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**Seeking and securing protection from
domestic abuse through the family courts:
an examination into the accessibility of non-
molestation and occupation orders under
Part IV of the Family Law Act 1996 and
Domestic Abuse Protection Orders under
Part Three of the Domestic Abuse Act 2021**

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A written commentary submitted in partial fulfilment of the requirements of the University of Northumbria at Newcastle for the degree of Doctor of Philosophy by published work.

December 2021

Declaration

I declare that no outputs submitted for this degree have been submitted for a research degree at any other institution.

I declare that the word count of this commentary is 19,774 words (excluding title pages, contents pages, acknowledgements, bibliography, referencing and appendices).

Any ethical clearance for the research presented in this commentary has been approved. Approval has been sought and granted through the Researcher's submission to Northumbria University's Ethics Online System (see Appendix 2).

Signed:

Date: 31 December 2021

For Poppy

“Unless someone like you cares a whole lot, nothing is going to get better. It’s not”.

Dr Seuss

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Abstract

This work, published over a four-year period, focusses on the accessibility of non-molestation and occupation orders under Part IV of the Family Law Act 1996 and Domestic Abuse Protection Orders (DAPOs) under Part Three of the Domestic Abuse Act 2021. The collection addresses three questions (i) To what extent are non-molestation orders and occupation orders accessible to victims of domestic abuse? (ii) How is the accessibility of these orders impacted by societal crises such as Covid-19 and what lessons can be learned for future crises? (iii) To what extent is the new DAPO likely to be a more accessible form of protection than non-molestation and occupation orders? The work is both retrospective, analysing the impact of key reforms on accessibility (i.e., the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)) and forward-looking, exploring how the Domestic Abuse Act 2021 may facilitate access to remedies by reforming the law on special measures and introducing a new protective order. The work is also timely in charting a pathway for the future of the family court as decisions are being made about the extent to which the Remote Access Family Court (RAFC) will be retained, even after pandemic-related reasons for its use no longer apply. The work combines doctrinal and empirical research and draws on qualitative and quantitative data from four separate projects. A range of voices are represented in the data including legal practitioners, professionals supporting victims of domestic abuse and victims themselves.

The central conclusion reached is that the accessibility of protective orders has been undermined by wider family justice reforms which have taken place over the last decade as part of austerity measures and which have reduced the accessibility of the family courts more generally. Whilst it was intended that legal aid should be preserved for victims of domestic abuse, the restrictive means test has resulted in large numbers of victims being ineligible for public funding. This has had the impact of both deterring some victims from pursuing protection and increasing the number of victims who appear as litigants in person. The work highlights that litigants in person can experience barriers at all stages of the court process and these barriers may reduce a victim's prospects of securing protection. In relation to the rates at which orders are granted, the research shows that whilst non-molestation orders are granted generously, the odds are stacked against victims to secure occupation orders – a trend which has been exacerbated during the Covid-19 pandemic. Although there was a sustained increase in applications for non-molestation orders and occupation orders in the first year of the pandemic, suggesting that the transition to the RAFC has not impeded victims' access to protective orders, the pandemic has exacerbated pre-existing barriers for litigants in person. Notwithstanding, the research also identifies benefits of the RAFC in safeguarding victims' safety and wellbeing, indicating there is value in retaining remote hearings in some circumstances beyond the pandemic. Whilst prima facie the new DAPO is set to offer a more accessible form of protection (both because of the availability of third-party applications and because the legal requirements to secure an order are lower than the existing criteria for occupation orders), there is a need for thoughtful implementation to ensure that existing problems are not simply transferred across to the new regime.

List of publications

- (i) A. Speed and K. Richardson ‘Should I Stay or Should I Go Now? If I Go There Will be Trouble and if I Stay There Will be Double’: An Examination into the Present and Future of Orders Regulating the Family Home in England and Wales (2022) *Journal of Criminal Law*.
- (ii) A. Speed, ‘Clinical Legal Education as an Effective Tool for Improving the Accessibility of Protective Injunctions for Victims of Domestic Abuse: A Case Study Example of the Models of Support Available at Northumbria University’ (2021) 28:2 *International Journal of Clinical Legal Education*, 66-116.
- (iii) A. Speed, K. Richardson, C. Thomson and L. Coapes, ‘Covid-19 and the Family Courts: Key Practitioner Findings in Applications for Domestic Violence Remedy Orders’ (2021) 33:3 *Child and Family Law Quarterly*, 215-235.
- (iv) A. Speed, ‘Just-ish? An Analysis of Routes to Justice in Family Law Disputes in England and Wales’ (2020) 52:3 *Journal of Legal Pluralism and Unofficial Law*, 276-307.
- (v) 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.
- (vi) K. Richardson and A. Speed, ‘Two Worlds Apart: A Comparative Analysis of the Contrasting Approaches to Responding to Domestic Abuse Adopted by England and Wales and the Russian Federation’ (2019) 85:5 *The Journal of Criminal Law*, 320-351.
- (vii) L. Bengtsson and A. Speed, ‘A Case Study Approach: Legal Outreach Clinics at Northumbria University’ (2019) 26:1 *International Journal of Clinical Legal Education*, 179-215.
- (viii) 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*, 135-152.

Publications submitted and awaiting review

- (ix) A. Speed, ‘Domestic Abuse and the Provision of Advocacy Services: Mapping Support for Victims in Family Proceedings in England and Wales’ *Submitted to the Journal of Social Welfare and Family Law*.

Introduction

Civil protection orders have been at the heart of the family justice response to protecting victims of domestic abuse since the 1970s. This collection of work provides a leading point of reference into the accessibility of the two most commonly sought forms of protection under the Family Law Act 1996, non-molestation orders and occupation orders. The research is both retrospective, analysing the impact of key reforms which have taken place over the last decade on accessibility, and forward-looking, exploring how the Domestic Abuse Act 2021 may improve accessibility for victims of domestic abuse by reforming the law on special measures and introducing a new civil protection order, the Domestic Abuse Protection Order (DAPO). The work is also timely in charting a pathway for the future of the family court as decisions are being made about the extent to which the Remote Access Family Court (RAFC) will be retained, even after pandemic-related reasons for its use no longer apply.

Advancement of field of study

Although the legal response to protecting victims of domestic abuse has been the subject of extensive academic commentary in recent years, this has overwhelmingly taken place in the context of private law children proceedings¹ and the criminal justice system.² Those studies which have focussed on injunctive protection through the family courts have typically analysed the effectiveness rather than the accessibility of protective orders.³ As such, by offering empirical insights into the accessibility of non-molestation orders and occupation orders, the work makes a significant and original contribution to the existing knowledge base. Further, in contrast to previous studies which have examined discrete aspects of accessibility, the outputs, when taken together, provide a comprehensive and holistic account of the procedural and

¹ R. Hunter and A. Barnett, *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Cases: Domestic Violence and Harm* (Family Justice Council, 2013); R. Hunter, A. Barnett and F. Kaganas, 'Introduction: Contact and Domestic Abuse' (2018) 40:4 *Journal of Social Welfare and Family Law*, 401-425; 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; R. Hunter, M. Burton and L. Trinder, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (Ministry of Justice, 2020).

² M. Burman and O. Brooks-Hay, 'Aligning Policy and Law? The Creation of a Domestic Abuse Offence Incorporating Coercive Control' (2018) 18:1 *Criminology and Criminal Justice*, 67-83; M. McMahon and P. McGorrey, 'Criminalising Controlling and Coercive Behaviour: The Next Step in the Prosecution of Family Violence?' (2016) 41:2 *Alternative Law Journal*, 98-101; C. McGlynn, J. Downes and N. Westmarland, 'Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences' in E. Zinsstag, and M. Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge Frontiers of Criminal Justice. Routledge, 2017), 179-191; J. Herman, 'Justice from the Victim's Perspective' (2005) 11: 5 *Journal of Violence Against Women*, 571-602.

³ T. Logan 'Civil Protective Order Outcomes: Violations and Perceptions of Effectiveness' (2009) 24:4 *Journal of Interpersonal Violence*, 675-692; S. Goldfarb, 'Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse without Ending the Relationship?' (2008) 29:4 *Cardozo Law Review*, 1487-1552; T. Logan, R. Walker and L. Shannon, 'Factors Associated with Separation and Ongoing Violence among Women with Civil Protective Orders' (2008) 23 *Journal of Family Violence*, 377-385; C. Connelly and K. Cavanagh, 'Domestic Abuse, Civil Protection Order and the 'New Criminologies': Is There Any Value in Engaging with the Law?' (2007) 15 *Feminist Legal Studies*, 259-287; A. Gill and S. Anitha, 'The Illusion of Protection? An Analysis of Forced Marriage Legislation and Policy in the UK' (2009) 31:3 *Journal of Social Welfare and Family Law*, 257-269; K. Blackburn and S. Graca, 'A Critical Reflection on the Use and Effectiveness of DVPNs and DVPOs, Police Practice and Research' (2021) 22:1 *Police Practice and Research*, 23-39.

substantive barriers to seeking and securing protection from a variety of professional, practitioner and victim perspectives.

The research also addresses existing gaps in the literature. Notably, the works offer evidence-based insights into the availability of special measures in injunction proceedings (publication (i) and (iii)). This is both novel, as previous studies have overwhelmingly examined special measures in the context of private children proceedings, and timely, in that the findings support that improved measures through the Domestic Abuse Act 2021 (which were implemented on 1 October 2021 through the Domestic Abuse Act 2021 (Commencement No. 2) Regulations 2021) were needed to address the power imbalances between victims and perpetrators within the courtroom. The works also make immediate and fresh insights into the impact of Covid-19 on the accessibility of protective injunctions (publication (iii)) and the availability of support for victims (publication (v)). Whilst there is a wealth of literature regarding the impact of humanitarian crises on the incidence rate and severity of domestic abuse⁴, fewer empirical studies have documented the impact of such crises on the ability of victims to access protection. The studies underpinning publications (iii) and (v) were two of the first to consider the effectiveness of the RAFC during the pandemic and to provide qualitative understandings to some of the issues raised in the Nuffield Family Justice Observatory's (NFJO) reports on the capacity of the remote family court to provide fairness and justice for court users.⁵ Further, publication (iii) remains the only study to offer specific insight into the experiences of practitioners supporting family court users in the North East of England during this time. The North-East is a particularly important site for researching this topic because alongside experiencing the nationwide restrictions between March and August 2020, it continued to experience more significant restrictions than much of the rest of the country between September and December 2020 meaning that the impact of the restrictions may have been more acutely felt for a longer period of time. Whilst this does not necessarily make the North-East representative of all regions in England throughout the Covid-19 pandemic, it does, however, provide the best opportunity for highlighting the impact of the RAFC on the ability of victims to secure protection.

In addition to advancing knowledge in the field of study, the works develop the practice of family law by proposing evidence-based recommendations to improve the accessibility of protective orders. Whilst the proposals prioritise victim wellbeing and the needs of litigants in person, there is an underlying recognition of the current government's neoliberal approach to family justice, which has seen policies increasingly being

⁴ M. Rezaeian, 'The Association Between Natural Disasters and Violence: A Systematic Review of the Literature and a Call for more Epidemiological Studies' (2013) 18:12 *Journal of Research in Medical Sciences*, 1103–1107; I.Cerna-Turoff, H. Fischer, S. Mayhew and K. Devries, 'Violence Against Children and Natural Disasters: A Systematic Review and Meta-Analysis of Quantitative Evidence' (2019) 14:5 *PLoS One*; S. Swiss and J. Giller, 'Rape as a Crime of War: A Medical Perspective' (1993) 270 *Journal of the American Medical Association*, 612–615; N. Renwick, 'The 'Nameless Fever': The HIV/AIDS Pandemic and China's Women' (2002) 23:2 *Third World Quarterly*, 377–393.

⁵ M. Ryan, L. Harker and S. Rothera, *Remote Hearings in the Family Justice System: A Rapid Consultation* (Nuffield Family Justice Observatory, May 2020); M. Ryan, L. Harker and S. Rothera, *Remote Hearings in the Family Justice System: Reflections and Experiences* (Nuffield Family Justice Observatory, September 2020).

valued in economic terms.⁶ Accordingly, many of the proposals involve cost-effective changes which can be implemented with relative ease, to the extent that this does not compromise victim safety or wellbeing. Contributions to practice are particularly evident in the context of Covid-19 where the work charts a pathway for the future of the RAFC, which may also have relevance to other courts. In relation to access to advice and representation, the research also brings together theory and practice to explore how the clinical education of future lawyers can be used as a tool to minimise barriers to seeking protection (publication (ii)). This collection is an original point of reference for researchers, members of the legal profession, professionals supporting victims of abuse, social workers, police, educators, victim law reformers and academics from disciplines including law, criminology and social policy.

Structure

The research questions are addressed by reference to this critical commentary, eight articles published in leading refereed journals (labelled (i) – (viii)) and a further article (ix) which has been submitted for publication but which is included for the sake of completeness and because its findings contribute to answering the research questions. The research questions are:

- (i) To what extent are non-molestation orders and occupation orders accessible to victims of domestic abuse?
- (ii) How is the accessibility of these orders impacted by societal crises such as Covid-19 and what lessons can be learned for future crises?
- (iii) To what extent is the new DAPO likely to be a more accessible form of protection than non-molestation orders and occupation orders?

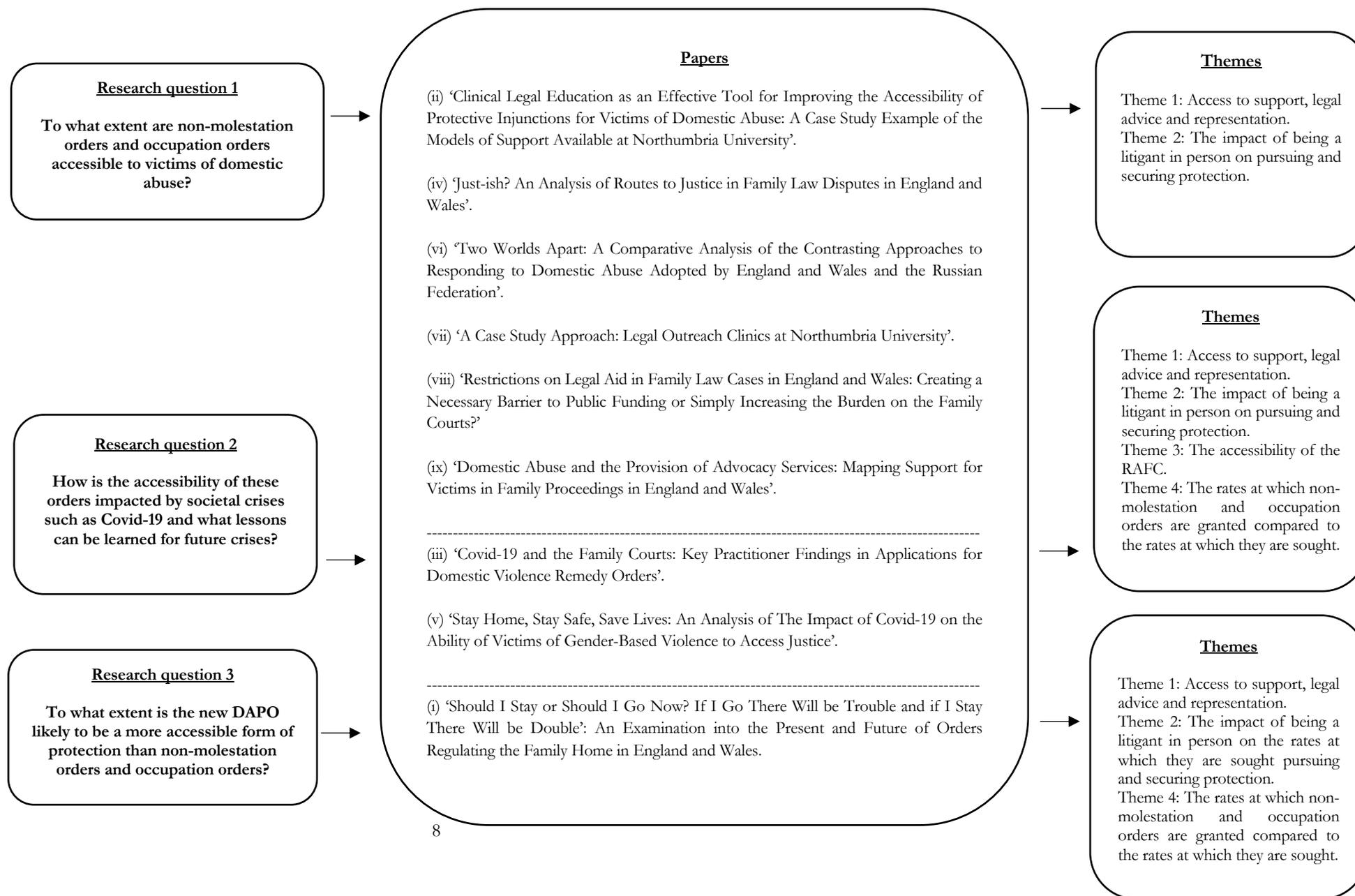
Across the overarching research questions, four key themes relating to distinct aspects of accessibility emerge within the outputs and this is reflected in the structure of this commentary. The themes running through the research questions are:

- 1) Access to support, legal advice and representation;
- 2) The impact of being a litigant in person on pursuing and securing protection;
- 3) The accessibility of the RAFC; and
- 4) The rates at which non-molestation and occupation orders are granted compared to the rates at which they are sought.

