

**THE WINSTON CHURCHILL MEMORIAL TRUST OF AUSTRALIA**

**REPORT BY JULIA MANSOUR, 2014 CHURCHILL FELLOW**

**THE PETER MITCHELL FELLOWSHIP TO INVESTIGATE THE SITUATION OF  
WOMEN DEFENDANTS IN DOMESTIC VIOLENCE INCIDENTS IN  
COMPARABLE LEGAL JURISDICTIONS**

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Signed: Julia Mansour

Dated: 27 November 2014

## INTRODUCTION

I wish to sincerely thank the Mitchell family and the Winston Churchill Memorial Trust for allowing me the opportunity to undertake this Fellowship.

I thank all of the individuals and organisations that generously gave of their time to speak with me and assist me in learning more about the operation of the civil intervention order system in Australia, the UK, the USA, and Canada. In particular, I acknowledge the warmth and generosity of Professor Myrna Dawson in Guelph, Ontario who invited me to participate in the 'Take Back the Night' march alongside local advocates; and of Mary Asmus at the Office of the City Attorney in Duluth, Minnesota who assisted me in making many last minute connections with local organisations in her city. I also thank Associate Professor Alesha Durfee at Arizona State University for inviting me to present a guest lecture to students in her course 'Women and Crime', an opportunity I thoroughly enjoyed.

I acknowledge the support of Women's Legal Service NSW in the development of my topic of study and thank them for their support. I also acknowledge the helpful suggestions of Professor Julie Stubbs and Dr Jane Wangmann in the development of my itinerary and research. However, the views expressed in this paper are entirely my own, and may not represent the views of Women's Legal Services NSW or any other person.

## EXECUTIVE SUMMARY

*Fellow: Julia Mansour, Solicitor, Women's Legal Services NSW (to November 2014)  
Senior Solicitor, Public Interest Advocacy Centre (from December 2014)*

As a solicitor at Women's Legal Services NSW ('WLS') I have been substantially involved in law reform projects on the issue of women defendants to Apprehended Domestic Violence Order ('AVO') proceedings in NSW. These projects have responded to the concerning issue of women with a history of domestic violence being committed against them being named as the person of interest (i.e. the perpetrator) in domestic violence matters. While acknowledging that some women, including domestic violence victims, may themselves commit violence warranting a criminal justice response, WLS has had a longstanding concern that the AVO system may also be used against female victims of domestic violence as a tool of legal abuse.

The purpose of my Churchill Fellowship was to investigate the situation of women defendants in domestic violence situations in comparable jurisdictions. Although my principal goal was to consider possibilities for reform to the AVO scheme, rather than to the criminal law, I was interested to interview respondents who could give me insight into the links between the systemic issues faced by women defendants to AVOs, and women facing criminal charges in jurisdictions where Police act on a 'pro-arrest' or 'mandatory arrest' policy basis in domestic violence cases.

Although not all of my interview subjects were of the view that abuse of the civil intervention order system was a problem in their own jurisdictions, each interviewee agreed that it was easy to understand how the nature and dynamics of domestic violence might lead to the kind of systemic abuse of the NSW legal system in the manner I described. The most common factor that appeared to be a determinant of whether abuse of the civil intervention order system was present in a jurisdiction was the relative importance of these orders as a legal response to domestic violence compared to other measures, such as the criminal law.

While gender sensitive policing and training of both judges and police is clearly crucial to stopping perpetrator abuse of the system in NSW, there are concrete steps that Community Legal Centres such as WLS can take to improve the overall service provision to women defendants to AVOs who are victims of violence. These steps could include advocating for the Women's Domestic Violence Court Advocacy Service and Domestic Violence Practitioner Scheme to cover all courts in NSW so that women defendants have the opportunity for early legal advice; building relationships with Registrars, especially in rural and regional courts, to determine what kind of Community Legal Educational Materials could be developed and distributed by the Court to women defendants in AVO matters; and developing advocacy packs for CLCs and other lawyers to streamline and improve their advocacy. Further Australia-wide research is also clearly needed concerning the extent to which intervention orders are pursued against women with a history of domestic violence against them, especially by their intimate partners.

## **PROGRAMME OF INTERVIEWS**

### ***United Kingdom***

1. Jackie Apps, Project Manager, Domestic Violence  
Victim Support, Essex and Hertfordshire
2. Pragna Patel, Director  
Southall Black Sisters, Southall
3. Marianne Hester, Chair of Gender, Violence and International Policy  
School for Policy Studies, University of Bristol
4. Claire Laxton, Public Policy Manager  
Women's Aid, London

### ***United States of America***

1. Scott Kessler, Bureau Chief  
Domestic Violence Bureau, Queens District Attorney's Office, New York
2. Alesha Durfee, Associate Professor  
School of Social Transformation, Phoenix, Arizona
3. Judge Matt Tafoya, Judge Richard Garcia, Judge Michelle Lue Sang  
Mesa Municipal Court, Arizona
4. Emberly Cross, Co-ordinating Attorney  
Co-operative Restraining Order Clinic, San Francisco, California
5. Jackie Ortiz and Elizabeth Tarchi  
District Attorney's Office, San Francisco, California
6. Elizabeth Hilton  
Public Defender's Office, San Francisco, California
7. Yolanda Macias and Gilda Serrano  
Survivor Restoration Department, Sherriff's Office, San Francisco, California
8. Melissa Scaia, Director  
Domestic Violence Turning Points, Duluth, Minnesota
9. Mary Asmus, Assistant City Attorney  
Office of the City Attorney, Duluth, Minnesota
10. Patty Wheeler, County Attorney  
Office of the County Attorney, Duluth, Minnesota
11. Tara Haynes, Margo Colomb, Jenny Davey, Mary Kitterman, Heather Drees  
Legal Advocates, Safe Haven Resource Center, Duluth, Minnesota

