the fact that women are avoiding going to court and are comfortable with the alternative approach to justice, in this case VOM.

The qualitative data allowed multi-vocal perceptions from CBPs and service recipients through preservation and presentation of narrative. The meta-conceptual framework of problems and benefits associated with CRJ and CBP drove the study against the backdrop of philosophical worldviews of advocacy/participation and pragmatism. These underlying worldviews helped generate conclusions drawn and lessons learnt from the study. On the one hand, the advocacy/participation worldview gave voice to CBPs and rural female survivors of domestic violence. On the other hand, pragmatism shed light on pragmatic approaches used by CBPs to handle domestic violence cases. Based upon results from employment of the meta-conceptual framework as discussed in chapters 3 and 4, this study concludes that CBPs in KZN not only deliver the benefits associated with CRJ and CBPs but CBPs have also managed to convert problems typically attributed to CRJ and CBPs into benefits for rural female victims of domestic violence in KZN.

In terms of doctrinal analysis of rule of law orthodoxy and case law, this study concludes that the intention of the DVA to understand the dynamics of domestic violence and respond appropriately was

progressive. However, said intention failed in application because the DVA provided only one remedy, a Protection Order. Paralegals stated that women are aware of the implications of a Protection Order; they have witnessed the problems it caused for people that they know. The provisions of the DVA create more problems than they solve. Those subjected to domestic violence want violence to stop and to continue to live in peace with the offender with whom they have a relationship. It is concluded that confining problems to a single justice institution does not solve domestic discourse of the victims who participated in the study.

Traditional courts are also overwhelmed by problems connected with customary law marriages. Victims of domestic violence fall into a trap of lack of access to justice when rule of law orthodoxy and customary law are in conflict. The literature review pointed to the same problem. Scholars have argued that the Recognition of Customary Marriages Act (RCMA) has interfered with traditional practices and customs. In *MG v BM and others* 2012 (2) SA 253 (GSJ) C. Moshidi J held that 7 (6) of the RCMA that deals with registration of customary marriages is silent on the provision for penalties for a party that enters into another marriage without following the process and procedures provided for by the RCMA. Moshidi J recommended that Parliament address this gap in the DVA. This study revealed that paralegals, in their day to day work monitor the implementation of DVA, RCMA, Maintenance Act and other laws passed after the fall of apartheid. Paralegals seem to know which statute works and does not work for rural people.

In effect, it is concluded by this study that CBPs and CAOs help fill the gap in justice created by contradictory indigenous practices and statutory law and CBPs do so in a way that addresses women's domestic safety. This conclusion adds to the debate on the appropriateness of addressing domestic violence using community restorative justice.

#### **11.8 Implications for Law and Policy on the Role of Community-based Paralegals in Restorative Justice for Domestic Violence Cases**

It is evident that, CBPs are underutilised in rural areas and that there are no specific laws or policies that regulate their work. The literature review noted that there is a paucity of research on restorative justice processes with victims of domestic violence in South Africa. This suggests that the lack of formal recognition of CBPs' work has resulted in a lack of knowledge of the work they are doing with victims of domestic violence in the rural areas where they apply restorative justice. The criminal justice system is viewed by paralegals as intimidating to rural women due to the formality of the process, complicated procedures, court delays, and culture and language barriers (see the summary of findings in table 10-2). The literature acknowledges that the DVA does not provide real protection due to these barriers. The DVA does not make reference to restorative justice or to any support

provided by organisations or structures other than the police and courts. In an African context, the family remains the first source of assistance; when this fails community-based organisations informally provide a range of services, which address victims' needs. The court is the last resort when all other options have been exhausted. The focus group participants said that they only approach the courts when they know that they are divorcing their spouses. Referrals from the police and the courts to CAOs for mediation are indicative of greater acceptance of restorative approaches to justice and suggest that there is a trend towards the institutionalisation of restorative justice in South Africa. This eagerness to embrace the restorative justice approach may be motivated by a number of factors including reducing court backlogs, increasing access to justice; and genuine commitment to restorative justice approaches. This ties in with the role paralegals are playing in CAO offices as reflected by the descriptive statistics and qualitative data contributed by victims of domestic violence and the paralegals as presented in chapters 6-9.

It is clear that restorative justice practices are applied in domestic violence cases; the success of this process was measured in terms of the experiences of paralegals and victims of domestic violence. While this study did not include offenders who benefited from the restorative justice processes implemented by paralegals, it contributes to the development of restorative justice approaches to domestic violence cases. Conclusions from this study provide a platform for paralegals and community members who are directly affected to advocate for the inclusion of CBPs as support structures for victims who choose private-based informal community restorative justice over the public-based criminal justice approach.

A private-based model of CRJ for domestic violence victims runs contrary to the strides made in South Africa with regard to gender policy and the progressive domestic violence legislation that have brought domestic violence out of the private into the public domain. Integrated policy and a holistic approach are required that recognise the reality and dynamics of domestic violence. Focus group participants stated that the law has failed to deal with domestic violence. If changes in the DVA could improve the situation of women and offer the kind of remedies that build relationships and condemn violence, it may be more useful. Focus group participants and paralegals believe that CRJ and the criminal justice system should be developed as parallel systems, with users allowed to choose which system better serves their interest.

Implications for law and policy are that both approaches have positive aspects that could be merged at certain junctures to address the recalcitrant and protracted problem of domestic violence. The restorative justice process should be applied to non-violent aspects of the case, while the criminal justice system would be employed to deal with extreme cases that threaten the current and future safety of a victim and the family of a victim.

However, rather than a simple amalgamation of the two approaches, new laws and regulations are required that recognise the role of CBPs in increasing access to justice for rural women and that formally recognise CBPs as service providers. Paralegal services do not currently enjoy statutory recognition. Nor do they feature anywhere in the South African legal system. The DVA (Act 116 of 1998) (RSA, 1998a) came into operation in 1999. Findings and conclusions from this study reveal that there are compelling reasons why women victims of domestic violence in rural KZN are reluctant to approach the criminal justice system. Equally, the study reveals compelling reasons why women seek an alternative approach like CAOs and CBPs to address domestic violence.

The study's findings and conclusions reflect an avoidance of the protective measures of the DVA. From the quantitative data it is clear that some women use the DVA, but do not turn up in court for the finalisation of the Protection Order. Victims cited safety issues, cultural issues, economic issues, pressure from in-laws, and love as reasons for not approaching the courts and for withdrawing from the criminal justice process. They also felt that withdrawing a Protection Order is well-nigh impossible. This is problematic as section 10 of the DVA states that a victim and an offender may apply in writing to have a Protection Order set aside. If the court is satisfied that the victim has shown good reason for setting aside the Protection Order and that the application has been made freely, such an order may be granted. When the court issues a Protection Order, it remains in force until the court sets it aside. The data obtained from the focus group discussions of domestic violence survivors and interviews with paralegals show that once the Protection Order is granted and finalised, there is reluctance on the part of the courts to set it aside. Empirical evidence from this study reveals that men do not like to stay with women in possession of a Protection Order because a warrant of arrest is attached to it. Paralegals indicate that while women may opt for restorative justice after applying for a Protection Order; men make its withdrawal a condition for reconciliation. Focus group participants note that a Protection Order causes more problems for themselves and their families.

The DVA (Act 116) provides monetary relief and has the effect of a civil judgment of a magistrate's court. In terms of other remedies available to the victim, the court will, in the interests of justice, make any provision part of the Protection Order. In order that the person concerned will be able to seek relief/enforce their rights in terms of the relevant law, this includes the Maintenance Act No 99 of 1998 (1998b). Some focus group participants and paralegals stated that this does not help victims much because their husbands are seasonal farm workers and some are working in the informal sector where they are not registered with the Department of Labour; therefore this provision is unenforceable. The policy implication is that there should be judicial support for the use of CRJ in domestic violence cases. It is time to accommodate those who shy away from the CJS or are reluctant to use the CJS, or decide not to report at all by developing effective community-based interventions

that do not depend on the intervention of the criminal justice system, but are supported by it. If the Department of Justice and Constitutional Development is committed to increasing women's access to justice, it should consider the use of restorative justice in cases of domestic violence.

#### **11.9 Recommendations for and Policy Implications of the Role of Community-based Paralegals in Restorative Justice for Domestic Violence Cases**

Based on the findings of this study, it is recommended that the following action be taken to promote the full use of CBPs in restorative justice for domestic violence cases:

\* Further research is required to document the impact of paralegals' interventions in domestic violence cases and the impact of the practice of restorative justice from the offender's perspective. Paralegals have much to share with both the wider community and academia. The documentation of CBPs' work within the CRJ paradigm would raise their profile not only in handling domestic violence cases but other justice-related issues where they apply restorative justice. This could attract much-needed funding to further develop paralegals' expertise in the area of restorative justice, support and monitoring of cases. There is a possibility of a professional career path for some paralegals to specialise in the CRJ approach. Community restorative justice is gaining prominence globally, while the criminal justice system is in crisis and in need of reform.

\* The comments made during the *S v Baloyi* case open the opportunity for further research that will contribute to the development of policy that addresses the dynamics of domestic violence and its social and economic impact on members of society. Such policy should reflect the reality on the ground. The issues of safety, culture, language and the debate on the public/private nature of domestic violence reveal how complex this phenomenon is, and that a single strategy on its own will not adequately protect women against domestic violence. Therefore the policy must be holistic and multi-dimensional.

\*The majority of CBPs currently operating in KZN have vast practical experience in handling domestic violence; statutory regulation should be adapted to suit the setting and context where it is implemented. This study focused on the community context. The issue of regulation should be resolved to strengthen the CBP sector. It is therefore recommended that the government expedite the regulation of the paralegal sector. Government has proposed an amendment to the Legal Practice Bill (LPB) (Bill 20B, 2012) through separate legislation in the next two years. Article 34(9) states that the Legal Council must, within two years of the commencement of the LPB, investigate and make recommendations to the Minister on the statutory recognition of paralegals. Through the Department of Justice and Constitutional Development, the government has shown an interest in and commitment

to establishing a legal framework to recognise and regulate the work of CBPs. The problem is that the process has taken so long and it will still be a while before such recognition is achieved. As noted in the literature review, some scholars have argued that recognition and regulation could be realised through CBPs' integration with the legal aid model. The researcher does not support this proposal; separate legislation for paralegals is the most appropriate model to recognise the CBP sector. NADCAO has assisted the paralegal sector to launch the Association of Community Advice Offices of South Africa (ACAOSA) in anticipation of the legislation that will regulate the sector within the next two years. It is envisaged that ACAOSA will give the paralegal sector a voice and ensure its future sustainability ([www.nadcao.org.za](http://www.nadcao.org.za) 11 December 2013).

\*Guidelines or protocols should be set out within the DVA to guide paralegals' involvement in the criminal justice system. The focus group participants suggested that CBPs should continue to provide their services in the same manner as in the past. This study has revealed that paralegals could play an important role within the criminal justice system and other areas of justice. For example, section 170A of the Criminal Procedure Act, 1977 (Act 51 of 1977) excludes paralegals from acting as intermediaries. In subsection 4(a) the Minister is empowered to appoint by means of a notice in the government gazette, persons or a class of persons suitable to be appointed as intermediaries. Paralegals should be included.

Furthermore, paralegals are not included in other well known restorative justice projects. The Child Justice Act 2008: S38 (2) provides for a pre-trial assessment to be attended by the offending child and his or her parent, guardian or appropriate adult. There is scope for CBPs to be contacted by police officers as appropriate adults to help facilitate pre-trial assessment. Section 38 (3) of the Child Justice Act possibly allows scope for paralegals to link with diversion programmes, and to keep an eye on the progress of the child offender. Section 53 (7) provides for a family group conference, VOM or other restorative processes. There is scope here to involve paralegals as mediators. Section 54 provides that the process and programmes should be suited to the child's cultural, religious and linguistic background, the domestic and environmental circumstances, the appropriateness of the option recommended in relation to the child's circumstances and the interests of society. Paralegals would be the ideal persons for this role, but they are not recognised.

Paralegals are also not recognised as suitable mediators for the purposes of the new Children's Act, 2005. Sections 21 (3)(a) and 33(5)(b) state that mediation should be employed to resolve disputes regarding parental rights and responsibilities and parental plans (contact and care). The legislation currently recognises psychologists, social workers and other qualified persons as suitably qualified persons. Section 70 provides that, in a dispute before the Children's Court, the court may cause a

family group conference to be set up, and appoint a suitably qualified person or organisation to facilitate (mediate). It also provides that in a dispute before the Children's Court, the court may refer the matter to a lay forum, including traditional authorities, to settle the matter by way of mediation out of court. Paralegals would be ideal for this role, but they are not recognised. Policy change is warranted to accommodate and recognise the role of paralegals in CRJ; this would promote indigenous governance, and justice practices in the Republic of South Africa.

\* Paralegals could play an important role within the criminal justice system. The study revealed that 10% of domestic violence cases at the Bulwer and New Hanover CAOs involve sexual violence. Sexual offences, sexual offenders and their victims have been high on the criminal justice agenda since the onset of democracy. Greater public awareness of rape, sexual assault, abuse of children, and heightened awareness of their long term effect on victims, and increased reporting have combined to put pressure on the criminal justice system to respond effectively to sexual offences. The objective of the Sexual Offences and Related Matters Amendment Act (No 32, 2007) (RSA, 2007) is to provide protection for women who are victims of sexual abuse. However, legal reform does not address all the challenges rape survivors experience with the criminal justice system; challenging the everyday interpretation and practice of the law often requires much more than legal reform. With the Sexual Offences and Related Matters Amendment Act (RSA, 2007) in place, NGOs such as the CCJD through its paralegals will need to remain vigilant with regard to the myriad ways in which the law disqualifies and excludes many women, children and men's accounts of sexual offences. Sexual violence within a domestic situation is a challenge for the criminal justice system.