⁶ J. Mant, 'Neoliberalism, Family Law and the Cost of Access to Justice' (2017) 39:2 *Journal of Social Welfare and Family Law*, 246-258.

As shown in diagram 1 below, many of the outputs are discussed across multiple themes. The overarching aim of the research is to identify barriers which impede victims from seeking or securing protection and to propose evidence-based solutions which minimise or eradicate such barriers.

Diagram 1: Research questions, relevant publications, and themes



Theme 1 considers accessibility with reference to the availability of support, legal advice and representation following LASPO. The outputs chart a reduction in the availability of legal aid for victims of domestic abuse notwithstanding that attempts were made to preserve public funding for this category of applicants. The data indicate that the primary barrier to securing legal aid in injunction proceedings is the means assessment. The publications propose that LASPO has led to both an increase in the number of litigants in person in applications for protective injunctions and the number of victims taking no action to secure protection. Publications (ii), (vii) and (ix) examine some of the alternative routes to legal advice/support which have been advanced to ‘fill the gap’ where legal aid is not available to victims and considers the capacity of these models to maintain or improve the accessibility of protective orders. In the context of Covid-19, publications (iii) and (v) explore the challenges and opportunities experienced by support services and other pro bono organisations in assisting victims in applications for protective orders. The research acknowledges the innovative ways in which organisations have adapted to deliver support, however it also charts a decline in organisational capacity to assist at a time where legal need is heightened.

Developing earlier studies which show that litigants in person experience difficulties accessing and navigating the family court process⁷, theme 2 considers the impact of being a litigant in person on pursuing and securing protection. The publications identify how litigants in person can experience barriers at all stages of the court process. Publication (i) considers how victims of domestic abuse are particularly disadvantaged compared to other litigants in person because they may be vulnerable by reason of the abuse they have experienced, by features of the court process which require them to come face-to-face with their perpetrator and because of the limited use of procedural safeguards. The findings indicate that a victim’s unrepresented status (particularly at the application stage) can impact their prospects of securing protection, and even though attempts have been made to make the application documents more user friendly for unrepresented litigants this is unlikely to have made a significant difference to the rates at which orders are granted. Publication (iv) examines how in other areas of family law, barriers to entry have reduced the capacity of the family court to facilitate procedural and substantive justice and has led to alternative dispute resolution being used (or at the very least proposed) as a means to fill the justice gap. The publication considers the extent to which this is possible and/or desirable in the context of civil protection orders.

Theme 3 explores the accessibility of the RAFC in applications for protective orders. Building on the findings of theme 2, publications (iii) and (v) examine how in some respects the RAFC has exacerbated barriers to protection for litigants in person (i.e., by reducing opportunities for victims to access in person court-based support and by judges in remote hearings placing increased importance on statements of case). The publications also highlight that there is a continuing need for high quality accessible guidance to ensure that litigants in person understand the remote process for seeking protection. Nonetheless, the findings are generally optimistic about the capacity of the RAFC to ensure that protective order applications are

⁷ 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).

prioritised and that protection is granted (particularly for represented clients) without undue delay. Further, the data suggest that some victims prefer remote hearings as they are better able to protect victim safety and wellbeing, particularly as they are not dependent on judges approving the use of special measures or courts having appropriate facilities in place. The publications make recommendations for improving practitioners' and litigants' experiences of the RAFC bearing in mind some reliance on it may continue even after pandemic-related reasons for its use no longer apply.⁸

Theme 4 explores the rates at which orders are granted compared to the rates at which they are sought. The publications propose that LASPO has led some victims who are ineligible for public funding to take no action to secure protection through the family courts. In respect of victims who wish to commence other family law proceedings (i.e. divorce or private law children), publication (viii) queries whether LASPO may have resulted in orders being sought for a purpose beyond that which they were originally designed (i.e. to secure gateway evidence).⁹ The data consistently evidence that non-molestation orders are granted at a higher rate than the number of applications, indicating that the legal requirements for securing an order are 'generous and victim focussed'¹⁰ and that the courts utilise their power to grant orders in interrelated family proceedings despite an application having not been made.¹¹ In contrast, the rate of successful applications for occupation orders is consistently low (and in many years is less than 50%) despite recent case law indicating a less restrictive approach.¹² Publication (i) examines the barriers to securing an occupation order and considers the future of protective injunctions in light of the forthcoming DAPO. The findings are optimistic that DAPOs are likely to improve the accessibility of protective injunctions, both because of the potentially broad scope of third-party applicants which should reduce the reliance on victims to take action and because the legal requirements to secure an order are either equivalent to (in the case of non-molestation orders) or more lenient (for occupation orders) than existing protection. There is, however, a need for thoughtful implementation to ensure that existing problems are not simply transferred across to the new regime.

⁸ M. Ryan, S. Rothera, A. Roe, J. Rehill and L. Harker, *Remote Hearings in the Family Court Post Pandemic* (Nuffield Family Justice Observatory, 2021).

⁹ Research conducted in 2017 suggested a protective injunction in force or granted in the five-year period prior to applying for legal aid was the most common form of evidence relied on to secure legal aid, submitted to the Legal Aid Agency in nearly a quarter of cases. 77% of the respondents in the study confirmed that they had not had any problems obtaining an injunction making it the most accessible form of legal aid gateway evidence. It should be noted however, that protective injunctions can include non-molestation orders, occupation orders, forced marriage protection orders, FGM protection orders and harassment injunctions under the Protection from Harassment Act 1997. See F. Syposz, *Research Investigating the Domestic Violence Evidential Requirements for Legal Aid in Private Family Disputes* (Ministry of Justice, 2017).

¹⁰ 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*, 109–120.

¹¹ The Family Law Act 1996, s 42(2)(b).

¹² *Re L (Children) (Occupation order: absence of domestic violence)* [2012] EWCA Civ 721; *Dolan v Corby* [2011] EWCA 1664.

Influence on teaching, engagement, and potential impact

The published work in this PhD has influenced and been influenced by my practice as a solicitor and my clinical teaching, both of which take place in the Student Law Office (SLO) at Northumbria University.¹³ As outlined in publications (ii) and (vii), I have been involved in designing and implementing a suite of initiatives into our clinical programme to simultaneously educate our students about issues of gender justice and meet local need for pro bono advice/representation. These include a legal outreach clinic (Empower 4 Justice) which provides one-off advice to victims of domestic abuse in association with a women's organisation; a full representation clinic where advice and casework support is provided to victims in applications for injunctive protection; policy projects where students have worked with an external organisation to analyse and make recommendations to improve the law/legal process; and public legal education initiatives where the SLO has sought to improve the capacity of a local women's organisation to support victims in proceedings for protective orders. In addition, a colleague and I created an online blog, designed to reach a wider audience.¹⁴ Blog articles are written by students and include case comments, legal updates and discussion pieces. Since its launch in November 2017, the blog has had over 14,750 views from over 113 countries. Finally, we have participated in the 16 Days of Activism against Gender-Based Violence campaign to raise student awareness about violence against women. In 2018, the campaign brought together Northumbria law students and local support services in a variety of workshops. As discussed in supporting publication (ii) in appendix 4, the students cited multiple benefits of participating in the campaign. Following its success, the campaign was rolled out to students from six universities across the North-East in a two-day multi-disciplinary conference, which took place in January 2019. Over 50 students attended, together with 15 academics and practitioners. The community and student benefits of this work were commended at the 2018 LawWorks and Attorney General Student Awards, where the project was recognised as the Best New Pro Bono Activity.¹⁵

The research in this PhD is collaborative, both in the sense that many of the pieces are co-authored and because the projects are often the result of a partnership with clinical students and/or external organisations.¹⁶ Publication (i) is the result of a partnership with the national charity Surviving Economic Abuse. Publication (vii) arose out of a collaboration with the black and minority ethnic (BAME) women's

¹³ The Student Law Office is a multi award-winning and world leading law clinic, offering vital legal services on a regional and national level free of charge to members of the public, businesses and community groups. Through its outreach activity, the Student Law Office acts as a catalyst in raising awareness of and providing access to justice. Each year, approximately 200 students and 25 staff contribute many thousands of hours of pro bono advice each year. The Student Law Office produces exceptional results: since 2008 the Student Law Office has dealt with over 3,000 enquiries, represented more than 1,000 clients and secured over £1 million on their behalf.

¹⁴ The blog 'A Family Affair' can be accessed at <https://afamilyaffairsite.wordpress.com>.

¹⁵ James Sandbach, Director of Policy at LawWorks said "responding to an increase in need for family law advice and representation, this project provides bespoke family law and domestic violence clinics, using creative and innovative ways to engage, in particular, members of minority communities. Our recent The LawWorks Law School Pro Bono and Clinics Report 2020 show that projects like the Family Justice Project make a very significant contribution access to justice, and that law schools clinics are transforming legal education by offering well supervised opportunities for students to assist vulnerable groups within the community."

¹⁶ In study 2 the students conducted preliminary coding on the interview transcripts whilst in supporting publication (ii) in appendix 4 they were research participants, having taken part in the 16 Days of Activism against Gender-Based Violence campaign.

support service, the Angelou Centre. Paths to engagement have also been developed through my role as co-convenor of the Family Justice Research Interest Group¹⁷ where I brought together domestic abuse practitioners and academics to respond to the UK government consultation ‘Transforming the Response to Domestic Abuse’. More recently, funding was secured from the Modern Law Review to host an online conference entitled ‘Gender-Based Violence: Education, Engagement and Elimination’, which saw academics, domestic abuse specialists and practitioners come together from countries including England, India, Bangladesh and Canada. The research has also been presented at conferences and events. In 2020 I was invited to present the findings from study 4 to the Northumbria and North Durham Local Family Justice Board (comprising the judiciary and family law practitioners) and subsequently at the Policing, Vulnerability and Victimisation Conference. In December 2021 I delivered a presentation to the Ministry of Justice Evidence and Partnerships Hub on the lessons that could be learned from the RAFC, based on the data reported in publication (iii) and supporting publication (i) in appendix 4).

The outputs in this PhD have been published in peer-reviewed journals which are internationally recognised in their field. Accordingly, many of the articles have received high levels of exposure.¹⁸ At the time of writing in December 2021, publication (v) is in the top 2 ‘most read’ articles in the *Journal of Criminal Law* in the last six months. The research conducted for publication (v) was submitted as evidence to the Home Affairs Committee’s Inquiry on the Home Office Preparedness for Covid-19. Publications (vi), (viii) and (v) were assessed as internationally excellent in preparation for the Research Excellence Framework (REF) 2021 and submitted as part of the REF exercise.

A note on definitions and terminology

Victim/survivor

The identity of a woman who has experienced domestic abuse has far-reaching implications. Morrison argues that ‘not only does it impact her particular experience of abuse, but it also affects the kind of assistance she receives, if any, should she seek help... this is especially true if she chooses to utilise the legal system as a means to deal with the abuse’.¹⁹ Two dominant narratives have emerged since the 1960s²⁰ to refer to women who experience domestic abuse – those of ‘victim’ and ‘survivor’.²¹ These forms of

¹⁷ Family Justice is a multidisciplinary research group comprising over 20 practitioners and academics with an interest in family law and practice. Kayleigh Richardson is co-convenor. More information about the RIG can be found at <https://www.northumbria.ac.uk/about-us/academic-departments/northumbria-law-school/law-research/the-family-justice-research-group/>.

¹⁸ As at 23 November 2021 publication (v) has been viewed 11,212 times; publication (vii) has been viewed 1,629; publication (iv) has been viewed 471 times.

¹⁹ A. Morrison, ‘Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor’ (2006) 39:3 *U.C. Davis Law Review*, 1061-1118.

²⁰ The term ‘victim’ is rooted in the liberalism of the late 1960s. The term ‘survivor’ emerged in the 1980s in response to the ‘prevailing attitude of victimism’ with literature challenging the concept of learned helplessness by documenting the ‘resilience and strength that women display in thwarting their partner’s violence’. See N. Proffitt, ‘Battered Women as ‘Victims’ and ‘Survivors’ Creating Space for Resistance’ (1996) 13:1 *Canadian Social Work Review*, 23-38.

²¹ R. Gupta, *Victim vs Survivor: Feminism and Language* (Open Democracy, 2014); M. Hockett and D. Saucier, ‘A Systematic Literature Review of “Rape Victims” Versus “Rape Survivors”’: Implications for Theory, Research and Practice’ (2014) 25 *Aggression and*

identification are often considered distinct and mutually exclusive, with Boyle and Rogers asserting that while ‘victims are portrayed as having little personal responsibility, agency or power, survivors are characterised as strong, wilful agents who cope positively and resist male violence’.²² More recent literature has sought to move beyond this dichotomy, if not with the use of different terms then through a growing recognition that while some women ‘identify strongly either as a ‘victim’ or a ‘survivor’, some may not identify strongly with either identity and others may identify with both depending on the context’.²³ The work in this PhD overwhelmingly draws on the term ‘victim’. It does so because this is dominant within the context of legal proceedings, because it acknowledges that women who experience domestic abuse have often been subject to criminal behaviour and because the word also bestows a status that provides certain rights under the law.²⁴ Further, most victims of domestic abuse seek protective injunctions in the immediate aftermath of a relationship breakdown at a time where their safety and wellbeing is compromised, and the abuse may still be ongoing. This reflects studies which show that post-separation violence is the main reason women seek protective orders²⁵ and that orders are not typically sought after the first incident of violence but after repeated incidences.²⁶ Gupta argues that the term victim is therefore apt to recognise the ‘enormity of the system women are up against and its brutalising potential’.²⁷ The research rejects, however, any conceptualisation of victims as passive or lacking agency. In contrast, applying for a protective order represents an empowered decision giving victims ‘a choice about how and when they access protection’.²⁸

Domestic abuse/gender-based violence

The publications refer to ‘domestic abuse’ rather than ‘domestic violence’. The use of the term ‘domestic abuse’ is adopted not to ‘water down’ or obfuscate the severity of harmful conduct against women, as has

Violent Behaviour, 1-14; M. Papendick and G. Bohner “‘Passive Victim – Strong Survivor?’ Perceived Meaning of Labels Applied to Women who were Raped’ (2017) 12:5 *PLOS ONE*, 1-21.