## **PROGRAMME OF INTERVIEWS (Continued)**

### ***Canada***

1. Vicky Law, Legal Advocate  
Battered Women's Support Services, Vancouver, British Columbia
  
2. Myrna Dawson, Director  
Centre for the Study of Social and Legal Responses to Violence, Guelph, Ontario
  
3. Sly Castaldi, Director  
Guelph-Wellington Women in Crisis, Ontario
  
4. Julie Poon  
PhD candidate in Sociology, University of Guelph, Ontario
  
5. Pamela Cross, Family Lawyer and Community Research Associate  
University of Western Ontario, London, Ontario
  
6. Mavis Morton, Professor  
Department of Sociology and Anthropology, University of Guelph, Ontario

## FELLOWSHIP REPORT

### 1. Background

In January 2013, I began practicing as a solicitor for Women's Legal Services NSW ('WLS') a statewide community legal service providing free legal advice and representation for women. WLS has a focus on areas of law that have a particularly gendered impact upon women, such as domestic violence, family law, and discrimination. WLS also conducts both law reform and community legal education in order to affect legal change in the broader community.

Upon commencing at WLS, I was asked to take over the management of a law reform project that had earlier been initiated by another solicitor, Alicia Jillard. WLS had long been involved in providing women with legal advice about how to obtain and use an Apprehended Domestic Violence Order ('AVO') for their protection in cases of family violence against them. Over the previous five years, WLS had noticed a sharp increase in the number of women reporting that, although they were the victim of violence in their relationship, they needed WLS' assistance to defend AVOs that had been initiated against them, either by the individual they named as the perpetrator, or more commonly, by the Police on that person's behalf.

During 2013, WLS reviewed each of our client files from 2010 where we had assisted a woman in this situation. In March 2014, we published a report sharing the results of that study, *Women defendants to AVOs: What is their experience of the justice system?*<sup>1</sup> While a detailed overview of the issues canvassed is outside the scope of this paper, the report made a number of significant findings. Over two-thirds of our women clients defending AVOs reported that they were the victims of violence in their relationships. Many of the women defending AVOs reported that when Police had been called after a violent incident, they felt that their version of events had not been viewed as credible compared with the other party, due to the circumstances of their heightened stress and anxiety. Other women reported that they believed the other party had deliberately initiated AVO proceedings as a further mechanism of controlling their behaviour, by giving them the ability to threaten them with reports to Police in the future. A close reading of many of the Police incident reports seemed to demonstrate a long history of violence against our clients, and led to questions about whether initiation of an AVO was appropriate in the circumstances.

When we reviewed the literature on this topic, we found very little research or commentary on either the abuse of the civil intervention order system by perpetrators, or problems recorded in relation to the Police's involvement in this system. However, we did note that there appeared to be some similarity in the problems experienced by our clients, and those reported in jurisdictions where Police had adopted a strong 'pro-arrest' or 'mandatory arrest' policy in relation to domestic violence incidents. In these cases, significant numbers of women

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<sup>1</sup> Available online at: <http://www.womenslegalnsw.asn.au/wlsnsw/wp-content/uploads/womendefAVOsreport.pdf>, accessed 20 September 2014.

who claimed to be long-term victims of violence had been charged with domestic violence offences.

The proposed purpose of my Churchill Fellowship was to examine the primary differences in the civil intervention order systems in a variety of jurisdictions. I wanted to understand whether the differences in civil intervention order systems meant that the problems we had identified in our March 2014 report did not occur in other jurisdictions; and if this was the case, to consider the ways that protections in those systems might be adapted to better protect women victims of violence from exposure to legal abuse within the justice system. Alternatively, if similar problems to those we had identified did exist, I wanted to understand what sort of strategies lawyers and advocacy organisations had used to try and improve outcomes for these clients in their own jurisdictions.

I selected United Kingdom, the United States, and Canada as countries with comparable legal systems to study. As well as being common law jurisdictions, each is also a developed country with a diverse cultural and class makeup, and, in the case of the United States and Canada, a postcolonial legacy and First Nations Peoples who face considerable barriers to accessing the legal system on an equal basis.

Within these countries, I selected a mix of academics, lawyers, policy makers, social support staff and violence against women advocates who could offer diverse perspectives on their legal systems. Recognising that the law in the United States and Canada differs between State and Province respectively (and sometimes also varies considerably at the local, city and county level) I selected a variety of different locations to give the maximum possible spread of jurisdictional differences some consideration.

My methodology was to conduct semi-structured interviews with individuals and organisations, to write up the interview, and, generally, to send the notes back to the subject for confirmation, checking and further information. Typically, the interviews covered three topic areas: a discussion of the differences between the AVO system and the system of civil intervention orders in the interviewee's own jurisdiction; whether they perceived that abuse of the civil order system was present in their own jurisdiction, and what the interviewees could suggest about possible solutions to the legal problem I described.

I also asked each of the interview subjects to recommend particular reports, literature, case studies and tool kits that might help me understand better the issues I was researching. While this report makes reference to some of this external literature and cites statistics where available, direct comparison of data between jurisdictions was usually not possible, owing to the differences in methodology and time periods over which data has been gathered.

The dominant responses I received from interviewees on these topics are set out below, and covered jurisdiction by jurisdiction, in the following sections.

## **2. United Kingdom**

*(a) Differences in legal framework and context*

In the NSW system, an AVO can be initiated by either: the person in need of protection, by making an application to the Registrar of a Local Court; or by a Police Officer, when they have reasonable grounds to believe it to be necessary for the safety of a protected person. When AVO legislation was first introduced, it was far more common for applications to be privately initiated by the person in need of protection, but over time, the proportion of private AVOs has declined rapidly. In 2007 Police initiated 91% of AVO applications in NSW<sup>2</sup> with the numbers of applications initiated overall also growing steadily over time. As a civil remedy, AVOs are legislated for by the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and are pursued separately to any family law proceedings on foot.