This study has revealed that insensitive intervention by the criminal justice system could inflict further harm on victims. Paralegals are excluded from correctional community service. In the case of offenders placed in correctional supervision, or released on parole, paralegals could assist by supervising offenders performing community service sentences. Factors that hinder access to justice, such the issues of culture, language and mistrust of the criminal justice system could be addressed by involving CBPs who are closer to the people. Paralegals increase rural people's access to legal services in a meaningful and effective way; the study revealed that they strengthen and complement formal, traditional and informal justice processes. This is also achieved by means of legal and human rights awareness activities, such as workshops, presentations and focus groups in rural areas. Paralegals understand the kind of justice rural people desire, need and to which people in rural communities aspire. This study demonstrated that community members place a premium on harmony and peace. The criminal justice system should integrate the work of paralegals, as there is evidence that they promote access to justice for ordinary people. The study revealed that the paralegals' ability

to resolve domestic violence problems relies on cooperation with the police and the courts. The CBPs take referrals from the police and courts and they also refer matters to these institutions. This offers rural people an opportunity to make a well-informed decision/choice based on the advice given by the paralegal. Policy change is warranted to accommodate and recognise the role of paralegals in CRJ; this would promote indigenous governance and justice practices in the Republic of South Africa. Policies that promote indigenous governance and justice practices are also worthy of consideration for African countries and indigenous communities elsewhere.

#### 11.10 **Knowledge Production Generated by this Study**

The introduction to this study suggested the ways in which the new knowledge generated could be helpful to the Republic of South Africa, other African countries and by extension other indigenous communities across the globe. The new knowledge generated includes but is not limited to empirical evidence on the role of CBPs in restorative justice; confirmation that CRJ is suitable for CBPs' handling of domestic violence cases; a modest contribution to process theory-building on forum shopping and communication pragmatism based on narrative from participants; and a conceptual model for the role of CBPs in CRJ as explained by mediation procedures and processes delineated in this study.

The three theoretical propositions that evolved from the findings and conclusions of this study are:

- Forum shopping and concurrent use of multiple justice systems enhances access to justice.
- Cultural competency is inherent in communication pragmatism.
- Communication pragmatism facilitates access to justice.

In terms of moving from practice to theory and then back to improve practice, what has featured prominently in the study in terms of data from fieldwork is the public and private distinction between criminal justice and informal justice in the context of domestic violence. The qualitative data contributes to the debate in the literature on whether domestic violence is a public or private matter. Victims of domestic violence have maintained that domestic violence is a private matter and should therefore be dealt with privately, whereas paralegals maintain that domestic violence is a public concern but should be dealt with privately and should be mediated by people who are local language literate and culturally competent.

The paralegals noted that public communication of intimate details is not favoured by the majority of women in abusive relationships. What women require is a conducive, private environment to communicate, guided by an effective mediator. Qualitatively, the findings revealed that the private-



based model of restorative justice is being used in cases of domestic violence, irrespective of whether scholars deem it appropriate or not. Contrary to the literature that states that the model should not be used where there is physical violence, victims take other factors into consideration that prompt them to still opt for reconciliation. This demonstrates that the lack of formal recognition of CBPs' work results in a lack of wider knowledge about the work they are doing with victims of domestic violence in rural areas where they apply a private-based restorative justice model. The success of this model was measured according to the narrative of paralegals and victims of domestic violence. While the study did not include offenders who benefit from the private-based model of restorative justice implemented by paralegals, it contributes to the development of restorative justice approaches to domestic violence cases. It also provides a platform for paralegals and community members who are directly affected to advocate for the inclusion of paralegals as support structures for victims who choose an alternative route to the criminal justice system.

Mediation encounters facilitated by CBPs are reduced to oral agreements. In continuing to improve this organic, private-based model of CRJ it would seem better not to create written agreements or a list of rules and regulations. Rather, CBPs have found a way to follow-up on oral agreements through, for example, home visits. This evolving private-based model has attracted the attention of traditional leaders which could help raise awareness of women's rights and family sustainability, not just in terms of individual human rights but as a return to a focus on group duties in the African indigenous sense.

### **11.1 Limitations of the Study**

The study only dealt with one aspect of CBPs' work in helping women who are victims of domestic violence to access justice. Paralegals' scope of work is broad; future research could focus on the various categories of cases paralegals handle in their day-to-day work in order to gain a more complete picture of their service delivery model. Another limitation is that the study did not include offenders who benefit from private-based restorative justice processes implemented by CBPs.

### **11.2 Suggestions for Further Research**

\* Community-based paralegals have gained vast experience and knowledge in working with victims of domestic violence. Further studies could provide insight into CBP work and the dynamics of the communities they serve.

\* Another question that was beyond the scope of this study is whether recognition and regulation of CBPs' work will benefit those they serve or erode their unique approach to justice. This inquiry deserves further research.

\* African indigenous knowledge systems, including African living law are worthy of empirical inquiry. The debate paralegals were interested in was African living law. These laws were not written but were passed down from generation to generation. Cases were attended to in a manner that appeased the ancestors. With the arrival of the colonisers, African living law was eroded. People started to be treated as individuals; their ancestors were not taken into consideration when dealing with their cases. The colonisers started to write law, ensuring that they only codified what was useful to them. This gave birth to statutes. The question is: Can we go back to old African law? Some paralegals said that women had no say in the old African living law. One participant observed that the colonisers' laws caused women to be inferior, not African living law. Other paralegals said that African living law allowed for diversity; the Madlala family would deal with issues differently from the Mkhize family. Paralegals agreed that going back to African living law could address the social ills affecting rural communities. One paralegal said that an *Inkosi* indicated at a meeting: "*Azibuyele emasisweni*"; back to the roots.

### 11.3 Chapter Summary

This chapter presented an overview of the findings of the study and demonstrated how the objectives of the study have been achieved and the research questions answered. The conclusions drawn were highlighted based upon a synthesis of the findings. In view of the findings achieved through the use of a meta-conceptual socio-legal framework, the implications for law and policy on the role of CBPs in restorative justice for domestic violence cases were delineated. Beyond those implications, recommendations were made in terms of a way forward on the role of CBPs in using restorative justice practices to handle domestic violence cases. The chapter discussed the new knowledge generated by this study and offered suggestions for future research that will advance access to justice for members of rural and indigenous communities.

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## Appendix A : Questionnaire for Interviews

School of Management, IT and Governance

UKZN Durban Westville Campus

### Questionnaire for Interviews

#### Questionnaire to Community-based Paralegals

Name of Site .....

Date .....

#### Perception Study of the Work of Community-based Paralegals

##### 1. Access to Justice

1.1 How do you define access to justice?
1.2 Why is access to justice important?
1.3 What are barriers to access justice?
1.4 What are the critical factors that are hindering access to justice for the poor in KZN?
1.5 In what practical ways can access to justice be improved?
1.6 To What extent are people, especially women in rural areas accessing justice when it comes to domestic violence?
1.7 What is your role in promoting access to justice in rural areas

##### 2. Community-Based Paralegals

2.1 What is the role of a community-based paralegal? In restorative justice in KZN?
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2.2 What kind of state recognition do you think would be best for community-based paralegals – statutory recognition with full, partial or no financial support?
2.3 What advantages are there for community-based paralegals in being recognized by the justice system, and the role you play in restorative justice?
2.4 What would be the disadvantages for you if your work with victims of domestic violence became part of the justice system?
2.5 How would working for the state affect your relationship to the community?
2.6 Can access to justice by rural women be improved by recognition and inclusion in the justice system?
2.7 How does the exclusion of paralegals from The Legal Practice Bill affect your work?
2.8 What would be the effect of community-based paralegals receiving unique recognition in their own legislation, rather than being incorporated in a law covering all legal practitioners?
2.9 What do you think should happen to the advice offices and paralegals in terms of your physical office location if you become part of the state legal system? What would be the impact if you no longer provide paralegal services in rural areas?
2.10 What would the impact be on your work if you are in the same bill that regulates the work of attorneys and advocates?

### 3 Community Restorative Justice

3.1 What makes people choose the informal, alternative approach (mediation) of resolving disputes over the formal system? What are the reasons for their dissatisfaction with the formal system?
3.2 Do you use restorative justice initiative in Domestic violence cases? If so how? What sorts of cases are not suited to being resolved by mediation?
3.3 Is restorative Justice intervention by you appropriate for cases of domestic violence? How does the restorative justice initiative in your office tie in with traditional African restorative justice?
3.4 Do restorative justice initiatives by you increase access to justice for victims of domestic violence? What proportion of cases is resolved through mediation?
3.5 What factors contribute to the success or failure of restorative justice initiatives for domestic violence cases you handle? What kinds of cases are heard?
3.6 Who brings these cases?
3.7 What is the procedure during mediation?
3.8 How are you mandated by the clients?
3.9 What types of solutions are used? Have they worked? Are they appropriate?



3.10 How do you keep records?
3.11 What proportion of mediations is successful?
3.12 How do you follow up with clients to ensure that they implement what they have agreed at mediation?
3.13 In cases where mediation is not successful, what in your opinion are the main reasons for this?
3.14 How often does a party refuse to attend mediation, walk out, or refuse to abide by an agreement?
3.15 If party does any of these things, what authority does a paralegal have to compel them to attend and abide by mediation?
3.16 Do communities have sufficient resources to implement restorative justice adequately?

#### **4 The Justice System**

4.1 What sorts of cases are better suited to being handled by the formal justice system?
4.1 How do local police and courts become involved in domestic violence? Are there any problems areas in implementing the domestic violence Act? What are these problem areas?
4.2 How satisfied are people with the involvement of the police and the courts on these issues?
4.3 To what extent are formal courts been used on these issues? By whom? And involving what kind of problems or disputes?
4.4 How satisfied are people with the way in which cases are dealt with under the formal justice system, for example in terms of procedure, time taken and outcomes?
4.5 What constraints exist in using the formal courts? How could these be overcome?
4.6 How fairly are women and their children dealt with under the system? How could they be better treated? What problems and challenges do you currently encounter when dealing with formal justice and clients

## **Appendix B: Focus Group Forms**

**School of Management, IT and Governance**

**UKZN Durban Westville Campus**

**Project Title:**

**Exploring community-based paralegals work with formal and informal justice institutions**

**in rural areas of KwaZulu-Natal**

**Researcher: Busiwana Winnie Martins**

**Focus Group Guide for Community Member Participants**

**Name of Site .....**

**Date .....**

### **Focus group questions**

There will be four focus groups, one for each site, and there will be between seven and ten participants in each. The questions asked will give a comprehensive view of the role of community-based paralegals in access to justice generally and their role in community restorative justice in particular as far as the community members and clients is concerned. The questions will be as follows:

- To what extent is there still a need for community advice services and paralegals in the new dispensation?
- In your opinion, what is the role of paralegals in the restorative justice system?
- What is your view regarding the recognition of paralegals and them working for the state?
- Why are rural women not using the domestic violence act for their protection and benefits?

- What problems do rural people have with the current justice system, especially regarding domestic violence?
- What practical ways can you suggest to improve access to justice for rural women who are victims of domestic violence?
- What role do you see for community restorative justice in the formal justice system in the future? And what role should paralegals play in this?
- How can access to justice for rural people improve through the involvement of community-based paralegals in the justice system?
- What was your experience during restorative justice processes? Was there any follow up after the restorative justice processes by the paralegal?
- What are the benefits of restorative justice?
- What is the problem if any with the restorative processes you have experienced?

## Appendix C: Intake Form for Domestic Violence

Form1 B  
FORM

INTAKE

# DOMESTIC VIOLENCE

Support Centre: \_\_\_\_\_

Date: \_\_\_\_\_

Name of Coordinator: \_\_\_\_\_

Client Ref No: \_\_\_\_\_

Police Case No: \_\_\_\_\_

### CLIENT INFORMATION

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Client Name: \_\_\_\_\_ Surname: \_\_\_\_\_

Gender:  Male  Female Date/Year of Birth: \_\_\_\_\_

Marital Status:  Customary  Divorced  Married  Unmarried  Widowed  Domestic Partnership

Home Address: \_\_\_\_\_ Tel: \_\_\_\_\_

\_\_\_\_\_ Cell: \_\_\_\_\_

Name of Friend/Relative: \_\_\_\_\_ Tel of Friend/Relative: \_\_\_\_\_

No of family members:  1-4  5-8  more than 8

Employment/Economic Status:  Unemployed/No Income  Housewife-looking for employment

Grantee-only income is govt. grant  Housewife-by choice  Employed/Self-employed  Pensioner

Scholar

How long employed/unemployed: \_\_\_\_\_ Employer: \_\_\_\_\_

Position: \_\_\_\_\_ Case Referred by: \_\_\_\_\_

Disability Status:  Blind  Deaf  Physical  Mental  Other  None

How did you know about the centre?  friend/neighbour/relative/community member

Poster/sign

Community meeting/School presentation/Workshop

Radio/TV

Other Institutions

Is this the first time you've come to the centre for help?  Yes  No

If NO: were you happy with the service you received last time you were here?  Yes  No

what were the reasons you came to the Centre last time?  domestic violence  rape

child abuse

maintenance

labour

general crime

legal advice

social problems

# Form 1 B

## OUTCOME

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What was the outcome of this case?  Mediated successfully  Protection Order Confirmed

Maintenance Order  Mediated Unsuccessfully  Conviction  Case Withdrawn  Acquittal

Facilitation of Payments  Advice & counseling provided  Closed - No contact for 6 months

Referral to an Institution  Interim Protection Order  Case Referred to CCMA/Labour Department

How did the client feel about the outcome of the case?  happy  unhappy

If happy, comment on client's expression of satisfaction (e.g. did they say something/send a letter):

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If unhappy, what are the reasons?

believes the outcome was not in their favour and is disappointed  needs help the Centre cannot provide

does not want to go elsewhere  other \_\_\_\_\_

**DETAILS OF ALLEGED PERPETRATOR** - complete details if you know them.

---

Perpetrator's Name: \_\_\_\_\_ Surname: \_\_\_\_\_  
\_\_\_\_\_

Home Address: \_\_\_\_\_ Tel: \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ Cell: \_\_\_\_\_  
\_\_\_\_\_

Work \_\_\_\_\_ Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## PROFILE OF ALLEGED PERPETRATOR

---

Who is the client having a problem with?  Boyfriend/Girlfriend  Spouse  Ex-boyfriend/Ex-girlfriend

Parent-in-law  Uncle/Aunt  Father  Mother  Nephew/Niece  Brother/Sister  Uncle/Aunt  
 Child

Parents  Grandparents

Acts Committed:  Indecent assault  Femicide  Attempted rape  Rape - Married couple  Incest

Sexual Harassment  Assault  Rape - Unmarried  Insulting (Verbal Abuse)

Form of Violence/Abuse:  Emotional  Verbal  Physical  Sexual  Economic

Who else knows about the problem?  Family member  Friend  No one  Other

Dynamics of the problem:  First time  Ongoing  Previously not reported  Other

Previous attempts to solve the problem:  Talk to abuser  Talk to family members  Counseling  
 Other

What happens when client tries to speak to the alleged abuser or others about the abuse?