²² K. Boyle and K. Rogers, ‘Beyond the Rape “Victim” – “Survivor” Binary: How Race, Gender and Identity Processes Interact to Shape Distress’ (2020) 53:2 *Sociological Forum*, 324.

²³ Boyle et al (n 22); Proffitt (n 20); I. Heywood, D. Sammut and C. Bradbury-Jones, ‘An Exploration of ‘Thrivership’ among Women who have Experienced Domestic Violence and Abuse: Development of a New Model’ (2019) 19:1 *BMC Women’s Health*, 1-25. Heywood et al coin the process of ‘thrivership’ - a fluid, non-linear journey of self-discovery featuring three ‘stages’ of victim, survivor, and thriver. Thriving after domestic abuse is characterised by a positive outlook and looking to the future, improved health and well-being, a reclamation of the self, and a new social network. Crucial to ensuring ‘thrivership’ are three key components all of which are underpinned by education and awareness building at different levels: (1) Provision of Safety (2) Sharing the Story (3) Social Response.

²⁴ To qualify for special measures within family court proceedings, for example, section 63 of the Domestic Abuse Act 2021 states that ‘where P is, or is at risk of being, a *victim* of domestic abuse... it is to be assumed that the following matters are likely to be diminished by reason of vulnerability – the quality of P’s evidence and where P is a party to the proceedings, P’s participation in the proceedings’. Similarly, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 requires *victims* of domestic abuse to provide gateway evidence, demonstrating that they have experienced abuse as part of the requirement to qualify for legal aid. See Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

²⁵ B. Balos, ‘Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings’ (2006) *Temple Political Civil Rights Law Review* (2006), 557-602.

²⁶ C. Jordan, ‘Intimate Partner Violence and the Justice System: An Examination of the Interface’ (2004) 19 *Journal of Interpersonal Violence*, 1412-1434.

²⁷ Gupta (n 21).

²⁸ 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*, 136.

been argued by some academics²⁹ but rather to acknowledge the broad scope of behaviours that many victims of domestic abuse experience which may (or may not) include physical violence. The transition to domestic abuse has been valuable in widening the judicial understanding so that most, if not all, types of abusive conduct between associated persons could justify the making of a non-molestation order or occupation order and, when they are introduced, a DAPO. Practitioners anticipate that this may result in a move away from the current hierarchy where physical abuse is treated as more significant than other forms of emotional abuse³⁰ and may improve the quality of legal advice and rates of self-identification amongst victims who have mistakenly interpreted the law as requiring physical abuse to justify applying for a remedy.³¹

The transition to domestic abuse is reflected in the Home Office cross-government definition³² and the subsequent statutory definition in section 1(3) of the Domestic Abuse Act 2021, which came into effect on 1 October 2021 and defines domestic abuse as:

‘Behaviour of a person (“A”) towards another person (“B”) is ‘domestic abuse’ if A and B are each aged 16 or over and are personally connected to each other, and the behaviour is abusive’.

Section 1(3) continues that behaviour is ‘abusive’ if it consists of ‘physical or sexual abuse, violent or threatening behaviour, controlling or coercive behaviour, economic abuse, psychological, emotional or other abuse, and it does not matter whether the behaviour consists of a single incident or a course of conduct’. Section 2 of the Domestic Abuse Act 2021 sets out that two people are ‘personally connected’ to each other if any of the following apply:

- a) They are, or have been, married to each other
- b) They are, or have been, civil partners of each other
- c) They have agreed to marry one another (whether or not the agreement has been terminated)
- d) They have entered into a civil partnership agreement (whether or not the agreement has been terminated)
- e) They are, or have been, in an intimate personal relationship with each other
- f) They each have, or there has been a time when they each have had, a parental relationship in relation to the same child; or
- g) They are relatives.

²⁹ J. Aldridge, “Not an Either/or Situation”: The Minimisation of Violence against Women in United Kingdom “Domestic Abuse” Policy’ (2021) 27:11 *Violence against Women*, 1823-1839 who argues that the statutory definition should refer to domestic violence and abuse.

³⁰ J. Beck, *The Domestic Abuse Act* (Beck Fitzgerald, 2021).

³¹ Burton (n 10); Ministry of Justice and National Statistics, *Family Court Statistics Quarterly: January to March 2021* (Ministry of Justice and National Statistics, 2021).

³² The cross-government definition defines domestic abuse as ‘any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to psychological, physical, sexual, financial and emotional’.

Whilst the work largely draws upon the cross-government and statutory definition, it is acknowledged that there are some valid criticisms of these definitions. Primarily, academics have condemned that neither definition accounts for the ways in which domestic abuse is a gendered crime, in the sense that it is largely worse for women in its frequency and severity³³, and because there is a qualitative difference between intimate partner violence and family violence perpetrated by a relative of the same sex.³⁴ Studies suggest that in South Asian households, for example, abuse is often perpetrated by mothers in law and may involve subtle acts such as controlling the marital relations and domestic despotism where daughters-in-law feel constant pressure to cook and clean for those in the household.³⁵ Henderson argues that ‘the cultural norms about masculinity and femininity cannot be simply applied to other relationships where the issues of gender and sexuality play out differently’.³⁶ In some senses, concerns about a gendered definition of domestic abuse are less problematic in the context of this research, as the meaning of both ‘personally connected’ in the Domestic Abuse Act 2021 and ‘associated persons’ in the Family Law Act 1996 permit an application for protective orders against a broad category of persons, including relatives of the same sex. As such, the new statutory definition does not mark a shift in entitlement for these orders, nor does it result in any changes to the basis on which such cases are decided, except to the extent that the court may be willing to consider a broader range of abusive conduct, as noted above. Nonetheless, whilst the criteria for pursuing an application for injunctive protection may not be gendered, approximately 85% of on-notice applications for non-molestation orders and 93% of ex-parte applications are pursued by women against intimate partners or former partners.³⁷ In recognition of the gendered reality of domestic abuse, the research focuses specifically on the protective orders which typically arise out of intimate partner relationships - non-molestation orders, occupation orders and forthcoming DAPOs - rather than more specialised forms of injunctive protection available through the family courts which are more commonly made against wider

³³ M. Hester, S-J. Walker and E. Williamson, *Gendered Experiences of Justice and Domestic Abuse. Evidence for Policy and Practice* (Bristol: Women’s Aid, 2021); S. Walby and J. Towers, ‘Measuring violence to End Violence: Mainstreaming Gender’ (2017) 1:1 *Journal of Gender-Based Violence*, 11-31; Office for National Statistics, *Appendix Tables: Homicide in England and Wales* (ONS, 2020); Office for National Statistics, *Domestic Abuse and the Criminal Justice System, England and Wales: November 2020* (ONS, 2020); M. Hester, ‘Who Does What to Whom? Gender and Domestic Violence Perpetrators in English Police Records’ (2013) 10 *European Journal of Criminology*, 623–637; A. Myhill, ‘Measuring Domestic Violence: Context is Everything’ (2017) 1:1 *Journal of Gender-Based Violence*, 33–44; A. Myhill ‘Measuring Coercive Control: What can we Learn from National Population Surveys?’ (2015) 21:3 *Violence Against Women*, 355–375.

³⁴ K. Henderson, *The Role of Housing in a Coordinated Community Response to Domestic Abuse* (Durham theses, Durham University, 2019). Following the consultation phase of the Domestic Abuse Bill the government did concede that it would ‘recognise that the majority of victims of abuse are female’ in the accompanying statutory guidance – see Home Office, *Statutory Definition of Domestic Abuse Factsheet* (Home Office, 2021).

³⁵ M. Rew, G. Gangoli and A. Gill, ‘Violence between Female in-laws in India’ (2013) 14:1 *Journal of International Women’s Studies*, 147-160; N. Mirza, *South Asian Women’s Experience of Family Abuse: The Role of the Husband’s Mother, Briefing 80* (Centre for Research on Families and Relationships, 2016).

³⁶ Henderson (n 34), 20.

³⁷ In 2011, 2012 and 2013, 93% of applicants for ex-parte non-molestation orders were women. In 2014 and 2015, 91% of applicants for ex-parte non-molestation orders were women. In 2011, 87% of on-notice applications for non-molestation orders were made by women. In 2012 and 2013, this was 84% and in 2014 this was 83%. In 2015, 80% of on-notice non-molestation order applications were made by women. The figures were derived from a Freedom of Information Act request responded to by Ross Black (Family Statistics, Justice Statistics Analytical Services) at the Ministry of Justice, which is available at <https://www.whatdotheyknow.com/request/the_gender_division_in_applying> accessed 22 November 2021. Similar findings have been reached in relation to DVPNs/DVPOs, where Blackburn and Graca’s study highlighted that nearly 92% of the victims protected were female and 95% of the perpetrators were male, with 90% of orders being granted in respect of intimate relationships. See Blackburn and Graca (n 3).

family or community members (i.e. forced marriage protection orders and female genital mutilation (FGM) protection orders).

The statutory definition also fails to acknowledge ‘dating abuse’ between those under 16 years old.³⁸ As considered in publication (i) there is an inconsistency between the Domestic Abuse Act 2021 and the Family Law Act 1996 in that whilst the latter permits an application by under 16s where the court has provided permission, the DAPO eligibility criteria provides that protection can only be granted in favour of those aged 16 and over.³⁹ For the purposes of this research, most of the data relates to the experiences of adult victims of domestic abuse and those who support/legally represent them. This is likely to be reflective of domestic abuse demographics in that over 2.3 million adults aged 16 to 74 experienced domestic abuse in the year ending November 2020.⁴⁰ Nonetheless, some of the participants in study 3 which underpinned publication (v) acknowledged supporting victims of ‘dating abuse’ in the family courts. As such, the experiences of these professionals in supporting child victims may be represented in these findings.

There were a few instances where the respondents reported supporting victims of abuse which would fall outside the statutory definition of domestic abuse. These occurred in the context of studies 1 and 3 (which underpinned publications (ix) and (v) respectively), where the respondents were principally from domestic abuse support services (see page 25 for a summary of the research projects). Such services are not limited to supporting victims of domestic abuse but may also support victims of wider forms of gender-based violence and this was reflected in the findings. The first instance related to dating abuse as described above. The second was in respect of violence between a victim and perpetrator who were not ‘personally connected’ or ‘associated persons’ (such as stalking and sexual violence). Whilst in the first scenario, a victim could seek a non-molestation order or occupation order under the Family Law Act 1996 (subject to receiving leave of the court), in the latter situation protection could not be sought under either Act, owing to the requirement for the parties to be ‘associated persons’ (under Family Law Act 1996 remedies) or ‘personally connected’ (in the context of DAPOs). Instead, victims who do not have such a relationship with their perpetrator may be able to seek an injunction under the Protection from Harassment Act 1997, which is not covered within this work. To reflect the fact that the findings related to both victims of domestic abuse and other forms of violence against women, publication (v) is differentiated from the others through the use of the term ‘gender-based violence’ rather than ‘domestic abuse’.⁴¹ The findings in the publication, which focus on the ability of victims to access justice at the outset of the pandemic, nonetheless apply in their entirety to victims

³⁸ The Domestic Abuse Factsheet states that abuse between those aged under 16 is instead considered child abuse. See Home Office (n 34).

³⁹ The Domestic Abuse Act 2021, s 27(1).

⁴⁰ Office for National Statistics, *Domestic Abuse in England and Wales Overview: November 2020* (ONS, 2021).

⁴¹ There is considerable overlap between the terms ‘domestic abuse’ and ‘gender-based violence’. Both refer to abusive conduct which is disproportionately perpetrated against women by men, and both are commonly seen as a consequence and a cause of gender inequality. However, in contrast to domestic abuse, gender-based violence includes acts which can be perpetrated or condoned by community members and the state. It is defined in Article 3a of The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence as abuse which results in ‘physical, sexual, psychological or economic harm or suffering [disproportionately to women], including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’.

of domestic abuse given that they may seek interventions through domestic abuse support services, access the family courts for a protective order (or other interrelated proceedings) and/or support a prosecution through the criminal courts. Accordingly, the terminology used does not impact the relevance of the article to the overarching research questions. In relation to study 1, although data was collected in relation to the experiences of professionals supporting victims in the family, civil and criminal courts, the findings reported in publication (ix) relate specifically to support offered in family court proceedings. Accordingly, whilst the respondents may have supported victims of gender-based violence, the publication refers to victims of 'domestic abuse' given that victims who do not have a familial relationship with their perpetrator will not typically engage in family court proceedings in respect of the abuse they have experienced. The findings in publication (ix) apply both to proceedings for protective injunctions and to other types of family court proceedings which victims of domestic abuse may need to engage in (i.e., divorce and child arrangements proceedings). In studies 2 and 4, data was obtained from professionals who specifically supported victims in applications for protective injunctions and the scope of the studies was therefore limited to those types of proceedings.

Litigant in person

Reflecting guidance issued by Lord Dyson MR (as he was then), the publications adopt the term 'litigant in person' rather than 'self-representing litigant' or 'unrepresented litigant'.⁴² Attempts are made to reject any conceptualisation of litigants in person as a homogenous group in favour of a recognition that victim litigants in person will not necessarily share the same characteristics, attributes and experiences. Previous research has shown that there are numerous reasons why people might not have legal representation⁴³ however financial motivations were most commonly raised by the participants in the studies within this PhD. In study 2, victims reported not being eligible for legal aid but also not able to afford legal representation (publication (i)). In study 1, the majority of the respondents (16 out of 22) agreed that most of their service users could not afford to pay for initial legal advice in the event they did not qualify for legal aid and nearly all (20 out of 22) felt service users would not be able to afford legal representation (publication (ix)). Drawing on Lord Dyson's guidance, the research considers litigants in person to be those who 'exercise their right to conduct legal proceedings on their own behalf', meaning that they do not have a legal representative on the court record. It is acknowledged that such litigants may, however, have received legal advice (whether paid for or on a pro bono basis), albeit the extent, quality and meaningfulness of such advice is likely to vary significantly between litigants in person.

⁴² The guidance applies 'in all criminal, civil and family courts'. See Lord Dyson MR, *Terminology for Litigants in Person* (Courts and Tribunals Judiciary, March 2013).

⁴³ Trinder et al (n 7).

Accessibility

The work interprets ‘accessibility’ as relating to the ease with which victims of domestic abuse can access the family courts to pursue an application and thereafter navigate the court process. It also relates to the rates at which orders are granted compared to the rates at which they are sought since this is indicative of the rigour of the threshold criteria and the judicial approach to granting orders. This interpretation is deliberately broad to encompass all aspects of a victim’s experience of seeking and potentially securing protection and is reflective of the works’ conclusion that some procedural or substantive barriers exist at all stages of the process (albeit this may not be experienced by all victims).⁴⁴ A holistic interpretation is therefore required to understand the impact of and relationship between barriers and to inform how they can be minimised or eradicated.