In contrast, in the UK the civil injunction system falls within the family law system: Part IV of the *Family Law Act 1996* (UK) provides for two primary kinds of civil protection orders (non-molestation orders and occupation orders) that are available in all courts exercising a family law jurisdiction. The party in need of protection must initiate these orders, and Police are not legally permitted to do so. However, in early 2014 amendments were made to the *Crime and Security Act 2010* (UK) that give Police powers to issue Domestic Violence Protection Notices (DVPNs), civil orders of protection that can give victims up to 48 hours of protection in the aftermath of a domestic violence incident, and Domestic Violence Protection Orders (DVPOs) which, when approved by a Magistrate may provide up to 28 days protection. As with AVOs in NSW, breach of a DVPN, DVPO and non-molestation order may be dealt with as a criminal offence.

In NSW, the increase in relative numbers of ADVOs pursued over time reflects the growing centrality of their usage as a legal response to domestic violence in our system. Police in NSW do not currently have either a pro-arrest or mandatory arrest policy in domestic violence incidents, but state that their policy is one of 'pro-investigation'.<sup>3</sup> By contrast, in the UK there has been an almost consistently steady decline in the number of non-molestation order applications made over the last 10 years.<sup>4</sup> The organisations I interviewed cited numerous likely reasons for the decline, including: the reduction of legal aid availability and the high cost of pursuing a non-molestation order, which may be

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<sup>2</sup> Legal Aid NSW, *Report on Legal Aid NSW Services to People in Domestic Violence Situations* (2008) 103.

<sup>3</sup> 'Frontline Police now 'better equipped' to deal with domestic violence, Assistant Commissioner Mark Murdoch says', *Sydney Morning Herald*, 11 March 2014.

<sup>4</sup> In 2003, the number of non-molestation orders made in the UK was 25,433: Marian Hester, Nicole Westmarland, Julia Pearce and Emma Williamson, *Early Evaluation of the Domestic Violence, Crime and Victims Act 2004* (Ministry of Justice Research Series 14/08), August 2008; in 2012 the number of non-molestation orders was 19,405: Ministry of Justice, *Court Statistics Quarterly: July-September 2013*.

in the order of £2500-8000;<sup>5</sup> the concern that, following the 2004 change to the law that made breaches of non-molestation orders a criminal offence, that civil orders would no longer be an instrument within victims' control; and the effect of government policy to reduce the gap in reported offences and convictions for domestic violence, which in turn has resulted in increased numbers of criminal charges, and by extension, rendered some civil protection orders unnecessary.

*(b) Is abuse of the civil order system present?*

The organisations and individuals I visited said that in their experience, they had only heard of isolated examples of perpetrator abuse of the civil order system in the UK. While interviewees cautioned that they could only draw upon their own direct experience in answering my questions, all agreed that they did not think this issue had been the subject of any detailed study.

The reasons given by interviewees for why this may be so varied. The first suggestion was that the cost of pursuing a civil order, and the relative unavailability of legal aid, would be a serious financial disincentive for perpetrators to apply for a protection order where the primary motivation was legal abuse. Another was that it was likely that abuse of the system did occur, but that the way in which the government released data on the numbers of orders sought and made without disaggregating for sex made it a difficult question to study. Finally, it was suggested that misidentification of victim and perpetrator in domestic violence situations had become such a prominent problem in the criminal law sphere, that it rendered a similar problem in the civil order sphere minor by comparison.

Nevertheless, the interviewees all commented that this final problem – misidentification of victim and perpetrator by Police when attending a domestic violence incident – was directly comparable to the problem I described in the AVO system, owing to the comparable dynamics of Police involvement. For this reason, they felt that a number of initiatives that they viewed as potential solutions to their own policy problem might also be worthy of consideration for my investigation.

*(c) Suggested solutions to perpetrator abuse of system*

The major policy proposals that were suggested to me by interviewees and other external organisations are discussed below. It is important to note, however, that interviewees did not universally agree on the efficacy of each proposal, and where relevant, this is noted.

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<sup>5</sup> Marian Hester, Nicole Westmarland, Julia Pearce and Emma Williamson, *Early Evaluation of the Domestic Violence, Crime and Victims Act 2004* (Ministry of Justice Research Series 14/08), 21.

(i) Screening tools

Interviewees noted that over time, the CAADA-DASH Risk Identification Checklist<sup>6</sup> had been mainstreamed as a tool of domestic violence policing and service provision in the UK. Designed to assess relative levels of risk to both parties in a domestic violence situation, some interviewees suggested that use of a similar uniform screening tool might assist Police in better identifying victim and perpetrator in a domestic violence situation.

I was also referred to a Wales-based service provider for men experiencing domestic abuse, the Dyn Project, which had developed a specific tool for men claiming to be victims of domestic violence, to try to prevent service provision to and collusion with men who were perpetrators of violence. Upon reading a report evaluating the Dyn Project,<sup>7</sup> I noted that this screening tool had, in turn, been developed from an earlier tool used by the Gay, Lesbian, Bisexual and Transgender Domestic Violence Coalition in Massachusetts for perpetrator identification in GLBT relationships. The screening tools focused on determining relative levels of power and control in relationships, by asking questions about context, intent and effect of violent acts; who had agency in different aspects of a relationship; who expressed empathy for the other partner; who asserted their will over the other partner; who expressed a sense of entitlement; and who expressed a sense of fear.

Police in NSW do have a number of screening questions that they are required to ask when attending a domestic violence incident: some of these questions are reflected on the Application for an AVO, while others are further outlined in Police Special Operating Procedures. The question of whether these tools are sufficient to identify victim and perpetrator is a salient one. It is also interesting to consider whether any similar screening tool could be used by other justice system actors, such as Registrars and Judges, in determining applications for AVOs.

However, a number of interviewees were critical of the extent to which the CAADA-DASH risk assessment tool had been mainstreamed. They cautioned that in order to be useful, any tool must be accompanied by extensive training around gender and domestic violence so that justice system actors would understand how to use the tool properly. In the absence of a deeper personal understanding of the dynamics of domestic violence, interviewees warned that a screening tool would simply be a 'check the box' requirement for justice system actors that would have little real impact on their decision-making.