Abuse continues  Ignored

Who does the client live with?  Family  Other people  Own home  Other

Precipitating factors:  Drinks  Drugs  Problems at work  Depression  Unemployment  None  Other

Who else is abuse affecting?  Child  Children  Other family members  Other



How is problem affecting the client and other family members?

## Appendix D: Sample of Monthly Report Form used to collect data



### Monthly Report

<b>Name of Paralegal and Advice Office:</b>	
<b>Month:</b>	<b>Number</b>
1 No. of cases seen (new and current)	
2 No. of first time cases	
3 No of people seen	
4 No. of people who have been at the Centre before	
5 No. of cases referred to the Centre by other institutions	
6 No. of cases referred to other institutions	
7 No. of cases closed	
8 No. of cases mediated successfully	
9 No. of cases where Protection Orders were confirmed/finalised	
10 No. of cases where Interim Protection Orders were granted	
11 No. of home visits	
12 No. of cases not completed (pending in the office) for follow up	
13 No. of clients accompanied to institutions by Coordinators	
14 No. of community presentations organised by Coordinators	
15 No. of people attending community presentations	
16 No. of focus group workshops organised by Coordinators	
17 No. of people attending focus group workshops	
18 No. of schools visited (presentations)	
19 No. of pupils attending school presentations for reporting periods	
20 No. of pupils at schools for reporting period	
21 No. of visits made to schools, as follow-up or ON CALL	
22 No. of meetings attended	
23 No. of forum presentations by Coordinators	
24 No. of community outreach events attended by Coordinators	
25 No. of people attending support groups	
26 No. of new support groups established by Coord in the area during reporting period	

## Breakdown of Cases

Name of Paralegal and Advice Office :	
Month:	
	<b>New Cases</b> <span style="float: right;"><b>Cases Seen (New and current)</b></span>
Child Abuse	
Domestic Violence	
General Crime	
Legal	
Labour	
Maintenance	
Rape	
Social Problems	
Unspecified	
<b>TOTAL</b>	

  
 Carry forward to Number 2 on  
 Monthly Report

  
 Carry forward to Number 1 on  
 Monthly Report

# Appendix E: Sample of Case Register used to collect data



## Case Register

Name of Paralegal		Date:										Community Advice Office					
Contact Date	New/Current Case	Name of Client	Location/Area	Gender	Age	Marital Status	Number in Family	Economic Status	Disability Status	Type of Case	Home Visit (Y/N)	Pending	Ref. No.	Referred by	Referred to	Date Closed/Completed	Outcome
1																	
2																	
3																	
4																	
5																	

**Gender** Male = **M** Female = **F**  
**Marital Status** Married = **M** Unmarried = **U** Divorced = **D** Widowed = **W** Domestic Relationship - **DR**  
**No. in Household** 1-4 members = **F4** 5-8 members = **F5-8** more than 8 = **F9+**  
**Economic Status** Employed = **EM** Self-Employed = **SE** Unemployed = **UE** Housewife-by choice = **HWa** Housewife-looking for job = **HWb** Grantee = **G** Pensioner = **PE** Scholar = **SC**  
**Disability** None = **NO** Physical = **PH** Blind = **BL** Deaf = **DE** Mental = **ME**  
**Type of Case** Domestic Violence = **DV** Rape/Sexual Abuse = **R** Social Problems = **SP** Labour Problems = **LP** Child Abuse = **CA** Legal Advice = **LA**  
**Outcome of Case** General Crime = **GC** Maintenance Cases = **MC** Unspecified Cases = **UC**  
 Mediated Successfully = **MS** Mediated Unsuccessfully = **MU** Protection Order Confirmed = **POC** Interim Protection Order = **IPO** Maintenance Order = **MO** Conviction = **C**  
 Case Withdrawn = **CW** Acquittal = **A** Advice & Counseling = **A&C** Facilitation of Payments = **FP** Referral to an Institution = **RI** Closed/No Contact = **CL**  
 Case Referred to CCMA Labour Department = **CRCLD**

## Appendix F: Data collected and collated

SOCIO-ECONOMIC CONDITIONS OF CLIENTS -2009 – 2011				
	Bulwer	New Hanover	Ixopo	Madadeni
Unemployed	443	594	996	558
Self-employed	27	15	24	27
Employed	152	220	396	289
Pensioner	199	158	352	255
Housewife by Choice	156	220	400	267
Housewife Looking for Job	147	167	364	246
Grantee	791	963	1797	1147
Scholar	46	42	50	48
<b>Total Cases</b>	<b>1961</b>	<b>2379</b>	<b>4379</b>	<b>2837</b>

Domestic Violence: Outcomes 2009 – 2011					
Cases	Bulwer	New Hanover	Ixopo	Madadeni	Grand total cases
Total Domestic Violence	354	865	1441	769	3429
Cases Mediated	233	556	1153	661	2603
Cases Mediated Successfully	203	407	999	540	2149
Cases referred for Protection Orders	25	93	197	70	385
Cases where Interim Protection Orders were Granted	17	85	177	32	311

Cases where Protection Orders were Confirmed/Finalized	10	71	163	17	261
Number of Convictions	0	0	0	0	0

TYPES OF CASES SEEN - 2009 – 2011

	Violence	Rape	Problems	Maint.enance	Labour	Child Abuse	Legal Advice	Crime	Unspec.	TOTAL
Bulwer	254	10	92	71	34	55	552	7	0	1075
Ixopo	1441	3	121	241	6	7	504	247	17	2587
Madadeni	768	7	129	105	10	64	606	5	7	1701
New Hanover	865	2	38	76	18	96	285	6	26	1412
<b>TOTAL</b>	<b>3328</b>	<b>22</b>	<b>380</b>	<b>493</b>	<b>68</b>	<b>222</b>	<b>1947</b>	<b>265</b>	<b>50</b>	<b>6775</b>



REPUBLIC OF SOUTH AFRICA

# GOVERNMENT GAZETTE

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## STAATSKOERANT

VAN DIE REPUBLIEK VAN SUID-AFRIKA

*Registered at the Post Office as a Newspaper*

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Vol. 402

CAPE TOWN, 2 DECEMBER 1998

No. 19537

KAAPSTAD, 2 DESEMBER 1998

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OFFICE OF THE PRESIDENT

KANTOOR VAN DIE PRESIDENT

No. 1551. 2 December 1998

No. 1551. 2 Desember 1998

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

Hierby word bekend gemaak dat die President sy goedkeuring gegee het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 116 of 1998: Domestic Violence Act, 1998.

No. 116 van 1998: Wet op Gesinsgeweld, 1998.



Act No. 116, 1998

DOMESTIC VIOLENCE ACT, 1998

**GENERAL EXPLANATORY NOTE:**

Words underlined with a solid line indicate insertions in existing enactments.

*(English text signed by the President.)*  
*(Assented to 20 November 1998.)*

**ACT**

**To provide for the issuing of protection orders with regard to domestic violence; and for matters connected therewith.**

**PREAMBLE**

**RECOGNISING** that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective;

**AND HAVING REGARD** to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child;

**IT IS THE PURPOSE** of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence.

**B**E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Definitions**

1. In this Act, unless the context indicates otherwise—
- (i) "arm" means any arm as defined in section 1(1) or any armament as defined in section 32(1) of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969); (xxiii) 5
  - (ii) "clerk of the court" means a clerk of the court appointed in terms of section 13 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and includes an assistant clerk of the court so appointed; (xvi) 10
  - (iii) "complainant" means any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant; (xv)

- (iv) "court" means any court contemplated in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) or any family court established in terms of an Act of Parliament; (xiii)
- (v) "damage to property" means the wilful damaging or destruction of property belonging to a complainant or in which the complainant has a vested interest; (ii) 5
- (vi) "dangerous weapon" means any weapon as defined in section 1 of the Dangerous Weapons Act, 1968 (Act No. 71 of 1968); (xi)
- (vii) "domestic relationship" means a relationship between a complainant and a respondent in any of the following ways: 10
- (a) they are or were married to each other, including marriage according to any law, custom or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other; 15
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or 20
- (f) they share or recently shared the same residence; (x)
- (viii) "domestic violence" means— 25
- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment; 30
- (g) stalking;
- (h) damage to property;
- (i) entry into the complainant's residence without consent, where the parties do not share the same residence; or
- (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant; (ix) 35
- (ix) "economic abuse" includes
- (a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; or 40
- (b) the unreasonable disposal of household effects or other property in which the complainant has an interest; (v) 45
- (x) "emergency monetary relief" means compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including—
- (a) loss of earnings;
- (b) medical and dental expenses; 50
- (c) relocation and accommodation expenses; or
- (d) household necessities; (viii)
- (xi) "emotional, verbal and psychological abuse" means a pattern of degrading or humiliating conduct towards a complainant, including— 55
- (a) repeated insults, ridicule or name calling;
- (b) repeated threats to cause emotional pain; or
- (c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security; (vi)
- (xii) "harassment" means engaging in a pattern of conduct that induces the fear of harm to a complainant including— 60

**Act No. 116, 1998****DOMESTIC VIOLENCE ACT, 1998**

- (a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
- (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues; 5
- (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant; (xx)
- (xiii) "intimidation" means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear; (xiv) 10
- (xiv) "member of the South African Police Service" means any member as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995); (xvii)
- (xv) "peace officer" means a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977); (xxii) 15
- (xvi) "physical abuse" means any act or threatened act of physical violence towards a complainant; (vii)
- (xvii) "prescribed" means prescribed in terms of a regulation made under section 19; (xxi)
- (xviii) "protection order" means an order issued in terms of section 5 or 6 but, in section 6, excludes an interim protection order; (iv) 20
- (xix) "residence" includes institutions for children, the elderly and the disabled; (xxiv)
- (xx) "respondent" means any person who is or has been in a domestic relationship with a complainant and who has committed or allegedly committed an act of domestic violence against the complainant; (xviii) 25
- (xxi) "sexual abuse" means any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant; (xix)
- (xxii) "sheriff" means a sheriff appointed in terms of section 2(1) of the Sheriffs Act, 1986 (Act No. 90 of 1986), or an acting sheriff appointed in terms of section 5(1) of the said Act; (ii) 30
- (xxiii) "stalking" means repeatedly following, pursuing, or accosting the complainant; (i)
- (xxiv) "this Act" includes the regulations. (xii)

**Duty to assist and inform complainant of rights**

35

2. Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported—

- (a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment; 40
- (b) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and
- (c) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint, if applicable. 45

**Arrest by peace officer without warrant**

3. A peace officer may without warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant. 50

**Application for protection order**

4. (1) Any complainant may in the prescribed manner apply to the court for a protection order.

(2) If the complainant is not represented by a legal representative, the clerk of the court must inform the complainant, in the prescribed manner—

- (a) of the relief available in terms of this Act; and
- (b) of the right to also lodge a criminal complaint against the respondent, if a criminal offence has been committed by the respondent.

(3) Notwithstanding the provisions of any other law, the application may be brought on behalf of the complainant by any other person, including a counsellor, health service provider, member of the South African Police Service, social worker or teacher, who has a material interest in the wellbeing of the complainant: Provided that the application must be brought with the written consent of the complainant, except in circumstances where the complainant is—

- (a) a minor;
- (b) mentally retarded;
- (c) unconscious; or
- (d) a person whom the court is satisfied is unable to provide the required consent.

(4) Notwithstanding the provisions of any other law, any minor, or any person on behalf of a minor, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.

(5) The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day, if the court is satisfied that the complainant may suffer undue hardship if the application is not dealt with immediately.

(6) Supporting affidavits by persons who have knowledge of the matter concerned may accompany the application.

(7) The application and affidavits must be lodged with the clerk of the court who shall forthwith submit the application and affidavits to the court.

**Consideration of application and issuing of interim protection order**

5. (1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 4(7) and may, for that purpose, consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings.

