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Citation: Speed, Ana and Richardson, Kayliegh (2022) 'Should I Stay or Should I Go Now? If I Go There will be Trouble and if I Stay it will be Double': An Examination into the Present and Future of Protective Orders Regulating the Family Home in England and Wales. *The Journal of Criminal Law*, 86 (3). pp. 179-205. ISSN 0022-0183

Published by: SAGE

URL: <https://doi.org/10.1177/00220183211073639>  
<<https://doi.org/10.1177/00220183211073639>>

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**‘SHOULD I STAY OR SHOULD I GO NOW? IF I GO THERE WILL BE TROUBLE AND IF I STAY IT WILL BE DOUBLE’:  
AN EXAMINATION INTO THE PRESENT AND FUTURE OF PROTECTIVE ORDERS REGULATING THE FAMILY HOME  
IN DOMESTIC ABUSE CASES IN ENGLAND AND WALES**

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**Abstract**

Occupation orders are the dedicated legal remedy through which victims of domestic abuse can be supported to remain in the family home following a relationship breakdown. Case law indicates, however, that victims experience barriers to securing orders due to the high threshold criteria and because concerns about protecting the rights of perpetrators has led to judicial reluctance to grant extensive protection to victims. The options for providing protection to victims of abuse in respect of the family home are shortly set to be reformed by the Domestic Abuse Act 2021, which creates a new Domestic Abuse Protection Order (DAPO). It is anticipated that DAPOs will be easier to secure because they will have a lower threshold criteria, they will be available in family, civil and criminal proceedings, and both victims and third parties will be able to make an application thereby alleviating the burden on victims who feel unable to take any action. Whilst there is no intention at this point to repeal occupation orders, the Home Office has acknowledged that ‘DAPOs will become the ‘go to’ protective order in cases of domestic abuse’ suggesting that occupation orders will be replaced by DAPOs in most cases.

By drawing on data obtained from an analysis of court statistics, a questionnaire of legal practitioners and domestic abuse specialists, and in-depth interviews with victims of domestic abuse, this paper offers original empirical insights into where the current law fails victims of domestic abuse. The analysis reveals three key barriers to securing occupation orders. Firstly, despite the Legal Aid, Sentencing and Punishment of Offenders Act 2012 making efforts to preserve legal aid for victims of domestic abuse, the means test is difficult for victims to satisfy, resulting in increases both to the number of victims taking no action to pursue protection and who act as litigants in person in occupation order proceedings. Secondly, the prospects of a victim securing protection can be adversely affected by their unrepresented status. Thirdly, despite case law indicating a less restrictive approach to granting occupation orders, many victims continue to struggle to satisfy the strict threshold criteria. Some judges are seemingly willing to bypass this by granting alternative remedies which may offer victims a weaker form of protection in respect of the family home. Where orders are granted, the data suggest this is on restricted terms and for limited durations which reduce their effectiveness at preventing post-separation abuse and supporting victims to regulate their short and longer-term housing situation. These empirical findings are then situated within a discussion of the Domestic Abuse Act 2021. The authors analyse whether forthcoming DAPOs are likely to offer a more accessible and effective form of protection than occupation orders. The analysis suggests that by increasing the scope of applicants, the breadth and flexibility of available protection and the sanctions for breach, DAPOs have the potential to remedy many of the existing barriers to securing protection over the family home. As is always the case with new legislation however, the key will be in its implementation,

to ensure that existing issues are not simply transferred across to the new regime. The findings are novel because academic commentaries on protective injunctions typically focus on ‘personal protection’ offered by non-molestation orders, domestic violence protection orders, and restraining orders, meaning that both occupation orders and protection for victims in respect of the family home are under-researched areas of domestic abuse.

**Key words:** Occupation orders; Domestic Abuse Protection Orders; Domestic Abuse Act 2021

## Introduction

Remaining in the family home following the breakdown of an abusive relationship is a priority for many victims<sup>1</sup> which promotes positive longer-term outcomes for their safety, economic security and social support networks and causes less disruption to children of the family.<sup>2</sup> In contrast, victims who are required to secure short-term accommodation typically experience higher levels of housing instability<sup>3</sup>, unsuitable conditions<sup>4</sup> and, for those turning to privately rented accommodation, increased housing costs.<sup>5</sup> The oft-cited phrase ‘why doesn’t she just leave?’ however, is indicative of the assumption that it is victims who will remove themselves from the family home in order to bring an abusive relationship to an end and this is supported by academic literature which demonstrates that victims are disproportionately more likely to seek temporary accommodation than their perpetrators.<sup>6</sup> Such assumptions are also reflected in housing policy, where academics have identified an over-reliance on the refuge model when responding to domestic abuse.<sup>7</sup> Refuges are problematic insofar as poor resourcing means they often have limited capacity<sup>8</sup> - a position which has worsened as a result of Covid-19.<sup>9</sup> Women who enter refuge accommodation may not be able to do so locally and may be required to move away from their support networks, leave their employment and disrupt their children’s education – sometimes on

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<sup>1</sup> SafeLives, ‘Safe at Home: The Case for a Response to Domestic Abuse by Housing Providers’ (SafeLives, 2017)

<<https://safelives.org.uk/sites/default/files/resources/Safe%20at%20Home%20Report.pdf>> accessed 1 September 2021.

<sup>2</sup> J. Breckenridge, D. Donna Chung, A. Spinney and C. Zufferey, ‘National Mapping and Meta-Evaluation Outlining Key Features of Effective “Safe at Home” Programs that Enhance Safety and Prevent Homelessness for Women and their Children who have Experienced Domestic and Family Violence’ (ANROWS Landscapes, Sydney, NSW, 2015) <<https://www.anrows.org.au/publication/national-mapping-and-meta-evaluation-outlining-key-features-of-effective-safe-at-home-programs-sok/>> accessed 30 August 2021.

<sup>3</sup> N. Daoud, F. Matheson, C. Pedersen, S. Hamilton-Wright, A. Minh, J. Zhang and P. O’Campo. ‘Pathways and Trajectories of Housing Instability and Poor Health Among Low-income Women Experiencing Intimate Partner Violence (IPV): Toward a Conceptual Framework’ (2016) 56(2) *Women & Health*, 208-25.

<sup>4</sup> R. Morley, ‘Domestic Violence and Housing’ in J. Hanmer and C. Itzin (Eds.) *Home Truths about Domestic Violence* (London: Routledge, 2000); B. Aguirre, ‘Why Do they Return? Abused Wives in Shelters’ (1985) 30(4), *Journal of Social Work*, 350-54; P. Horn, ‘Beating Back the Revolution: Domestic Violence’s Economic Toll on Women’ [1992] 182 *Dollars & Sense*, 12-22.

<sup>5</sup> SafeLives (n 1); K. Bell and C. Kober, *The Financial Impact of Domestic Violence* (London, Family Welfare Association/One Parent Families/Gingerbread, 2008).

<sup>6</sup> SafeLives (n 1).

<sup>7</sup> G. Burnet, *Winston Churchill Fellowship – Domestic Abuse and Housing: International Practice and Perspectives* (Winston Churchill Trust: 2017).

<sup>8</sup> Women’s Aid, *The Domestic Abuse Report 2020: The Annual Audit* (Women’s Aid: 2020) <

<https://www.womensaid.org.uk/wp-content/uploads/2020/01/The-Domestic-Abuse-Report-2020-The-Annual-Audit.pdf>> accessed 1 November 2021.

<sup>9</sup> A. Speed, K. Richardson and C. Thompson, ‘Stay Home, Stay Safe, Save Lives: An Analysis of the Impact of Covid-19 on the Ability of Victims of Gender-based Violence to Access Justice’ (2020) 84:6, *The Journal of Criminal Law*, 539-572.

multiple occasions. This can be both stressful and stigmatising for women and children, requiring victims to sacrifice 'the very things that gave their daily lives structure and meaning to be safe'.<sup>10</sup>

Occupation orders are currently the dedicated legal remedy through which victims of domestic abuse can be supported to remain in the family home following a relationship breakdown, by determining who should live in the property and by potentially excluding one of the parties from living in or attending a specified area around the home.<sup>11</sup> Whilst in theory occupation orders are capable of providing victims with the necessary space to plan their next steps with reduced potential for post-separation abuse<sup>12</sup>, case law indicates that in practice victims experience barriers to securing occupation orders due to the high threshold criteria which is less 'generous and victim focussed'<sup>13</sup> than other forms of protective orders and because concerns about protecting the rights of perpetrators has led to judicial reluctance to grant extensive protection to victims in respect of the family home.<sup>14</sup> In addition to legal barriers, it is well documented that victims of domestic abuse experience procedural barriers to accessing and navigating the family courts, particularly where they have not received legal advice and/or representation.<sup>15</sup> Without access to appropriate remedies to regulate the family home, however, perpetrators are not held to account for their conduct<sup>16</sup> and studies show that victims often remain in abusive relationships.<sup>17</sup> This can make the family home a very dangerous place to be as domestic abuse (and post-separation abuse) typically takes place in the family home.<sup>18</sup> Baker et al suggest that women may be 'more likely to experience post-separation violence from their partners if systems fail to help women to become

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<sup>10</sup> K. Henderson, *The Role of Housing in a Coordinated Community Response to Domestic Abuse* (Durham theses, Durham University, 2019), 86 <[http://etheses.dur.ac.uk/13087/1/Kelda\\_Henderson\\_Thesis\\_2018\\_December\\_Formatted\\_2019.pdf?DDD34+](http://etheses.dur.ac.uk/13087/1/Kelda_Henderson_Thesis_2018_December_Formatted_2019.pdf?DDD34+)> accessed 15 August 2021; H. Abrahams, *Supporting Women after Domestic Violence. Loss, Trauma and Recovery* (London: Jessica Kingsley Publishers, 2007).

<sup>11</sup> Family Law Act 1996, ss 33-38.

<sup>12</sup> C. Benitez, D. McNeil and R. Binder, 'Do Protection Orders Protect?' (2010) 38 *The Journal of the American Academy of Psychiatry and the Law*, 376-85; C. Humphreys and R. Thiara, 'Neither Justice nor Protection: Women's Experiences of Post-Separation Violence' (2003) 25(3), *Journal of Social Welfare and Family Law*, 195-214; L. Bates and M. Hester, 'No Longer a Civil Matter? The Design and Use of Protection Orders for Domestic Violence in England and Wales' (2020) 42(2) *Journal of Social Welfare and Family Law*, 133-53; R. Cordier, D Chung, S. Wilkes-Gillan and R. Speyer, 'The Effectiveness of Protection Orders in Reducing Recidivism in Domestic Violence: A Systematic Review and Meta-Analysis' (2019) *Trauma, Violence and Abuse*, 1-25.

<sup>13</sup> M. Burton, 'Civil Law Remedies for Domestic Violence: Why are Applications for Non-Molestation Orders Declining?' (2009) 31(2), *Journal of Social Welfare & Family Law*, 110-20.

<sup>14</sup> *Chalmers v Johns* [1999] 1 FLR 392; See also The Law Commission, 'Family Law, Domestic Violence and Occupation of the Family Home' (Law Com No 207) (HMSO, 1992) at page 13 where it was said that there was a general assumption within the judiciary that 'the effects of an exclusion order were invariably so severe as to merit the terms drastic or even draconian'. In addition, the requirement that the respondent's conduct be bad enough to merit such a step impeded the 'sensible and practical resolution of the problem presented' < <http://www.lawcom.gov.uk/app/uploads/2016/07/LC.-207-FAMILY-LAW-DOMESTIC-VIOLENCE-AND-OCCUPATION-OF-THE-FAMILY-HOME.pdf>> accessed 24 July 2021.

<sup>15</sup> S. Choudhry and J. Herring, 'A Human Right to Legal Aid? – The Implications of Changes to the Legal Aid Scheme for Victims of Domestic Abuse' (2017) 39(2) *Journal of Social Welfare and Family Law*, 152-67; Amnesty International, 'Cuts That Hurt: The Impact of Legal Aid Cuts in England on Access to Justice' (London, Amnesty International UK, 2016) < <https://www.amnesty.org/en/documents/eur45/4936/2016/en/>> accessed 14 July 2021.