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<sup>6</sup> Available online at the website of the charity Co-Ordinated Action Against Domestic Abuse ('CAADA'): [www.caada.org.uk/marac/RIC\\_with\\_guidance.pdf](http://www.caada.org.uk/marac/RIC_with_guidance.pdf)

<sup>7</sup> Dr Amanda Robinson and James Rowlands (2006) *The Dyn Project: Supporting Men Experiencing Domestic Abuse*, Cardiff University.

## (ii) Training

All interviewees were clear about the need for extensive and ongoing Police training in the dynamics of gender and domestic violence. Some noted that while there were many examples of excellent policing in across different counties, too often these examples were due to the strong and effective leadership of one or two people, with institutional knowledge and sensibilities being lost after those individuals had retired. While all NSW Police are given training on the nature and dynamics of domestic violence, it was interesting to learn that in the UK, domestic violence NGOs such as Women's Aid are sometimes a part of this education, as auspiced by their National Training Centre. Interviewees reported that collaborative training between Police and organisations working in the domestic violence sector could, if undertaken correctly, provide each organisation with a better understanding of the work and approach of the other.

## (iii) Accountability

Interviewees suggested that a primary manner of assisting women victims incorrectly identified as perpetrators was to continually push for Police accountability, by making complaints, contributing to legal and executive reform processes, and taking steps to draw media attention to the issue. One interviewee in particular was firmly of the opinion that of these, the most important focus for women's organisations was to draw attention to areas in which Police demonstrated a lack of accountability in their decision-making process. When I suggested to her that perpetrator manipulation may also be central to the problem, she commented that the most correct way to frame misidentification of perpetrator and victims by Police was not perpetrator manipulation, but state collusion with legal abuse. According to this interviewee, a primary focus of women's organisations must be to remind the State of its obligation not to collude with and enable domestic violence perpetrators intent on using the justice system for collateral purposes.

## (iv) Data monitoring

Interviewees suggested that in order to better demonstrate and assess the issues I raised, better data should be kept and coded by Police, courts and statistics agencies about the number of AVOs initiated against women every year, and what proportion of those are initiated by male intimate partners. Although it is difficult for women's organisations to compel other organisations to do this, mapping the available data and making specific requests of organisations to release particular data sets now and in the future is an extremely important task.

A different aspect of data monitoring that interviewees underlined as important was that women's organisations should be highly attentive to, and critical of, any release of data suggesting that men experience the same levels of violence in their intimate partner relationships as do women. Interviewees discussed the flaws in some prevalent UK studies which have asked individuals to report if they have ever been a victim of domestic violence throughout their lifetime, without interrogating the incidence, frequency and effects of the violence reported. As a result, interviewees reported that significant resources have been diverted to organisations targeting domestic violence against men, in spite of the fact that levels of real need are demonstrably not as great.

### 3. Canada

#### (a) Differences in legal framework and context

In Canada, two forms of civil protection orders are generally available to women seeking legal protection from domestic violence: peace bonds, which are available under s 810 of the *Criminal Code of Canada*; and family law protection orders, which are available under Provincial Family Law Acts.<sup>8</sup> A peace bond is an instrument the criminal courts, and may be initiated by Police or by an individual. If Police initiate, they do so by recommending to Crown Counsel that a peace bond should be applied for; if an individual initiates, they typically take their complaint before a Justice of the Peace. In contrast, a protection order is a family law instrument and is initiated by an individual through the family law system in the Provincial or Supreme Court. While both instruments are enforceable by Police and a breach of either may result in criminal charges, it is also possible for individuals with a family law protection order to return to court and seek the civil remedy of contempt of court against the other party when an order is breached.

According to Statistics Canada, the civil protection order system is seldom utilised: in 2009, 15% of female victims of spousal violence reported obtaining some kind of protection order against their spouse, with the reporting rate for 5% for male responders.<sup>9</sup> Every interview subject I spoke to in Canada commented that the civil protection order is rarely used at all, in part owing to the dominance of pro-arrest and mandatory arrest policies in both British Columbia and Ontario, where bail conditions or terms of release may play the same role for many in the system as would a civil protection order. One of my interviewees, the co-author of a leading textbook *Violence against women in Canada*<sup>10</sup> agreed that very little discussion had been given to civil orders of protection in her textbook because were a comparatively minor part of the legal system.

In both British Columbia and Ontario, interviewees told me that the peace bond system was seldom used for domestic violence incidents, and that Police rarely or never initiated a peace bond on their own initiative, unless there was already an ongoing criminal matter and the protections offered by bail conditions or terms of release were insufficient. Interviewees were highly critical of the peace bond system, and noted that since they were a creature of the criminal legal system, it appeared that courts seemed to apply a standard of proof to their issue which was closer to a 'beyond reasonable doubt' standard rather than the true legislative test (i.e. a balance of probabilities standard).

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<sup>8</sup> As family law in Canada is primarily governed by provincial (rather than federal) law, it is important to note that there are variations between regional legal systems within Canada. This paper is restricted in its discussion to s 46 of Ontario's *Family Law Act* and s 183 of British Columbia's *Family Law Act*.

<sup>9</sup> Statistics Canada, (2009) *Measuring Violence Against women: statistical trends*.

<sup>10</sup> Holly Johnson and Myrna Dawson, *Violence against women in Canada* (2011) Oxford University Press.

Those involved in the family law system in both British Columbia and Ontario said that there were also problems with family law protection orders, which led to comparatively low rates of usage. These included the emotional difficulty and perceived barriers women faced in using restraining orders, especially when contact arrangements for children were in place; poor Police response to reported breaches of orders; legal aid being extremely difficult to access in the family law system, with the majority of participants in the family law system going unrepresented; the length of time required to seek a family law protection order, with judges often being reluctant to grant an order *ex parte*; and the difficulties of serving applications for restraining orders, since individual women were expected to take financial and personal responsibility for this process.