(2) If the court is satisfied that there is *prima facie* evidence that

- (a) the respondent is committing, or has committed an act of domestic violence; and
- (b) undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately,

the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in subsection (1), issue an interim protection order against the respondent, in the prescribed manner.

(3)(a) An interim protection order must be served on the respondent in the prescribed manner and must call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued.

(b) A copy of the application referred to in section 4(1) and the record of any evidence noted in terms of subsection (1) must be served on the respondent together with the interim protection order.

(4) If the court does not issue an interim protection order in terms of subsection (2), the court must direct the clerk of the court to cause certified copies of the application concerned and any supporting affidavits to be served on the respondent in the prescribed manner, together with a prescribed notice calling on the respondent to show cause on the return date specified in the notice why a protection order should not be issued.

(5) The return dates referred to in subsections (3)(a) and (4) may not be less than 10 days after service has been effected upon the respondent: Provided that the return date referred to in subsection (3)(a) may be anticipated by the respondent upon not less than 24 hours' written notice to the complainant and the court.

(6) An interim protection order shall have no force and effect until it has been served on the respondent. 5

(7) Upon service or upon receipt of a return of service of an interim protection order, the clerk of the court must forthwith cause—

(a) a certified copy of the interim protection order; and

(b) the original warrant of arrest contemplated in section 8(1)(a), 10  
to be served on the complainant.

#### Issuing of protection order

6. (1) If the respondent does not appear on a return date contemplated in section 5(3) or (4), and if the court is satisfied that—

(a) proper service has been effected on the respondent; and 15

(b) the application contains *prima facie* evidence that the respondent has committed or is committing an act of domestic violence,

the court must issue a protection order in the prescribed form.

(2) If the respondent appears on the return date in order to oppose the issuing of a protection order, the court must proceed to hear the matter and— 20

(a) consider any evidence previously received in terms of section 5(1); and

(b) consider such further affidavits or oral evidence as it may direct, which shall form part of the record of the proceedings.

(3) The court may, on its own accord or on the request of the complainant, if it is of the opinion that it is just or desirable to do so, order that in the examination of witnesses, including the complainant, a respondent who is not represented by a legal representative— 25

(a) is not entitled to cross-examine directly a person who is in a domestic relationship with the respondent; and

(b) shall put any question to such a witness by stating the question to the court, and the court is to repeat the question accurately to the respondent. 30

(4) The court must, after a hearing as contemplated in subsection (2), issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence.

(5) Upon the issuing of a protection order the clerk of the court must forthwith in the prescribed manner cause— 35

(a) the original of such order to be served on the respondent; and

(b) a certified copy of such order, and the original warrant of arrest contemplated in section 8(1)(a), to be served on the complainant.

(6) The clerk of the court must forthwith in the prescribed manner forward certified copies of any protection order and of the warrant of arrest contemplated in section 8(1)(a) to the police station of the complainant's choice. 40

(7) Subject to the provisions of section 7(7), a protection order issued in terms of this section remains in force until it is set aside, and the execution of such order shall not be automatically suspended upon the noting of an appeal. 45

#### Court's powers in respect of protection order

7. (1) The court may, by means of a protection order referred to in section 5 or 6, prohibit the respondent from—

(a) committing any act of domestic violence;

(b) enlisting the help of another person to commit any such act; 50

(c) entering a residence shared by the complainant and the respondent: Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;

(d) entering a specified part of such a shared residence;

(e) entering the complainant's residence; 55

(f) entering the complainant's place of employment;

- (g) preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in subparagraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or
- (h) committing any other act as specified in the protection order.
- (2) The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant, including an order—
- (a) to seize any arm or dangerous weapon in the possession or under the control of the respondent, as contemplated in section 9; and
- (b) that a peace officer must accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property.
- (3) In ordering a prohibition contemplated in subsection 1(c), the court may impose on the respondent obligations as to the discharge of rent or mortgage payments having regard to the financial needs and resources of the complainant and the respondent.
- (4) The court may order the respondent to pay emergency monetary relief having regard to the financial needs and resources of the complainant and the respondent, and such order has the effect of a civil judgment of a magistrate's court.
- (5) (a) The physical address of the complainant must be omitted from the protection order, unless the nature of the terms of the order necessitates the inclusion of such address.
- (b) The court may issue any directions to ensure that the complainant's physical address is not disclosed in any manner which may endanger the safety, health or wellbeing of the complainant.
- (6) If the court is satisfied that it is in the best interests of any child it may—
- (a) refuse the respondent contact with such child; or
- (b) order contact with such child on such conditions as it may consider appropriate.
- (7) (a) The court may not refuse—
- (i) to issue a protection order; or
- (ii) to impose any condition or make any order which it is competent to impose or make under this section,
- merely on the grounds that other legal remedies are available to the complainant.
- (b) If the court is of the opinion that any provision of a protection order deals with a matter that should, in the interests of justice, be dealt with further in terms of any other relevant law, including the Maintenance Act, 1998, the court must order that such a provision shall be in force for such limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of such law.

#### Warrant of arrest upon issuing of protection order

8. (1) Whenever a court issues a protection order, the court must make an order—
- (a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and
- (b) suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.
- (2) The warrant referred to in subsection (1)(a) remains in force unless the protection order is set aside, or it is cancelled after execution.
- (3) The clerk of the court must issue the complainant with a second or further warrant of arrest, if the complainant files an affidavit in the prescribed form in which it is stated that such warrant is required for her or his protection and that the existing warrant of arrest has been—
- (a) executed and cancelled; or
- (b) lost or destroyed.
- (4) (a) A complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order, to any member of the South African Police Service.

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## DOMESTIC VIOLENCE ACT, 1998

(b) If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17(a).

(c) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must forthwith hand a written notice to the respondent which—

- (i) specifies the name, the residential address and the occupation or status of the respondent;
- (ii) calls upon the respondent to appear before a court, and on the date and at the time, specified in the notice, on a charge of committing the offence referred to in section 17(a); and
- (iii) contains a certificate signed by the member concerned to the effect that he or she handed the original notice to the respondent and that he or she explained the import thereof to the respondent.

(d) The member must forthwith forward a duplicate original of a notice referred to in paragraph (c) to the clerk of the court concerned, and the mere production in the court of such a duplicate original shall be *prima facie* proof that the original thereof was handed to the respondent specified therein.

(5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account—

- (a) the risk to the safety, health or wellbeing of the complainant;
- (b) the seriousness of the conduct comprising an alleged breach of the protection order; and
- (c) the length of time since the alleged breach occurred.

(6) Whenever a warrant of arrest is handed to a member of the South African Police Service in terms of subsection (4)(a), the member must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.

#### Seizure of arms and dangerous weapons

9. (1) The court must order a member of the South African Police Service to seize any arm or dangerous weapon in the possession or under the control of a respondent, if the court is satisfied on the evidence placed before it, including any affidavits supporting an application referred to in section 4(1), that—

- (a) the respondent has threatened or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such arm or dangerous weapon; or
- (b) possession of such arm or dangerous weapon is not in the best interests of the respondent or any other person in a domestic relationship, as a result of the respondent's—
  - (i) state of mind or mental condition;
  - (ii) inclination to violence; or
  - (iii) use of or dependence on intoxicating liquor or drugs.

(2) Any arm seized in terms of subsection (1) must be handed over to the holder of an office in the South African Police Service as contemplated in section 11(2)(b) of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969), and the court must direct the clerk of the court to refer a copy of the record of the evidence concerned to the National Commissioner of the South African Police Service for consideration in terms of section 11 of the Arms and Ammunition Act, 1969.

(3) Any dangerous weapon seized in terms of subsection (1)—

- (a) must be given a distinctive identification mark and retained in police custody for such period of time as the court may determine; and
- (b) shall only be returned to the respondent or, if the respondent is not the owner of the dangerous weapon, to the owner thereof, by order of the court and on such conditions as the court may determine:

Provided that—

- (i) if, in the opinion of the court, the value of the dangerous weapon so seized is below R200; or
- (ii) if the return of the dangerous weapon has not been ordered within 12 months after it had been so seized; or

(iii) if the court is satisfied that it is in the interest of the safety of any person concerned,  
the court may order that the dangerous weapon be forfeited to the State.

#### Variation or setting aside of protection order

10. (1) A complainant or a respondent may, upon written notice to the other party and the court concerned, apply for the variation or setting aside of a protection order referred to in section 6 in the prescribed manner. 5

(2) If the court is satisfied that good cause has been shown for the variation or setting aside of the protection order, it may issue an order to this effect: Provided that the court shall not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily. 10

(3) The clerk of the court must forward a notice as prescribed to the complainant and the respondent if the protection order is varied or set aside as contemplated in subsection (1).

#### Attendance of proceedings and prohibition of publication of certain information 15

11. (1) (a) No person may be present during any proceedings in terms of this Act except—

- (a) officers of the court;
- (b) the parties to the proceedings;
- (c) any person bringing an application on behalf of the complainant in terms of section 4(3); 20
- (d) any legal representative representing any party to the proceedings;
- (e) witnesses;
- (f) not more than three persons for the purpose of providing support to the complainant; 25
- (g) not more than three persons for the purpose of providing support to the respondent; and
- (h) any other person whom the court permits to be present:

Provided that the court may, if it is satisfied that it is in the interests of justice, exclude any person from attending any part of the proceedings. 30

(b) Nothing in this subsection limits any other power of the court to hear proceedings *in camera* or to exclude any person from attending such proceedings.

(2) (a) No person shall publish in any manner any information which might, directly or indirectly, reveal the identity of any party to the proceedings.

(b) The court, if it is satisfied that it is in the interests of justice, may direct that any further information relating to proceedings held in terms of this Act shall not be published: Provided that no direction in terms of this subsection applies in respect of the publication of a *bona fide* law report which does not mention the names or reveal the identities of the parties to the proceedings or of any witness at such proceedings. 35

#### Jurisdiction 40

12. (1) Any court within the area in which—

- (a) the complainant permanently or temporarily resides, carries on business or is employed;
- (b) the respondent resides, carries on business or is employed; or 45
- (c) the cause of action arose,

has jurisdiction to grant a protection order as contemplated in this Act.

(2) No specific minimum period is required in relation to subsection (1)(a).

(3) A protection order is enforceable throughout the Republic.

#### Service of documents

13. (1) Service of any document in terms of this Act must forthwith be effected in the prescribed manner by the clerk of the court, the sheriff or a peace officer, or as the court may direct. 50



## Act No. 116, 1998

## DOMESTIC VIOLENCE ACT, 1998

(2) The regulations contemplated in section 19 must make provision for financial assistance by the State to a complainant or a respondent who does not have the means to pay the fees of any service in terms of this Act.

**Legal representation**

14. Any party to proceedings in terms of this Act may be represented by a legal representative. 5

**Costs**

15. The court may only make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably.

**Appeal and review** 10

16. The provisions in respect of appeal and review contemplated in the Magistrate's Courts Act, 1944 (Act No. 32 of 1944), and the Supreme Court Act, 1959 (Act No. 59 of 1959), apply to any proceedings in terms of this Act.

**Offences**

17. Notwithstanding the provisions of any other law, any person who— 15

(a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7;

(b) contravenes the provisions of section 11(2)(a);

(c) fails to comply with any direction in terms of the provisions of section 11(2)(b); or 20

(d) in an affidavit referred to section 8(4)(a), wilfully makes a false statement in a material respect,

is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and in the case of an offence contemplated in paragraph (b), (c), or (d), to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment. 25

**Application of Act by prosecuting authority and members of South African Police Service**

18. (1) No prosecutor shall— 30

(a) refuse to institute a prosecution; or

(b) withdraw a charge,

in respect of a contravention of section 17(a), unless he or she has been authorised thereto, whether in general or in any specific case, by a Director of Public Prosecutions as contemplated in section 13(1)(a) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), or a senior member of the prosecuting authority designated thereto in writing by such a Director. 35

(2) The National Director of Public Prosecutions referred to in section 10 of the National Prosecuting Authority Act, 1998, in consultation with the Minister of Justice and after consultation with the Directors of Public Prosecutions, must determine prosecution policy and issue policy directives regarding any offence arising from an incident of domestic violence. 40

(3) The National Commissioner of the South African Police Service must issue national instructions as contemplated in section 25 of the South African Police Service Act, 1995 (Act No. 68 of 1995), with which its members must comply in the execution of their functions in terms of this Act, and any instructions so issued must be published in the *Gazette*. 45

(4) (a) Failure by a member of the South African Police Service to comply with an obligation imposed in terms of this Act or the national instructions referred to in subsection (3), constitutes misconduct as contemplated in the South African Police Service Act, 1995, and the Independent Complaints Directorate, established in terms of that Act, must forthwith be informed of any such failure reported to the South African Police Service. 50

(b) Unless the Independent Complaints Directorate directs otherwise in any specific case, the South African Police Service must institute disciplinary proceedings against any member who allegedly failed to comply with an obligation referred to in paragraph (a).

(5) (a) The National Director of Public Prosecutions must submit any prosecution policy and policy directives determined or issued in terms of subsection (2) to Parliament, and the first policy and directives so determined or issued, must be submitted to Parliament within six months of the commencement of this Act. 5

(b) The National Commissioner of the South African Police Service must submit any national instructions issued in terms of subsection (3) to Parliament, and the first instructions so issued, must be submitted to Parliament within six months of the commencement of this Act. 10

(c) The Independent Complaints Directorate must, every six months, submit a report to Parliament regarding the number and particulars of matters reported to it in terms of subsection (4)(a), and setting out the recommendations made in respect of such matters. 15

(d) The National Commissioner of the South African Police Service must, every six months, submit a report to Parliament regarding—

- (i) the number and particulars of complaints received against its members in respect of any failure contemplated in subsection (4)(a);
- (ii) the disciplinary proceedings instituted as a result thereof and the decisions which emanated from such proceedings; and 20
- (iii) steps taken as a result of recommendations made by the Independent Complaints Directorate.