<sup>16</sup> Breckenridge et al (n 2).

<sup>17</sup> M. Hester, N. Westmarland and G. Gangoli, 'Domestic Violence Perpetrators: Identifying Needs to Inform Early Intervention' (Bristol: University of Bristol in association with the Northern Rock Foundation and the Home Office, 2006) < <https://www.bristol.ac.uk/media-library/sites/sps/migrated/documents/rj4157researchreport.pdf>> accessed 6 August 2021.

<sup>18</sup> Humphreys and Thiara (n 12).

economically independent of their partners, to live separately from their partners and to hold their partners accountable for the violence'.<sup>19</sup>

The options for regulating the occupation of the family home are set to be reformed by the Domestic Abuse Act 2021, which creates a new form of protection, the Domestic Abuse Protection Order (DAPO). The policy objectives of DAPOs are to simplify the complex landscape of protection for victims and their children, provide better protection for victims and children and reduce repeat offending by perpetrators.<sup>20</sup> It is anticipated that DAPOs will be easier to secure than occupation orders because they have a lower threshold criteria, they will be available in family, civil and criminal proceedings and both victims and third parties will be able to make an application, therefore reducing the onus on a victim to act as a litigant in person where they cannot secure legal advice. The Home Office has stated that DAPOs will 'bring together the strongest elements of existing protective orders into a single comprehensive, flexible order which will provide more effective and longer-term protection to victims of domestic abuse and their children'<sup>21</sup>. Whilst there is no intention at this point to repeal occupation orders, the Home Office has acknowledged, 'it is our intention that DAPOs will become the 'go to' protective order in cases of domestic abuse'<sup>22</sup> suggesting that occupation orders will be replaced by DAPOs except for in cases where they are being applied for purely as a property order and there is no background of domestic abuse.<sup>23</sup> This aligns with the government's intention for other forms of injunctive protection, such as non-molestation orders and restraining orders.<sup>24</sup> Beyond this, there is still some uncertainty around the scope of DAPOs as the Home Office are yet to publish statutory guidance which will cover 'how DAPOs fit within the existing protective order landscape and scenarios in which they should be considered'.<sup>25</sup>

Drawing on data obtained from an analysis of court statistics, a questionnaire of legal practitioners and domestic abuse specialists, and in-depth interviews with victims of domestic abuse, this paper offers original empirical insights into where the current law fails victims of domestic abuse. The analysis reveals three key barriers to securing occupation orders. Firstly, despite the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) making efforts to preserve legal aid for victims of domestic abuse, the means test is difficult for victims to satisfy, resulting in increases both to the number of victims taking no action to pursue protection and who act as litigants in person in occupation order proceedings. Secondly, the prospects of a victim securing protection

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<sup>19</sup> C. Baker, S. Cook and F. Norris, 'Domestic Violence and Housing Problems: A Contextual Analysis of Women's Help-Seeking, Received Informal Support, and Formal System Response' (2003) 9:7 *Journal of Violence against Women*, 757.

<sup>20</sup> Home Office, 'Domestic Abuse Protection Notices and Domestic Abuse Protection Orders: Draft Statutory Guidance for the Police' (Home Office, 2021)  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/955459/Draft\\_statutory\\_guidance\\_for\\_police\\_on\\_domestic\\_abuse\\_protection\\_notices\\_and\\_orders.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/955459/Draft_statutory_guidance_for_police_on_domestic_abuse_protection_notices_and_orders.pdf)> accessed 2 September 2021.

<sup>21</sup> Ibid.

<sup>22</sup> Home Office, 'Policy Paper: Domestic Abuse Protection Notices/Orders Factsheet' (Home Office, 2020)  
<<https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-protection-notices-orders-factsheet>> accessed 1 October 2021.

<sup>23</sup> Ibid.

<sup>24</sup> The Home Office (n 22) states that 'protective orders, such as Non-Molestation Orders and Restraining Orders, will remain in place so that they can continue to be used in cases which are not domestic abuse-related, such as cases of stalking or harassment where the perpetrator is not a current or former intimate partner or a family member'.

<sup>25</sup> Ibid.

can be adversely affected by their unrepresented status. Thirdly, despite case law indicating a less restrictive approach to granting occupation orders, many victims continue to struggle to satisfy the strict threshold criteria. Some judges are seemingly willing to bypass this by granting alternative remedies which may offer victims a weaker form of protection in respect of the family home. Where orders are granted, the data suggest this is on restricted terms and for limited durations which reduce their effectiveness at preventing post-separation abuse and supporting victims to regulate their short and longer-term housing situation. This is exacerbated by a poor police response to reports where orders are breached. These empirical findings are then situated within a discussion of the Domestic Abuse Act 2021. The authors analyse whether forthcoming DAPOs are likely to offer a more accessible and effective form of protection than occupation orders. The analysis suggests that by increasing the scope of applicants, the breadth and flexibility of available protection and the sanctions for breach, DAPOs have the potential to remedy many of the existing barriers to securing protection over the family home. As is always the case with new legislation however, the key will be in its implementation, to ensure that existing issues are not simply transferred across to the new regime. The findings are novel because academic commentaries on protective injunctions, at least within the jurisdiction of England and Wales, typically focus on 'personal protection' offered by non-molestation orders, domestic violence protection orders (DVPOs) and restraining orders, meaning that occupation orders and protection for victims in respect of the family home are under-researched areas of domestic abuse – a trend which is seemingly continuing in the initial analyses of DAPOs to have been published to date.<sup>26</sup>

### **The current law – protective orders regulating the occupation of the family home**

The introduction of the Family Law Act 1996 (as amended by the Domestic Violence Crime and Victims Act 2004 (DVCVA) led to the creation of occupation orders in their current form.<sup>27</sup> Orders can be sought by applicants regardless of whether they have a legal or beneficial interest in the property, although they and the respondent must be 'associated persons'.<sup>28</sup> Where the threshold criteria (discussed later in this article) are satisfied, the court has the power to grant a 'declaratory' and/or a 'regulatory' order. Declaratory orders are those which state the parties' pre-existing occupation rights in the home, extend statutory occupation rights or grant such rights to those without an existing right in a property.<sup>29</sup> In contrast, regulatory orders can require a party to leave the home (or part of it), suspend or terminate occupation rights or regulate the occupation of the home by either or both of the parties. Regulatory orders can also deal with practical arrangements such as who will pay the rent or mortgage and whether the party in occupation should compensate the party who has been excluded.<sup>30</sup> The likely duration of an order depends on the nature of the relationship between the parties and whether they have any rights in the property. Whilst orders granted to applicants with a legal/beneficial interest

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<sup>26</sup> K. Blackburn & S. Graca, 'A critical reflection on the use and effectiveness of DVPOs and DVPOs' (2021) 22:1 *Police Practice and Research*, 23-39, DOI:10.1080/15614263.2020.1759059

<sup>27</sup> Replacing the Domestic Violence and Matrimonial Proceedings Act 1976, Domestic Proceedings and Magistrates' Courts Act 1978 and The Matrimonial Homes Act 1983.

<sup>28</sup> Family Law Act 1996, s 62.

<sup>29</sup> In the case of an application under ss 35 and 36 of the Family Law Act 1996, a declaratory order must be sought before a regulatory order can be made.

<sup>30</sup> Family Law Act 1996, s 40.

can hypothetically be made indefinitely,<sup>31</sup> those granted to other applicants can only be made for a maximum of six months but may be renewed on one or more occasions.<sup>32</sup> In contrast to other forms of civil protection (notably non-molestation orders and restraining orders), breach of an occupation order is not a criminal offence, however the court may attach a power of arrest to the order so that if it is not complied with, a perpetrator can be arrested without the need for a warrant.<sup>33</sup> Regardless of whether a power of arrest is attached to the order, breach of an occupation order is contempt of court, capable of enforcement through civil proceedings.

Ancillary terms can be sought to support a victim to remain in the family home as part of a non-molestation order under the Family Law Act 1996. Non-molestation orders aim to 'prevent domestic abuse, stalking and harassment by prohibiting the offender from contacting the victim and/or attending certain places'.<sup>34</sup> Nevertheless, there is some overlap between occupation orders and non-molestation orders which afford judges an opportunity to exclude the perpetrator from the family home through the 'back door'. This is achieved through the use of a 'zonal' or 'stay away' clause, which prohibits a respondent from attending or entering a specified area, including a specific room (or rooms) in a family home, a particular building or a defined geographical area.<sup>35</sup> A similar provision can also be granted following the conclusion of criminal proceedings (either on conviction or acquittal) through a restraining order under the Protection from Harassment Act 1997 where the court is satisfied that it is necessary to do so to protect the person named in the order from harassment (or, where the defendant has been convicted, from conduct that will put them in fear of violence).

Other potential measures currently available to regulate the occupation of the family home are Domestic Violence Protection Notices (DVPNs) and DVPOs which were introduced in 2014 through the Crime and Security Act 2010. DVPNs/DVPOs were not designed to replace existing protective orders but rather, as Hester and Bates note, to offer an additional layer of protection through the police granting 'on-the-spot immediate protection to victims in the aftermath of a domestic violence incident, whilst other avenues – which might include criminal charges, civil orders, or victim support – are investigated'.<sup>36</sup> Where the police issue a DVPN, they are obliged to make an application to the magistrates' court for a DVPO within 48 hours.<sup>37</sup> The court can make an order if it is satisfied on the balance of probabilities that the recipient of the order has been violent towards or has threatened violence towards an associated person and making the DVPO is necessary to protect that person from violence or a threat of violence by the recipient.<sup>38</sup> The order can prevent the perpetrator from returning

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<sup>31</sup> Family Law Act 1996, s 33(10).

<sup>32</sup> Family Law Act 1996, s 35(10), s 36 (10), s 37(5).

<sup>33</sup> Under section 47 the court can grant a power of arrest in circumstances where the application is issued on notice to the respondent, if the court is satisfied that the respondent has used or threatened violence against the applicant or a relevant child, unless the court is satisfied they would be adequately protected without it. When the application is issued without notice, a power of arrest may be attached if the respondent has used or threatened violence against the applicant or a relevant child and there is a risk of significant harm if the power of arrest is not attached.

<sup>34</sup> Bates and Hester (n 12), 135.

<sup>35</sup> The power to grant such a term derives from section 42(1) of the Family Law Act 1996 which gives courts a broad jurisdiction to make provisions prohibiting a person from molesting another person who is associated to the respondent or a relevant child.

<sup>36</sup> Bates and Hester (n 12), 135.

<sup>37</sup> Crime and Security Act 2010, s 27.

<sup>38</sup> Crime and Security Act 2010, s 28.

to the family home and from having any contact with the victim. The DVPO can last between 14 days and 28 days.<sup>39</sup> Once DAPOs have been implemented (a process which is likely to take some time given the intention to first pilot the new remedy in a small number of areas across the UK) it is intended that DVPOs will be immediately repealed.

### **The proposed new law – Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs)**

The statutory provisions for DAPNs/DAPOs are set out in the Domestic Abuse Act 2021, which received Royal Assent on 29 April 2021.<sup>40</sup> A wider scope of individuals can apply for a DAPO than either occupation orders or DVPOs, including victims, the chief officer of police, a person specified in regulations made by the Secretary of State and any other person with the leave of the court.<sup>41</sup> Freestanding applications will be made to the magistrates court however in contrast to occupation orders, DAPOs will also be available within existing criminal, civil and family proceedings, despite there being no application before the court.<sup>42</sup> This is an extension of the provision under the Family Law Act 1996 which provides that the court may make a non-molestation order if, in family proceedings only, the 'court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no such application has been made'.<sup>43</sup> However, this represents a marked change from the position in occupation order proceedings where no similar provisions currently exist.