In spite of these problems, interviewees who were family law practitioners did recommend that women involved in other family law court matters sought protection orders where the circumstances of their safety warranted it. One interviewee told me that she considered them an important part of progressively building in protections for women and children, and that while Police may not respond to the first breach of such an order, with multiple and serious breaches there was a good chance that they would, eventually, act. Furthermore, she commented that if the perpetrator was eventually charged with a domestic violence offence, there would be an argument for stricter bail conditions or terms of release if there was evidence that the perpetrator had not previously been able to comply with a protection order.

One of my interviewees directed me to a research paper from British Columbia that would seem to suggest that Police, too, are more likely to recommend that women pursue a protection order over a peace bond.<sup>11</sup> It is worth noting, however, that the same paper would seem to confirm my interviewee's sentiments that Police too rarely respond to breaches of civil orders, with Police themselves noting that arrest occurred only between 20-35% of the times that breaches were reported. One interviewee told me that there had recently been a law reform initiative proposed in Ontario that would have granted Police powers to make interim orders of protection for women, in a similar fashion to the UK's recent DVPO and DVPN measures discussed above. According to her, the measures were ultimately not pursued, as violence against women activists had strong concerns about whether the Police should be made the 'guardians' of the protection order process; Police, too, publicly resisted the changes, stating that they did not have the resources to engage victims in the manner any new legislation would have required.

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<sup>11</sup> George S. Rigakos (1997) 'Situational Determinants of Police Responses to Civil and Criminal Injunctions for Battered Women' 3 *Violence Against Women* 204.

*(b) Is abuse of the civil order system present?*

While each of my interview subjects was qualified in their comments, and noted that they could not definitively talk about cases outside their own experience, each of my interviewees said that they did not think perpetrator abuse of the civil protection order system in Canada was a significant problem. The primary reason given for why this was so was that civil orders were perceived by the community to be a 'toothless' instrument, and that as such it would not seem likely that perpetrators would see any advantage in seeking a civil order against their victim. Owing to the low level of Police involvement in the civil system, the extent of Police's misidentification of victim and perpetrator was also not a significant issue where protection orders were concerned.

However, as was the case in the UK, all interviewees agreed that perpetrator abuse of the criminal law system, and Police misidentification of perpetrator and victim in domestic violence situations, was a considerable problem. One interviewee, in discussing her own research, noted that: men were often better acquainted with the criminal justice system than their female partners, that women were relatively more likely to make admissions and disclosures in situations of violence, including about violent self defence, when attending with Police, and that women were more likely than men to be arrested while under the influence of alcohol or illicit drugs.<sup>12</sup> As in the UK, most interviewees in Canada noted that the similarity between this policy issue and that the problems I described in the AVO system appeared directly comparable, and that many of the same policy responses may be appropriate. However, as discussed below, some dissenting views were expressed on the efficacy of particular strategies suggested by my UK interviewees.

*(c) Suggested solutions to perpetrator abuse of system*

(i) Practice directions for Judges

One interviewee strongly suggested that in her view, it was difficult to control the behaviour and actions of perpetrators and Police, and that specific legislative direction was needed for judges to apply a higher level of scrutiny when considering whether to grant AVOs against women in cases of intimate partner violence. When I suggested that the difficulty in this strategy might lie in mounting a persuasive argument that the law should apply differently to different individuals, she pointed out that in her view, differential treatment was consistent with the very schema of protection order legislation, which specifically recognises the particular problem of violence against women.<sup>13</sup>

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<sup>12</sup> Julie Poon, Myrna Dawson, and Mavis Morton (2014) 'Factors Increasing the Likelihood of Sole and Dual Charging of Women for Intimate Partner Violence' *Violence Against Women* (forthcoming) Pre-published online on November 14, 2014 as doi:10.1177/1077801214557954.

<sup>13</sup> Indeed, sections 9(3)(b) and 9(1)(c) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) state, respectively, 'Parliament recognises ... that domestic violence is predominantly perpetrated by men against women and children' and 'the objects of this Act in relation to domestic violence are to enact

(ii) Training for Police

As in the UK, a number of interviewees impressed upon me the importance of ongoing training for Police in domestic violence incidents, particularly around the implications of gender sensitivity. However, in Canada a number of interviewees were also highly critical of Police training as a solution to the problem. One interviewee noted that Police had already been required for many years to undergo extensive training of this nature. The problem, in her view, was the implementation gap between training and process. For this reason, some interviewees suggested that other cultural change mechanisms in the Police Force would be more important than training, including specific recognition, awards and promotions for Police who showed particular dedication to the safety of women and children in domestic violence incidents.

(iii) Training for lawyers

As well as training for Police, a number of interviewees impressed upon me the importance of training and sensitisation for lawyers who advocate for and represent women defendants in domestic violence matters. While lawyers are bound to follow client instructions, interviewees noted that it is extremely helpful for lawyers to understand the pressure that may be on women in domestic violence relationships to stop proceedings early by consenting to a protection order. More broadly, my interviewees commented that the deeper an understanding that lawyers had of the dynamics and nature of domestic violence, the better the quality of their representation would be.

(iv) Capacity and resource building for women

Interviewees in Canada believed that the best way to provide holistic service provision to women defendants was to think about how to build their social capacity. One interviewee suggested that educating women about the way that legal abuse forms part of a larger web of power and control could help them make better informed choices about how to instruct their solicitors. Interviewees also suggested that early and effective referrals to services to assist women leaving violent relationships may result in clients being less likely to be exposed to the possibility that they will be accused of breaching an order. Materials developed by the Battered Women's Support Services in British Columbia are a good example of what these type of resources could look like.<sup>14</sup>

(v) Data Monitoring

As in the UK, interviewees in Canada were very clear that violence against women activists should be attentive and critical to research attempting to demonstrate men experiencing intimate partner violence at the same levels as women. Additionally, interviewees in Canada were particularly concerned about government directed policy and research that de-links the idea of family violence from gender.

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provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women'.