Within this work, accessibility is also viewed through a lens of vulnerability insofar as it examines how being a victim of domestic abuse can both increase legal need and make accessing and navigating the court system more difficult. There is no statutory definition of vulnerability in the family courts however there has been growing recognition over the last few years of the factors which may impede a victim’s ability to engage in proceedings⁴⁵ and the measures that may assist a party to give evidence or otherwise participate fully (publications (ii), (iii) and (iv))⁴⁶. It is acknowledged within this commentary, however, that vulnerability is ‘universal and constant when considering the general human condition’ and can therefore affect all litigants although the way in which it may do so is ‘varied and unique on the individual level’.⁴⁷ Accordingly, not all victims experience vulnerability in the same way or to the same extent (or indeed, at all). Further, there are a ‘vast array of personal and social attributes which can potentially hinder a court user’s capacity to understand or engage fully with the court process’ which may be separate to, but potentially compounded

⁴⁴ Burton (n 10) found that those who were able to access legal advice were often discouraged from seeking protective remedies as a result of poor legal advice and solicitors lacking an understanding about the availability of legal aid and orders. Burton therefore concluded that whether victims were able to access remedies under the Family Law Act 1996 depended a great deal on the quality of legal advice they received. Bates and Hester’s participants (n 28) reported difficulties in ‘proving’ domestic abuse to a sufficient standard for an order to be granted, with some judges refusing orders where there had been no physical abuse or where the incidents had not been reported to the police and other victims’ orders being downgraded to an undertaking because the judge suggested it would be more difficult for the perpetrator to contest.

⁴⁵ Family Procedure Rules 2010, Rule 3A and Practice Direction 3AA; For the purposes of domestic abuse, the relevant court considerations include ‘any issues arising in proceedings, including concerns in relation to abuse’ and ‘actual or perceived intimidation by another party, witness or wider family or associates’ under Family Procedure Rules 2010, Rule 3A.7.

⁴⁶ Family Procedure Rules 2010, Rule 3A.6; under Rule 3A.8 the court can make a number of measures to support a vulnerable litigant including preventing a party or witness from seeing another party or witness, allowing a party or witness to participate in hearings and give evidence by live link, providing for a party or witness to use a device to help communicate, providing for a party to use a device to help communicate, providing for a party or witness to participate in proceedings with the assistance of an intermediary, or do anything else which is set out in Practice Direction 3AA. In addition, under para 4.2 of Practice Direction 3AA, the court may use its general case management powers as it considers appropriate to facilitate the party’s participation; In the context of Covid-19 see also the Family Justice Council, *Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings* (Family Justice Council, November 2020). Measures to protect victims of domestic abuse have been strengthened by s 63 of the Domestic Abuse Act 2021, as examined in publication (i).

⁴⁷ M. Fineman, ‘Equality, Autonomy, and The Vulnerable Subject in Law and Politics’ in M. Fineman and A. Gear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*. (Abingdon: Routledge, 2013), 21.

by, their experiences of abuse.⁴⁸ In much the same way as the research rejects any conceptualisation of victims as passive, the work also challenges that vulnerability is synonymous with weakness.⁴⁹

Across the key themes explored, a vital component of accessibility is ‘participation’. Kirby argues that participation is important because it is the court user’s exercise of legal rights, it enables decision making by the courts, it legitimates court processes and outcomes, and it offers potential therapeutic benefits for the court user.⁵⁰ Nonetheless, Jacobson and Cooper note that ‘despite the significance of effective participation as a principle in English law, the concept tends to be poorly defined and, to date, has been subject to little critical analysis or empirical investigation’.⁵¹ Kirby found that, for the practitioners in her study, ‘participation’ involved the court user ‘providing and/or eliciting information for the court, being informed about proceedings, being legally represented, being protected (well-being), being ‘managed’ so as to avoid disruption to the proceedings and being present at hearings’.⁵² Whilst these features nicely encapsulate some of the key measures of participation in a family justice context, the works within this PhD identify that there is a distinction between simply participating in proceedings and doing so effectively. This is evidenced in publication (iii) where a victim-interviewee’s application for a non-molestation order and occupation order were initially refused because she incorrectly made the application on two separate forms. In the same publication, another victim-interviewee described attending the hearing but being unable to speak because she felt paralysed with fear. These findings support that the *effectiveness* of a court users’ participation (particularly amongst litigants in person) is often militated against by ‘the very nature of the judicial process and the social and power differentials it exposes’.⁵³ Further, the work within this PhD shows that there are barriers within the court process which preclude effective participation, even amongst represented litigants (i.e., the availability of special measures). The work therefore builds on work by academics such as Jacobson, who found that there were three broad categories of barriers to effective participation – those arising from court users’ needs and vulnerabilities (i.e., mental health problems and communication and language needs etc), long-standing structural and cultural features of the justice system (i.e., the formality of proceedings, the complexities of legal language and processes, legal constraints on participation, delays and inefficiencies) and barriers which have arisen as a result of recent policy developments (i.e., LASPO and reforms under the HMCTS courts modernisation programme).⁵⁴ Similarly, writing in the context of tribunal proceedings in Northern Ireland, McKeever identified that litigants experienced intellectual, practical and emotional barriers to effective participation.⁵⁵ Whilst the work within this PhD does not make any attempt to create a

⁴⁸ J. Jacobson, ‘Introduction’ in J. Jacobson and P. Cooper, *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* (Bristol Shorts Research and Bristol University Press, 2020), 7.

⁴⁹ D. Newman, J. Mant and F. Gordon, ‘Vulnerability, Legal Need and Technology in England and Wales’ (2021) 21:3 *International Journal of Discrimination and the Law*, 230-253.

⁵⁰ A. Kirby, ‘Conceptualising Participation: Practitioner Accounts’ in J. Jacobson and P. Cooper *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* (Bristol Shorts Research and Bristol University Press, 2020).

⁵¹ Jacobson (n 48), 3.

⁵² Kirby (n 50), 70.

⁵³ J. Jacobson, ‘Observed Realities of Participation’ in J. Jacobson and P. Cooper *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* (Bristol Shorts Research and Bristol University Press, 2020), 136-137.

⁵⁴ Jacobson (n 48).

⁵⁵ G. McKeever, ‘A Ladder of Legal Participation for Tribunal Users’ (2013) *Public Law*, 575-598.

typology of the barriers to participation, it nonetheless makes a contribution to this existing body of work by highlighting that policy initiatives which have taken place in the context of domestic abuse in the family courts have focussed on vulnerability to the exclusion of other types of barriers. In doing so, the works reveal that there is a need for reform which is aimed at improving effective participation over and above the availability of special measures.

Methodology

My professional background

An important part of this PhD is my positionality as a researcher who is also a family solicitor (non-practising for the 2021/2022 academic year) and an educator, whose professional background is within organisations seeking to promote social justice. I began my career in law as a trainee solicitor in the SLO in 2014, the year after LASPO came into effect and at a time when few enquiries were received from victims seeking injunctive protection. In the second year of my training contract, however, I was seconded to the family law department of a local legal aid firm, where seeking such orders quickly became the bread and butter of my practice. Despite being a trainee, I was tasked with managing all aspects of the case from seeking initial instructions to conducting advocacy at hearings. I would regularly spend most of my day in court presenting applications on an emergency basis. I promptly began to understand the important role that solicitors play in facilitating engagement with the family courts (and other professional services) and navigating clients' cases in a way that promotes their safety as well as their legal interests. In turn, I also developed an appreciation for the value of legal aid. All my clients at this time were in receipt of public funding and the vast majority would not have been able to afford to pay privately for advice or make a contribution to the cost of their legal services. Part of my role also involved carrying out initial legal aid assessments for prospective clients. I would frequently assess women in urgent need of protection who could not otherwise afford to pay for legal advice privately as ineligible for funding. There was a palpable sense of frustration in the office about the lack of alternative options for pro bono assistance for women who did not qualify for funding at that time and an acceptance that most would ultimately either not pursue a case or would do so with little to no formal support.

These formative experiences would influence my practice as a newly qualified solicitor. I returned to the SLO as a clinical supervisor and lecturer in 2016. Now responsible for my own caseload and with a better understanding of the challenges faced by victims in securing legal assistance, I decided to take on cases for victims seeking injunctive protection through the clinic, thus making the SLO one of the only places in Newcastle where victims could access tailored pro bono legal advice and representation. Alongside this, I established a legal outreach clinic for victims of domestic abuse. These models of support are discussed extensively in publications (ii) and (vii). Perhaps unsurprisingly, there has been a steady demand for both services. In line with previous research which suggests that demand for pro bono initiatives typically exceeds capacity, we are not able to take on most of the enquiries we receive.⁵⁶

My new role also came with a requirement to undertake doctoral research. Eager to make sense of the world I was experiencing in my practice I chose to study the accessibility of the family courts. By engaging

⁵⁶ J. Organ and J. Sigafos, *The Impact of LASPO on Routes to Justice. Research Report 118* (Equality and Human Rights Commission, England; 2018).

various perspectives through the research, my own understanding has transformed beyond that developed through my practice as a solicitor. Given that the studies were carried out at intervals across the last four years, however, this has been a journey and both my understanding and writing style has developed in this iterative approach. It is therefore likely that there are some inconsistencies expressed within the different publications. An example of this can be seen in publication (viii) where it is stated at page 146 (page 316 of this document) that ‘the process for obtaining a non-molestation or occupation order in England and Wales is relatively simple’ and ‘in the writers’ experience, judges are likely to err on the side of caution and grant an interim order’. Nearly two years later, as part of publication (i), I collected data on occupation orders from victims, legal practitioners, and specialist support workers, alongside analysing family court statistics. This revealed that the rates of successful applications for occupation orders are relatively low, particularly in comparison to non-molestation orders, suggesting that more nuanced phrasing would have been appropriate in the earlier article. Further, conflicting with the authors’ experiences, the data from the study suggest that occupation orders are typically refused on an ex-parte basis. It is argued however, that such inconsistencies do not undermine the strength of the narrative but should be taken to illustrate my continuing journey as a researcher and intention to improve.⁵⁷

A summary of the underpinning research

The works combine both doctrinal and empirical research. The empirical work draws on data collected from four separate research projects. As demonstrated by diagram 2, two methods of primary data collection were utilised – online questionnaires (study 1, 2 and 3) and semi-structured interviews (study 1, 2 and 4) – with the former being used to secure a broader insight into the phenomenon studied and the latter seeking to elicit the lived experience of the many key stakeholders in domestic abuse cases.⁵⁸ Across the projects, secondary data analysis was conducted of the family court and legal aid statistics, to varying extents. Two of the studies (study 1 and 2) utilised a mixed methods approach (both questionnaires and interviews). In study 1, qualitative insights were required to provide depth to the quantitative findings whereas in study 2, ethical approval dictated that any interactions with victims took place through interviews. This reflects a general concern that whilst ‘surveys are an indispensable tool for analysing violence against women and domestic violence’⁵⁹ qualitative methods of data collection are preferable because methodologically, victims are more likely to downplay their experiences in questionnaires whilst from an ethical perspective, it is difficult to include special procedures to ensure a victim’s safety outside an interview setting.⁶⁰

⁵⁷ S. Peacock, ‘The PhD by Publication’ (2017) 12 *International Journal of Doctoral Studies*, 123-135.

⁵⁸ J. Creswell and V Clark, *Designing and Conducting Mixed Methods Research* (Sage Publications; 2017).

⁵⁹ S. Walby and A. Myhill, ‘New Survey Methodologies in Researching Violence against Women’ (2001) 41:3 *British Journal of Criminology*, 502-522.

⁶⁰ M. Ellsberg, L. Heise, R. Pena, S. Agurto and A. Winkvist, ‘Researching Domestic Violence against Women: Methodological and Ethical Considerations’ (2001) 32:1 *Studies in Family Planning*, 1-16.

Around 140 voices are represented across the four studies. The exact figure is likely to be slightly lower than this given that some respondents may have participated in multiple studies, where the same methods of recruitment were used. Nonetheless, each individual study suffered from a relatively low response/participation rate. Lee and Stanko recognise that because domestic abuse is a sensitive topic, ‘access can be problematic’.⁶¹ Victims may not want to participate because of concerns about re-traumatisation or disclosing information which is stigmatising or incriminating.⁶² Comparatively, however, recent studies also suggest that ‘sharing the story’ is an important component of ‘thrivership’ – the transition from surviving to thriving after domestic abuse.⁶³ Whilst the nature of the topic may account for the relatively low rates of participation amongst victims themselves, in respect of recruiting participants from support services, a number of responses were received from potential respondents explaining that Covid-19 had put resourcing pressures on their organisation, reducing their capacity to contribute to research projects.

As a result of the small samples, the findings are not generalisable. Following Reis, however, it is argued that small scale studies which are ‘carefully thought out and conceptualised nonetheless have the potential to make a contribution to understanding phenomenon’.⁶⁴ Similarly, Ellsberg et al note that smaller scale focussed studies are not uncommon in violence against women research.⁶⁵ They recognise that studies with a relatively small sample size and/or a limited geographical focus can provide a more detailed insight into women’s responses to violence.⁶⁶ In respect of the qualitative aspects of the studies, Silverman argues that small samples can allow the researcher to gain in-depth understanding of ‘the contextual dimensions that influence a social phenomenon’.⁶⁷ Validity, or the transferability of the findings to another setting, is more important than generalisability with qualitative research.⁶⁸ To ensure that a reader would be able to replicate the studies in this PhD, each publication (except publication (ii), extensive details of which are provided in the following section) contains details about how the data was collected and the findings analysed. Utilising ‘in vivo’ coding (as opposed to preconceived codes) also allowed me to stay close to the data. In vivo coding is also referred to as ‘verbatim coding’⁶⁹ where the initial codes refer to ‘a word or short phrase from the actual language found in the qualitative data record, the terms used by participants themselves’.⁷⁰ Saldana recognises that by reducing the risk of the researcher imposing their own biases on the data, in vivo coding

⁶¹ R. Lee and E. Stanko, *Researching Violence: Methodology and Measurement* (Routledge, 2014), 2.

⁶² Ibid.

⁶³ Heywood et al (n 23), 1.

⁶⁴ Reis argues that this is assisted by studies having a narrow focus and a clear specification about what has been undertaken. See R. Reis, *Making the Most of Small-Scale Research* (Stanford University, undated).

⁶⁵ Ellsberg et al (n 60).

⁶⁶ Ibid, 3.

⁶⁷ D. Silverman, *Interpreting Qualitative Data, Fifth Edition* (Sage, 2014), 72-73.

⁶⁸ A. Barusch, C. Gringeri and M. George, ‘Rigor in Qualitative Research: A Review of Strategies Used in Published Articles’ (2011) 35:11 *Social Work Research*, 11-19.