DAPOs will have a wider scope than DVPOs, in that they can be made where the court is satisfied on the balance of probabilities that the respondent has been 'abusive' to someone over the age of 16 to whom they are 'personally connected'.<sup>44</sup> Further, the court must consider that an order is 'necessary and proportionate'.<sup>45</sup> In contrast to DVPOs, they will not therefore be restricted to cases where there have been threats of or actual physical violence, given the new statutory definition of domestic abuse includes physical or sexual abuse, violent or threatening behaviour, controlling or coercive behaviour, economic abuse and psychological, emotional or 'other' abuse.<sup>46</sup> Where a DAPO is granted, the court can impose any requirements they consider necessary to protect the person with the benefit of the order.<sup>47</sup> In common with the current law, this could include specific terms prohibiting the perpetrator from entering the premises or from evicting or excluding the victim<sup>48</sup>, or terms more typically achieved through a non-molestation order, such as those prohibiting the perpetrator from

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<sup>39</sup> Crime and Security Act 2010, s 28(10).

<sup>40</sup> The Domestic Abuse Act, ss 22-49.

<sup>41</sup> Domestic Abuse Act 2021, s 28.

<sup>42</sup> Family Law Act 1996, s 31.

<sup>43</sup> Family Law Act, s 42(2)(b).

<sup>44</sup> Domestic Abuse Act 2021, s 32.

<sup>45</sup> Ibid.

<sup>46</sup> Domestic Abuse Act 2021, s 1.

<sup>47</sup> Domestic Abuse Act 2021, s 35.

<sup>48</sup> Domestic Abuse Act 2021, s 35(5).

contacting the victim.<sup>49</sup> Going further than any civil protective order has done previously, a DAPO may also require a perpetrator to submit to electronic monitoring of their compliance with the order.<sup>50</sup>

### **Supporting the need for reform – the low rate at which occupation orders are granted**

Statistics report a general downward trend in the number of occupation orders sought and granted since their introduction.<sup>51</sup> However, data from 2013 onwards (when the family court statistics become consistently available and when LASPO came into effect) suggest that applications have plateaued at a rate of between 4,500 and 5,500 each year (table 1).<sup>52</sup> Likewise, the number of orders granted over this period has remained relatively stable, meaning that across the timeframe considered in table 1, the percentage of successful applications has averaged at just 50%. Similar issues, albeit on a more concerning scale, have been identified in the USA, where Johnson found that orders to remove the perpetrator were granted in between 6% and 32% of cases leading her to conclude that ‘a petitioner cannot rely on the court to issue a vacate order’.<sup>53</sup> The rate at which occupation orders are granted is, however, considerably lower than equivalent rates for non-molestation orders<sup>54</sup> (where the number of orders granted consistently exceeds the number of applications - see table 2)<sup>55</sup> and the rates for DVPOs, suggesting the issue does not relate to simply a judicial reluctance to grant *any* protection in respect of the family home. Statistics evaluating the pilot of DVPOs found that ‘relatively few’ applications were refused, with 89% being approved.<sup>56</sup> More recently, the Office of National Statistics reported that in the year ending November 2019, 90% of DVPOs applied for (across 39 police forces) were granted.<sup>57</sup> In relation to restraining orders, Bates and Hester found that with the exception of 2016-2017, there has been a ‘steady increase’ in the number of restraining orders issued in criminal proceedings since 2011’ with orders being granted both on conviction and acquittal and in non-harassment and stalking offences, following changes brought about by the DVCVA.<sup>58</sup>

Table 1: occupation orders between 2013 and 2019

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<sup>49</sup> Domestic Abuse Act 2021, s 35(4).

<sup>50</sup> Domestic Abuse Act 2021, s 35(6).

<sup>51</sup> Bates and Hester (n 12).

<sup>52</sup> Figures directly obtained from Ministry of Justice and National Statistics, ‘Family Court Statistics’ (Ministry of Justice) <<https://www.gov.uk/government/collections/family-court-statistics-quarterly>> accessed 23 September 2021.

<sup>53</sup> M. Johnson, ‘A Home with Dignity: Domestic Abuse and Property Rights’ (2014) 1 *Brigham Young University Law Review*, 23.

<sup>54</sup> Figures directly obtained from Ministry of Justice and National Statistics, ‘Family Court Statistics’ (Ministry of Justice) <<https://www.gov.uk/government/collections/family-court-statistics-quarterly>> accessed 23 September 2021.

<sup>55</sup> This can be explained by the court’s ability under section 42(2)(b) Family Law Act 1996 to grant a non-molestation order as part of other family law proceedings.

<sup>56</sup> L. Kelly, J. Adler, M. Horvath, J. Lovett, M. Coulson, D. Kernohan and M. Gray, ‘Evaluation of the Pilot of Domestic Violence Protection Orders Research Report 76’ (London Metropolitan University, Middlesex University and the Home Office; November 2013)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260897/horr76.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/260897/horr76.pdf)> accessed 17 September 2021.

<sup>57</sup> Equating to 5,859 out of the 6,546 applications. See Office of National Statistics, ‘Domestic Abuse and the Criminal Justice System, England and Wales: November 2019’ (ONS, 2019)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2019>> accessed 24 September 2021.

<sup>58</sup> Bates and Hester (n 12), 141.

Year	Applications	Orders granted	% of applications which are successful
2013	5,114	2,724	49%
2014	5,022	2,590	51%
2015	4,555	2,348	51%
2016	4,689	2,669	56%
2017	4,653	2,405	51%
2018	4,737	2,260	47%
2019	5,445	2,499	45%

Table 2: non-molestation orders between 2013 and 2019

Year	Applications	Orders granted	% of applications which are successful
2013	19,066	22,197	116%
2014	19,465	23,962	123%
2015	18,701	23,630	126%
2016	19,087	23,647	123%
2017	20,259	25,755	127%
2018	20,400	27,203	133%
2019	24,433	31,235	127%

Throughout the first year of the pandemic, applications for occupation orders were up in each quarter as against the previous year (see table 3).<sup>59</sup> This is a positive indicator that the family courts' approach to prioritising applications for injunctive protection as 'work that must be done' was both necessary and successful in ensuring victims continued to have access to the courts.<sup>60</sup> Nonetheless, the number of occupation orders granted has declined over this period. In all quarters of 2020, less than half of applications were successful, whilst in two quarters (April to June and July to September) this fell to below 40%. The pandemic has created financial difficulties for many families, increased ties to the family home where perpetrators have been working from home and, at times, restricted people's ability to stay with family/friends, all of which are likely to contribute to the rates at which orders are granted. However, the same issue has not affected non-molestation orders (see table 4)<sup>61</sup> or DVPOs. In the year ending November 2020 (a period which for nine months was impacted by the pandemic), 91% of DVPOs applied for (across 37 police forces) were granted, equating to 6,267 out of the 6,915 applications.<sup>62</sup> The data therefore indicates that both during and outside of the pandemic, occupation orders are vastly more inaccessible than both other forms of injunctive protections, and other remedies which are designed to regulate the family home.

<sup>59</sup> Figures directly obtained from Ministry of Justice and National Statistics, 'Family Court Statistics Quarterly: January to March 2020; April to June 2020; July to September 2020; October to December 2020'. <<https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2020>> accessed 26 July 2021.

<sup>60</sup> Courts and Tribunals Judiciary, 'Coronavirus (Covid-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts' (Courts and Tribunals Judiciary, 19 March 2020) < <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>> accessed 18 September 2021.

<sup>61</sup> Ministry of Justice (n 59).

<sup>62</sup> Office of National Statistics, 'Domestic Abuse and the Criminal Justice System, England and Wales: November 2020' (ONS, 2020) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2020>> accessed 28 September 2021.

Table 3: occupation orders in 2020

Quarters	Applications	% difference on same period in 2019	Orders granted	% of applications granted	% difference on same period in 2019
Jan-Mar	1,364	+8%	610	45%	+1%
Apr-Jun	1,504	+17%	568	38%	-4%
Jul-Sept	1,790	+22%	631	35%	-3%
Oct-Dec	1,468	+3%	624	43%	-5%

Table 4: non-molestation orders in 2020

Quarters	Applications	% difference on same period in 2019	Orders granted	% of applications granted	% difference on same period in 2019
Jan-Mar	6,658	+12%	8,105	122%	+9%
Apr-Jun	7,341	+26%	8,895	121%	+18%
Jul-Sept	8,154	+27%	9,875	121%	+19%
Oct-Dec	7,705	+23%	9,780	127%	+22%

As will be examined later in this article, the comparatively high rates at which other protective injunctions are granted indicates a number of factors could be at play including a difference in the quality of applications pursued by victims as compared to professional third parties (although this alone certainly cannot account for this trend given the rates at which non-molestation orders are granted), the difference in threshold tests or the extent of the protection afforded by a particular order (as indicated by factors such as an order’s duration). The low rates at which occupation orders are granted nevertheless support that there is a need for reform through the Domestic Abuse Act 2021. Firstly, no other protective orders can provide victims with a comparative level of protection over the family home. DVPOs are extremely restricted in their duration and are therefore inadequate to support victims to regulate their housing situation. Non-molestations cannot be used to grant terms relating to payments and expenses over the property. Further, whilst other orders may have a higher success rate than occupation orders, the ability to apply for these orders may be in the hands of a third party. DVPOs are reliant on the police using their initiative to secure orders, which, as the following sections will consider, has resulted in inconsistencies across police forces and vital opportunities being missed.<sup>63</sup> Likewise, whilst restraining orders are no longer reliant on a successful prosecution, they can only be sought where criminal proceedings have been pursued. Statistics demonstrate that the decision to charge is made in only a small number of cases. In the year ending 2020, only 58,374 cases were charged by the Crown Prosecution Service (CPS) out of the 758,941 domestic-abuse related cases reported by the police over the same period (representing approximately 7.6% of cases).<sup>64</sup> Moreover, reform is important because (as the findings of this study attest) protective orders can be effective at reducing post-separation abuse and providing victims space to regulate their housing position. Cordier’s systematic review, for example, found that, across 25 studies, protective orders reduced the

<sup>63</sup> Bates and Hester (n 12).

<sup>64</sup> Office of National Statistics, *Domestic abuse in England and Wales Overview: November 2020* (ONS, 2020) < <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwalesoverview/november2020>> accessed 28 October 2021.

quantitative occurrence of abuse.<sup>65</sup> Similarly, Bates and Hester found that for some perpetrators the presence of a protective injunction was sufficient to regulate their behaviour.<sup>66</sup> In contrast, Humphreys and Thiara found that without protection, perpetrators continued to demonstrate abusive conduct at the family home including 'breaking down doors; breaking in when the woman was absent and 'trashing' her home; stealing items from the house, watching the house; breaking windows; throwing paint and/or writing graffiti on the house; getting other relatives to watch the house; verbally abusing her when she was in the house or leaving the house; breaking in and physically or sexually assaulting her; leaving bouquets of dead flowers; hate notes; harassing and threatening phone calls'.<sup>67</sup>

## **Methodology**

The paper draws on data obtained from a mixed-methods study, which examined trends in the rates at which occupation orders are sought and granted and identified barriers to securing protection. An online questionnaire was designed to elicit the views of professionals who had represented or supported victims to apply for occupation orders in England and Wales. Valid responses were received from 38 professionals from a range of different roles, at different stages of their careers, operating in different settings and covering every geographical area of England. In-depth semi-structured interviews were also conducted with eight victims of domestic abuse about their experiences of applying for an occupation order. During the interviews it became apparent that two of the women had sought applications outside the jurisdiction of England and Wales. The analysis therefore represents the views of the six women whose application was dealt with in England and Wales (Participants A, B, C, E, F and G). Given the small sample size, the findings cannot claim to be representative of victim and practitioners' experiences across England and Wales. However, when taken with the survey results, the interview data provide a valuable qualitative insight into the lived experience of the family court process.

## **Findings and discussion**

### ***Victim litigants in person experience procedural and substantive barriers to accessing occupation orders, suggesting that third-party applications will be of value for many victims***

One of the most common barriers to securing an occupation order raised by the professionals was the strict legal aid criteria. Victims applying for a protective injunction do not need to provide gateway evidence to secure funding, however they must still satisfy the means test, which is prohibitive for many victims.<sup>68</sup> There was an even split between professionals who agreed that most of their clients/service users would receive legal aid to pursue an application and those who felt they would not. Out of the victims interviewed, three had no

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<sup>65</sup> Cordier et al (n 12).

<sup>66</sup> Bates and Hester (n 12).