<sup>14</sup> Battered Women's Support Services (2010) *When battered women are arrested: A growing problem*. Available at: <http://www.bwss.org/wp-content/uploads/2010/03/womens-arrest-toolwomen-web1.pdf>

## 4. United States

### *(a) Differences in legal framework and context*

In the United States, domestic violence laws vary considerably as between States, and in practice, also between different cities and counties. There are some similarities between the systems I examined. Ordinarily, individuals, rather than the Police, file protection orders, and there is a strong link between protection orders and the family law system. There is normally no fee to file protection orders; and some form of free legal advocacy is usually available for women applicants. Each of the States examined has a mandatory arrest policy for domestic violence incidents, except for Minnesota, which has a 'predominant aggressor' policy. It is also worth noting that culturally, restraining orders have a high level of recognition in the United States and are widely used in domestic violence cases. Nevertheless, it is difficult to tell what percentage of individuals experiencing domestic violence seek civil protection orders, with research suggesting that victims typically suffer repeated assaults and victimisation before they do so.<sup>15</sup>

In spite of these similarities, it is also useful to briefly note some of the differences in laws in the four States I examined.

#### (i) New York

In New York, individuals initiate Orders of Protection by filing with a court clerk. Orders are available through the Family Court, through filing a family offence petition, or through the Supreme Court, as part of divorce proceedings. If the Court is of the opinion that there is 'good cause' upon the filing of the application, a temporary Order of Protection may be issued until the first mention date.<sup>16</sup> Final Orders for Protection are normally made for a period not exceeding two years, though they may be issued for five years in the case of aggravating circumstances.<sup>17</sup> Upon the making of an Order of Protection, the Court has the power to order temporary custody of any children of the relationship to one parent or to another relative.<sup>18</sup>

Civil orders may also be granted in ongoing criminal cases, either in accompanying bail conditions, or at the District Attorney's request. Breach of any of these orders is an arrestable offence, though if the order is issued by the Family Court, a protected person is also able to seek a civil remedy for any violation of the order.

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<sup>15</sup> US Department of Justice (2009) *Practical implications of current domestic violence research: For Law Enforcement, Prosecutors and Judges* (National Institute of Justice Special Report) 6.

<sup>16</sup> New York Family Court Act s 828.

<sup>17</sup> New York Family Court Act s 842.

<sup>18</sup> New York Family Court Act s 842.

(ii) Arizona

In Arizona, Orders of Protection are initiated by individuals by filing with a magistrate, justice of the peace or Superior Court judge.<sup>19</sup> Applications for orders can be filed in any Superior, Municipal, or Justice Court in Arizona, unless family court proceedings are on foot, in which case they must be filed with a Superior Court. Individuals may also apply for Emergency Orders of Protection,<sup>20</sup> which can be issued immediately by any Court and last until the end of the next business day. The intention of these orders is to give applicants immediate protection while filing for a permanent order, which can last up to a maximum of one year.

Upon reviewing an application for an Order for Protection, a judge may order an ex parte hearing. If a judge decides at a hearing that there is sufficient evidence to make a permanent order, that order must then be served by the applicant on the defendant, who has a right to request a hearing. If a judge decides that there is insufficient evidence to make a permanent order without a hearing, the applicant must serve their application on the defendant, who has a right to attend a hearing, usually scheduled within 10 days of their request to attend being made.

(iii) California

In California, Emergency Protective Orders may be issued by a judge at the request of Police where the Police have reason to believe there is an immediate danger of domestic violence to the protected person.<sup>21</sup> Emergency Protective Orders typically last a maximum of seven calendar days. Individuals may also file at court for a Temporary ex parte Restraining Order,<sup>22</sup> which lasts for between 20 and 25 days, and is designed to give the protected person time to file a permanent Domestic Violence Restraining Order,<sup>23</sup> which must be lodged with a Superior Court. If granted at a hearing, a permanent restraining order can be put in place for up to 3 years.

When orders are sought between intimate partners with children in common, the application may as a trigger for family law proceedings to commence and mediation at court between the parties regarding arrangements for the children. If no arrangements can be made, a Superior Court has the power to affect interim orders for children upon the hearing of the restraining order.<sup>24</sup>

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<sup>19</sup> Arizona Revised Statute s 13-3602.

<sup>20</sup> Arizona Revised Statute s 13-3624.

<sup>21</sup> California Family Code s 6250.

<sup>22</sup> California Family Code s 6320.

<sup>23</sup> California Family Code s 6340.

<sup>24</sup> California Family Code s 6252.

(iv) Minnesota

In Minnesota, Orders for Protection must be filed in the Family Court. The application must be filed in a county where either the applicant or the defendant lives, in the county where the abuse happened, or in the county where there is or was a family court proceeding involving the parties.

When an applicant files an application, a judge may issue an ex parte temporary Order for Protection if there is enough evidence to justify the order.<sup>25</sup> An ex parte temporary Order for Protection can last for up to two years. It must be served by the applicant on the defendant, who then has a right to request a hearing. Any hearing requested must be scheduled within 10 days of the request. Alternatively, a judge may order a full hearing from the outset, where a permanent Order for Protection may also be granted up to a period of two years.<sup>26</sup> In situations where the applicant can demonstrate that the defendant has violated a prior or existing order on two or more occasions, or if two or more orders have previously been granted against the defendant, a judge may grant an Order for Protection lasting for up to 50 years.<sup>27</sup>

When orders are sought between intimate partners with children in common and the matter proceeds to a hearing, a judge may award temporary custody to one party of the children of the relationship.<sup>28</sup>

*(b) Is abuse of the civil order system present?*

Each of my interviewees in the United States who had experience with protection orders was very clear that there was extensive use of the system by perpetrators seeking orders against women victims of violence. Many commented that this often happened in retaliation: once perpetrators had an order applied for or made against them, they became familiar with the system, and knew what evidence was required to obtain an order against their partner. For this reason, many interviewees commented that justice system actors often treated cross-applications with scepticism, and flagged them to investigate potential legal abuse by one party. A number of interviewees also noted that they believed the problem of perpetrator legal abuse was more pronounced for women of colour, women who did not speak English as a first language, and First Nations women, as other barriers to accessing the justice system often made their engagement in the process more difficult.