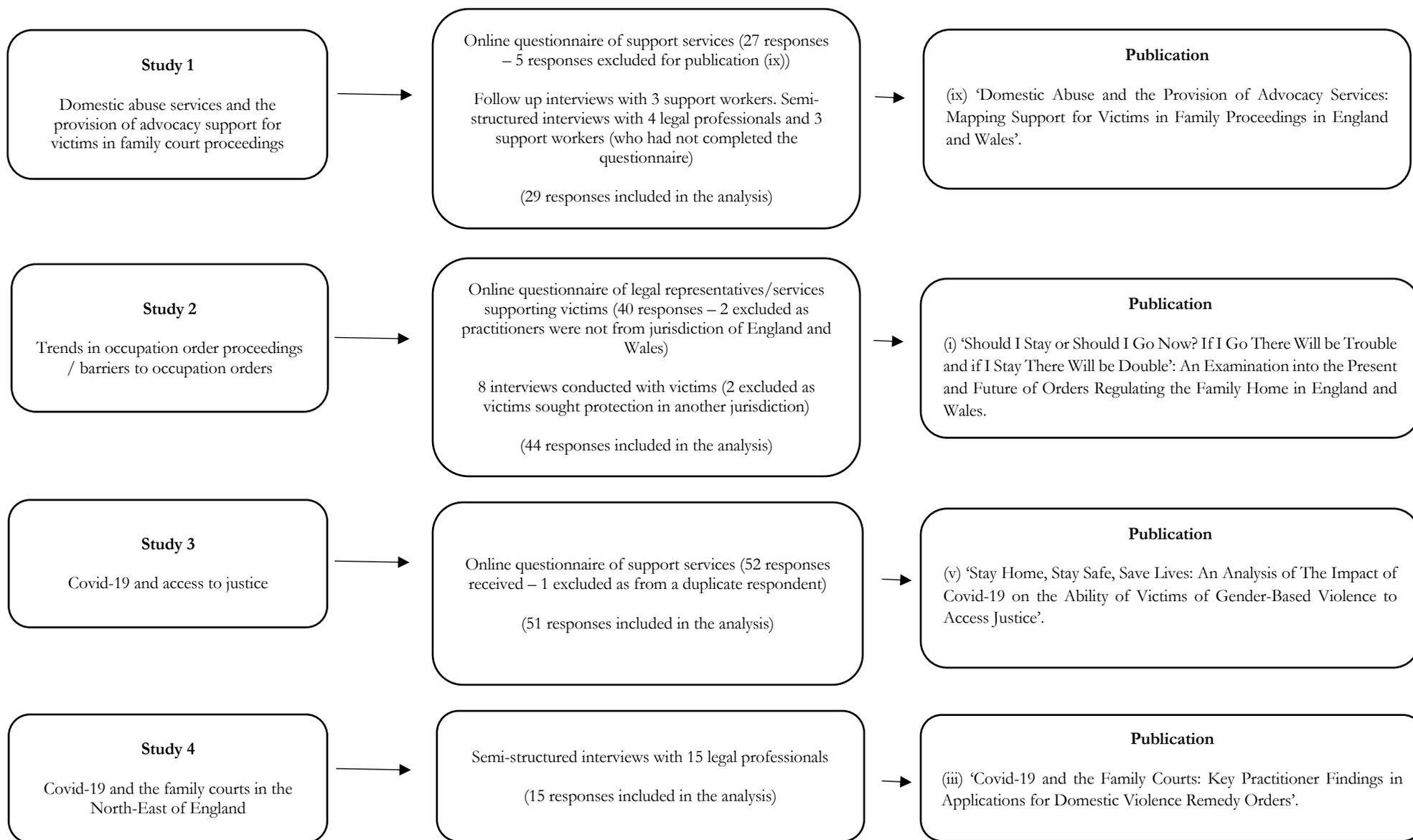
⁶⁹ J. Saldana, *The Coding Manual for Qualitative Researchers* (Sage Publications, 2016), 102.

⁷⁰ A. Strauss, *Qualitative Analysis for Social Scientists* (Cambridge University Press, 1987), 33.

is particularly suited to studies that ‘honour the participant’s voice’, which as the following section will consider, was prioritised within this research.⁷¹

⁷¹ Saldana (n 69), 106.

Diagram 2: studies, research methods and papers



A feminist approach to research

It is widely accepted that a researcher's methodology is influenced by their epistemological and theoretical position.⁷² The research in this PhD makes certain findings about power dynamics within the family justice system and society more generally which disproportionately disadvantage women. For example, it is acknowledged that a woman is more likely to be a victim of domestic abuse and therefore will have a greater need for access to legal aid and protective remedies. Moreover, the research discusses how the effectiveness of a victim's participation can be compromised by the court's failure to provide adequate protection through special measures. Accordingly, the research sought to facilitate positive changes in institutional responses where difficulties in accessing protective injunctions were identified. The research aims could therefore be aligned with a feminist approach to research. Skinner et al recognise that because there is 'no single unified theory of feminism, there can be no single feminist methodology'.⁷³ Nonetheless, there are 'commonly held characteristics of feminist research as well as key principles that feminists use in an attempt to produce sound findings'.⁷⁴ This section reflects upon the extent to which these features are present in this research.

The first characteristic is that feminist research focusses on gender and inequality. Skinner et al argue that these issues are 'at the heart of most feminist research on gender violence, even if this is not always obviously so'.⁷⁵ Whilst the research in this PhD is principally about the accessibility of protective injunctions, it is nonetheless implicitly concerned with issues of gender because, for the reasons outlined in the preceding paragraph, barriers to accessibility affect women more than men. Accordingly, the research is still 'grounded in women's experience'.⁷⁶ The study of protective injunctions has not always been considered deserving of academic attention, however. Earlier feminists challenged the use of civil protection orders as a means of protecting victims of domestic abuse for reinforcing the notion that domestic violence is a civil rather than a criminal matter⁷⁷ and that focusing energy on civil reform diverts efforts and resources from criminal justice reform.⁷⁸ These concerns have gradually been allayed by a shift in the design of protection orders over the last two decades 'from being purely civil law measures, towards orders being increasingly issued as part of criminal proceedings, and by criminal justice agents', leading to what Bates and Hester have described as the 'hybridisation' of criminal and civil measures.⁷⁹ Feminist concerns have further been appeased by studies demonstrating that for a considerable number of victims, protection orders are effective at reducing the frequency and/or severity of domestic abuse, meaning 'the

⁷² T. Skinner, M. Hester and E. Malos, *Researching Gender Violence* (Routledge, 2013).

⁷³ Ibid, 10.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ C. Ramazanoglu and J. Holland, *Feminist Methodology, Challenges and Choices* (Sage Publications, 2002), 16.

⁷⁷ S. Edwards, *Policing Domestic Violence* (London: Sage, 1989).

⁷⁸ J. Scutt, 'Going Backward: Law Reform and Women Bashing' (1986) 9:1 *Women's Studies International Forum*, 49-55.

⁷⁹ Bates and Hester (n 28), 136.

orders constitute a progressive rather than regressive step and deserve both energy and attention'.⁸⁰ Henderson found that women report 'lower levels of intimate partner violence for up to two years after seeking assistance'.⁸¹ McFarlane identified that simply having contact with the court system in requesting a protective order (regardless of whether the order is actually granted) could result in decreased abuse.⁸² Whilst all studies invariably show a violation rate (typically between 20% and 40% of orders granted) this does not detract from the finding that 'accessing protective orders is associated with reduced subsequent violence'.⁸³

The second characteristic of feminist research is a rejection of the standard academic distinction between the researcher and researched.⁸⁴ This is closely linked to the third principle of enabling the voices of women and other marginalised groups to be heard and their experiences valued.⁸⁵ This involves a 'democratisation of the research process'.⁸⁶ The extent to which the research attempted or achieved these tenets of feminist research varied between the different studies. Across the studies in which interviews were conducted (studies 1, 2 and 4) all of the 32 interviewees except one identified as female. Given that the methods of recruiting participants were equally accessible to both genders, this is likely to be reflective of the demographics of victims and those who pursue a career in supporting them. Demographic information about ethnicity was not sought from the interviewees and no attempts were made to recruit respondents from marginalised female groups (i.e., BAME women, transgender women). In studies 1 and 3, the questionnaire responses were provided on behalf of an organisation meaning that demographic information about the individual completing the survey was not sought. It was a recognised limitation of study 4 that it made findings about the impact of victim litigant in person's experiences of the RAFC, although the researchers had no direct contact with litigants themselves (publication (iii)). Instead, the data on which these findings were reached reflected the experiences and perceptions of the professionals interviewed. In study 2, the views of victims were sought. Following Hague and Mullender, attempts were made to facilitate their participation, such as by putting in place mechanisms to reduce the prospect of data collection re-victimising the women, by facilitating their safe and confidential participation and by making every effort so that findings had a positive impact on policy or practice.⁸⁷ Nonetheless, there was still a power imbalance as the interviews were conducted by researchers who were also family law solicitors, whereas most of the interviewees had a limited understanding of the law and had been unable to access legal advice in the

⁸⁰ C. Humphreys and M. Kaye, 'Third-Party Applications for Protection Orders: Opportunities, Ambiguities and Traps' (1997) 19:4 *Journal of Social Welfare and Family Law*, 405. See also, 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.

⁸¹ J. Henderson, 'Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence against Women' (2001) *American Journal of Family Law*, 67.

⁸² J. McFarlane, A. Malecha, J. Gist, K. Watson, E. Batten, I. Hall and S. Smith, 'Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic and White Women' (2014) 94:4 *American Journal of Public Health*, 613-618.

⁸³ Balos (n 25).

⁸⁴ Skinner et al (n 72).

⁸⁵ Skinner et al (n 72).

⁸⁶ Ibid, 12.

⁸⁷ G. Hague and A. Mullender, 'Listening to Women's Voices: The Participation of Domestic Violence Survivors in Services' in T. Skinner, M. Hester and E. Malos, *Researching Gender Violence* (Routledge, 2013).

proceedings which were the subject matter of the interviews. The power differential was less obvious in the interviews conducted with the domestic abuse specialists and legal practitioners in studies 1 and 4. In publication (iii) it was noted that ‘the researchers are experienced in conducting fact-finding exercises and discussing cases with other professionals... as a result, the interviews were overwhelmingly conversational and detailed interactions’. Even still, the power imbalance could not be minimised entirely, as the interviews were semi-structured, meaning the research team determined the questions asked. Across all studies, attempts were made through the coding process to ensure that the research did not misrepresent the views of the women interviewed. Charmaz notes that in vivo codes ‘can provide a crucial check on whether you have grasped what is significant to the participant’.⁸⁸ Credibility was also assisted by including direct quotes from the participants within the publications where this was welcomed by the publishing journal, to support the interpretations and explanations presented and more powerfully illustrate participants’ experiences. Academics argue that quotations ‘deepen understanding by enrolling the informant’s voice’ and also act as evidence, ‘helping to serve the reader’s assessment of the accuracy of the analysis thereby strengthening the findings’.⁸⁹ All of the studies, however, fell short of achieving ‘true participatory research’, as described by Renzetti, given that none of the participants were invited to participate in the design and execution of the research projects.⁹⁰

The fourth characteristic is ‘an assertion of the importance of politically active and emancipatory research’.⁹¹ Skinner et al argue that this can be achieved by enabling women’s voices to be better heard by practitioners. Given that the data underpinning the publications derive from the experiences of victims themselves and those advocating for their safety and wellbeing, the research in this PhD fits this criteria. The outputs have also been published in practitioner focussed journals and as outlined above, have enjoyed high levels of exposure, therefore improving the prospects of the women’s experiences being heard. Finally, the research can be considered political/emancipatory due to my own dual role as a practitioner/researcher which meant that my practice experience was drawn on to inform the development of proposals for reforming the legal process where barriers to research were identified. Skinner et al argue that research which ‘bridges the gap between research and practice’ is potentially more likely to have an impact because of its direct links to practice.⁹²

The fifth characteristic is researcher reflexivity, or the process of ‘standing outside and gazing back to see what we can from afar’.⁹³ Reflexivity was not formally incorporated into the research design (i.e., through maintaining a diary) because alongside carrying out the research I was working full time and raising a small

⁸⁸ K. Charmaz, *Constructing Grounded Theory* (Thousand Oaks: Sage Publications, 2014), 135.

⁸⁹ A. Eldh, L. Arestedt and C. Bertero, ‘Quotations in Qualitative Studies: Reflections on Constituents, Custom and Purpose’ (2020) *International journal of Qualitative Methods*, 2.

⁹⁰ C. Renzetti, ‘Confessions of a Reformed Positivist: Feminist Participatory Research as Good Social Science’ in M. Schwartz, *Researching Sexual Violence against Women: Methodological and Personal Perspectives* (Thousand Oaks: Sage Publications, 1997).

⁹¹ Skinner et al (n 72), 14.

⁹² *Ibid*, 15.

⁹³ E. Stanko, ‘“I Second that Emotion”’: Reflections on Feminism, Emotionality and Research on Sexual Violence’ in M Schwartz, *Researching Sexual Violence against Women: Methodological and Personal Perspectives* (Thousand Oaks: Sage Publications, 1997), 83.

child – often, due to the pandemic, simultaneously – and I was concerned that imposing a ‘requirement’ on myself to reflect might stifle my ability to do so meaningfully and organically. Further, this seemed unnecessary as various opportunities presented for informal reflections throughout the research process, such as during conversations between the research teams, in supervision meetings and in the outputs themselves. In contrast to the feminist expectations of reflection, however, which require discussions about ‘the effects of power relations on the research process’ and ‘the researcher’s assumptions, beliefs, sympathies and biases’, the reflections tended to be more generalised to the various methodological challenges and opportunities faced throughout a research process. The exception to this was in study 2 where during the ethical approval stage, extensive consideration was given to the best way to protect the victims being interviewed, as discussed in the following paragraph. As such, the subject matter of the reflections only related to gender and power insofar as this was a methodological or ethical necessity.

The sixth characteristic is ensuring the emotional and physical wellbeing of the researcher and researched. Skinner et al recognise that ‘where the participant has already suffered emotional and/or physical harm and may suffer further as a result of the research, the research and its implications must be discussed with them’.⁹⁴ This was a key consideration in the victim interviews conducted in study 2. It was recognised that there was a possibility of victims being re-traumatised by discussing their experiences and also that the extent to which they were comfortable may impact their willingness to make disclosures to the interviewer.⁹⁵ A decision was made to conduct the interviews in accordance with the comprehensive World Health Organisation Ethical and Safety Recommendations for Intervention Research on Violence against Women.⁹⁶ This required, amongst other things, the safety of the respondents and the research team to be paramount and a guiding factor in all project decisions; the protection of confidentiality to ensure both women’s safety and data quality; all research members to be carefully selected and receive specialised training; the study design to include actions aimed at reducing any possible distress to the participants and for fieldworkers to be trained to refer women requesting assistance to available local services and sources of support. Complying with these principles, the interview participants were recruited through a poster providing key details of the study which was distributed by domestic abuse support services and shared on social media. This meant that victims were not individually contacted by the researchers and participating was at their discretion. To protect the wellbeing of the participants, the interviews were conducted remotely. This removed the prospect of either the researcher or the researched contracting Covid-19 because of the interview and also ensured the interviewees could join the interview from a location which was safe and comfortable for them. Several victims chose to protect their anonymity by blurring out their background or joining the call using a pseudonym, which would not have been possible in face-to-face interviews. Utilising video conferencing facilities also ensured that at least some non-verbal and emotional cues could

⁹⁴ Skinner et al (n 72), 15.

⁹⁵ Ellsberg et al (n 60).

⁹⁶ World Health Organisation and RTI International, *Ethical and Safety Recommendations for Intervention Research on Violence against Women: Building on Lessons from the WHO publication Putting women First: Ethical and Safety Recommendations for Research on Domestic Violence against Women* (Geneva: World Health Organisation, February 2016).

be identified, and support could be provided if interviewees became noticeably distressed. The interviews were conducted by family law solicitors who were familiar with providing emotional support to victims and who had contacts at local women's organisations. During the initial consent procedure, the sensitivity of the research topic was raised and any questions about violence were introduced sensitively, with the interviewee being given the opportunity to either stop the interview, or not to answer a particular question. To protect the confidentiality of the interviewees, they were not asked to provide any identifiable information and all recordings of the interviews were deleted immediately upon being transcribed. It is worth noting that whilst the eight interviewees in study 2 all identified as female, the same protective measures would have been put in place if male victims had volunteered to participate. As discussed in publication (ii), measures were also taken to protect the wellbeing of the clinical students who engaged in some of the initiatives with victims of abuse which are discussed in this PhD. It was a limitation of studies 1 and 4 however, that the emotional effects of participating in the research for the professional participants was more overlooked because of a (potentially mistaken) perception that such respondents would have a greater resilience to discuss sensitive issues with other professionals, especially when they were not recounting their own personal experiences of abuse. Likewise, minimal concern was given to my own wellbeing throughout the research process owing to the fact that, as mentioned above, research was often fitted in around an already busy full-time job.