<sup>67</sup> Humphreys and Thiara (n 12), 201.

<sup>68</sup> D. Hirsch, 'Priced out of Justice: Means Testing Legal Aid and Making Ends Meet' (Loughborough University Centre for Research in Social Policy, 2018)

<[https://repository.lboro.ac.uk/articles/report/Priced\\_out\\_of\\_justice\\_Means\\_testing\\_legal\\_aid\\_and\\_making\\_ends\\_meet/9470897](https://repository.lboro.ac.uk/articles/report/Priced_out_of_justice_Means_testing_legal_aid_and_making_ends_meet/9470897)> accessed 10 August 2021.

representation (Participants A, B and G), two had limited representation which was paid for privately (Participants C and E) and only one participant had full representation (Participant F). All sought legal aid but were ineligible. Participants C and G were refused as they did not satisfy the income threshold. Participant C narrowly missed qualifying as she earned '30 pounds a month' over the limit. Whilst she was not eligible for legal aid, she also could not afford to pay privately for a representative – a common dilemma for those who cannot secure funding. The participants were also involved in a multitude of court proceedings resulting from the abuse, with Participants E and G reporting that they had already spent the money they could afford on representation in those connected proceedings. Participants A and E found that owning the very house that they sought an occupation order in respect of prevented them from qualifying for legal aid. Under previous legal aid rules, when determining the value of an individual's interest in a property, a mortgage would only be taken into account up to £100,000, meaning that individuals with large mortgages but low or no equity were ineligible for funding, an issue which became known as 'imaginary capital'. In 2020, with the support of the Law Society, the Public Law Project (PLP) sought to challenge this rule.<sup>69</sup> In response, the government amended the legal aid regulations and the full amount of a person's mortgage will now be deducted when considering the value of a property for the purpose of the means test.<sup>70</sup> Many of the victims in this study also reported experiencing economic abuse, which restricted their access to the finances they required to pay for legal advice. As a result of a further challenge by PLP, the High Court has confirmed that the Legal Aid Agency is able to afford a 'nil' value to capital that victims cannot access ('trapped capital') in cases where they would otherwise pass the means assessment.<sup>71</sup> These key decisions will be valuable in supporting victims to access advice and representation, both under the current law and for those victims seeking DAPOs in the future, given that the same means and merits test will apply to both sets of proceedings.

Difficulties accessing legal advice/representation can affect a victim's decision to pursue an application, with the professionals agreeing that where legal aid is not available, victims will commonly not pursue a case or will opt to act as a litigant in person (i.e., instead of paying privately for advice or utilising an unbundled service to minimise costs). Statistics on representation group all 'domestic violence' family court cases together. However, they demonstrate an increase in the number of unrepresented applicants since LASPO was introduced in April 2013, with 19.3% of applicants self-representing in an application for injunctive protection in 2013, compared to 40.3% in 2019,<sup>72</sup> a rise that directly correlates with the cuts to legal aid imposed by LASPO. In this study, five of the six participants represented themselves at least once in court during proceedings. Participants C and E managed to secure partial representation through the help of friends and family who funded support. Participant E attempted to crowdfund for representation, but her ex-husband 'shut that down'. She then applied

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<sup>69</sup> Public Law Project, *Legal aid rule change for home-owners on low incomes & domestic violence survivors* (Public Law Project, 2020) < <https://publiclawproject.org.uk/latest/legal-aid-rule-change-for-home-owners-on-low-incomes-domestic-violence-survivors/>> accessed 11 November 2021.

<sup>70</sup> The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020, Regulation 2(4).

<sup>71</sup> *R (GR) v Director of Legal Aid Casework* [2020] EWHC 3140 (Admin).

<sup>72</sup> Ministry of Justice, 'Family Court Statistics Quarterly: October to December 2020' (National Statistics, 25 March 2021) < <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020>> accessed 1 October 2021.

for pro-bono representation through a legal clinic however this was means tested and she did not qualify as she owned the house. This mirrors existing research which demonstrates that self-representation often arises out of necessity, rather than choice.<sup>73</sup>

Reflecting findings made in earlier studies that without a professional advocate litigants struggle to understand the law and litigation procedure,<sup>74</sup> both the professionals who completed the questionnaire and the interviewees raised concerns about the quality of litigants in persons' applications and the negative impact of this on their prospects of success. Participants B and G's applications, for example, were rejected on the first attempt. Participant G's application was initially refused because of a procedural deficit, in that she submitted her application for a non-molestation order and occupation order as two separate applications, rather than applying on one form. It is concerning that the court delayed the application for an administrative reason when they could have consolidated the two applications and heard them together. Participant B's application was initially refused because it contained insufficient information about the abuse. The judge referred her to a domestic abuse service for advice and asked her to resubmit the application the same day. Incidences of applications for protective orders being rejected because of procedural or substantive deficits are not isolated. Speed et al highlighted that this was seemingly an issue with the Remote Access Family Court where judges were placing increased importance on the statements of case.<sup>75</sup> Similarly, Durfee's study in the USA found that...

'In cases where the abuse was severe and/or externally documented, the use of legal assistance by the respondent did not appear to affect hearing outcomes... in contested cases, however, where respondents retained a lawyer and/or filed affidavits disputing the petitioner's claims of abuse, there was no external documentation of the abuse, or it was unclear whether the incidents described met the legal criteria for a protection order; variations in the form, content and structure of the narrative had important implications for case outcomes'.<sup>76</sup>

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<sup>73</sup> J. Organ and J. Sigafoos, *Equality and Human Rights Commission: Research Report 118: The Impact of LASPO on Routes to Justice* (Equality and Human Rights Commission: 2018) <<https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>> accessed 14 July 2021; L. Trinder, R. Hunter, E. Hitchings, J. Miles, R. Moorhead, L. Smith, M. Sefton, V. Hinchly, K. Bader, and J. Pearce, 'Litigants in Person in Private Family Law Cases' (Ministry of Justice, 2014) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf)> accessed 18 September 2021.

<sup>74</sup> Moorhead and Sefton identified without legal representation, litigants struggle to 'translate their dispute into legal form, i.e. understanding the purpose of litigation, confusing law with social and moral notions of 'justice' and identifying which legally relevant matters are in dispute' in R. Moorhead and M. Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (London: Department for Constitutional Affairs; 2005), 256 <<https://orca.cardiff.ac.uk/2956/1/1221.pdf>> accessed 24 September 2021; Similarly, Trinder et al noted that 'without informed guidance at the initial stages, litigants face great difficulties in attempting to understand and act upon the substantive law' and may resort to unofficial sources which contain inaccurate or incomplete information, see Trinder et al (n 73), 37.

<sup>75</sup> Speed et al (n 9).

<sup>76</sup> A. Durfee, 'Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders' (2009) 4:1 *Feminist Criminology*, 24.

Factors which seemingly made a difference to the outcome in these cases included that statements of case prepared by legal representatives were more focussed on satisfying the threshold criteria, contained very specific descriptions of events and were more likely to include supplemental supporting evidence. In contrast, applications filed by litigants in person were often short, contained incomplete information or focussed on general details about the relationship rather than specific incidents. Applications containing information about specific incidents were successful in 74% of cases compared to 39% for those which did not.<sup>77</sup> From 11 October 2021, changes have been made to the non-molestation order/occupation order application form including setting out the legal test for a without notice application, providing information about serving the application and providing more details about special measures. In addition, the court has introduced a new template witness statement (Form FL401T) to assist litigants in person to provide the relevant information. This is a welcome step however some caution must be urged given Durfee's finding that 'even with "victim-friendly" procedures and forms, individuals without legal representation are significantly less likely to have their requests for protection orders granted'.<sup>78</sup>

Linked to self-representation is a concern about the impact on the quality of the evidence being provided to the family court, both in the sense that unrepresented litigants are more likely to experience difficulties in securing and funding necessary evidence<sup>79</sup> and because facing their perpetrator in the courtroom may prevent their effective participation. Despite most of the professionals in this study reporting that special measures (available under Part 3A and Practice Direction 3AA of the Family Procedure Rules 2010) were granted in between 75% and 100% of the occupation order proceedings in which they were requested, interviewees reported feeling unsafe at court, indicating that the measures were not sufficient to support women's effective participation. Participant A explained, '*I was just a mess, I was shaking, I was almost sick on the walk to the court... everyone was so worried he was gonna turn up and kill me*'. Five out of six interviewees were offered a separate waiting room before the court hearing. None of the interviewees were offered other forms of special measures such as screens and many of them did not know that this option was available, potentially because they were not represented. Several interviewees spoke about their experience of being close to their perpetrator during the court hearing. Participant C explained that she was '*paralysed with fear*' when she saw her abuser in the courtroom to the point that she could not speak. This was despite having written to the court to plead for special measures stating in her letter '*please give me protection measures, I don't want to see my rapist*'. This level of fear would undoubtedly have impacted the evidence she was able to provide to the court. Participant G reported a positive experience with the Judge ensuring that the Respondent left the courtroom first. This shows some awareness, although a more logical route would have been to allow Participant G to leave first with time to get safely away from the vicinity of the building, rather than risking the Respondent waiting outside for her. Supporting previous research, the professionals cited a lack of equipment/facilities, administration issues,

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid, 7.

<sup>79</sup> K. Richardson and A. Speed, 'Restrictions on Legal Aid in Family Law Cases in England and Wales: Creating a Necessary Barrier to Public Funding or Simply Increasing the Burden on the Family Courts?' (2019) 41:1 *Journal of Social Welfare and Family Law*, 135-52.

insufficient time to put measures in place or the Judge not being persuaded that they are necessary as the main reasons why special measures are refused.<sup>80</sup> Concerns were also raised about the awareness of the judiciary of the impact of domestic abuse on a victim's evidence, with one judge being quoted as having said '*well they have children together – they will have to be civil*' and another noting the victim '*can't be that frightened*' because she had allowed child contact.

At the time the data was collected, Judges also had discretion under Practice Direction 3AA of the Family Procedure Rules 2010 to prevent direct cross-examination of a victim. Corbett and Summerfield's research indicated inconsistency in the approach taken by judges when exercising this discretion, with some judges permitting direct cross-examination due to a 'perceived right of the litigant in person to cross-examine' or a reluctance to conduct the cross-examination themselves, whereas others took a strong stance and believed direct cross-examination was inappropriate.<sup>81</sup> Only Participant C reported being cross-examined by her perpetrator during the court proceedings. However, most of the individuals reported the respondent not showing up to the return hearing or an agreement being reached about the order continuing, which may explain why this was not more common. Participant C was one of the few interviewees who had representation at the hearing. She reported her barrister protecting her from aggressive questioning by the Respondent, again demonstrating the importance of effective representation in cases of this type.

The data reflects the experiences of professionals and individuals prior to the changes which will shortly be implemented under The Domestic Abuse Act 2021. Nonetheless, it is important in supporting that there is a need for reform in this area. The Act will prohibit direct cross-examination of victims where the perpetrator has been convicted of, received a caution for or has been charged with a specified offence, where there is an on notice injunction in place or there is other evidence of domestic abuse.<sup>82</sup> If none of those circumstances applies, the court will still have discretion to prohibit direct cross-examination (similar to the discretion they currently have under Practice Direction 3AA) and should consider the alternatives to direct cross-examination set out within the Act. Further, the Act provides that victims of domestic abuse will be automatically eligible for special measures in family proceedings because the court will assume their ability to participate or give evidence will be diminished by reason of vulnerability.<sup>83</sup> This is a change from the current law which provides that the court is 'under a duty' to consider whether a person's participation in proceedings may be diminished by reason of vulnerability. Although the new Act will strengthen the law, it does not guarantee protection, as whether special measures are ultimately provided will still depend on whether the court considers they are necessary to assist

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<sup>80</sup> M. Coy, E. Scott, R. Tweedale, and K. Perks, 'It's Like Going Through the Abuse Again: Domestic Violence and Women and Children's (Un)safety in Private Law Contact Proceedings' (2015) 37(1) *Journal of Social Welfare and Family Law*, 53-69; J. Birchall and S. Choudhry, *What About my Right Not to be Abused? Domestic Abuse, Human Rights and the Family Courts* (Bristol: Women's Aid, 2018) <<https://www.womensaid.org.uk/evidence-hub/research-and-publications/domestic-abuse-human-rights-and-the-family-courts/>> accessed 1 October 2021.