#### Regulations

19. (1) The Minister of Justice may make regulations regarding— 25

- (a) any form required to be prescribed in terms of this Act;
- (b) any matter required to be prescribed in terms of this Act; and
- (c) any other matter which the Minister deems necessary or expedient to be prescribed in order to achieve the objects of this Act.

(2) Any regulation made under subsection (1)— 30

- (a) must be submitted to Parliament prior to publication thereof in the *Gazette*;
- (b) which may result in expenditure for the State, must be made in consultation with the Minister of Finance; and
- (c) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year. 35

#### Amendment of section 40 of Act 51 of 1977, as amended by section 41 of Act 129 of 1993 and section 4 of Act 18 of 1996

20. Section 40 of the Criminal Procedure Act, 1977, is hereby amended by the addition in subsection (1) of the following paragraph: 40

“(g) who is reasonably suspected of having committed an act of domestic violence as contemplated in section (1) of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element.”.

#### Repeal of laws and savings

21. (1) Sections 1, 2, 3, 6 and 7 of the Prevention of Family Violence Act, 1993 (Act No. 133 of 1993), are hereby repealed. 45

(2) Any application made, proceedings instituted or interdict granted in terms of the Act referred to in subsection (1) shall be deemed to have been made, instituted or granted in terms of this Act.

#### Short title and commencement 50

22. This Act shall be called the Domestic Violence Act, 1998, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

# Appendix H: Traditional Courts Bill

REPUBLIC OF SOUTH AFRICA

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## TRADITIONAL COURTS BILL

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*(As introduced in the National Council of Provinces (proposed section 76), on request of the Minister of Justice and Constitutional Development; explanatory summary of Bill published in Government Gazette No. 34850 of 13 December 2011) (Bill originally introduced in National Assembly as Traditional Courts Bill [B 15—2008], and withdrawn on 2 June 2011)*  
*(The English text is the official text of the Bill)*

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(SELECT COMMITTEE ON SECURITY AND CONSTITUTIONAL DEVELOPMENT)

[B 1—2012]

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# BILL

To affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation; to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values; to enhance customary law and the customs of communities observing a system of customary law; and to provide for matters connected therewith.

## PREAMBLE

**SINCE** the Constitution recognises the institution, status and role of traditional leadership, including a role in the administration of justice, as well as the application of customary law, subject to the Constitution;

**AND SINCE** the traditional justice system, which is based on customary law, forms part of the legal system of the Republic;

**AND SINCE** the Traditional Leadership and Governance Framework Act, 2003, recognises a role for the institution of traditional leadership in the administration of justice;

**AND SINCE** it is necessary to transform the traditional justice system, in line with constitutional imperatives and values, including the right to human dignity, the achievement of equality and the advancement of human rights and freedoms;

**AND SINCE** it is necessary to have a single statute applicable throughout the Republic, regulating traditional courts,

**B** E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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#### Definitions

1.	In this Act, unless the context indicates otherwise—	
	“ <b>Black Administration Act</b> ” means the Black Administration Act, 1927 (Act No. 38 of 1927);	15
	“ <b>Constitution</b> ” means the Constitution of the Republic of South Africa, 1996;	
	“ <b>Department</b> ” means the Department of Justice and Constitutional Development;	
	“ <b>Director-General</b> ” means the Director-General of the Department;	
	“ <b>headman or headwoman</b> ” means a headman or headwoman contemplated in the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act, and includes a person who is appointed to act or deputise for a headman or headwoman, as is contemplated in sections 13, 14 and 15 of the Traditional Leadership and Governance Framework Act;	20
	“ <b>king or queen</b> ” means a king or queen contemplated in the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act, and includes a person who is appointed to act or deputise for a king or queen, as contemplated in sections 13, 14 and 15 of the Traditional Leadership and Governance Framework Act;	25
	“ <b>Minister</b> ” means the Cabinet member responsible for the administration of justice;	30
	“ <b>prescribed</b> ” means prescribed by regulation;	
	“ <b>presiding officer</b> ” means a king, queen, senior traditional leader, headman, headwoman or member of a royal family who has been designated as a presiding officer of a traditional court by the Minister in terms of section 4 and who —	35
	(a) presides over proceedings in the resolution of disputes contemplated in this Act; or	
	(b) pronounces judgment at the end of such proceedings after being advised in terms of customary law and custom;	40
	“ <b>regulation</b> ” means a regulation in terms of section 21;	
	“ <b>Repeal of the Black Administration Act and Amendment of Certain Laws Act</b> ” means the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005 (Act No. 28 of 2005);	
	“ <b>royal family</b> ” means royal family as defined in the Traditional Leadership and Governance Framework Act;	45
	“ <b>senior traditional leader</b> ” means a senior traditional leader contemplated in the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act, and includes a person who is appointed to act or deputise for a senior traditional leader, as is contemplated in sections 13, 14 and 15 of the Traditional Leadership and Governance Framework Act;	50
	“ <b>this Act</b> ” includes any regulation;	
	“ <b>traditional community</b> ” means a traditional community recognised as such in terms of section 2 of the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act;	55
	“ <b>traditional council</b> ” means a traditional council which has been recognised and established under section 3 of the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act;	60

- “traditional court”** means a court established as part of the traditional justice system, which—
- (a) functions in terms of customary law and custom; and
  - (b) is presided over by a king, queen, senior traditional leader, headman, headwoman or a member of a royal family who has been designated as a presiding officer of a traditional court by the Minister in terms of section 4, and which includes a forum of community elders who meet to resolve any dispute which has arisen, referred to in the different languages as—
    - (i) “*eBandla*” in isiNdebele
    - (ii) “*Havo*” in Xitsonga;
    - (iii) “*inKantolo yeNdabuko*” in isiZulu;
    - (iv) “*iNkhundla*” in siSwati;
    - (v) “*iNkundla*” in isiXhosa;
    - (vi) “*Kgoro*” in Sepedi;
    - (vii) “*Kgotla*” in Sesotho;
    - (viii) “*Khoro*” in Tshivenda;
    - (ix) “*Lekgotla*” in Setswana; and
    - (x) “*Tradisionele hof*” in Afrikaans.
- “traditional justice system”** means a system of law which is based on customary law and customs;
- “traditional leader”** means a person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of the Traditional Leadership and Governance Framework Act;
- “Traditional Leadership and Governance Framework Act”** means the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).

#### Objects of Act

2. The objects of this Act are to—
- (a) affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
  - (b) affirm the role of the institution of traditional leadership in —
    - (i) promoting social cohesion, co-existence and peace and harmony in traditional communities;
    - (ii) enhancing access to justice by providing a speedier, less formal and less expensive resolution of disputes; and
    - (iii) promoting and preserving traditions, customs and cultural practices that promote nation-building, in line with constitutional values;
  - (c) create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with constitutional imperatives and values; and
  - (d) enhance the effectiveness, efficiency and integrity of the traditional justice system.

#### Guiding principles

3. (1) In the application of this Act, the following principles should apply:
- (a) The need to align the traditional justice system with the Constitution in order for the said system to embrace the values enshrined in the Constitution, including—
    - (i) the right to human dignity;
    - (ii) the achievement of equality and the advancement of human rights and freedoms; and
    - (iii) non-racialism and non-sexism;
  - (b) the need to promote access to justice for all persons;
  - (c) the promotion of restorative justice measures;
  - (d) the enhancement of the quality of life of traditional communities through mediation;
  - (e) the development of skills and capacity for persons applying this Act in order to ensure the effective implementation thereof; and
  - (f) the need to promote and preserve African values which are based on reconciliation and restorative justice.

(2) In the application of this Act, the following should be recognised and taken into account:

- (a) The constitutional imperative that courts, tribunals or forums, when—
  - (i) interpreting the Bill of Rights, must promote the values that underlie an open and democratic society, based on human dignity, equality and freedom; and
  - (ii) interpreting any legislation, and when developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights;
- (b) the existence of systemic unfair discrimination and inequalities, particularly in respect of gender, age, race, as a result of past unfair discrimination, brought about by colonialism, apartheid and patriarchy;
- (c) the need to promote and preserve the African values of justice which promote social cohesion, reconciliation and restorative justice; and
- (d) the principles underlying the traditional justice system are not, in all respects, the same as in the context of due process, as applied or understood in the retributive justice system.

#### Designation and training of traditional leaders

4. (1) The Minister may, in the prescribed manner, after consultation with the Premier of the province in question, designate a senior traditional leader recognised as such by the Premier, as is contemplated in the Traditional Leadership and Governance Framework Act, as presiding officer of a traditional court for the area of jurisdiction in respect of which such senior traditional leader has jurisdiction.

(2) The Minister may, in the prescribed manner, after consultation with the President, designate a king or queen recognised as such by the President, as is contemplated in the Traditional Leadership and Governance Framework Act, as presiding officer of a traditional court for the area or areas of jurisdiction in respect of which such king or queen has jurisdiction.

(3) Any designation made by the Minister in terms of subsection (1) or (2) is effective from the date of the recognition of the traditional leader as king, queen or senior traditional leader, by the Premier or President, as the case may be, as contemplated in the Traditional Leadership and Governance Framework Act.

(4) The Minister may, at the written request of a king, queen or senior traditional leader contemplated in subsection (1) or (2), in the prescribed manner, designate any headman, headwoman or a member of the royal family as an alternative presiding officer of the traditional court, in the absence of such king, queen or senior traditional leader.

(5) Any king, queen, senior traditional leader, headman, headwoman or member of the royal family who has been designated in terms of subsection (1), (2) or (4) must—

- (a) save where such king, queen, senior traditional leader, headman, headwoman or member of the royal family is exempted from attending a prescribed training programme or course in the circumstances prescribed in section 21(1)(c); and
- (b) subject to section 23(3)(a)(i) or 23(3)(b)(i),

as soon as is practicable after he or she has been so designated, but within a period of at least 12 months after such designation, attend the prescribed training programme or course contemplated in section 21(1)(b).

(6) The Minister may, in the prescribed manner, revoke any designation made under subsection (1), (2) or (4) if the designated king, queen, senior traditional leader, headman, headwoman or member of the royal family fails to attend the prescribed training programme or course within the period contemplated in subsection (5) and such failure is due to the fault on the part of such person.

(7) The Director-General must establish and keep a prescribed register of all kings, queens, senior traditional leaders, headmen, headwomen and members of the royal family who have been designated in terms of subsection (1), (2) or (4) or whose designation has been suspended or revoked in terms of subsection (6) or section 16.

(8) The Director-General must establish and keep a prescribed register of all traditional leaders who have completed the prescribed training programme or course as contemplated in section 21(1)(f).



**Settlement of certain civil disputes of a customary law nature by traditional courts**

5. (1) A traditional court may, subject to subsection (2), hear and determine civil disputes arising out of customary law and custom brought before the court where the act or omission which gave rise to the civil dispute occurred within the area of jurisdiction of the traditional court in question. 5

(2) A traditional court may not under this section or any other law hear and determine—

- (a) any constitutional matter;
- (b) any question of nullity, divorce or separation arising out of a marriage, whether a marriage under the Marriage Act, 1961 (Act No. 25 of 1961), a customary marriage under the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or a civil union under the Civil Union Act, 2006 (Act No. 17 of 2006); 10
- (c) any matter relating to the custody and guardianship of minor children;
- (d) any matter relating to the validity, effect or interpretation of a will; 15
- (e) any matter arising out of customary law and custom where the claim or the value of the property in dispute exceeds the amount determined by the Minister from time to time by notice in the *Gazette*; or
- (f) any matter arising out of customary law and custom relating to any category of property determined by the Minister from time to time by notice in the *Gazette*. 20

**Settlement of certain criminal disputes by traditional court**

6. A traditional court may, subject to section 10(1), hear and determine offences brought before the court if the offence occurred within the area of jurisdiction of the traditional court in question and if such offence is listed in the Schedule. 25

**Nature of traditional courts**

7. Traditional courts are distinct from courts referred to in section 166 of the Constitution, and operate in accordance with a system of customary law and custom that seeks to—

- (a) prevent conflict; 30
- (b) maintain harmony; and
- (c) resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution.

**Sessions of traditional court 35**

8. Sessions of a traditional court are held at the time and place determined by the presiding officer of the traditional court, in accordance with customary law and customary practices.

**Procedure of traditional court**

9. (1) Subject to subsection (2)— 40

- (a) the procedure at any proceedings of a traditional court; and
- (b) the manner of execution of any sanction imposed by a traditional court, must be in accordance with customary law and custom, except in so far as the Minister prescribes otherwise under section 21(2)(a).