The final characteristic relates to the choice of research methods. Earlier feminist academics posited that there were two methodological camps, positivists who utilised scientific quantitative methodologies and the naturalist, interpretivist qualitative camp, which feminist research was thought to fall into.⁹⁷ Subsequent feminist researchers have argued that 'such a dichotomous representation is both unhelpful and unrepresentative of the experience of feminist activists'.⁹⁸ Whilst utilising both a quantitative method (i.e., online questionnaires) *and* a qualitative method (i.e., semi-structured interviews) would no longer therefore disqualify the research from being considered 'feminist research', the research methods were not chosen because of an allegiance to an underlying epistemological perspective but because they provided a methodologically sound way of examining the accessibility of protective injunctions from a range of perspectives. The importance of this has been discussed by Skinner et al who recognise that feminist research needs to adopt the 'right method for the research question rather than being purist qualitative researchers'.⁹⁹

Whilst at the start of the research process I did not knowingly align myself to any particular epistemological perspective, the above analysis highlights that many aspects of the studies comprised in this PhD adhered to the characteristics of feminist research. Many of the decisions made during the research process were intended to provide a voice to women and to support their safety and wellbeing throughout their

⁹⁷ A. Oakley, *Experiments in Knowing: Gender and method in the social sciences* (Cambridge: Polity Press and New York: The New Press, 2000), 24.

⁹⁸ Skinner et al (n 72), 17.

⁹⁹ Ibid.

involvement. Whilst other decisions were driven by methodological, ethical, or resourcing imperatives they were nevertheless made in a manner which was consistent with achieving the underlying aims of the research which itself had a feminist focus. The analysis also reveals that there were some limitations across the four studies from a feminist perspective. These limitations are unlikely to have affected the quality or richness of the data since many of the areas where the research fell short related to a lack of concern for my own well-being and protection as a researcher throughout the process. Nonetheless, they provide an important point of reflection for future research projects.

Theme 1: Access to support, legal advice and representation

In addressing the first research question, theme 1 focusses on the accessibility of protective injunctions with reference to the availability of support, legal advice and representation for victims of domestic abuse following LASPO. It is well documented that the reforms introduced by LASPO have adversely affected the accessibility of public funding, which many victims rely on to secure legal services.¹⁰⁰ The publications within this PhD chart that the reforms have had a similarly devastating effect on victims of domestic abuse, notwithstanding that attempts were made to preserve public funding for this category of litigant. Despite making sweeping cuts to the availability of legal aid in family disputes, LASPO retained public funding for ‘civil legal services provided in relation to home rights, occupation orders and non-molestation orders under Part 4 of the Family Law Act 1996’¹⁰¹ and for ‘civil legal services provided to an adult (‘A’) in relation to a matter arising out of a family relationship between A and another individual (‘B’) where – (a) there has been, or is a risk of, domestic violence between A and B and (b) A was, or is at risk of being, the victim of that domestic abuse’.¹⁰² Prima facie, the scope of legal aid therefore still extends to victims of abuse in applications for protective orders and interrelated family proceedings (i.e., divorce and child arrangements disputes). Moreover, whilst LASPO introduced a requirement that applicants relying on the exemption under paragraph 12 must be supported by gateway evidence demonstrating that the applicant is (or is at risk of being) a victim of domestic abuse¹⁰³ there is no such requirement for applications relying on the paragraph 11 exemption (i.e., those seeking a protective injunction).

The data indicate however that the accessibility of public funding for many victims has been compromised by changes to the means assessment brought about by LASPO. LASPO froze the income and capital thresholds which applicants must satisfy¹⁰⁴, meaning there has been a real terms reduction in the maximum income and capital an applicant may have to qualify for funding since the Act came into force. Further, LASPO removed the provision that applicants in receipt of welfare benefits were automatically eligible for public funding. In study 1 (publication (ix)) 46% of the respondents agreed that the means assessment was a barrier to victims engaging with the family courts. In contrast, only 23% agreed the same in relation to the requirement to provide gateway evidence in those proceedings where it was required. Study 2 (publication (i)) builds on these findings, providing qualitative insights into victims’ experiences of attempting to secure legal aid. Participants reported difficulties falling within the income and capital

¹⁰⁰ Trinder et al (n 7); Organ and Sigafos (n 56).

¹⁰¹ Legal Aid, Sentencing and Punishment of Offenders Act 2012, Part 1, Sch 1, para 11.

¹⁰² Legal Aid, Sentencing and Punishment of Offenders Act 2012, Part 1, Sch 1, para 12.

¹⁰³ Civil Legal Aid (Procedure) Regulations 2012, reg 33 (as amended by the Civil Legal Aid (Procedure) (Amendment) Regulations 2020).

¹⁰⁴ For applicants with fewer than four children, the gross income threshold is currently set at £2,657 per month although an applicant’s disposable income cannot exceed £733. For those victims whose disposable income is above £316, a monthly contribution to the costs of legal representation must be paid. For applicants with five or more dependent children an additional £222 per child is applied to the gross income threshold. To calculate an applicant’s disposable income, fixed income deductions can be applied including a £45 employment allowance, a dependent’s allowances of £185.54 for the applicant’s partner, £298.08 for every dependent child and a deduction for housing expenses of up to £545. Applicants in receipt of certain forms of welfare benefits will automatically be passported through the income element of the test. The capital threshold is £8,000. Where an applicant’s capital exceeds £3,000, they will be required to pay a capital contribution to the costs of their legal representation.

thresholds but were nevertheless unable to afford to pay privately for advice and representation, suggesting that the means test does not accurately reflect the level at which people can afford to pay for legal services. The research therefore supports that there is a need to review the fitness of the current limits.¹⁰⁵ Particular difficulties were raised regarding victims being refused funding on the basis of ‘imaginary’ and ‘trapped capital’, meaning that owning the very home they sought an occupation order in respect of prevented them from qualifying for funding – an issue which, to some extent should be improved by the Judgment in *R (GR) v Director of Legal Aid Casework*¹⁰⁶ and the introduction of the Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020 (publication (i)). The data from study 2 also highlight that victims of domestic abuse can be particularly disadvantaged by the refusal to award legal aid because they are often involved in multiple family court proceedings arising from the abusive relationship (publication (i)). The previous legal aid regime under the Access to Justice Act 1999 provided the Legal Services Commission (now the Legal Aid Agency (LAA)) the power to waive the standard financial eligibility limits for applications for protective injunctions. This provision was retained under Regulation 12 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013. The data from this PhD, however, suggest that this provision is not often used given the victims reported acting as litigants in person because of having no other option. Further research is required to identify whether this is because legal aid solicitors are not making applications under the exemption and/or because the LAA are not using their discretion to approve such applications. In any event, the capacity of the waiver to improve the accessibility of legal aid (and in turn, protective injunctions) is limited to those victims who can afford to make contributions to their legal costs as the LAA do not have any discretion to waive contributions under the exemption. For some victims the waiver may also not be an attractive option because it cannot be used to secure legal aid in interrelated proceedings.

Demonstrating the reliance on legal aid in proceedings of this type, the family court statistics show that in 2020 there were around 30,687 applications for non-molestation orders and occupation orders (table 3). Of these applicants, 20,135 received legal aid (table 2) and 6,611 appeared as a litigant in person in at least one hearing (table 3), suggesting that only around 3,941 either paid privately or received pro bono representation. The data indicate that victims who can neither secure legal aid nor afford to pay privately for legal services adopt a range of strategies to secure assistance, including borrowing money from family and friends to fund assistance, crowdfunding, or prioritising which cases to allocate any limited financial resources to (publication (i)). In study 2, victims who were refused legal aid sought advice from pro bono organisations but found that most were only able to offer generalised information, lacked the capacity to provide ongoing support, or had eligibility requirements for utilising the service that the victims did not

¹⁰⁵ In 2019, the Ministry of Justice announced the launch of the Legal Aid Means Test Review which will consider the income and capital thresholds for civil and criminal legal aid entitlement, benefits passporting, non-means tested areas of legal aid, types of income and capital that are disregarded when assessing financial eligibility and the contributions system. The review was paused in June 2020 in response to Covid-19 and legal challenges to the means test but was resumed in October 2020. A date for the publication of the review has not (as at the time of writing in November 2021) been published.

¹⁰⁶ *R (GR) v Director of Legal Aid Casework* [2020] EWHC 3140 (Admin).

satisfy (publication (i)). The data from study 1 and study 2 suggest that after exhausting these options victims ultimately decide between taking no action to secure protection through the family courts or pursuing a case as a litigant in person (i.e., instead of pursuing legal support on an unbundled basis) (publication (i) and publication (ix)). This indicates that difficulties accessing legal aid may have reduced engagement with the family courts for those litigants who prior to LASPO were eligible for funding, increasing the gap between the number of victims requiring protection and those who ultimately go on to make an application. This is particularly concerning because unlike some other legal problems, domestic abuse is not a ‘trivial’ issue that ‘resolves over time’, nor are victims able to ‘negotiate a solution informally with the other party, avoiding the need for action or discussion of legal rights’.¹⁰⁷ Further, it supports previous work which has shown that victims act as litigants in person out of necessity rather than choice.¹⁰⁸

The publications chart an increase in the number of litigants in person applying for non-molestation orders and occupation orders since LASPO came into effect in April 2013. As demonstrated by table 1, assuming the number of unrepresented applicants for a protective order (in at least one hearing) remained at 16.6% (i.e., the rate prior to LASPO coming into effect), there have been an additional 13,867 litigants in person (in at least one hearing) in protective order proceedings between 2013 and 2019.

Table 1: Rates of litigants in person in applications for non-molestation and occupation orders (2012-2019)

Year	Number of applications	Cases with at least one hearing	Number of unrepresented applicants (in at least one hearing)	% of applicants who are unrepresented in at least one hearing
2012	17,318	10,559	1,751	16.6%
2013	19,738	11,621	2,258	19.4%
2014	20,295	12,452	2,967	23.8%
2015	19,508	13,200	3,318	21.5%
2016	20,056	14,383	3,843	26.7%
2017	21,214	16,157	4,665	28.9%
2018	21,356	16,571	5,597	33.8%
2019	25,373	19,755	6,755	34.2% ¹⁰⁹

The publications also examine the role that pro bono organisations play in ‘filling the gap’ where legal aid is not available to victims of domestic abuse. The first context considered is advocacy services provided by domestic abuse organisations (publication (ix)). Such services are described by Costello and Durfee as ‘lay legal advocacy’ or ‘survivor defined advocacy’ owing to the fact that (non-legally qualified) advocates ‘work to advance feminist goals, including the removal of the traditional patriarchal hierarchal relationship between advocate and survivor, which privileges the advocate as having greater knowledge, authority and decision-making capabilities’.¹¹⁰ The data indicate that victims turn to support services for assistance with

¹⁰⁷ Newman et al (n 49), 236.

¹⁰⁸ Trinder et al (n 7).

¹⁰⁹ Figures derived from Ministry of Justice and National Statistics, *Family Court Statistics Quarterly: April to June 2021 (Family Court Tables, Table 11)* (Ministry of Justice and National Statistics, 2021).

¹¹⁰ J. Costello and A. Durfee, ‘Survivor-Defined Advocacy in the Civil Protection Order Process’ (2020) 15:3 *Feminist Criminology*, 299-318.

legal disputes because they cannot afford the services of a privately paid legal representative and because (building on the discussion above) they have been unable to secure legal aid. As such, they are not necessarily a victims' first choice for professional support in legal disputes. Further, it suggests that IDVAs/support workers are commonly used as a replacement to legal services rather than as an additional form of support, as they were intended in a family justice context. In contrast to many other third sector organisations which only have capacity to offer generalised one-off information, the data suggest that many domestic abuse support services provide victims with assistance at all stages of the dispute including identifying their options, facilitating referrals, attending hearings with victims and engaging in casework. The assistance offered is principally practical and emotional, however some organisations also reported advising victims about what remedies may be available to them which invariably involves some assessment of a service user's legal position. Whilst publication (ix) cautiously concludes that support services can minimise barriers to the family court by ensuring victims can make empowered choices and navigate proceedings more competently and safely than if support were not available, the findings also support Costello and Durfee, who argue that 'lay legal advocacy is not without problems' and that, to improve its practice, 'it must be challenged, critiqued and pushed forward'.¹¹¹ Some organisations were limited in how long they could support victims for and, due to funding restrictions, could not assist victims with no recourse to public funds. Assistance was also commonly provided by support workers who had varying levels of legal training rather than IDVAs. It was therefore unsurprising that concerns were raised that some support workers lacked a sufficient working understanding of the law, and this compromised the quality of advice provided to service users. The findings indicate that there is a need for greater investment in advocacy services and the creation of more family court IDVAs. In 2021, the Home Office announced funding of £43 million to recruit 1,100 more Independent Sexual Violence Advisers (ISVAs) and IDVAs however it is unclear what proportion of this will be dedicated to supporting victims through the family courts.¹¹²

The second pro bono context considered is clinical legal education. Publication (ii) charts that whilst few clinical programs in England and Wales offer services for victims of domestic abuse, this is a growing area of clinical practice which can be incorporated into most clinical settings, whether through resource intensive models like live client casework and policy projects or less onerous models such as public legal education activities. The analysis suggests that the impact of clinical activities in improving the accessibility of protective orders can be evidenced through a reduction in the number of litigants in person in applications for protection (albeit not in a way that is statistically significant), in building the capacity of others to support victims in proceedings (and with the introduction of DAPOs, to potentially make applications on their behalf) and in making evidenced-based proposals to make the legal process for securing protection more victim-focussed. Just as significantly, however, the analysis suggests that by exposing clinical students to

¹¹¹ Ibid, 313.

¹¹² Comprising initial funding of £16 million and a subsequent pot of £27 million. See M. MacDonald, *Domestic Abuse: Support for Victims and Survivors* (House of Commons, 2021).

domestic abuse work at an early stage in their career, future practitioners will enter practice with a better understanding of the dynamics of domestic abuse and an ability to support clients in a way that is victim-centred and trauma-informed. Whilst the publication concludes that there is a compelling case for practitioners to consider extending their clinical offering to support victims in injunctive proceedings, clinical legal education is not capable of ‘filling the gap’ created by LASPO due to limitations on how many cases can be taken on and the fact that representation cannot usually also be provided in interrelated proceedings.

Addressing research question (ii), the Covid-19 pandemic ‘exposed existing fragilities’ in the advice and support sector.¹¹³ The publications chart an increase in legal need amongst victims of domestic abuse during the pandemic, demonstrated by the surge in applications for non-molestation orders and occupation orders in 2020 (publication (iii)). Further, as discussed in publication (v) the respondents considered that the first lockdown resulted in an increase in the frequency and/or severity of domestic abuse for some women and was therefore a ‘final straw’ in motivating victims to seek protection. However, the data from studies 2 and 3 present a mixed picture regarding the extent to which the legal practitioners and support services who participated in the studies experienced an increase in requests for assistance. Although not a published finding, only 29% of the questionnaire respondents in study 2 observed that they had experienced more clients seeking occupation orders whilst 24% reported receiving fewer enquiries. Over 26% had not noticed a change in the number of enquiries received. This aligns with the findings of study 3 where only 21% of the organisations reported an increase in calls/reports from victims seeking assistance during the first few months of the pandemic, compared to 41% of the respondents who noticed a decrease (publication (v)). The respondents to both studies attributed any plateauing or decline in requests for assistance during this time to victims facing more barriers to seeking support and pursuing protection, findings which were born out in study 4 and documented in publication (v). A number of the respondents also noted that at the outset of the pandemic, some agencies which typically refer victims to their service were closed, resulting in fewer referrals. The fact that applications for injunctive protection were higher in the latter part of the year suggests that barriers to seeking protection particularly affected the initial period of lockdown.