<sup>81</sup> N. Corbett and A. Summerfield, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses* (London: Ministry of Justice, 2017) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/592873/alleged-perpetrators-of-abuse-as-litigants-in-person.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592873/alleged-perpetrators-of-abuse-as-litigants-in-person.PDF)> accessed 27 September 2021.

<sup>82</sup> Domestic Abuse Act 2021, s 65.

<sup>83</sup> Domestic Abuse Act 2021, s 63.

the party. Accordingly, it does not fully address the concerns raised about judges minimising the need for special measures, nor does it address the situation where screens etc are not available or fit for purpose in a particular court building. Where the victim is unrepresented, there should be no requirement for them to make a request before such measures are considered given victims in this study reported not knowing about the existence or value of some measures.

It is hoped that the changes considered above will improve the capacity of victims to effectively pursue applications going forward. However, in cases where victims feel unable to do so, applications for DAPOs can be made by third parties, taking the onus off victims to be the 'initiator of action' when they are potentially 'suffering from emotional and physical trauma'.<sup>84</sup> Provisions for third party applications for protective orders are not novel and are already in place for forced marriage protection orders<sup>85</sup> and FGM protection orders.<sup>86</sup> Section 60 of the Family Law Act 1996 also provides for 'rules to be prescribed to allow third parties to apply for non-molestation and occupation orders on behalf of survivors of domestic violence', however this provision has never been implemented despite research that such provisions would potentially be valuable for victims.<sup>87</sup> Academics have suggested that third party applications may also support victims whose confidence has been 'so eroded by their experience of domestic violence that they would be unable to recognise that their situation called for a remedy'.<sup>88</sup> Humphreys and Kaye recognise that 'third party applications have the advantage of not placing women in positions where they are taking out applications against men who they are in great fear of, may still care about, or who may intimidate them to revoke the orders'.<sup>89</sup> This has been one of the main successes of forced marriage and FGM protection orders, with case law demonstrating that applications are frequently pursued as a safeguarding measure by professionals (i.e. the police, social services and local authority)<sup>90</sup> and families and friends of the person to be protected.<sup>91</sup> The Domestic Abuse Act 2021 is set to broaden the categories of applicants who may make a third party application by specifying the police as a distinct category of applicants.<sup>92</sup> In addition, the Domestic Abuse Bill Delegated Powers Memorandum suggests that the third parties who might be specified by the Secretary of State as capable of applying without prior permission include 'local authorities, probation service providers, specialist domestic abuse advisers and specialist non-statutory support services (for example, refuge support staff)'.<sup>93</sup> This is broader than forced marriage/FGM

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<sup>84</sup> Southall Black Sisters, *Domestic Violence and Immigration Law: An Urgent Need for Reform, Memorandum to Home Affairs Committee Inquiry into Domestic Violence: Appendices 9 and 13* (London: HMSO, 1992).

<sup>85</sup> Family Law Act 1996, s 63.

<sup>86</sup> Female Genital Mutilation Act 2003, sch 2 para 1.

<sup>87</sup> M Burton, 'Third Party Applications for Protection Orders in England and Wales: Service Provider's Views on Implementing Section 60 of the Family Law Act 1996' (2003) 25(2) *Journal of Social Welfare and Family Law*, 137; C. Humphreys and M. Kaye, 'Third-Party Applications for Protection Orders: Opportunities, Ambiguities and Traps (1997) 19(4) *Journal of Social Welfare and Family Laws*, 403-21.

<sup>88</sup> Burton (n 87), 139.

<sup>89</sup> Humphreys and Kaye (n 87), 406.

<sup>90</sup> *Re X (FGMPO No.2)* [2019] EWHC 1990 (Fam); *Re K (Forced Marriage: Passport Order)* 2020 EWCA Civ 190.

<sup>91</sup> *Re E (Children) (FGM Protection Orders)* [2015] EWHC 2275 (Fam); *Re C (Female Genital Mutilation and Forced Marriage Fact Finding)* [2019] EWHC 3449 (Fam).

<sup>92</sup> Domestic Abuse Act 2021, s 28(2)(b).

<sup>93</sup> Home Office, Ministry of Justice and Ministry of Housing, Communities and Local Government, *Domestic Abuse Bill: Delegated Powers Memorandum* (Home Office, 2021), para 24 < <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-overarching-documents/delegated-powers-memorandum> > accessed 1 October 2021.

legislation where the only Relevant Third Party to have been designated by the Secretary of State is the local authority.<sup>94</sup> Alongside this, friends and family members will be able to apply with permission, which is important given research suggests that many victims turn to their informal support networks for assistance with leaving an abusive relationship.<sup>95</sup>

Given a recognised benefit of protective orders is that victims can choose when and how they access protection, third-party applications can be disempowering. This is particularly concerning considering Johnson's findings that disempowering victims can increase their susceptibility to ongoing violence and abuse.<sup>96</sup> Section 33(3) of the Domestic Abuse Act 2021 provides it is 'not necessary for the person for whose protection a domestic abuse protection order is made to consent to the making of the order'. At the very least, the court are required to consider the opinion of the person to be protected by the order but only to the extent that the court is made aware of this.<sup>97</sup> This is reinforced by the statutory guidance for the police which states that 'the lack of need for consent does not remove the need to listen to the views of the person being protected and they should be fully engaged at all times when deciding the best course of action'.<sup>98</sup> This can be compared with the current approach to restraining orders, where the ultimate decision as to whether to make the order will rest with the court but this will be influenced heavily by the victim's views which must be presented to the court by the prosecution.<sup>99</sup> The importance of obtaining the victim's views was clarified in *R v Picken*<sup>100</sup> where the judge who granted the order at first instance was criticised for making the order without having ascertained the victim's views. In that case the Court of Appeal went as far as to state that, 'if he had been satisfied that she wished to continue relations with the applicant, then it would have been inappropriate for him to have made the order. It was not for him to decide that she should not do so.'<sup>101</sup> This indicates that whilst it is for the judge to determine whether an order is necessary, they are unlikely to make a restraining order where it is contrary to the victim's wishes. This can be somewhat contrasted with the position in forced marriage cases. *Re K (Forced Marriage: Passport Order)*<sup>102</sup> established that where the adult requiring protection does not consent, the court will balance the protective and risk factors, determine whether the facts establish a real and immediate risk of the subject of the application suffering inhuman or degrading treatment sufficient to cross the Article 3 ECHR threshold and if so, balance the victims' Article 3 and Article 8 (right to family life and the victims' autonomy) ECHR rights, before deciding if an order is necessary. Academics such as Hitchings and Hirschel have argued against pursuing prosecutions without victim support because this can be disempowering and takes away a victim's autonomy to

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<sup>94</sup> The Family Law Act 1996 (Forced Marriage) (Relevant Third Party) Order 2009; The Female Genital Mutilation Protection Order (Relevant Third Party) Regulations 2015.

<sup>95</sup> R. Klein, *Responding to Intimate Violence against Women: The Role of Informal Networks* (Cambridge University Press, 2012).

<sup>96</sup> Johnson (n 53), 8.

<sup>97</sup> Domestic Abuse Act 2021, s 33(1).

<sup>98</sup> Home Office (n 20), 50.

<sup>99</sup> Crown Prosecution Service, *Restraining Orders – Section 5, Protection from Harassment Act 1997, Legal Guidance* (CPS, 2020) < <https://www.cps.gov.uk/legal-guidance/restraining-orders-section-5-protection-harassment-act-1997> > accessed 28 October 2021.

<sup>100</sup> *R v Picken* [2006] EWCA Crim 2194

<sup>101</sup> *Ibid*, 17

<sup>102</sup> *Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190.

make their own decision about the most appropriate form of action/protection.<sup>103</sup> Similar arguments could be put forward for pursuing a DAPO without victim support. Additionally, without victim support it is difficult to see how an order would be effective or enforceable. However, a blanket ban on making an order without victim support would ignore the coercive and controlling nature of abusive relationships.<sup>104</sup> Therefore, it will be important that a victim's views are not taken at face value but rather specialist support is offered to victims who are not consenting to an order (potentially through the use of an IDVA) to investigate why this is the case and whether their safety can be secured without a DAPO.

It is also crucial that professionals are not disincentivised from pursuing applications and are trained to prepare and present good quality applications. This is particularly important for non legally qualified third parties. Durfee's study found that petitioners who filed applications for protective orders with the assistance of lay advocates and support services were only 'slightly more' likely to receive a protection order than those who filed without any legal assistance.<sup>105</sup> Previous research in relation to DVPOs demonstrates that orders are mainly refused because of police errors in missing information on the DVPN and applications being made out of time.<sup>106</sup> As recently as 2017, many forces were still 'not using DVPOs as widely as they could, and opportunities to use them continue to be missed'.<sup>107</sup> This study found this to be an ongoing issue, as despite the police being involved in the aftermath of incidents of violent/abusive conduct against interviewees, the only remedy issued by the police was a Police Information Notice (PIN), which simply carries a warning that harassment has been alleged against a perpetrator but has no power to prevent him returning to the family home. Crucially, in comparison to DVPNs, PINs also cannot be used as gateway evidence for legal aid. PINs, however, are cheaper and less resource intensive for the police to issue. The idea that the police may shy away from applying for substantive orders is supported by previous studies which suggest that reasons for the underuse of DVPOs include 'officer inexperience in using them, a lack of officer training and orders being seen as too bureaucratic or the paperwork being too time-consuming (especially when building a case for charge in parallel)'.<sup>108</sup> Further, as Richardson and Speed note in relation to DVPNs, the police are reluctant to utilise an order that obliges them to take further steps to secure an order within a short period of time.<sup>109</sup> It is therefore promising that under the new law, the police will be able to make free standing applications for DAPOs rather than requiring a DAPN to be made first. Nonetheless, an outstanding issue relates to the cost of pursuing an application. Paragraph 2.5 of the draft statutory guidance for the police states that 'for the duration of the pilot phase, the police will not be required

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<sup>103</sup> E. Hitchings, 'A Consequence of Blurring the Boundaries Less Choice for the Victims of Domestic Violence?' (2006) 5(1) *Social Policy and Society* 91–101; D. Hirschel and I. Hutchinson, 'The Voices of Domestic Violence Victims: Predictors of Victim Preference for Arrest and the Relationship Between Preference for Arrest and Revictimization' (2003) 49(2) *Journal of Crime and Delinquency (CAD)* 313–36.

<sup>104</sup> K. Richardson and A. Speed, 'Two Worlds Apart: A Comparative Analysis of the Effectiveness of Domestic Abuse Law and Policy in England and Wales and the Russian Federation' (2019) 83(45) *The Journal of Criminal Law*, 320–51.

<sup>105</sup> Durfee (n 76), 28.

<sup>106</sup> Kelly et al, (n 56).

<sup>107</sup> Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services (HMICFRS), *A Progress Report on the Police Response to Domestic Abuse* (London: HMICFRS, 2017), 25 <<https://www.justiceinspectors.gov.uk/hmicfrs/publications/a-progress-report-on-the-police-response-to-domestic-abuse/>> accessed 28 September 2021.

<sup>108</sup> Bates and Hester (n 12), 138.

<sup>109</sup> K. Richardson and A. Speed (n 104)

to pay an application fee to court to apply for a DAPO', implying that at some point an application fee may be introduced (contrasting with occupation orders which do not attract a court fee) and that the police may be expected to meet such a cost where they are the applicant.<sup>110</sup> The issues in this section therefore suggest that investment in specialised training and funding to ensure the proper allocation of resources will be necessary in ensuring the success of third party applications.