A variety of different reasons were given as to the motivations of perpetrators in seeking protection orders against their partners where their partners were the primary victim of violence. Many interviewees pointed out that initiating civil order proceedings often led to one party gaining the upper hand in family law proceedings, particularly where civil orders acted as a trigger for interim family law orders. Some noted that once a person became the defendant in a protection

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<sup>25</sup> Minnesota Statutes s 518B.01, sub-division 7.

<sup>26</sup> Minnesota Statutes s 518B.01, sub-division 6.

<sup>27</sup> Minnesota Statutes s 518B.01, sub-division 6a.

<sup>28</sup> Minnesota Statutes s 518B.01, sub-division 6.

order, they became ineligible for some legal and support services; that they were unable to engage in certain forms of employment; that they could not own a gun; and that it could negatively affect their immigration status. Conversely, where a person was protected by a protection order, it sometimes meant easier access to public housing and parking spaces in public institutions.

A number of my interviewees suggested that the problem of protection order abuse appeared to be getting worse over time. Many noted the irony that as protection orders were increasingly taken more seriously by justice system actors and given greater weight in different aspects of the legal and social support system, the greater the incentives became for perpetrators to try and use them as a form of legal abuse against their victim.

Finally, as was the case in the UK and Canada, many interviewees also noted that the problem of Police misidentification of victim and perpetrator in criminal cases was well recognised, and has also had serious consequences for women victims of domestic violence. On this point, I was referred to a number of studies done at the county level in different States to engage multiple justice system actors to prevent unwarranted prosecution of victim/defendants.<sup>29</sup>

*(c) Suggested solutions to perpetrator abuse of system*

*(i) Judicial Training*

Many of my interviewees, including judges themselves, noted that good judicial training on the nature of domestic violence and the dynamics of power and control was the most important tool to prevent protection orders being used as a tool of legal abuse. In part, this is largely reflective of the fact that in protection order cases in the United States, judges may be the only independent justice system actor involved with the parties. Nevertheless, even while acknowledging the differences between the Australian and American legal systems, interviewees stressed that this measure must be a key a solution to perpetrator abuse of the protection order system.

*(ii) Capacity and resource building for women*

Nearly all of the interviewees stressed the importance of good legal and social referrals for women victim/defendants, with many stating that these referrals by both Police and prosecution services should be mandatory, especially where there was a recorded history of violence against the woman. Many noted that support services should recognise that female victim/defendants will not always fit a 'deserving stereotype' of a domestic violence victim, but that agencies must work harder to include these individuals, rather than screening them out, as they are often at the greatest risk of social isolation.

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<sup>29</sup> See, for example: Meg Cramer, Merrill Cousin and Tara Hardy (2003) *Victim-Defendants: An Emerging Challenge in Responding to Domestic Violence in Seattle and the King County Region*; Mary E Asmus (2004) *At a Crossroads: Developing Duluth's prosecution response to battered women who fight back*.

Capacity building for victims was also noted as key to both their legal success and safety. Many interviewees noted that it is common for women victim/defendants to absorb and accept the idea that they are the perpetrator of violence if they are arrested, and considerable work needs to be done by violence against women activists to build the understanding of women that retaliatory violence may take place within a broader context of power and control. Tool kits for women defendants are useful in this respect, and should be designed and based on the information and referrals that women defendant clients say would make a difference to them.

(iii) Training for Lawyers

Many interviewees noted that good legal advocacy is a key part of preventing perpetrator abuse of the system. In particular, interviewees pointed out that all advocates need to have an understanding of when and how to use professional evidence that the woman is a prior or current victim of domestic violence; a strong understanding that women defendants may need multiple interviews and opportunities to be able to disclose previous or ongoing violence to them, or give evidence about the violence in court; and an understanding of how to conduct good strategic advocacy with Police and prosecution services, including early letters of complaint when inappropriate actions are initiated, and advocacy for Police not to pursue actions when the applicant does not attend the first court mentions or give clear instructions to Police to proceed.

(iv) Adopting a multi-agency approach

Interviewees suggested that owing to the complexity of the legal and social issues at play in cases of women defendants in domestic violence cases, it was crucial that violence against women activists target multiple justice sector agencies and actors to combat the problem. Many suggested bringing the issue onto the agenda of pre-existing justice system networks in order to build awareness of the problems. A number of interviewees stressed that it was also important to identify strategic relationships with other justice system actors, such as individual Police, court registrars and magistrates, who could act as change agents within systems not readily accessible to violence against women advocates.

## 5. Lessons Learned

One of the most interesting aspects of my research was learning how highly unique the Australian system of intervention orders is compared with other common law jurisdictions. The most obvious way in which this is so is the involvement of Police as court advocates in the process, which was not paralleled in any other jurisdiction I examined. Interviewees from all jurisdictions I visited were generally surprised that the Australian system operated this way, and many questioned its efficacy on two bases: first, they were concerned that Police might pursue civil intervention orders at the expense of charging with criminal acts; and second, they were concerned about the individual not having control over their own civil legal process.

The first concern has some merit. Having worked with many women who are protected persons, rather than defendants, to AVOs in NSW, it is sometimes difficult to understand why Police have not laid charges in serious cases of domestic violence. However, a persuasive counter-argument is that owing to the lower standard of proof required, rather than AVOs being used as a substitute for criminal charges, they are used as an additional, complementary form of protection, particularly in cases where there is insufficient evidence to lay charges. Furthermore, the problems associated with pro-arrest and mandatory-arrest policies that were expressed to me by interviewees suggest that Police discretion in this respect is necessary, as long as its exercise is guided correctly.

In my view, the second concern seems to be misplaced. There are many practical benefits to Police acting as advocates in intervention order cases. The high costs and difficulties experienced by women seeing protection orders in the UK and Canada are largely avoided in a system where Police act as advocates. Furthermore, for those women who wish to have greater control of their own AVO process, it remains possible in NSW to initiate that process by applying to a Local Court Registrar.