The publications also document how Covid-19 created challenges for the third sector organisations who offer pro bono advice and support to victims, reducing their capacity to meet this increased legal need. Supporting Newman et al, the respondents experienced ‘practical and logistical challenges of how to continue to support their service users in the midst of a pandemic’.¹¹⁴ In study 3, the respondents identified an initial difficulty with transitioning to a remote service offering and ensuring that service users had the necessary technology (and a safe space) from which to engage with support services (publication (v)). Whilst many specialist domestic abuse services were able to do this successfully, the position for law school clinics (publication (ii)) was more complicated with some clinics being unable to deliver legal services remotely

¹¹³ Newman et al (n 49), 230.

¹¹⁴ Ibid, 238.

whilst maintaining client confidentiality and data protection. Secondly, many of the respondents reported having decreased capacity resulting from a loss of volunteers (due to work and caring commitments during the pandemic and an inability to train new volunteers remotely) and income streams (from the cancellation of fundraising events, reductions in donation income and postponements to grants), issues which created uncertainties in planning for the future. Although various pots of funding have been made available to third sector organisations supporting victims of abuse,¹¹⁵ the data show that smaller organisations have lacked the resources required to complete lengthy application forms. Over 18 months since the first £2 million of funding was made available, only £1.72 million has been allocated and most of the recipients were larger commissioned services, indicating an inequity in government policies implemented to support organisations to meet this increased need.¹¹⁶ As a result of these challenges, there has been a knock-on effect on the ability of third sector organisations to continue normal service provision, with nearly 79% of the respondents to study 3 (publication (v)) reporting that in the earlier stages of the pandemic, they had withdrawn or delayed services. In particular, the study reported a reduction of 42% in services supporting victims through court proceedings during the first lockdown. Further, over a quarter of the respondent organisations who provided refuge accommodation had closed the doors to new entrants. Insofar as securing injunctive protection is concerned, the closure of refuges is problematic because it reduces the options for victims to leave abusive relationships and previous studies show that most women seeking protective orders have already physically separated from their partners.¹¹⁷ On a positive note, there was also evidence of organisations innovating to improve accessibility by delivering new services to meet needs arising out of the pandemic, for example, by extending hours during which phone lines were open and channels of communication, providing practical assistance to victims and developing community resources such as blogs and information packs.

Table 2: Legal aid applications and certificates granted (2020)

Quarter	Legal aid applications for PO applications in 2020	Comparison with same period in 2019	Legal aid certificates granted in 2020	Comparison with same period in 2019 (as % of applications)
January - March	4,451	3,908 (+13.9%)	4,257 (95.6% of all applications)	3,642 (+2.4%)
April – June	5,138	3,841 (+33.8%)	4,942 (96.2%)	3,632 (+1.6%)
July – September	5,829	4,211 (+38.4%)	5,573 (95.6%)	3,981 (+1.1%)
October – December	5,567	4,173 (+33.4)	5,363 (96.3%)	3,978 (+1.0%)
	20,985	16,133 (+30.1%)	20,135 (95.9%)	15,233 (+1.5%) ¹¹⁸

¹¹⁵ In May 2020 it was announced that £750 million would be available to the charities sector generally, with an additional £2 million of funding for organisations supporting victims of abuse. In February 2021, an additional £40 million ‘funding boost’ for specialist support services was confirmed. £2 million of this funding has been made available to smaller specialist organisations helping BAME, LGBTQ+ or disabled victims and £1.3 million has been dedicated to developing remote and online services for victims. See Ministry of Justice, *Press Release: Extra £40m to Help Victims During Pandemic and Beyond* (Home Office, 1 February 2021).

¹¹⁶ Home Office, *Successful Applicants in the First Bidding Round (Published 6 July)* (Home Office, 2020); Home Office, *Successful Applicants in the Second Bidding Round (Published 6 July)* (Home Office, 2020).

¹¹⁷ Balos (n 25).

¹¹⁸ Figures derived from the Ministry of Justice Civil Detailed Data Spreadsheet obtained by email from the Ministry of Justice on 8 November 2021. The spreadsheet can be accessed at

Table 3: Rates of litigants in person in applications for non-molestation and occupation orders (2020)

Quarter 2020	Number of applications	Cases with at least one hearing	Number (and %) of unrepresented applicants (in at least one hearing)	Comparison with 2019 (unrepresented applicants in at least one hearing)
January - March	6,845	5,209	1,752 (33.6%)	1,578 (+11.0%)
April - June	7,501	5,604	1,535 (27.4%)	1,616 (-5.0%)
July - September	8,422	6,302	1,748 (27.7%)	1,833 (-4.6%)
October - December	7,919	6,001	1,576 (26.3%)	1,728 (-8.8%)
	30,687	23,116	6,611 (28.6%)	6,755 (-2.1%)¹¹⁹

During the first year of the pandemic, applications for occupation orders and non-molestation orders were higher across all quarters than the same period in the previous year (publication (iii)). In relation to legal aid applications made under the domestic violence and child abuse gateway (DVCA gateway), statistics show that applications fell during the first year of the pandemic, by 23% (between January and March 2020), 37% (between April and June 2020), 22% (between July and September 2020) and 12% (between October and December 2020) compared to the same periods in 2019.¹²⁰ The disaggregated data, however, shows that in respect of non-molestation orders and occupation orders specifically, the opposite was true, with applications for legal aid being roughly 30% higher across 2020 than in 2019 (see table 2). This suggests that whilst protective orders were pursued during this period, other claims may not have been. This can be explained, in part, by applications for protective orders being prioritised as ‘work that must be done’ during the pandemic compared to non-urgent private and public children cases, which were categorised as either ‘work that will be done’ or ‘work that we will do our best to accommodate’.¹²¹ Accordingly, there were significant delays in pursuing non-urgent cases which may have disincentivised some litigants from starting proceedings. The family court statistics support that there was a reduction in the number of case starts for some case types falling under the DVCA gateway over this period, including FGM and forced marriage protection orders and for some quarters of 2020, public and private law proceedings, which is also likely to

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021432/legal-aid-statistics-detailed-civil-data-apr-jun-2021.zip. In order to filter for applications for legal aid in non-molestation order and occupation order proceedings the following filters need to be applied: scheme = civil representation, category = applications, sub_cat2 = domestic violence, code_1_description = non-molestation orders and occupation orders, sub_cat5 = details whether the application has been granted or not. The tab showing ‘volume’ confirms the number of applications (both successful and unsuccessful) for non-molestation orders and occupation orders. The other way to analyse legal aid statistics is to rely on the published Ministry of Justice and Legal Aid Agency statistics which are published quarterly (see, for example, table 6.1, column D of the following spreadsheet

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021430/legal-aid-statistics-tables-apr-jun-2021.ods). Whilst these statistics are helpful (and have been referred to in publications (i), (ii) and (iii)) they group all applications for domestic abuse. The Ministry of Justice estimate that between 90% and 95% of these cases will relate to occupation orders and non-molestation orders but will also account for forced marriage and FGM protection orders. As such, it is a less accurate method of analysing the statistics.

¹¹⁹ Figures derived from Ministry of Justice and National Statistics (n 109). A note of caution should be applied that the tables within the family court spreadsheets are updated regularly and therefore the figures included within any given quarter may change as and when more cases are included. As a result of this, there is a discrepancy between the number of applications over the relevant period cited in the tables and in the main quarterly statistics themselves (which have been cited in publications (i), (ii) and (iii)).

¹²⁰ Figures directly obtained from Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics Quarterly: January to March 2020; April to June 2020; July to September 2020 and October to December 2020* (Ministry of Justice and Legal Aid Agency, 2020 and 2021). Available at: <https://www.gov.uk/government/collections/legal-aid-statistics>.

¹²¹ Mr Justice MacDonald, *The Remote Access Family Court – version 4* (Courts and Tribunals Judiciary, 16 April 2020), para 3.2.1.

account for the downward trend in legal aid applications under the DVCA gateway. Accordingly, although there may have been barriers faced by victims to securing protective orders (discussed in detail in publication (iii)), these statistics indicate that many victims seeking protection continued to be able to access a legal aid practitioner during the early stages of the pandemic.

The proportion of successful legal aid applications for non-molestation orders and occupation orders in 2020 was consistent with pre-pandemic rates, averaging at 95.9% (table 2), compared to 94.4% in 2019, 95% in 2018 and 95.1% in 2017.¹²² This indicates that there was no considerable change in the LAA's approach to determining applications during the pandemic. Statistics in table 3 show, however, that there were (both numerically and as a proportion of applications) fewer litigants in person in at least one hearing for a non-molestation order or occupation order in 2020 than in 2019. Given that legal aid applications were granted at a similar rate and there had been a considerable rise in applications in some quarters of 2020, this suggests that more victims paid privately for representation (in at least one hearing) in 2020 than in 2019. Statistics also demonstrate that both during and prior to the pandemic, legal aid applications for non-molestation orders and occupation orders are more likely to be successful than for other types of cases for which funding is sought under the DVCA gateway, with the notes to the April to June 2020 DCVA gateway statistics stating, 'the proportion of applications granted remained steady at around 70% from the inception of this type of application until the end of 2015, before increasing to around 80%... the provisional figure for the latest quarter is 86%'.¹²³ Conflicting somewhat with the data presented earlier in this section, this may be attributed to the requirement to provide gateway evidence in non-injunction proceedings or alternatively, it may suggest that the LAA is in fact granting funding under Regulation 12 of the Civil Legal Aid (Financial Resources and Payments for Services) Regulations 2013. Looking to the future, publication (ii) suggests that whilst DAPOs will not improve the availability of public funding (given the same legal aid test will continue to apply to remedies under the Domestic Abuse Act 2021), the availability of third-party applicants will likely reduce the numbers of litigants in person and potentially close the gap between those requiring protection and those seeking it.

¹²² Ministry of Justice Civil Detailed Data Spreadsheet (n 118).

¹²³ Ministry of Justice and Legal Aid Agency (n 120).

Theme 2: The impact of being a litigant in person on pursuing and securing protection

Theme 2 examines the impact of being a litigant in person on pursuing and securing protection. The family court statistics in table 1 show that whilst litigants in person in injunction proceedings were not born out of LASPO, they have increased (by roughly 106% after accounting for the increase in applications) since its introduction. This is problematic insofar as the ‘court process is predicated upon a full representation model... with two lawyers presenting their client’s cases to an impartial arbiter – the judge – who will make a decision’.¹²⁴ In injunction proceedings, however, this is often not reflected in practice with one or neither party having legal representation. Statistics show that in 2019 and 2020, around 86% of respondents¹²⁵ and a third of applicants (table 1) were litigants in person in at least one hearing. Given that the court process is not designed for parties to act in person, it is unsurprising the publications chart how victim litigants in person can experience difficulties at all stages of the process (albeit not all difficulties are necessarily experienced by all victims). The publications also acknowledge that ‘intrinsic features of the court process itself can add to an individual’s vulnerability and impede participation’ including the requirement for a victim to prepare a narrative account of the abuse in the application paperwork, attend a hearing in the presence of her perpetrator, present evidence to the court about the abuse and (until the relevant provisions of the Domestic Abuse Act 2021 are implemented in Spring 2022) to potentially cross-examine or be cross-examined by her perpetrator.¹²⁶ The two particular barriers considered in this theme are (1) the capacity of victim litigants in person to prepare and file an application which is likely to satisfy the threshold criteria and warrant the court granting a protective order and (2) the availability and impact of special measures for victims of domestic abuse. Whilst it is recognised that special measures may be required by all victims, particular attention is paid to the position for unrepresented litigants as such measures arguably become more important where there is an expectation that the victim will present their case and provide evidence without professional assistance, despite the power imbalance between the parties in the courtroom. Given that publications (i) and (ix) document how legal professionals and lay advocates are effective at challenging approaches which can disadvantage victims or compromise their ability to effectively participate in the proceedings (i.e., the refusal to grant special measures), the central conclusion reached is that litigant in person applicants in injunction proceedings can be doubly disadvantaged by their status as victims and litigants in person.

Research suggests that ‘best outcomes are not achieved when parties are litigants in person’¹²⁷ because lawyers possess legal knowledge¹²⁸ and knowledge about the legal procedure.¹²⁹ The findings from the

¹²⁴ Trinder et al (n 7), 53.

¹²⁵ Ministry of Justice and National Statistics (n 31).

¹²⁶ Jacobson and Cooper (n 48), 8.

¹²⁷ C. Bevan, ‘Self-represented Litigants: The Overlooked and Unintended Consequences of Legal Aid Reform’ (2013) 35:1 *Journal of Social Welfare and Family Law*, 43-54.

¹²⁸ R. Moorhead and M. Sefton, *Litigants in Person. Unrepresented Litigants in First Instance Proceedings* (Department for Constitutional Affairs Research Series 2/05, 2005).

¹²⁹ R. Sandefur, ‘Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyer’s Impact’ (2015) 80:5 *American Sociological Review*, 909-933.

publications support that this can also be true in injunction proceedings. In relation to the capacity of unrepresented litigants to prepare an effective application, the data from studies 2 and 4 (publications (i) and (iii)) highlight instances of applications being delayed and/or rejected because of procedural defects (i.e., completing forms incorrectly) or because they failed to establish how the threshold criteria had been satisfied (i.e., by including insufficient or irrelevant information). Difficulties preparing an effective application may also be compounded by the requirement to write a narrative account of the abuse in the application paperwork which some victims may find traumatising or revictimising. The application paperwork also assumes that victims' experiences of abuse are 'incident based' (i.e., the template draft witness statement requires applicants to include details of the first, worst and most recent incidents of abuse) which is likely to be problematic for victims who experience more subtle and pervasive forms of abuse such as coercive and controlling behaviour. In such cases, the experience of a knowledgeable representative is likely to be invaluable. The data found that in some instances, victims were advised how to remedy the defects, leading only to a delay in securing protection. However, on other occasions victims were not notified about the reason for their applications being rejected, meaning they left the hearing without any protection and without the merits of the case being properly examined. Some of the respondents in studies 3 and 4 considered that this had been exacerbated by Covid-19 where the transition to remote hearings had resulted in judges placing increased reliance on statements of case and, in the North-East, by regional guidance which provided that as a matter of course the court will not hear oral evidence at remote ex-parte hearings (publications (iii) and (v)). Respondents also noted that some judges were more willing to grant non-molestation orders 'on the papers' in remote hearings, suggesting that for those victims who were capable of preparing a good quality application (i.e., following the rationale above, disproportionately those victims with legal representation) their prospects of securing ex-parte protection may have been improved during the pandemic (publication iii) – a finding raised in the most recent report of the NFJO.¹³⁰ This suggests that the pandemic may have increased the gap between those who are and are not able to access emergency protection. The data support that in the absence of introducing a 'legal help' style scheme to provide initial assistance to victims (who are not eligible for legal aid on a full representation basis) with preparing the initial court paperwork, there is value in funding initiatives such as CourtNav, a digital tool which assists litigants in person to prepare the initial application and witness statement for a protective order and which is reviewed by an experienced or legally qualified volunteer.¹³¹ Although relating more to effectiveness than accessibility, the data from study 2 (publication (i)) also indicate that litigants in person who secure protection may not always obtain comprehensive relief in those orders because they lack the knowledge about which provisions may be of benefit to them.