***The threshold criteria for an occupation order are difficult for many victims to satisfy, indicating that DAPOs may increase the prospects of victims securing protection in respect of the family home***

One of the main barriers to securing an occupation order to emerge from the data was the strict threshold criteria. When deciding whether to make an occupation order, the court must consider the 'balance of harm' test. In cases where the applicant has property rights or has home rights by virtue of being married or in a civil partnership with the respondent, the court must make an order if it appears that the applicant (or a relevant child) is likely to suffer significant harm attributable to the conduct of the respondent if an order is not made unless the court considers that the harm that would be suffered by the respondent (or a relevant child) by the order being made would be equal to or greater.<sup>111</sup> In cases where the applicant does not have property or home rights, the court must still consider the balance of harm test but does not have the same mandatory requirement to make the order. When considering the meaning of 'harm attributed to the respondent's conduct' the Court of Appeal in *G v G* held that 'the court's concentration must be upon the effect of conduct rather than on the intention of the doer...whether misconduct is intentional or unintentional is not the problem'.<sup>112</sup> If the court decides the balance of harm test in favour of the respondent, or if the scales are evenly balanced, they will then consider whether to nonetheless make an order by applying a discretionary checklist of factors. The relevant checklist(s) depends on the status of the applicant and therefore the section being applied under but will include the housing needs and housing/financial resources of each of the parties; the conduct of the parties; and the likely effect of an order not being made on the health, safety or well-being of the parties and any relevant child. If the applicant has no existing legal right to occupy the home, the court will also consider the nature and seriousness of the relationship, the length of time since the relationship ended and any other relevant proceedings.<sup>113</sup>

Case law demonstrates that the decision to remove a perpetrator from the family home should not be made lightly. In *Chalmers v John*, occupation orders were described as 'draconian' and 'only justified in exceptional circumstances'.<sup>114</sup> More recent cases have indicated a slightly less restrictive approach to granting orders. In *Dolan v Corby*, for example, Black LJ stated that *Chalmers v Johns* should not be read as 'saying that an exclusion order can only be made where there is violence or a threat of violence... that would be to put a gloss on the

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<sup>110</sup> Home Office (n 20).

<sup>111</sup> Family Law Act 1996, s 33(7); Family Law Act 1996, s 35(8); Family Law Act 1996, s 36(8); Family Law Act 1996, s 37(4); Family Law Act 1996, s 38(5).

<sup>112</sup> *G v G (Occupation Order)* [2000] 3 FCR 53.

<sup>113</sup> Family Law Act 1996, s 35(6); Family Law Act 1996, s 36 (6).

<sup>114</sup> *Chalmers v Johns* [1999] 1 FLR 392.

statute which would be inappropriate... exceptional circumstances can take many forms and the important thing is for the judge to identify and weigh up all the relevant factors of the case whatever their nature'.<sup>115</sup> Further, 'harm' has been interpreted broadly and in *Re L (Children) (Occupation Order)* it was stated that 'harm' was not limited to physical harm.<sup>116</sup> Nonetheless, it is still largely accepted that for an order to be justified there needs to be more than the 'domestic disharmony' which could be controlled through the imposition of a non-molestation order.<sup>117</sup>

The criteria for securing a DAPO bears more of a resemblance to the test for a non-molestation order, which requires the court to have regard to the need to secure the health, safety and wellbeing of the applicant and any relevant child.<sup>118</sup> The court must be satisfied on the balance of probabilities that judicial intervention is required to protect the applicant from the respondent.<sup>119</sup> Nearly all of the professionals in this study (35 out of 38) agreed the test for a non-molestation order was an easier threshold to satisfy than an occupation order, with the criteria elsewhere being described as 'generous' and 'victim-focussed'.<sup>120</sup> In many cases, the DAPO criteria will therefore be significantly easier to satisfy than the existing occupation order test and should result in an improvement to the number of successful applications. Nonetheless, in cases where other people live in the property with the victim and the perpetrator, the Domestic Abuse Act 2021 requires that the court considers the opinions of any 'relevant occupants' which relate to the making of the order.<sup>121</sup> A 'relevant occupant' is defined as a person who lives in the property and who is personally connected to the person for whose protection the order would be made or, if the respondent also lives in the premises, the respondent. It is not clear what weight the court will give to these views. It is concerning that a family member connected to the perpetrator could seek to interfere with or undermine an application. Moreover, it is not clear from the legislation whether (and if so, how) the views of any children who occupy the property will be sought. It is the authors' position that this provision could place an increased resource burden on the family courts at a time when they are already under significant pressure, whilst also placing a burden on children to contribute to the outcome of proceedings which may result in one of their parents being excluded from the family home.

### ***The courts are already utilising alternative remedies to grant protection over the family home***

Many of the professionals (25 out of 38) recognised that non-molestation orders with a zonal clause were frequently granted instead of an occupation order. This is an important finding, as it suggests that the courts have found alternative routes to granting protection in respect of the family home. Whilst granting a zonal order as part of non-molestation order proceedings is within the scope of the law, it enables judges to bypass the strict tests that are required in an application for an occupation order. Although this is arguably what DAPOs are seeking to do, as the following section will consider, DAPOs will be capable of providing much more extensive

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<sup>115</sup> *Dolan v Corby* [2011] EWCA 1664.

<sup>116</sup> *Re L (Children) (Occupation order: Absence of Domestic Violence)* [2012] EWCA Civ 721.

<sup>117</sup> *Chalmers v Johns* [1999] 1 FLA 392.

<sup>118</sup> Family Law Act 1996, s 42(5).

<sup>119</sup> *C v C* [2001] EWCA Civ 1625.

<sup>120</sup> Burton (n 13), 110.

<sup>121</sup> Domestic Abuse Act 2021, s 33(1)(c).

support to victims wishing to remain in the family home and therefore will usually be a preferable route to securing protection than non-molestation orders.

All of the professionals agreed that victims typically apply for a non-molestation order alongside an occupation order as part of a 'belts and braces' approach. One possibility is that when faced with both applications, the ease of granting a non-molestation order results in due consideration not being given to the occupation order application on the basis that 'some protection' will suffice. This was Participant E's experience. Participant F, on the other hand, did not apply for a non-molestation order, and she considered that this was 'an issue' for the judge hearing her case. Going forward, it is the government's intention that multiple orders will not be needed and that reliance on the existing forms of protection will be limited, given the extensive scope of DAPOs. However, there are a number of circumstances in which non-molestation orders and occupation orders may still be required. Firstly, the definition of 'associated persons' under the Family Law Act 1996 is slightly broader than 'protected persons', under the Domestic Abuse Act 2021. For example, the Family Law Act 1996 applies to cohabitants or former cohabitants of the same household who are not merely lodger/tenant but whose relationship falls short of being an intimate personal relationship as required under the Domestic Abuse Act 2021. There may also be a place for occupation orders in cases where victims do not want to see their perpetrator subject to criminal prosecution in the event of a breach, as they would under a non-molestation order, a restraining order or a DAPO. A third scenario in which occupation orders/non molestation orders may need to be sought is where a victim is under the age of 16. Under the DAPO eligibility criteria, protection can only be granted in favour of those aged 16 and over.<sup>122</sup> This contrasts with the eligibility requirements under the Family Law Act 1996, which provides that a victim under the age of 16 may not apply for an occupation order or a non-molestation order except with the leave of the court.<sup>123</sup> The court may grant leave only if it is satisfied that the child has sufficient understanding to make the proposed application.<sup>124</sup> Accordingly, under the Family Law Act 1996 there is not an absolute bar to seeking protection as there is through the Domestic Abuse Act 2021. The extent to which the ongoing use of existing orders may compromise the policy objective of 'simplifying the landscape of protection for victims and their children' will ultimately depend on the numbers of cases in which recourse to legacy remedies is required.

***Occupation orders are frequently granted on restricted terms/for limited durations which reduce their effectiveness at preventing post-separation abuse and supporting victims to regulate their short and longer-term housing situation***

*(a) The duration of orders*

In contrast to occupation orders, the terms available under a DAPO are not differentiated based on an individual's property rights and the relationship between the parties. This means that 'non-entitled'

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<sup>122</sup> The Domestic Abuse Act 2021, s 27(1).

<sup>123</sup> The Family Law Act 1996, s 43(1).

<sup>124</sup> The Family Law Act 1996, s 43(2).

applicants (i.e., those with no rights in relation to the property) will be able to secure protection through the same route as an entitled applicant. Further, in comparison to the Family Law Act 1996 provisions which specify that orders can be granted for different durations based on the category under which the victim applies, DAPOs will, in theory, be available indefinitely for all applicants.<sup>125</sup> In practice, however, given that most applicants either have a legal or beneficial interest in the property or home rights by virtue of being married to the perpetrator, this discretion is already available for most victims in occupation order proceedings. Nonetheless, the data indicates that it is not commonly exercised, suggesting a judicial reluctance to grant protection in relation to the family home for extended periods of time.

The perception of the professionals surveyed was that occupation orders were most commonly granted for a period of six months even when there were no restrictions on the courts' powers. This was supported by the interview data. Of the four interviewees who secured an order, two were granted protection for six months (Participant A and Participant B) and one was granted an order for three months (Participant G) although she requested an order for one year. At the other end of the spectrum, Participant C secured an order for two years. All had a legal interest in the property. In Participant B's case, the duration of her order was potentially justified by the fact that she made the application on an ex-parte basis. In such cases, the President's Practice Guidance will apply which states both that 'an ex parte injunctive order must never be made without limit of time'<sup>126</sup> and that 'a period longer than six months is likely to be appropriate only where the allegation is of long-term abuse or where there is some other good reason... conversely, a period shorter than six months may be appropriate in a case where there appears to be a one-off problem that may subside in weeks rather than months'.<sup>127</sup> However, in Participant A and Participant C's case, the applications were made on notice to the respondents, meaning that the guidance would not have applied. The guidance is expressed as applying to 'ex-parte (without notice) orders' rather than specifically occupation orders and non-molestation orders. Accordingly, there is a strong argument that the guidance will continue to apply to DAPOs thereby limiting the duration of orders in relevant circumstances.

Most of the professionals surveyed also agreed that occupation orders need to be granted for a longer duration with 22 of the 38 professionals acknowledging that the effectiveness of orders was compromised by failing to give victims sufficient opportunity to take action to regulate their longer-term living arrangements. Professionals noted that married victims typically start divorce proceedings during the period in which an occupation order is in force, with a view to either bringing the perpetrator's home rights to an end<sup>128</sup> or dealing with the ownership of the property as part of financial relief proceedings.<sup>129</sup> The

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<sup>125</sup> The Domestic Abuse Act 2021, s 38(3).

<sup>126</sup> Sir James Munby, *Practice Guidance: Duration of Ex Parte (Without Notice) Orders* (President of the Family Division (18 January 2017), para 5 (i) < <https://www.judiciary.uk/wp-content/uploads/2017/01/pfd-practice-guidance-ex-parte-orders.pdf>> accessed 5 August 2021.

<sup>127</sup> *Ibid.*

<sup>128</sup> Under section 31(8) of the Family Law Act 1996, a spouse/civil partner's home rights will come to an end on the termination of the marriage, unless the court has ordered that the charge should continue following an application under section 33(5) of the Family Law Act 1996.

<sup>129</sup> The court has the power to order the sale of a property or facilitate its transfer to one of the parties under section 24 of the Matrimonial Causes Act 1973.

professionals identified that other common action taken by victims included removing a perpetrator from a joint tenancy, securing privately rented accommodation or applying for local authority housing, none of which are likely to be immediate processes. Only four of the 38 professionals felt that victims commonly take 'no action' during the period an occupation order is in force.

It was not always the case that the length of an order positively correlated with the interviewees' ability to regulate their housing position. Although the average duration of an order was six months, for example, family court statistics show that between October and December 2020, the time from filing the petition to the decree absolute (the final order of divorce) was around 56 weeks.<sup>130</sup> Not all of these cases will have included consideration of financial arrangements therefore this figure is likely to be an underestimation. Further, in both Participant C and Participant G's cases, there was evidence that granting an order for a specified amount of time rather than until the end of the interrelated proceedings provided the perpetrator greater scope to control and manipulate the process:

*'The judge chose three months because he wanted us to try and finish the divorce... it was to push it to a conclusion quickly. But it didn't result in that at all, it just resulted in him being able to deliberately slow things'* (Participant G).