(2) During proceedings of a traditional court, a presiding officer must ensure that— 45

- (a) the rights contained in the Bill of Rights in Chapter 2 of the Constitution are observed and respected, with particular reference to the following: 50
  - (i) That women are afforded full and equal participation in the proceedings, as men are; and
  - (ii) that vulnerable persons, particularly children, disabled persons and the elderly, are treated in a manner that takes into account their particular vulnerability; and



- (b) the following rules of natural justice are adhered to:
- (i) The *audi alteram partem* rule, which means that persons affected by a decision must be given a fair hearing by the decision-maker before the decision is made; and
  - (ii) the *nemo iudex in propria causa* rule, which means that any decision-making must be, and must be reasonably perceived to be, impartial. 5
- (3) (a) No party to any proceedings before a traditional court may be represented by a legal representative.
- (b) A party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom. 10
- (4) (a) Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the court must apply the system of customary law that the parties expressly agreed should apply.
- (b) In the absence of any agreement contemplated in paragraph (a), the traditional court must decide the matter in accordance with the following guidelines: 15
- (i) The system of customary law applicable in the area of jurisdiction of the traditional court should take precedence over any other system of customary law; or
  - (ii) the traditional court may apply the system of customary law with which the parties or the issues in the dispute have their closest connection. 20
- (5) (a) The traditional court must, in the prescribed manner—
- (i) issue a receipt to every person in respect of any fine paid by such person;
  - (ii) pay any fine collected in terms of subparagraph (i) into the provincial revenue fund of the province in question; and 25
  - (iii) cause records to be kept of all financial transactions relating to any money paid into the provincial revenue fund as fines, in terms of subparagraph (i).
- (b) The records and financial transactions of every traditional court relating to fines must be audited when the financial statements of traditional councils are audited, as contemplated in section 4(2)(b) of the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by that Act. 30

#### Sanctions and orders that may be given by traditional court

10. (1) In the case of a criminal dispute, a traditional court may not impose the following sanctions:
- (a) Any punishment which is inhumane, cruel or degrading, or which involves any form of detention, including imprisonment; 35
  - (b) banishment from the traditional community;
  - (c) a fine in excess of the amount determined by the Minister from time to time by notice in the *Gazette*; and
  - (d) corporal punishment. 40
- (2) A traditional court may, in the case of both civil and criminal disputes, but subject to subsection (1) in the case of criminal disputes, after hearing the views of the parties to the dispute, make any appropriate order in the circumstances, including the following:
- (a) An order for the payment of a fine, sounding in money, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, payable in instalments, if necessary; 45
  - (b) an order, expressed in monetary terms or otherwise, including livestock—
    - (i) making a settlement between the parties to the proceedings an order of court;
    - (ii) for the payment of any damages in respect of any proven financial loss; 50
    - (iii) for the payment of compensation to a party; or
    - (iv) for the payment of damages to an appropriate body or organisation;
  - (c) an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of;
  - (d) an order that an unconditional apology be made; 55
  - (e) an order requiring the accused person or defendant to make regular progress reports to the court regarding compliance with any condition imposed by the court;
  - (f) an order directing that the matter be submitted to the national prosecuting authority for the possible institution of criminal proceedings in terms of the common law or relevant legislation; 60

- (g) an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court; 5
- (h) an order that one of the parties to the dispute, both parties or any other person performs some form of service for or provides some benefit to, a specified victim or victims; 5
- (i) an order depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom; 10
- (j) an order discharging a person with a caution or reprimand in the case of a criminal dispute; 10
- (k) an order, containing a combination of any of the sanctions contemplated in paragraphs (a) to (j), except where the matter is referred to the national prosecuting authority under paragraph (f), in which event the decision of the national prosecuting authority will prevail; and 15
- (l) any other order that the traditional court may deem appropriate and which is consistent with the provisions of this Act.

#### Enforcement of sanctions of traditional courts

11. (1) If it comes to the attention of a traditional court that a person upon whom the traditional court has imposed a sanction, has not complied with the sanction in question, including the payment of a fine, sum of money or livestock, in whole or in part, that traditional court must, in the prescribed manner, cause such person to appear before it. 20

(2) (a) When a person appears before a traditional court as contemplated in subsection (1), the traditional court must inquire into the reasons for the person's failure to comply with the sanction imposed by the traditional court and make a determination as to whether the failure is due to fault on the part of the person or not. 25

(b) If it is found that the failure is not due to fault on the part of the person, the traditional court may make an appropriate order which will assist the person to comply with the sanction initially imposed.

(c) If it is found that the failure is due to fault on the part of the person, the traditional court may deal with the matter in accordance with customary law and custom and may impose further sanctions for such non-compliance. 30

(d) Any order made by a traditional court as contemplated in paragraph (c) in the form of the payment of a fine, as contemplated in section 10(2)(a), or in the form of compensation to a person, as contemplated in section 10(2)(b), has the effect of a civil judgment of the magistrate's court having jurisdiction and is enforceable by execution in that magistrate's court, in accordance with the provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and as may be prescribed, and the person to whom such compensation is payable may proceed as if the order was made in the magistrate's court in his or her favour. 40

#### Order of traditional court final

12. An order of a traditional court is final, except where a party to the proceedings exercises his or her rights as contemplated in section 13 in respect of appeals or section 14 in respect of procedural review.

#### Appeals to magistrates' courts

13. (1) A party to a civil or criminal dispute in a traditional court may, in the prescribed manner and period, appeal to the magistrate's court having jurisdiction against an order of a traditional court, as contemplated in section 10(2)(a), (b), (h) or (i), as well as section 10(2)(k), to the extent that the order in terms of section 10(2)(k) relates to an order contemplated in section 10(2)(a), (b), (h) or (i). 50

(2) An order of a traditional court in respect of which an appeal is lodged, as contemplated in subsection (1), is suspended until the appeal has been decided (if it was prosecuted in the time and in the manner so prescribed) or until the expiry of the prescribed period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed. 55

(3) Notwithstanding any other law to the contrary, a magistrate's court hearing an appeal as contemplated in this section has the power to —

- (a) confirm the order of the traditional court;
- (b) amend or substitute the order of the traditional court, as it deems appropriate in the circumstances, with any order contemplated in section 10(2); or
- (c) dismiss the order of the traditional court.

**Procedural review by magistrates' courts** 5

14. (1) A party to any proceedings in a traditional court may, in the prescribed manner and period, take such proceedings on review before a magistrate's court in whose area of jurisdiction the traditional court sits on any of the following grounds:

- (a) The traditional court acted *ultra vires* (outside the scope of the Act);
- (b) absence of jurisdiction on the part of the traditional court; 10
- (c) gross irregularity with regard to the proceedings; or
- (d) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004), on the part of the presiding officer. 15

(2) Notwithstanding any other law to the contrary, a magistrate's court has the powers, as may be prescribed, relating to a procedural review contemplated in this section.

**Oath or affirmation of office**

15. (1) A traditional leader who has been designated as presiding officer of a traditional court must, subject to section 23(3)(a)(ii) or 23(3)(b)(ii), take the prescribed oath or make the prescribed affirmation that he or she will uphold and protect the Constitution before the magistrate of the magistrate's court having jurisdiction or any additional magistrate of that court who has been authorised thereto in writing by the said magistrate, before he or she may perform any of the functions contemplated in this Act. 20 25

(2) The Director-General must establish and keep a prescribed register of every traditional leader in the traditional court in question who has taken the prescribed oath or made the prescribed affirmation, as contemplated in this section or section 23(3)(a)(ii) or 23(3)(b)(ii).

**Incapacity, gross incompetence or misconduct of presiding officers** 30

16. (1) Any person may, in the prescribed manner, lodge with the Minister a complaint relating to the role of a presiding officer in the administration of justice.

(2) A complaint must be lodged by means of a prescribed affidavit or an affirmed statement, specifying—

- (a) the nature of the complaint; and 35
- (b) the facts upon which the complaint is based.

(3) The grounds on which any complaint against a presiding officer may be lodged, are the following:

- (a) (i) Incapacity, giving rise to a presiding officer's inability to perform his or her functions as a presiding officer; 40
- (ii) gross incompetence; or
- (iii) misconduct,

which has a bearing on the administration of justice;

- (b) any wilful or grossly negligent breach of the code of conduct contemplated in the Traditional Leadership and Governance Framework Act, or any code of conduct under any provincial legislation required by the Traditional Leadership and Governance Framework Act, which has a bearing on the administration of justice; 45

- (c) any wilful or grossly negligent conduct, other than conduct contemplated in paragraph (a) or (b), that is incompatible with or unbecoming of, the office of presiding officer; or 50

- (d) any contravention of a provision of this Act.

(4) (a) Upon receipt of a complaint as contemplated in subsection (1), and if the Director-General or an official in the Department above the rank of Director or any official of equivalent rank, authorised thereto in writing by the Director-General, has in the prescribed manner satisfied himself or herself that the complaint falls within one of the grounds as contemplated in subsection (3), the Minister must immediately refer it to the Premier concerned for investigation by the mechanism contemplated in section 27(3)(a) of the Traditional Leadership and Governance Framework Act, established in terms of legislation applicable in the province concerned. 5

(b) The Premier must, after the investigation contemplated in paragraph (a) has been finalised, submit a report to the Minister, with any of the following recommendations: 10

- (i) That the designation of the presiding officer be revoked, together with a recommendation regarding the designation of a substitute presiding officer;
- (ii) that the designation of the presiding officer be suspended for the duration of any specific remedial measure suggested by the Premier, as contemplated in paragraph (c)(v) to (vii);
- (iii) that the presiding officer be subjected to any specific remedial measure suggested by the Premier, as contemplated in paragraph (c); or
- (iv) that the complaint be dismissed. 15

(c) Any one or a combination of the following remedial measures may be imposed on a presiding officer, if his or her designation is not revoked: 20

- (i) An apology to the complainant;
- (ii) a reprimand;
- (iii) a written warning;
- (iv) any form of compensation;
- (v) any appropriate counselling;
- (vi) the attendance of a specific training course; or
- (vii) any other appropriate corrective measure. 25

(5) Upon receipt of the report and recommendation contemplated in subsection (4), the Minister must consider the matter and, in consultation with the Premier, decide on how the matter must be dealt with. 30

(6) After a decision has been reached as contemplated in subsection (5), the Minister must immediately, in writing, inform the presiding officer and the complainant of his or her decision.

(7) A traditional leader who is removed from office in terms of the Traditional Leadership and Governance Framework Act, is deemed to have had his or her designation as a presiding officer revoked. 35

#### **Assignment of officers to assist traditional courts**

17. The Minister may, within the resources available at the magistrate's court in which jurisdiction the traditional court sits, assign one or more officers to assist a traditional court in performing its functions under this Act. 40

#### **Record of proceedings**

18. A traditional court must, in the prescribed manner, record or cause to be recorded—

- (a) the nature of each dispute or charge;
- (b) a summary of the facts of the case; and
- (c) the decision of the court, including the sentence, order or sanction of the court. 45

#### **Transfer of cases**

19. (1) If a presiding officer of a traditional court is of the opinion that a dispute before it is not a matter in respect of which a traditional court has jurisdiction, as contemplated in section 5 in the case of civil disputes or section 6 in the case of criminal disputes, or if the matter involves difficult or complex questions of law or fact that should be dealt with in a magistrate's court or a small claims court, he or she may, in the prescribed manner, transfer such dispute to the magistrate's court or small claims court having jurisdiction and notify the parties to the dispute of the transfer. 50

(2) If a prosecutor, in the case of a criminal matter, before an accused person has pleaded to a charge as contemplated in section 6(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or a magistrate or a commissioner of a small claims court, in the case of a civil matter before him or her, is of the opinion that a dispute before him or her—

- (a) in the case of a civil dispute—
    - (i) is a matter that can be dealt with appropriately in terms of customary law and custom in a traditional court; and
    - (ii) is a matter in respect of which a traditional court has jurisdiction, as contemplated in section 5; or
  - (b) in the case of a criminal dispute, is a matter in respect of which a traditional court has jurisdiction, as contemplated in section 6,
- the prosecutor, magistrate or commissioner of a small claims court, as the case may be, may, in the prescribed manner, transfer the dispute to the traditional court having jurisdiction and notify the parties to the dispute of the transfer.

#### Offences and penalties

20. Any person who—
- (a) wilfully insults a presiding officer during proceedings of a traditional court; or
  - (b) wilfully interrupts the proceedings of a traditional court or otherwise misbehaves himself or herself in the place where the proceedings are held; or
  - (c) having received a notice to attend court proceedings, without sufficient cause fails to attend at the time and place specified in the notice, or fails to remain in attendance until the conclusion of the proceedings in question or until excused from further attendance by the presiding officer,
- is guilty of an offence and liable on conviction to a fine.