When I designed my research question, it was my hope that because I had seen little written about abuse of the civil protection order system in overseas jurisdictions, there may be protective measures in place guarding against such abuse that we could consider adapting in the Australian legal system. Unfortunately, my research suggests that such a solution is not quite so simple. A matter of both interest and serious concern to me is that in jurisdictions such as Australia and the United States, where the civil intervention order system is commonly used as a protective measure for victims of violence, abuse of the system appeared to be relatively well recognised. By contrast, where there were greater barriers to use of the system, and fewer incentives for its misuse, as in the UK and Canada, abuse was rarely reported. Putting greater barriers in place to use of the protection order system in Australia is clearly not the right approach to this problem. However, my research appears to demonstrate that violence against women advocates need to carefully consider the impacts upon female defendants of any future legal reforms that seek to strengthen the ways in which protection orders can be used in other fora.

When I first began to consider recommendations for this Report, the centrality of Police in the system of protection orders in Australia made it difficult for me to consider how to recommend legal change that could actually be implemented by me, and those I work closely with in the community legal sector. However, while the comments of my interviewees supports the idea that both Police and Judicial training and education does remain central to outcomes for women defendants, discussing and considering the Australian intervention order system in its context led me to believe that there were other measures that could be taken by lawyers and violence against women activists to improve the situation of women defendants. It is these recommendations that I focus on below.

## **RECOMMENDATIONS**

### **1. Extension of legal services to women defendants to AVOs**

The clearest message from interviewees in all jurisdictions was that strong legal representation is crucial to good outcomes for women defendants who are domestic violence victims. In NSW, there are some free legal services available to women defendants, though there are also currently gaps in service provision. Of 149 Local Courts, 114 are currently serviced by a Women's Domestic Violence Court Advocacy Service ('WDVCAS'). The WDVCAS provides free assistance, support and referrals to women defendants in preliminary court matters. However, only 32 Local Courts in NSW are also resourced with a Domestic Violence Practitioner Service ('DVPS'), which provides legal practitioners to advise and represent clients.

Organisations such as WLS and Law Access also run free telephone advice services that women can access state-wide. However, it is highly possible that in rural and regional courts there is little client awareness that these services exist. While advocating for the extension of WDVCAS and DVPS services is important, community legal organisations such as WLS could take a range of interim steps including mapping of the Courts that do not have access to either service; determining how many AVO applications are heard in those courts; and then seeking to build strategic relationships with Local Area Command Domestic Violence Liaison Officers and Court Registrars to publicise our services to women defendants in those areas. If women defendants who are victims of violence do seek legal advice and assistance, there is a greater possibility that they will consider defending their matter to a hearing. They may also be better linked with organisations and service providers that can assist them with their non-legal needs.

### **2. Developing a tool-kit for legal advocates**

WLS is a specialist legal service, and is particularly attentive to the issues faced by women defendants to intervention orders. Although WLS has done much in its law reform work to bring this issue to the public's attention, more could be done to improve the capacity of lawyers representing female defendants to AVOs to ensure that their matters are concluded with the best possible outcome. One option in this respect could be to develop a tool kit for lawyers representing women defendants to AVOs who are victims of violence. The tool kit could include a step-by-step guide to defending women, with an explanation of: the particular issues faced by women defendants who are victims of violence; the typical timeline for domestic violence matters; example complaint letters to Police; guide to preparing statements; how and when to use medical evidence of previous violence to the client, such as doctors report and reports to counselors; the importance of reporting previous violence to the Police; and the circumstances in which Legal Aid may be available for a defended hearing. Ideally, the tool kit could be made available online, and publicised through WLS' legal networks.

### **3. Developing capacity building resources for women defendants and their workers**

Organisations such as WLS should examine the possibility of developing resources to build capacity for women defendants to AVOs, so that they can better understand the legal process they face, and be better equipped to make decisions about the way forward. In drawing on overseas experience, this could involve seeking permission to adapt resources such as those developed by Battered Women's Support Services in Canada, or the Crossroads/ Domestic Violence Turning Points curriculum in the United States. These resources could be shared online, through the WDVCAS network and with community support workers through WLS' 'Ask Lois' webinar platform.

## APPENDIX

Aside from the sources of information directly cited in this report, a number of academic articles were significant in shaping both my research and understanding of the topic. These are listed below.

1. Michelle S. Ballan and Molly Burke Freyer (2012) 'Self Defense Among Women With Disabilities: An Unexplored Domain in Domestic Violence Cases' 18 *Violence Against Women* 1083.
2. Russell P Dobash and R. Emerson Dobash (2004) 'Women's violence to men in intimate partner relationships: Working on a Puzzle' 44 *Journal of British Criminology* 324.
3. Molly Dragiewicz and Walter S. DeKeseredy (2012) 'Claims About Women's Use of Non-fatal Force in Intimate Partner Relationships: A Contextual Review of Canadian Research' 18 *Violence Against Women* 1008.
4. Alesha Durfee (2012) 'Situational Ambiguity and Gendered Patterns of Arrest for Intimate Partner Violence' 18 *Violence Against Women* 64.
5. Alesha Durfee (2011) 'I'm Not a Victim, She's an Abuser: Masculinity, Victimization and Protection Orders' 25 *Gender and Society* 316.
6. Marianne Hester (2013) 'Who does what to whom? Gender and domestic violence perpetrators in English Police records' 10 *European Journal of Criminology* 623.
7. Marianne Hester (2012) 'Portrayal of Women as Intimate Partner Domestic Violence Perpetrators' 18 *Violence Against Women* 1067.
8. Martha McMahon and Ellen Pence (2003) 'Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence' 9 *Violence Against Women* 52.
9. Debjani Roy (2012) 'South Asian Women's Use of Force Against Intimate Male Partners: A Practice Note' 18 *Violence Against Women* 1108.
10. Suzanne C. Swan, Laura J. Gambone, M. Lee Van Horn, David L. Snow and Tami P. Sullivan 'Factor Structures for Aggression and Victimization Among Women Who Used Aggression Against Their Male Partners' 18 *Violence Against Women* 1045.