Correlating the length of the order to interrelated proceedings could therefore be used in the future to address the broader concern that perpetrators use court proceedings as a forum to exercise further control over their victims.<sup>131</sup> Whilst this approach will not be acceptable in every situation (for example, where there is no immediate intention to take any action to regulate the longer term ownership/occupation), in appropriate cases it would enhance the effectiveness of orders by reducing the need for victims to either secure an extension or take alternative action to find short term accommodation in the period after the order has expired, if the perpetrator insists on returning. Nevertheless, this would involve a judicial shift as part of the transition to DAPOs which would grant victims greater power over their perpetrators, something which has historically been rejected in protective injunction proceedings.<sup>132</sup>

*(b) Without notice orders*

The courts are permitted to make an occupation order without notice to the respondent provided the criteria in section 45 of the Family Law Act 1996 is satisfied. However, in practice they are reluctant to do so and will usually require an on notice hearing to take place before any regulatory provisions are put in place regarding the family home.<sup>133</sup> This practice was confirmed by the professionals surveyed. This makes

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<sup>130</sup> Ministry of Justice (n 59).

<sup>131</sup> Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (Ministry of Justice, 2020), 108  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf)> accessed 1 October 2021.

<sup>132</sup> *Cechi v Bashier and Others* [1999] Fam 528.

<sup>133</sup> Henderson (n 10), 79.

occupation orders less accessible/effective in emergency situations than non-molestation orders which are more likely to be granted on a without notice basis. As discussed above, given that applications for both orders are often currently pursued simultaneously, victims may at least have the protection of the without notice non-molestation order pending a decision being made about the occupation order. However, one of the professionals discussed the adverse impact this can have on the court's willingness to then grant the occupation order later:

*'...by the time it gets to the return date, some of the urgency may have been removed from the situation and judges take the view that if a victim has put up with the situation for the last two weeks, they can put up with it indefinitely.'*

It will be possible to apply for a DAPO on a without notice basis if identical criteria are met to that within the Family Law Act 1996.<sup>134</sup> The police will also be able to grant a short (48 hour) DAPN, which will be similar to a DVPN and will be capable of providing immediate protection, thereby reducing some of the need for without notice orders. In cases where a DAPN has not been granted first, however, it is to be seen whether the courts adopt an approach which is universally more in line with non-molestation orders, or whether the approach taken will be determined by the type of provisions included in the order, with a more cautious approach reserved for provisions relating to the family home. Given that a policy objective of DAPOs is to 'provide better protection for victims and children', it is hoped that a more liberal approach will be adopted than for occupation orders, at least in cases where failure to do so would leave victims without any immediate protection.

*(c) Inflexibility of terms*

A further limitation of occupation orders is that the terms are attached to a particular property rather than the victim themselves. This created a difficulty for Participant C who sold the house during the two-year period in which her occupation order was in place and was unable to change the address to which the order was attached. She was advised to apply for a non-molestation order instead where a zonal order can prohibit a respondent from attending or entering any property that he knows or believes the applicant to be staying in, something that she may have been better advised to also apply for initially. However, by this point, she had no recent evidence of domestic abuse or harassment and therefore had difficulty demonstrating the need for such an order. She was advised by the Judge to accept an undertaking from the respondent instead. This finding supports Bates and Hester's observation that some victims are pressurised into accepting downgraded forms of protection rather than pursuing an order under the threat of otherwise receiving no protection at all.<sup>135</sup> Given the relatively weak powers to enforce undertakings, it was therefore potentially unsurprising that Participant C's abuser continued to drive to her new property. In line with non-molestation orders, a DAPO can prohibit a perpetrator from coming within a specified distance of any premises in England

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<sup>134</sup> Domestic Abuse Act 2021, s 34.

<sup>135</sup> Bates and Hester (n 12).

and Wales in which that person lives<sup>136</sup> and can be enforced by criminal action. The new law will therefore provide scope for better protection where a victim moves whilst the order is in force but still wishes to prevent the perpetrator from attending their new property.

(d) *The availability of ancillary provisions*

The interviewees continued to experience economic abuse whilst the occupation orders were in force. Four of the perpetrators either stopped contributing to the mortgage/utility bills or took steps to disrupt the victims' financial position. Participant B stated that her ex-husband reduced his mortgage contribution to £10 whilst Participant G noted he '*stopped paying everything*'. Consequently, the victims were often required to make additional contributions to meet these liabilities. A range of powers relating to payments on the property are available in occupation order proceedings (for which there are no corresponding provisions for non-molestation orders) to try and combat the harm this causes victims. In some cases, the perpetrator can be ordered to pay (or make contributions to) the rent, mortgage payments or other outgoings or be directed to grant possession or use of the contents of the house as part of an occupation order.<sup>137</sup> Whilst there are limitations on the courts' powers to enforce compliance with such terms,<sup>138</sup> where perpetrators are willing and able to comply, they can provide a valuable tool to protect against ongoing economic abuse. In this study, one participant (Participant G) sought financial directions, and this was granted. This provision was effective for the three months for which it was in place however once it came to an end, the perpetrator refused to make any further contributions towards the property, suggesting that in this case at least, a court order was needed to ensure the payments. Although most of the interviewees could have benefited from this provision, they were unaware that this was available due to being unrepresented.

Under the provisions in the Domestic Abuse Act 2021, there is no specific statutory provision mirroring section 40. However, there is a more general provision that allows the court to 'impose any requirements that the court considers necessary to protect the person for whose protection the order is made from domestic abuse or the risk of domestic abuse'<sup>139</sup>. The draft statutory guidance to the police on DAPOs also states that 'the police could seek requirements to address abusive behaviour such as... intentionally running up bills or debts in the name of the person to be protected (with or without the knowledge of the person to be protected)'.<sup>140</sup> To support the accessibility of such provisions, where a victim is pursuing an application, it is crucial that the court is not reliant on the applicant making a request for a financial direction. Instead, it would be relatively easy for standard directions to be issued in advance of the hearing

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<sup>136</sup> Domestic Abuse Act 2021, s 35.

<sup>137</sup> The court has the power to make such provisions under section 40 of the Family Law Act 1996. However, this power is only available in respect of orders made under section 33, section 35 or section 36. The power does not exist for orders made under section 37 or section 38, where neither spouse (or former spouse) or cohabitant (or former cohabitant) is entitled to occupy the property.

<sup>138</sup> *Nwogbe v Nwogbe* [2000] 2 FLR 774 [2000] 3 FCR 345.

<sup>139</sup> Domestic Abuse Act 2021, s 35.

<sup>140</sup> Home Office (n 20), 22.

requiring the parties to file with the court specified information about their financial positions and the outgoing payments on the property, similar to divorce proceedings albeit in a reduced format. This would avoid the stress and cost of additional hearings, which may be particularly disruptive for litigants in person.

***Whilst protective injunctions are effective at reducing post-separation violence in many cases, improvements are required to the police response where a breach is alleged***

Supporting earlier research, the interviewees had separated from their abusers at the point of applying for an occupation order.<sup>141</sup> It is well documented that separations can trigger abusive conduct.<sup>142</sup> In this study, interviewees described that the abuse had escalated in the aftermath of the separation. Participant G described *‘during that time he threatened me with a frying pan, was quite an aggressive on messages and started following me outside of the house, tracking where I was going’*. Supporting Humphreys and Thiara’s findings, a number of the interviewees also cited instances of their abusers perpetrating post-separation violence within the family home.<sup>143</sup> This escalation in abuse was a motivating factor to apply for an occupation order for most of the women in this study.

Applying to the family courts was not necessarily the first step taken by the interviewees, as most reported the abuse to the police. Two of the interviewees described the police minimising their experiences. Referring to an incident where her ex-husband had driven to her home, Participant C said, *‘I was terrified, and I rang the police and said that he was stalking me and they just sort of laughed’*. Similarly, Participant E noted, *‘it just felt like “oh yes this is a sort of domestic dispute that happens when people split up”... I felt very unrepresented, very un-advocated for’*. These experiences suggest that inadequacies in the police response were a contributing factor to the rates of applications for occupation orders. Research shows however that issuing protective orders *and* simultaneous arrests for the underlying offence produces a significantly lower recidivism rate compared to issuing protective orders without an arrest at the time of the incident, thus suggesting that *‘a combination of law enforcement strategies may be more effective in deterring reoffence’*.<sup>144</sup> This indicates that introducing the DAPO in itself is not sufficient to achieve the objective of reducing repeat offending – police must be willing to apply for such orders and consider pursuing a case in relation to the underlying conduct.

Supporting the studies cited earlier in this article, most of the interviewees found that having an injunction in place either reduced the post-separation abuse they experienced or changed the type of abuse they faced. None of the interviewees reported any further incidents of physical violence whilst the order(s) were in force, despite experiencing this during the relationship and/or following the separation. Given that none of the interviewees reported their abuser attempting to actually come inside the property whilst the order(s) were in force, the physical space granted by an occupation order appeared to be successful at reducing the opportunity for physical

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<sup>141</sup> B. Balos, ‘Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings’ (2006) *Temple Political Civil Rights Law Review* (2006), 557-602.

<sup>142</sup> Humphreys and Thiara (n 12).

<sup>143</sup> Humphreys and Thiara (n 12), 201.

<sup>144</sup> Cordier et al (n 12), 20.

abuse, as it is well documented that violence disproportionately takes place in the family home.<sup>145</sup> Some of the victims recognised, however, that reducing access to themselves lead to an increase in perpetrators attempting to ‘control’ or ‘brainwash’ the parties’ children. As already highlighted, most of the interviewees also experienced continuing economic abuse.

Research also indicates that a minority of victims ‘experience themselves to be outside protection’, indicating a ‘significant disillusionment with the effectiveness of orders’.<sup>146</sup> In Humphreys and Thiara’s study, the finding that civil protective orders had little impact was particularly prevalent amongst those women suffering ‘chronic’ post-separation violence.<sup>147</sup> Elsewhere, reports have cited that offenders with prior arrests, higher levels of violence and a history of stalking were significantly more likely to violate protective orders.<sup>148</sup> Only one interviewee in this study (Participant E) reported that securing a protective order worsened her experience of post-separation abuse:

*‘It became quickly apparent to me that all I’d actually done is make my situation worse... I put all my faith in [the order] and that offered me nothing because it was like red rag to a bull because these people they’re control freaks and they will not accept being told to do something’.*

Some of the interviewees described that whilst their perpetrator did not technically breach the order, they consistently pushed the boundaries of what was allowed. Participant C, for example, secured a non-molestation order and an occupation order under which her husband was prohibited from coming within 100 meters of the family home, however he would ‘hover around 102 meters, 110 meters’. Similarly, Participant A noted that her perpetrator persistently breached the terms of the order from the point that it was granted until the order was served on him, going so far as to ‘leave an axe on the back wall of my house’ on the night the orders were served. Under the current law, protective injunctions are only enforceable from the time the respondent is aware of their existence<sup>149</sup>. The Domestic Abuse Act 2021 states that a DAPO ‘takes effect on the day on which it is made’<sup>150</sup> however there is presumably also a requirement for service in cases where a DVPN has not been issued and a standalone application is made ex-parte. In this study, service proved problematic for some of the interviewees, due to being litigants in person. For Participant A, the police agreed to assist with service, but this led to delays in the order being served, with incidents taking place in the meantime. Most concerning, Participant B was left to serve the order on the respondent herself. Despite being a litigant in person, the judge failed to consider instructing a court bailiff or to provide her with any advice about how the order could be

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<sup>145</sup> See for example R. Ivandic, T. Kirchmaier and B. Linton, ‘Changing Patterns of Domestic Abuse during Covid-19 Lockdown, Discussion Paper No.1729’ (Centre for Economic Performance, November 2020) <<https://cep.lse.ac.uk/pubs/download/dp1729.pdf>> accessed 1 September 2021; Women’s Aid, ‘A Perfect Storm: The Impact of the Covid-19 Pandemic on Domestic Abuse Survivors and the Services Supporting Them’ (Women’s Aid, August 2020) < <https://www.womensaid.org.uk/a-perfect-storm-the-impact-of-the-covid-19-pandemic-on-domestic-abuse-survivors-and-the-services-supporting-them/>> accessed 17 June 2021; Speed et al (n 9).