#### Regulations

21. (1) The Minister must make regulations regarding the following:
- (a) The manner in which a traditional leader is designated as a presiding officer of a traditional court, as contemplated in section 4(1), (2) or (4);
  - (b) the training programmes or courses and the contents thereof for traditional leaders who have been designated as presiding officers, as contemplated in section 4(5);
  - (c) the circumstances in which a traditional leader may be exempted from attending a training programme or course, as contemplated in section 4(5)(a);
  - (d) the manner in which the designation of a traditional leader as a presiding officer of a traditional court is revoked, as contemplated in section 4(6);
  - (e) the register to be established and kept by the Director-General of all traditional leaders who have been designated as presiding officers of traditional courts or whose designations as presiding officers of traditional courts have been suspended or revoked, as contemplated in section 4(7);
  - (f) the register to be established and kept by the Director-General of all traditional leaders who have completed the training programmes or courses, as contemplated in section 4(8);
  - (g) the manner in which a traditional court, as contemplated in section 9(5)(a), must—
    - (i) issue receipts in respect of fines paid;
    - (ii) pay any fines received into the relevant provincial revenue fund; and
    - (iii) keep records of financial transactions relating to money paid into the relevant provincial revenue fund;
  - (h) the manner in which a traditional court must cause persons, who have not complied with any sanctions imposed by it, to appear before it, as contemplated in section 11(1);
  - (i) the manner and period in which an appeal must be lodged, as contemplated in section 13(1);
  - (j) the manner and period in which a matter may be taken on procedural review, as contemplated in section 14(1);
  - (k) the powers of a magistrate's court relating to procedural reviews, as contemplated in section 14(2);



- (l) the oath to be taken or affirmation to be made by a presiding officer of a traditional court, as contemplated in section 15(1);
- (m) the register to be established and kept by the Director-General, containing the particulars of every traditional leader who has taken an oath or made an affirmation, as contemplated in section 15(2); 5
- (n) the manner in which a complaint relating to the role of a presiding officer in the administration of justice must be lodged with the Minister, as contemplated in section 16(1);
- (o) the affidavit or affirmed statement on which a complaint must be lodged with the Minister against a presiding officer, specifying the nature of the complaint 10 against the presiding officer and the facts upon which the complaint is based, as contemplated in section 16(2);
- (p) the manner in which a complaint against a presiding officer must be verified as falling within one of the grounds for initiating an investigation against a presiding officer, as contemplated in section 16(4)(a); 15
- (q) the manner in which a traditional court must keep records, as contemplated in section 18;
- (r) the manner in which matters may be referred from traditional courts to magistrates' courts and from magistrates' courts to traditional courts, as contemplated in section 19; or 20
- (s) any other matter which is necessary to prescribe in order to give effect to this Act.
- (2) The Minister may make regulations regarding the following:
- (a) The procedure applicable in proceedings of a traditional court and the manner of execution of any sanction imposed by a traditional court, as contemplated in section 9(1); 25
- (b) the manner in which an order of a traditional court must be executed in a magistrate's court, as contemplated in section 11(2)(d);
- (c) the collation and processing of information relating to the functioning of traditional courts, which must be submitted annually by the Minister to Parliament and the National House of Traditional Leaders; or 30
- (d) any other matter which may be prescribed in order to give effect to this Act.
- (3) Any regulation envisaged under this section must be made after consultation with the Cabinet member responsible for traditional leadership matters and the National House of Traditional Leaders. 35
- (4) Any regulation made in terms of subsection (1) or (2) may provide that any person who contravenes a provision thereof or fails to comply therewith, is guilty of an offence and, on conviction, is liable to a fine.

#### Delegation of powers

22. The Minister may, in writing, delegate any of the powers conferred on him or her under this Act, to the Deputy Minister responsible for the administration of justice, the Director-General or any official in the Department above the rank of Director or any official of equivalent rank. 40

#### Transitional provisions and repeal of laws

23. (1) For purposes of this section— 45
- (a) "affected area" means any area in the national territory in which the provisions of the Black Administration Act, dealing with the judicial role and functions of traditional leaders, did not apply before the commencement of this Act; and
- (b) "affected law" means any law applicable in an affected area, dealing with the role and functions of traditional leaders in the administration of justice, and includes— 50
- (i) the Regional Authorities Courts Act, 1982 (Transkei);
- (ii) the KwaNdebele Traditional Hearings of Civil and Criminal Cases by the Lingwenyama, Amakhosi, Amakhosana and Linduna Act, 1984 (Act No. 8 of 1984); 55
- (iii) the KwaZulu Amakhosi and Eziphakanyiswa Act, 1990 (Act No. 9 of 1990);

- (iv) the Venda Traditional Leaders Administration Proclamation, 1991 (Proclamation No. 29 of 1991);
- (v) the Bophuthatswana Traditional Courts Act, 1979 (Act No. 29 of 1979);
- (vi) the Transkei Authorities Act, 1965 (Act No. 4 of 1965);
- (vii) the Chiefs Courts Act, 1983 (Act No. 6 of 1983);
- (viii) the Ciskei Administrative Authorities Act, 1984 (Act No. 37 of 1984);
- (ix) the QwaQwa Administration Authorities Act, 1983 (Act No. 6 of 1983).

(2) (a) The provisions of this Act shall, subject to paragraphs (b) and (c), be of no force or effect in any affected area until 31 December 2008.

(b) The affected laws referred to in subsection (1)(b)(iii) to (ix), if they have not been repealed before the commencement of this Act, are deemed to be repealed on 31 December 2008, except where they have been repealed on such earlier date by the competent provincial authorities, whereupon the provisions of this Act shall apply.

(c) The provisions of this Act are applicable in any affected area upon commencement of this Act, if any of the laws referred to in subsection (1)(b)(iii) to (ix) and applicable in such affected areas, were repealed prior to the commencement of this Act.

(3) (a) A king, queen or senior traditional leader upon whom jurisdiction was conferred under section 12(1) or 20(1) of the Black Administration Act, to deal with certain civil and criminal disputes prior to its repeal by the Repeal of the Black Administration Act and Amendment of Certain Laws Act, and which jurisdiction, at the commencement of this Act, has not been revoked under section 12(2) or 20(4) of the Black Administration Act, shall be deemed to have been designated by the Minister under section 4 of this Act as a presiding officer of the traditional court in respect of the area over which such traditional leader has jurisdiction, subject to that traditional leader—

- (i) undergoing the prescribed training programme or course, as contemplated in section 21(1)(b) before 30 June 2009; and,
  - (ii) taking the prescribed oath or making the prescribed affirmation, as contemplated in section 15(1), within three months after the commencement of this Act,
- failing which such designation by the Minister under section 4 of this Act is deemed to have been revoked.

(b) A king, queen or senior traditional leader upon whom jurisdiction was conferred under any provision similar or corresponding to section 12(1) or 20(1) of the Black Administration Act, in any affected law in force in any affected area, to deal with certain civil and criminal disputes, and which has not been revoked under any similar or corresponding provision to section 12(2) or 20(4) of the Black Administration Act, in any affected law in any affected area, shall, when the laws contemplated in subsection (1)(b)(iii) to (ix) are repealed as contemplated in subsection (2)(b) or when this Act becomes applicable in an affected area as contemplated in subsection (2)(c), be deemed to have been designated by the Minister under section 4 of this Act as a presiding officer of the traditional court in respect of the area over which such traditional leader has jurisdiction, subject to that traditional leader—

- (i) undergoing the prescribed training programme or course, as contemplated in section 21(1)(b), before 30 June 2009; and
  - (ii) taking the prescribed oath or making the prescribed affirmation, as contemplated in section 15(1), within three months after the commencement of this Act,
- failing which such designation by the Minister under section 4 of this Act is deemed to have been revoked.

(4) (a) Nothing in this Act affects proceedings pending at the commencement of this Act or at the time of the repeal of the laws referred to in subsection (1)(b)(iii) to (ix) as contemplated in subsection (2), and such proceedings, arising out of the application of the provisions of the Black Administration Act, or the laws referred to in subsection (1)(b)(iii) to (ix), dealing with the judicial role and functions of traditional leaders, continue as if this Act had not been passed and, for this purpose the said provisions of the Black Administration Act, notwithstanding their repeal by the Repeal of the Black Administration Act and Amendment of Certain Laws Act, and the laws referred to in subsection (1)(b)(iii) to (ix), continue to be applicable solely for purposes of finalising all pending proceedings.

(b) Proceedings, for purposes of this subsection, are deemed to be pending if, at the commencement of this Act or at the time of the repeal of the laws referred to in subsection (1)(b)(iii) to (ix)—

- (i) a civil claim has been lodged or a civil summons has been issued but judgment has not been passed or a civil hearing has not commenced; or 5
- (ii) an accused in criminal proceedings has pleaded but judgment or sentence has not been passed or a criminal hearing has not commenced.

(5) The following Acts are hereby repealed:

- (a) Regional Authorities Courts Act, 1982 (Transkei); and
- (b) the KwaNdebele Traditional Hearings of Civil and Criminal Cases by the 10  
Lingwenyama, Amakhosi, Amakhosana and Linduna Act, 1984 (Kwa-Ndebele).

(6) Until such time as regulations are made in terms of section 21, the regulations made under section 12 and 20 of the Black Administration Act, and any regulations made under any law referred to in subsection (1)(b)(iii) to (ix), shall, in so far as they are not inconsistent with this Act or are not otherwise clearly inappropriate, continue to apply and any proceedings commenced under those regulations immediately before the coming into operation of the regulations made in terms of section 21 of this Act, shall continue and be disposed of under those regulations. 15

**Short title and commencement**

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**24.** This Act is called the Traditional Courts Act, 2008, and comes into operation on 29 June 2008 or on such earlier date fixed by the President by proclamation in the *Gazette*.



**MEMORANDUM ON THE OBJECTS OF THE TRADITIONAL  
COURTS BILL, 2012**

**1. BACKGROUND**

- 1.1 The Traditional Courts Bill, 2012 (the Bill) emanates from the Policy Framework on the Traditional Justice System under the Constitution. The aim of the Bill is to provide for the structure and functioning of traditional courts, in line with constitutional imperatives and values.
- 1.2 The Bill was introduced in the National Assembly in 2008 in terms of section 76(1) of the Constitution. The Portfolio Committee on Justice and Constitutional Development (the Portfolio Committee) to which the Bill was referred, held public hearings during which a number of concerns were raised. A decision was subsequently taken to withdraw the Bill from the National Assembly and to introduce it in the National Council of Provinces in terms of section 76(2) of the Constitution, with the intention of addressing the concerns raised in the Portfolio Committee during the deliberations of the Bill in the National Council of Provinces. The Bill was withdrawn from the National Assembly on 2 June 2011.

**2. OBJECTS OF BILL**

- 2.1 The objects of the Bill, as set out in **clause 2** of the Bill, are, among others, to—
- (i) affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
  - (ii) affirm the role of the institution of traditional leadership in enhancing access to justice;
  - (iii) create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with constitutional imperatives and values; and
  - (iv) to provide a framework to enhance the effectiveness, efficiency and integrity of the traditional justice system.
- 2.2 **Clause 3** sets out the principles that should guide the application of the Bill, among others, the following:
- (a) The need to align the traditional justice system with the Constitution in order for the traditional system to embrace the values enshrined in the Constitution;
  - (b) the need to promote access to justice to all persons;
  - (c) the promotion of restorative justice;
  - (d) the enhancement of the quality of life of traditional communities through mediation;
  - (e) the development of skills and capacity of persons applying the legislation in order to ensure the effective implementation thereof; and
  - (f) the need to promote and preserve African values which are based on reconciliation and restorative justice.
- 2.3 **Clause 4** provides for the designation of senior traditional leaders, kings and queens as presiding officers of traditional courts, the revocation or suspension of their designation and the attendance of a training programme within the timeframes set. It also requires the Director-General of Justice and Constitutional Development to keep a register of traditional leaders who have been designated and whose designation has been suspended or withdrawn.
- 2.4 **Clause 5** deals with the civil jurisdiction of traditional courts and sets out the matters in respect of which traditional courts do not have jurisdiction.
- 2.5 **Clause 6** deals with criminal jurisdiction of traditional courts and refers to a Schedule containing offences in respect of which traditional courts have jurisdiction.

- 2.6 **Clause 7** deals with the nature of traditional courts and makes it clear that they are distinct from courts referred to in section 166 of the Constitution.
- 2.7 **Clause 8** provides for the sessions of traditional courts.
- 2.8 **Clause 9** provides for the procedure at the proceedings of traditional courts, which must be in accordance with customary law and custom, except if the Minister prescribes otherwise in regulations. It also requires presiding officers to give effect to the Bill of Rights and the rules of natural justice during proceedings. Legal representation in traditional courts is prohibited, but parties can be represented by any person of their choice in terms of customary law and custom. This clause also makes provision for the situation where two or more different systems of customary law may be applicable in a dispute before a traditional court. Lastly, it regulates how the payment of any fines imposed by a traditional court must be dealt with.
- 2.9 **Clause 10** sets out —
- (a) specific sanctions that cannot be imposed by a traditional court; and
  - (b) a whole range of orders that a traditional court can make, many of which are of a restorative justice nature.
- 2.10 **Clause 11** deals with the enforcement of the sanctions or orders made by traditional courts.
- 2.11 **Clause 12** provides that orders of traditional courts are final, except where an appeal is lodged or where a matter is taken on review. **Clause 13** sets out the powers of a magistrate's court when it deals with an appeal from a traditional court in respect of certain orders made by a traditional court. The grounds for review are contained in **clause 14**.
- 2.12 **Clause 15** obliges senior traditional leaders and kings and queens who have been designated as presiding officers to take a prescribed oath of office or make a prescribed affirmation before a magistrate before they may preside in a traditional court. It also requires the Director-General: Justice and Constitutional Development to keep a register of every traditional leader who has taken the oath of office or made an affirmation.
- 2.13 **Clause 16** establishes a mechanism to lodge, receive and deal with complaints against presiding officers. The grounds for lodging a complaint are the following:
- (a) Incapacity, giving rise to a presiding officer's inability to perform his or her functions as a presiding officer, gross incompetence or misconduct which has a bearing on the administration of justice;
  - (b) any wilful or grossly negligent breach of the code of conduct contemplated in the Traditional Leadership and Governance Framework Act, 2003, or any code of conduct under any provincial legislation required by the Traditional Leadership and Governance Framework Act, 2003, which has a bearing on the administration of justice;
  - (c) any other wilful or grossly negligent conduct which is incompatible with or unbecoming of, the office of presiding officer; or
  - (d) any contravention of a provision of this Bill.
- 2.14 **Clause 17** empowers the Minister to assign officers who will assist traditional courts in performing their functions under the Bill.
- 2.15 **Clause 18** sets out what records are to be kept by traditional courts.
- 2.16 **Clause 19** creates a mechanism which regulates the transfer of cases in certain circumstances from a traditional court to a magistrate's court or small claims court and from a magistrate's court or small claims court to a traditional court.

2.17 **Clause 20** creates offences and penalties.