<sup>146</sup> Humphreys and Thiara (n 12), 204.

<sup>147</sup> Ibid.

<sup>148</sup> Cordier et al (n 12).

<sup>149</sup> Family Law Act, s 42A (2).

<sup>150</sup> Domestic Abuse Act 2021, s 38(1).

served in a safe manner. This is particularly concerning because it contravenes Part 10.6 (1A) of the Family Procedure Rules 2010 which states that the order must not be served personally by the applicant himself or herself – a rule which will continue to apply for DAPOs. Whilst this is not an issue which necessary relates to a particular order, it is nonetheless a concern which judges should be mindful of in the future.

Research suggests that compliance is a determining factor in assessing the capacity of injunctive orders to reduce post-separation abuse<sup>151</sup> and that compliance relies on the ‘threat of consequences for breach’.<sup>152</sup> Unlike occupation orders where civil proceedings are required in the event of a breach, breach of a non-molestation order and forthcoming DAPOs is a criminal offence with a maximum penalty of up to five years’ imprisonment and/or a fine.<sup>153</sup> This is a positive development given the threat of police involvement is usually a more powerful deterrent than the threat of civil action.<sup>154</sup> Most significantly, a DAPO may also require a perpetrator to submit to electronic monitoring of their compliance with the provisions imposed which will significantly ease the process of establishing a breach.<sup>155</sup>

However, the data from this study indicates that improvements are also required to the police response when a breach is reported. Whilst seven of the professionals reported that problems with enforcement lay with victims not reporting breaches, double this number felt that breaches were often not pursued by the police when reports had been filed. The interview data supports that overall, victims report breaches to the police. Only Participant G did not, because of concerns about a lack of evidence: *‘I considered it and I was like ‘how am I actually going to be able to prove what I’m saying’... It almost seemed pointless wasting their time’*. Participant A and Participant C both had powers of arrest attached to their orders and both reported the incidents to the police. Although the incidents would have fallen short of a breach (in Participant A’s case because it took place prior to service and in Participant C’s case because it did not strictly fall foul of the terms of the order), the behaviour could have constituted a criminal offence in its own right (i.e. stalking and harassment). Further, research highlights the importance of the police considering abusive conduct holistically rather than in isolation, something that was particularly important in these cases because of the ongoing police involvement following other incidents within the relationships.<sup>156</sup> Instead, supporting the questionnaire data, no action was taken in either case. Participant A was incorrectly advised that the case would need to *‘go back to court if there’s an issue as opposed to the police being involved... they were very much like this is a civil matter’*. This supports Bates and Hester’s findings that there is confusion amongst police officers about their power to enforce protective injunctions.<sup>157</sup> Further, it indicates that the criminalisation of DAPOs could reduce this confusion by aligning the response to enforcement with restraining orders, non-molestation orders, forced marriage protection orders

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<sup>151</sup> Humphreys and Thirara (n 12).

<sup>152</sup> Bates and Hester (n 12), 135.

<sup>153</sup> Domestic Abuse Act 2021, s 39.

<sup>154</sup> Bates and Hester (n 12).

<sup>155</sup> Domestic Abuse Act 1996, s 35(6).

<sup>156</sup> D. Brennan, ‘Femicide Census: Refining an Isolated Incident’ (Women’s Aid & NIA, 2020)

<<https://www.femicidecensus.org/wp-content/uploads/2020/02/Femicide-Census-Redefining-an-Isolated-Incident.pdf>> accessed 12 September 2021.

<sup>157</sup> Bates and Hester (n 12).

and FGM protection orders, breaches of which can also be enforced through the criminal courts. Participant C felt that the police minimised her experience: *'the[y] just said, "oh well it was a coincidence" ... they wouldn't actually use the powers of arrest at all'*. This is a concern which has been raised in other studies. Hitchings observed that breaches of orders considered 'trivial' were not prioritised by the police, leading to the '(unintended) effect of not only failing to protect the victim, but of not achieving justice either'.<sup>158</sup> Similarly, Humphreys and Thiara found that a quarter of the victims who participated in their study agreed that the police or the courts were unhelpful in acting upon breaches.<sup>159</sup> Only one of the interviewees (Participant E) reported that the police actually went to speak to her perpetrator, however, supporting research by Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services this was not until she had *'reported him to the police a couple of times'*.<sup>160</sup>

Academics have queried whether perpetrators may be more likely to comply with an order obtained by a third party, particularly the police.<sup>161</sup> Considering the issues with compliance outlined above, if this proved correct, it could make DAPOs a more valuable resource than occupation orders. This suggestion was discounted by the respondents in Burton's study, however, who felt that this would only be true of perpetrators who 'respect the authority of the police' but not repeat offenders.<sup>162</sup> However, it has also been argued (in the context of section 60 of the Family Law Act 1996) that a benefit of 'authorising the police as third party applicants is that they may be encouraged to respond to breaches of orders more rigorously', thus alleviating many of the difficulties with the police response discussed above.<sup>163</sup> The same could be argued of DAPOs in that applying for the order may give third parties 'fuller ownership'.<sup>164</sup> In light of the fact that section 60 was never implemented and breach of a DVPO (the only other protective remedy which can be applied for by the police) is civil contempt of court rather than a criminal offence<sup>165</sup> this assertion has not yet been properly tested. However, evidence from other studies have found improved levels of police engagement in enforcing breaches of restraining orders. Bates and Hester's analysis, for example, found that convictions for breach of restraining orders have increased from 25% of restraining orders issued in 2011 to 43% in 2017, with 91% of the defendants in 2017 prosecuted for breach being convicted.<sup>166</sup> Given that there will be multiple avenues for obtaining DAPOs, this could lead to a discrepancy in the voracity with which breaches of DAPOs are enforced in the future.

## Conclusion

By drawing on empirical data from legal professionals, domestic abuse specialists and victims themselves, this article has identified barriers which impact the accessibility and effectiveness of occupation orders and considers

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<sup>158</sup> E. Hitchings (n 103)

<sup>159</sup> Humphreys and Kaye (n 87).

<sup>160</sup> Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services (n 107).

<sup>161</sup> Humphreys and Kaye (n 87); Law Commission (n 14).

<sup>162</sup> Burton (n 87).

<sup>163</sup> *Ibid*, 142.

<sup>164</sup> *Ibid*.

<sup>165</sup> Under section 63 of the Magistrates' Courts Act 1980, the court can order a fine not exceeding £50 per day up to a maximum of £5,000 or up to two months' imprisonment.

<sup>166</sup> Bates and Hester (n 12).

the extent to which these barriers may be remedied by the introduction of DAPOs under the Domestic Abuse Act 2021. The first key finding to emerge from the data is that despite attempts being made as part of LASPO to preserve legal aid for victims of domestic abuse, the means test is difficult for victims to satisfy, resulting in increases both to the number of victims taking no action to pursue protection and who act as litigants in person in injunction proceedings. This overlaps with the second finding, that a victims' prospects of securing protection can be adversely affected by their unrepresented status. The Domestic Abuse Act 2021 will not result in more victims being able to secure legal advice and representation, given that the same legal aid criteria will also apply to DAPOs, as currently applies to occupation orders. However, there are ways in which DAPOs could improve the accessibility of protection in respect of the family home insofar as pursuing a claim and securing protection is concerned. Firstly, where victims feel unable to take any action to secure protection without legal advice/representation, the availability of third-party applications may result in a police officer or domestic abuse support worker doing so on their behalf. In such cases, whilst victims may be expected to give evidence, they will not be responsible for putting forward the case to the judge or funding and securing the evidence to prove the case. The proposed changes will not only assist those victims willing to engage with professional services, as the broad range of applicants should also ensure that friends and family of the victim can apply with permission of the court. A key measure of the success of DAPOs will therefore be in whether there is an increase in the number of applications on behalf of victims to secure protection over the family home, as the evidence indicates that there is a gap in those wishing to pursue protection and those actually doing so. Given DAPOs will become a generalised protective order which may also include terms relating to personal protection, it would be valuable for court data to be disaggregated, reflecting the different types of protection sought by victims, given this is indicative of victims' wider needs and priorities. The second way in which DAPOs could improve the accessibility of protection in respect of the family home insofar as pursuing a claim and securing protection is concerned is that the availability of third party applications may also result in a general improvement to the quality of applications filed by those who are not qualified legal representatives (i.e. which would ordinarily be pursued by litigants in person). This reflects earlier studies which demonstrate that non legally qualified parties and lay experts may be effective at influencing the outcomes of hearings because they can have a better understanding of court procedure and litigation conduct than litigants in person.<sup>167</sup> The findings of Durfee's study also lends some support to this suggestion.<sup>168</sup> This is likely to be particularly true of domestic abuse support services who already regularly support victims through family court proceedings<sup>169</sup>, and the police, who have been able to pursue DVPOs on behalf of victims for some time now.

The third key finding to emerge from the data was that despite case law indicating a less restrictive approach to granting occupation orders, many victims struggle to satisfy the threshold criteria. As the statistics considered

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<sup>167</sup> R. Sandefur, 'Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyer's Impact' (2015) 80:5 *American Sociological Review*, 909-933.

<sup>168</sup> Durfee (n 76).

<sup>169</sup> A. Speed, 'An Exploration into Provision by Specialist Domestic Abuse Support Services for Victims/Survivors in Family Court Proceedings in England and Wales' Unpublished Paper.

at the start of this article demonstrate, the odds are currently stacked against victims to secure occupation orders, yet the same issue does not seem to affect non-molestation orders, restraining orders and DVPOs containing terms about the family home – all of which have a lower threshold test. By introducing a more generous and victim focussed threshold criteria, it is possible that all categories of applicants (including litigants in person, third party professionals, lay third party applicants and legal representatives) may find that DAPOs are easier to secure than occupation orders. This should also reduce the perceived need for judges to grant protection ‘by the back door’ (i.e., as a zonal order attached to a non-molestation order) A second measure of success for DAPOs will therefore be that the new legislation results in more victims securing protection over the family home, either directly or because of orders sought on their behalf.

A final issue identified in the data is that where occupation orders are granted, this is on restricted terms and for limited durations which reduce their effectiveness at preventing post-separation abuse and supporting victims to regulate their short and longer-term housing situation. In contrast, DAPOs have the potential to offer more flexibility and greater security by (potentially) being granted on an ex-parte basis and for a longer duration. The breadth and flexibility of the provisions available under the DAPO suggests that the government are prima facie willing for victims to be granted more extensive protection, albeit how the judiciary interpret and apply these provisions is yet to be seen. Statutory guidance may be of assistance to achieve this. Where applications are pursued by litigants in person, the judiciary must not be dependent on victims making requests (particularly for special measures or ancillary terms relating to payments on the property), given they may lack the knowledge to make such requests. The final measure of success will therefore be in improving the level of protection that is given to victims.

Whilst many of the improvements will be made because of the provisions within the legislation, others will be dependent on the effective implementation of the Act. As Stanko identified, ‘the most important part of any legislation is how decision-makers put the provisions of the statutes into practice—unfortunately, once legislation is passed, it is mistakenly credited with solving the problem’.<sup>170</sup> In particular, to support professional third party applicants, it will be necessary to provide adequate training to ensure the quality of their applications. Funding will also be paramount, so that organisations are not disincentivised from pursuing applications. Given that there is limited good quality information available to support litigants in person, it is vital that guidance is also made available for lay people, since research suggests that many victims turn to their informal support networks for assistance with leaving an abusive relationship.<sup>171</sup> Moreover, a cultural shift is required within the police to ensure that breaches (and underlying criminal conduct) are properly investigated and prosecuted. Otherwise, the existing problems with enforcement will simply be transferred across to the new regime. With thoughtful implementation, however, occupation orders are likely to become redundant in all but the most limited of circumstances, achieving the government’s ambition of making DAPOs the ‘go to’ protection order, at least in relation to the short-term regulation of the family home.

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<sup>170</sup> E Stanko, *Intimate Intrusions (Routledge Revivals): Women’s Experience of Male Violence* (London, Routledge 2013), 165.

<sup>171</sup> R. Klein (n 95); C. Baker et al (n 19).