2.18 **Clause 21** empowers the Minister to make regulations in respect of a number of matters, among others, the training programmes which traditional leaders must attend, the designation of traditional leaders as presiding officers, registers to be kept by the Director-General, the lodging of appeals and procedural reviews, powers of magistrates in respect of procedural reviews, the oath or affirmation of office to be taken or made by presiding officers of traditional courts, the manner of dealing with fines, the keeping of records, the referral of matters from a magistrate's court to a traditional court and vice versa, the lodging of complaints against a presiding officer and the manner of execution of judgements of a traditional court in a magistrate's court.

2.19 **Clause 22** provides for the delegation of the powers of the Minister under the Bill to senior officials in the Department of Justice and Constitutional Development.

2.20 **Clause 23** contains a range of different transitional arrangements in order to ensure a smooth implementation of the proposed legislation.

2.21 **Clause 24** contains the short title and commencement of the Bill.

### 3. FINANCIAL IMPLICATIONS FOR THE STATE

Financial implications will result from the implementation of training programmes for presiding officers of traditional courts. The funds for this purpose will be accommodated within the Department's allocated budget.

### 4. PERSONS AND INSTITUTIONS CONSULTED ON THE BILL

4.1 The Department of Justice and Constitutional Development consulted with the structures of traditional leaders and the South African Local Government Association. Consultation with the structures of traditional leadership took place at national and provincial level. At national level a Conference of Magistrates to which members of the National House of Traditional Leaders were invited, took place during September 2007. The Conference discussed the policy initiatives that should be considered in drafting the Traditional Courts Bill. Flowing from the Conference, the Policy Framework and the Bill supporting the policy were drafted in consultation with the Constitutional Affairs Committee of the National House of Traditional Leaders.

4.2 Further provincial consultative workshops were held with provincial Houses of Traditional Leaders and SALGA, at which the South African Human Rights Commission, the Commission on Gender Equality, magistrates and prosecutors participated.

4.3 During the consultation process the policy thrust enunciated in the Policy Framework and Traditional Courts Bill was largely supported by the structures within the institution of traditional leadership, SALGA and members of the lower court judiciary.

### 5. PARLIAMENTARY PROCEDURE

5.1 At the time of the introduction of the Bill in the National Assembly, the State Law Advisers and the Department of Justice and Constitutional Development indicated that the Bill must be dealt with in accordance with the procedure established by subsection (1) or subsection (2) of section 76 of the Constitution since it falls within a functional area listed in Schedule 4 to the Constitution (indigenous and customary law).

5.2 At the time of the introduction of the Bill in the National Assembly, the State Law Advisers indicated that the Bill must be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership

and Governance Framework Act, 2003 (Act 41 of 2003), since it contains provisions relating to customary law or customs of traditional communities. This was done.

## Appendix I: Process Theory Building

Forum Shopping		
CAO	Responses from CBPS	Responses from FG
Bulwer	Referrals come from the police, traditional court and welfare. BWP1, 2	Courts are good for those who choose them and bad for those who choose an alternative. BWFG
	Victims may seek Protection Orders post-mediation. BWP 1, BWP 2	Mediation is quick. BWFG
	Victims make informed decision on mediation and protection orders. BWP2	Court intervention not helpful for unemployed women. BWFG
	Respect victim's choice not to charge offender and opt for mediation. BWP1	Public humiliation for choosing the court option. BWFG
	Victims gain knowledge to approach court after failed mediation BWP2	Poverty makes women not to approach courts. BWFG
Ixopo	Referrals come from the police, courts, traditional court, social welfare and health workers. IXP1, IXP2	Pressure from family members influence choice of justice system. IXFG
	Clients come to the CAO with affidavits for PO after reporting to the police and request mediation. IXP1, 2.	Paralegals process is faster and effective without going to court. IXFG
	Mediation is speedy, humane, saves time and less costly. IXP1	"A Protection Order makes the situation worse, brings tension to the family." IXFG
	"Culture and traditional custom is also another cause for women not to use the Domestic Violence Act." IXP2	Our culture is not compatible with the Act. From the culture perspective we also do not want to upset our ancestors. IXFG
	"Victims see police and courts as a kind of public humiliation, a stigma." IXP2	"A Protection Order on its own is not enough, if you depend on your husband for support it does not work." IXFG

Madadeni	Referrals come from the police, courts, traditional courts, social welfare and home affairs MDP1	“We do not believe in the justice system, they just take decisions about our future without back-up support when things go wrong.” MDFG
	Protection order is used together with mediation MDP1	“We have a problem because the courts do not care what happens after the court case. MDFG
	Unsuccessful mediation, PO is advised MDP	The court turns things upside down, for the victim and the offender, especially if he gets arrested, life is never the same. You become bad luck, even the ancestors can’t protect you.” MDFG
	My office is located in the police station and 150 meters from the court. MDP	“The way I was treated at the office, it was very respectful and the explanation on what steps to take was very clear and I was able to explain it to my abusive husband who immediately agreed to go for mediation.
	A Protection Order on its own not enough. MDP	“We are able resolve our problems without going to court.” MDFG
New Hanover	Paralegals take referrals from the police, courts, traditional courts, and social welfare. Others seek the process themselves after attending educational workshops, some having seen or read our pamphlets. Relatives, friends and neighbours also refer clients. NHP1,2	“Police officers at the charge office are males, they are not sympathetic and they are not adequately trained to handle domestic violence situation.” NHFG
	“We mediate cases as well as assisting the victims who want Protection Orders to fill in the Protection Orders form.” NHP1	“With reporting to the police, the problem persists and it does not go away.” NHFG
	“The majority of our mediations are completed in much less time than the courts. NHP2	“Police are not sympathetic to women who are victims of domestic violence and they are not trained to handle domestic violence situations. They lack passion for their work,
	“In such cases we assist the victim and	“We save time by coming to this office

	to apply for a Protection Order if she wishes to do so.” NHP1, 2	and it is less expensive in that you do not have to go to court so many times and take time off work.” NHFG
	“The fact that we are aware of traditional cultural practices and customs and are able to discuss and address cultural issues contributes to our success.” NHP2	
	“Women have a greater say in mediation, and many prefer mediation to the court process. The court is known for turning the wheel of justice very slowly and the courts are confusing for rural people.” NHP1, 2	
	“After mediation it is rare for violence to start again. In New Hanover we mediate and sometimes encourage applications for a Protection Order as a guarantee, and explain to the offender how it works, to deal with the myth that a Protection Order is like a hangman’s noose.” NHP1, 2	

Communication pragmatism		
CAO	Responses from CBPS	Responses from FG
Bulwer	People tell their side of the story clearly in the language that they are comfortable with.	CBP listen to both sides of the story, they can hear what is being discussed because they know the language.
	People are scared of going to court, and the language that is used at court is also confusing.”	
	Parties are able to talk about their problems, and through language they are able to express their	Both the victim and the offender tell their side of the story to the paralegal in their own language.

	emotions.	
Ixopo	“Listening to the parties discussing their problem, it is amazing to discover that beautiful relationships could actually end when they are not supposed to, and that parties could not communicate before it reached a level where they have to involve a third party.” IXP1	People do not understand the legal language of the court and procedures. Rural women often do not understand what is being said.” IXP2
	“We make sure clients are free to talk and cover everything that is of concern in the relationship. Language is very important.	In court they use the interpreters, we are not sure if they are conveying the right information.” IXFG
	As a mediator who speaks the same language as my clients, I could quickly grasp the hidden meaning in words that are spoken between the offender and the victim.” IXP1	“The office has improved people’s communication. We have a place to come to, and we are free to express our feelings during mediation.” IXFG
Madadeni	I also emphasize that no inappropriate language is allowed. There should be no interruptions, even if the other party is saying what you do not want to hear.” MDP	“I went to court on several occasions but I did not get help, instead I was humiliated, they do not even listen nor give me a chance to explain. Mediation is the best, paralegals listen and are very patient, they do not get tired, and maybe it is their training”. MDFG
	There is no language and cultural barrier as I speak the same language as my clients, I understand the culture as I am from the same culture.”	“In this office you talk about everything, you are free and equal in this office.” MDFG
	“The victim tells the story first, and then gives the offender a chance to talk. Thereafter they can ask each other question. This is where I play a very important part as a mediator and guard the process so that it does not become a	“Paralegals listen to you, they always insist on hearing the other side of story when we report abusive behaviour by our husbands.” MDFG



	<p>shouting match. The participants are allowed to argue, and during this time I take notes of important points, which I share with them and for them to further discuss. At this time common sense normally prevails and they are ready to deliberate on solutions of their problem.” MDP</p>	
	<p>It is healing to provide the victim enough time to tell her story from when it began to go wrong and how it affected the victim for all these years. MDP</p>	
New Hanover	<p>“The victim and the offender can talk how they feel regarding their problem, and this is a very important step for our clients.” NHP1</p>	<p>“They conduct mediation, you talk about everything, you are free, and they treat everyone the same.” NHFG</p>
	<p>“People tell their side of the story clearly in the own language that they are comfortable with. We are so used to listening to long stories, which is why we are here and have time for that.” NHP1  “People who have a relationship have a unique way of communicating with each other and we tell them to feel free, we encourage that.” NHP2</p>	<p>“It helps us to resolve our problem on our own and in future to communicate better. We have a place to come to, and we are free to express our feelings during mediation.” NHFG</p>
	<p>“We help the clients to learn to talk to each other. If our clients are shouting at each other we meet with them separately and explain that it is in their interest to be able to communicate respectfully and listen to one another.” NHP1, 2</p>	<p>“They lack passion for their work, no listening skills. For them is a job, not a calling.” NHFG</p>
	<p>“The victim and the offender have a dialogue, come up with a solution that</p>	

	suits them. If not they are also informed of the court process and alternative solutions that may address the interest of the two parties.” NHP1, 2	
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## Appendix J: Conceptual Framework

Private and Public distinction		
CAO	Responses from CBPS	Responses from FG
Bulwer	Clients tell us they do not want to go court because they do not want to make their problem public.” BWP2	“Domestic violence hearings should be private if we decide to go the court route. BWFG
	They appreciate mediation because the discussion takes place in private.” BWP1	“We have a problem, because domestic violence cases are heard in public, it is difficult for us to have people who know us to hear what is going on in private at a public hearing. These public hearings do not build relationships.” BWFG
	“It is common for victims to say, ‘I do not want to involve the police because I do not want people from my village to know my private matter because police vans always attracts curious onlookers’.” BWP2	“It is humiliating for people to know that I am a victim of domestic violence.” BWFG
	“The parties in a private setting are encouraged to discuss their problems and come up with a solution that is favourable to both parties”. BWP2	These public hearings do not build relationships.” BWFG
Ixopo	Sometimes the victim prefers that we call the offender, because she does not want people in the area to know her private affairs and that she is an abused woman, and some do not trust that the <i>Induna</i> will be discreet”. IXP1	“There is no privacy at the police station and at the court. This is what happens when we involve the police, your matter becomes public.” IXFG
	“Women prefer mediation because it is	People feel free to talk without fear.”

	private. Even though our office is based at the magistrate's court, it is a reasonable distance away to provide privacy. There are two offices and a waiting room." IXP2	IXFG
	"The police assist us with home visits sometimes, but they drop us at a distance, we understand the need for privacy by victims." IXP1	
Madadeni	Sometimes I go further to inform the offender that the victim desires privacy from a family situation hearing, and that she is not confident that family members will be neutral in the discussions. Therefore the process is free of bias."MDP	"We do not want to publicize our private affairs by going to the police." MDFG "Rural women are afraid of the stigma attached to abuse; therefore reporting is attracting attention to what she perceived is a private matter."
	They are often still in love with the offender, and he is the breadwinner. They say they do not want people from their village to know their private matter.	"We hate to make our private matter public ( <i>ihlazo lasekhaya alikhulunywa kubantu</i> ) you do not hang your dirty linen in public." MDFG
	"The women we work with believe it is a taboo to expose your family issues in public. Going to the police means public exposure of private marital issues."MDP	
	"Rural women are adamant that domestic violence is a private matter; this view is also supported by their husbands who always comment about the privacy of mediation. There are	

	very few men who are comfortable talking about private matters in public.” MDP	
New Hanover	“There is no privacy at the police station charge office.” NHFG	“We hate to make our private matter public. The police are not discreet when they visit your homestead. The sight of the van attracts curiosity from neighbours and we do not want that.” NHFG
	“We do not like to take our private matter and make it public; this is what happens when we involve the police, we do not want to please our enemies as well.” NHFG	“There is no privacy at the police station charge office.” NHFG
	“Privacy has been commented on by almost every victim of domestic violence seeking mediation as an alternative to applying for a Protection Order in terms of the Domestic Violence Act.” NHP1	“We do not like to take our private matter and make it public; this is what happens when we involve the police, we do not want to please our enemies as well.” NHFG

# Appendix K: Ethical Clearance



31 October 2014

Mrs Busiwana W Mertins (22887)  
School of Management, IT & Governance  
Westville Campus

Dear Mrs Mertins,

Protocol reference number: HSS/0436/012D

Project title: Access to Justice: The role of community-based paralegals in community restorative justice in rural KwaZulu-Natal

### Approval Notification – Amendment

This letter serves to notify you that your request for an amendment received on 28 October 2014 has now been approved as follows:

- Change in Degree (from Masters to Doctoral)

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

Best wishes for the successful completion of your research protocol.

Yours faithfully

Dr Shanuka Singh (Chair)

/ms

cc Supervisor: Dr Fayth Ruffin  
cc Academic leader Research: Professor Brian McArthur  
cc School administrator: Ms Angela Pearce

Humanities & Social Sciences Research Ethics Committee

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