¹³⁰ Ryan et al (2021) (n 8), 30. A District Judge participating in the study noted 'I am concerned that Family Law Act orders, which are serious orders with significant consequences, are being watered down – granted too often on the papers, served by email/WhatsApp etc... the granting of a without notice order on the papers should not be a default'.

¹³¹ On 1 February, it was announced that £800,000 would be awarded to support the CourtNav tool. See Ministry of Justice (n 115).

In relation to the availability of special measures, publications (ii), (iii) and (iv) chart how the effectiveness of a victim's participation in injunction proceedings may be compromised by the limited use of procedural safeguards. In study 2 (publication (i)), whilst most of the professionals reported that special measures were granted in between 75% and 100% of the cases in which they were requested, indicating a responsiveness by the judiciary to granting some protection, this was typically limited to a separate waiting area and a staggered arrival/departure time (i.e., measures which support a victims' safety) rather than the use of safeguards to support a victim to give evidence (i.e., screens). The professionals cited a lack of equipment/facilities, administration issues, insufficient time to put measures in place or judges not being persuaded that they are necessary as the main reasons why special measures are refused. There was also evidence of judges lacking an understanding of the dynamics of domestic abuse, with some refusing special measures because a victim had allowed contact between the children and the perpetrator meaning she 'could not be that frightened of him'. Whilst the qualitative data supported that separate waiting areas were often granted, the victims interviewed still reported feeling unsafe at court, indicating that there are limits on the effectiveness of this type of measure or its use in isolation. Beyond the availability of separate waiting areas, some litigants were unaware of the existence of other types of special measures as a result of their unrepresented status, although this may now have improved through amendments to the FL401 application form which outlines the available measures. In study 4 (publication (iii)), respondents noted that a benefit of remote hearings was that victims were not dependent on judges approving the use of special measures or courts having appropriate facilities in place. The study also suggests that, for some victims, participating in a remote hearing was an effective special measure in and of itself, enabling them to maintain a physical distance from their perpetrator whilst also allowing them to disguise their whereabouts. The data therefore conflicts with the findings of the second NFJO report, where victims reported feeling unsafe when they had to listen to or see their alleged abuser from their own home¹³² but it is more in line with the third report where respondents also noted that 'remote hearings provided a greater sense of safety for applicants who were not at risk from meeting the respondent and made it easier to enforce safety measures'.¹³³

Whilst the studies within this PhD support that there was a need for stronger legal provisions in respect of special measures through the Domestic Abuse Act 2021, it is nonetheless problematic that the Act does not guarantee protection, as whether measures are ultimately provided will still depend on whether the court considers they are necessary to assist the party. Accordingly, it does not fully address the concerns raised in this PhD about judges minimising the need for special measures, nor the situation where other measures are not available or fit for purpose in a particular court building. The data also suggest that lay advocates, with their focus on empowering victims and ensuring their safety, can be effective at supporting victims to secure special measures and challenging judges refusals to grant them (publication (ix)), strengthening the justification for more family court IDVAs and the training of support workers.

¹³² Ryan et al (September 2020) (n 5).

¹³³ Ryan et al (2021) (n 8), 29.

Attempts have recently been made by HMCTS to improve the accessibility of protective orders for litigants in person through procedural changes. This aligns with Cramton's analysis which found that there has been a 'simplification' of some proceedings to recognise that they are often conducted without legal professionals.¹³⁴ Publication (i) charts how this can be seen in changes to the FL401 application form (introduced on 11 October 2021) which now sets out the legal test for a without notice application, provides information about serving the application, offers improved information about how to keep contact details confidential and provides details of special measures under the Domestic Abuse Act 2021. In addition, HMCTS introduced a new template witness statement (Form FL401T) to assist litigants in person to provide the relevant information in an appropriate form. As the data in this PhD was obtained prior to the introduction of these forms, conclusions cannot be reached about whether they have improved the prospects of a litigant in person securing protection. However, given Durfee's findings in the USA that even with 'victim-friendly' procedures and forms, individuals whose applications were not prepared by a legal representative were 'significantly less likely' to have their requests for a protective order granted, it is unlikely to have made a notable difference.¹³⁵ The work also acknowledges the procedural changes introduced following Covid-19 to improve the accessibility of protective injunctions. Publications (iii) and (v) highlight that the impact of these changes has not been consistent for all victims. For example, whilst allowing applications to be filed by post and email is convenient for those who live some distance from their local court, it also requires victims to have access to a computer in order to access, complete and print the form, when ordinarily this could be obtained at a court building (and potentially completed with assistance from a court-based charity). The changes also presume that victim litigants in person are able to locate a safe and confidential space away from their abuser to complete the initial paperwork and attend a telephone hearing. Likewise, although the temporary Practice Direction 36U has allowed flexibility in the family court approach to serving applications and orders (i.e., by permitting service through electronic means), this has created a conflict with the stricter processes adopted by the police and Crown Prosecution Service (CPS), resulting in decisions not to pursue breaches where orders have been served electronically. This suggests that there is a need for a more joined up and consistent approach to ensure that victims are not put at risk by orders becoming unenforceable.

Publication (iv) examines how barriers to engagement with the family justice system have reduced the capacity of the family courts to facilitate procedural and substantive justice and questions whether and if so, how, forms of dispute resolution which are delivered by non-state actors but which rely on the state for their authority – notably mediation, arbitration, and religious tribunals – have evolved to fill the justice gap created by recent reforms. It is argued that such a move has been driven by policy changes implemented by the government and, in some cases, by the needs of litigants themselves and is therefore indicative of a move towards 'weak' legal pluralism where it is 'only through the state's willingness to grant powers to

¹³⁴ R. Cramton, 'Delivery of Legal Services to Ordinary Americans' (1994) 44 *Case Western Reserve Law Review*, 531-620.

¹³⁵ A. Durfee, 'Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders' (2009) 4:1 *Feminist Criminology*, 7.

other methods of adjudication that legal pluralism is given acceptance'.¹³⁶ Although not specifically focussing on injunction proceedings, the analysis does consider how in the context of interrelated family proceedings where domestic abuse is present, a weak legal pluralist approach upholds the rights of those who do not wish to (or cannot) engage with the family court whilst also ensuring vital safeguards for victims (i.e., that decisions reached in mediation can only be made legally binding by the courts and by providing that decisions made by religious tribunals acting as arbitration tribunals can be challenged on public policy grounds or in the event of a procedural irregularity). This is particularly important because victims engaging in alternative dispute resolution are unlikely to be legally represented, given the quasi-legal nature of the processes. In the context of protective orders specifically, publications (ii) and (iv) clarify that alternative dispute resolution is 'simply untenable' given that an order of the court is required to obtain legally enforceable protection. The work supports Davis in recognising that alternative dispute resolution 'is an appropriate means to resolve domestic violence cases only if it does so effectively and in accordance with notions of even handedness and fairness to both parties'.¹³⁷

¹³⁶ K. Von Benda-Beckmann and B. Turner, 'Legal Pluralism, Social Theory and the State' (2018) 50:3 *The Journal of Legal Pluralism and Unofficial Law*, 262.

¹³⁷ A. Davis, 'Mediating Cases Involving Domestic Violence: Solution or Setback?' (2006) 8:1 *Cardozo Journal of Conflict Resolution*, 253.

Theme 3: The accessibility of the Remote Access Family Court

Addressing research question (ii), theme 3 analyses the accessibility of the RAFC which was introduced following the first Covid-19 lockdown in England and Wales on 23 March 2020. Mr Justice MacDonald acknowledged that ‘the steps that have been taken to establish a Remote Access Family Court would ordinarily have been taken over a much longer period of time and only following extensive evaluation and consultation’.¹³⁸ Accordingly, publications (iii) and (v) provide an important and timely reflection on which aspects of the RAFC have been successful in supporting victims to seek protection and those which have reduced accessibility, as attention now turns to the future of the RAFC. Within the preceding themes it has been noted that in many respects the RAFC has exacerbated existing barriers (particularly for litigants in person) rather than necessarily creating new barriers. These include litigants requiring access to technology to obtain and complete the application paperwork, the transition to filing applications by email/post reducing physical opportunities for litigants in person to seek pro bono support at the court building, and the need for victim litigants in person to secure a safe and private space both to complete the application/witness statement and participate in a remote hearing – albeit some of these issues were temporary and will likely have been resolved through the opening of public spaces. In relation to the availability of remedies, the data was mixed, suggesting that (for non-molestation orders) some judges were more willing to grant applications ‘on the papers’ in remote hearings and were therefore placing increased importance on the initial statements of case. Court guidance has also overwhelmingly been aimed at legal representatives, meaning that whilst practitioners have experienced ‘guidance fatigue’¹³⁹ litigants in person are likely to have found it difficult to keep up to date with, and comply with, changing court procedures. Within this PhD, this finding has specifically been reached in relation to private children proceedings (see supporting publication (i) in appendix 4), however similar issues have been experienced in the context of injunction proceedings. The ‘coronavirus (Covid-19) contingency arrangements for Family Law Act injunctions’ for example, set out guidance to make sure that ‘injunction proceedings are prioritised and victims of domestic abuse receive protection as soon as possible’.¹⁴⁰ This provides that *legal representatives* should include the words ‘injunction, non-molestation, FL401, domestic violence or domestic abuse’ in the subject line of the email and complete a draft order using the standard template 10.1. Equivalent guidance has not been prepared for litigants in person and whilst they may not reasonably be able to prepare a draft order, they would be able to ensure that the relevant words are included in the subject heading, something which is particularly important because courts have been asked to create a priority folder with a filter on emails with those words in the title which they will check every hour. The inference is that by not complying with guidance, applications may get lost within generic court inboxes which are checked less frequently, delaying a victim’s application being processed. The creation of an official HMCTS webpage

¹³⁸ Mr Justice MacDonald, *The Remote Access Family Court – version 5* (Courts and Tribunals Judiciary, 26 June 2020), para 1.1.2.

¹³⁹ The Law Society of England and Wales *Letter to the President of the Family Division on National Guidance for Remote Hearings in the Family Courts* (The Law Society, 2020).

¹⁴⁰ Her Majesty’s Courts and Tribunals Service, *Coronavirus (Covid-19) Contingency Arrangements for Family Law Act Injunctions* (HMCTS, 2020), 1.

with guidance documents for litigants in person could be achieved with relative ease and this would address a need for better quality authoritative sources of information for litigants in person, which has been identified in other studies.¹⁴¹ Respondents to study 4 also reported not being aware of the availability of support for litigants in person – an issue which may pre-date and extend beyond the pandemic (publication (iii)). These findings suggest there would also be merit in a central database of pro bono advice organisations so that representatives have a clear referral route when contacted by litigants in need of support.

Nonetheless, the data also identified positive aspects of the RAFC. In relation to the effectiveness of remote platforms, the respondents in studies 3 and 4 praised the speedy and straightforward nature of telephone hearings and reported that remote hearings generally worked well for ex-parte hearings and often return hearings with orders being granted ‘swiftly’ and ‘without delay’. With the exception of some judges being more willing to grant orders on the papers, no changes were reported regarding the substantive content of hearings. Further, no concerns were raised regarding the seriousness with which the parties treated the proceedings, conflicting with the findings in relation to public and private children proceedings (see supporting publication (i) in appendix 4). Combined with the perceived safety benefits for victims (discussed above) and the practical benefits of reduced travel and waiting times for professionals and the parties, most of the respondents agreed that remote platforms could be at least as accessible than the physical courtroom. Respondents noted that for contested hearings, remote hearings were usually conducted by video platforms which could be more complicated for litigants in person to navigate and were more dependent on the parties having access to the necessary technology and good internet connection. A need was identified for greater support to allow litigants in person to make an informed decision about their preferred choice of platform and to help them navigate unfamiliar platforms, given that some services reported that their unrepresented service users were (at least in the early days) ‘not very confident in the technology’ and ‘did not feel supported by the courts to use it’ (publication (v)).

Turning to the future of the RAFC, publication (iii) argues that there is an ongoing place for remote hearings in protective order proceedings even after it is safe to return to the physical courtroom. However, there are some lessons to be learned from the experiences of the last 18 some months. In studies 3 and 4, the respondents were unanimous that remote hearings should continue for ex-parte hearings. This aligns with the findings of the most recent NFJO report where 58% of respondents thought that these types of hearings, particularly ex-parte applications, could continue to be heard remotely.¹⁴² Whilst there were no objections to holding return hearings remotely from the perspective of ensuring a victim’s effective and safe participation, respondents in study 4 did discuss that remote hearings pose a bigger challenge in return hearings where the respondent is self-representing, given it is not uncommon for the applicant’s representatives only to have an address for service and no other contact details, precluding the possibility of pre-hearing negotiations. The data therefore suggest that court administrators need to be more vigilant

¹⁴¹ Trinder et al (n 7).

¹⁴² Ryan et al (2021) (n 8).

in securing sufficient details for these discussions to take place, potentially by sending a short questionnaire to respondents alongside the application form and notice of hearing. In the absence of these discussions, a higher number of cases may become contested. Where additional contact details cannot be obtained, and the applicant is represented, it would be prudent for judges to take a robust approach in exploring the options for settling the dispute at the outset of a return hearing or set aside time for such negotiations to take place within an allocated hearing time.

In common with the findings of the most recent NFJO report, the majority of respondents in study 4 were dismissive of the use of remote hearings in factfind and final contested hearings.¹⁴³ Technical issues (i.e., navigating the more complex platforms that are used in final hearings, poor connection, delays and feedback interfering with the clarity of evidence) and difficulties assessing a parties' credibility remotely were the most common reasons provided for wanting a return to the physical courtroom in more substantive hearings. Based on the respondents' accounts, there was a conflict between representatives' preference for their clients to attend a final hearing in person, and their understanding that clients would prefer to continue attending remotely. The data therefore suggest that in relation to contested hearings, decisions should be made on a case-by-case basis with regard to victims' wishes and preferences, representation status and access to technology. This accords with the temporary guidance included in the Family Justice Council's guidance on special measures in remote and hybrid hearings that victims should be consulted about their preferred mode of participation prior to a hearing being arranged.¹⁴⁴

Where orders were granted, concerns were raised about delays in preparing orders and ensuring they were served/registered with the police as a result of amended procedures during the pandemic. Whilst the HMCTS guidance states that an applicant's solicitor will be given the order for service 'on the day it is made'¹⁴⁵ respondents in study 4 identified that orders were often taking weeks to be drawn up by the court leading to delays in effecting service (publication (iii)) and therefore the order becoming effective. A similar issue was identified by the respondents to the NFJO study, who felt there were insufficient staff to support the administration process.¹⁴⁶ Concerns were also raised regarding registering orders with the police (publication iii). The general position under rule 10.10 of the Family Procedure Rules 2010 is that applicants are to register the order with the police unless the court has also served the order itself on the respondent because the applicant is a litigant in person or the court has made an order of its own volition. This provision seeks to protect litigants in person who may not be familiar with the required procedural steps. Study 4 identified that this position has been somewhat modified for represented applicants by the North-East regional guidance, which states that 'at the conclusion of the hearing, the Court will draw any orders and will send them to the relevant police force' (publication (iii)). Given that applicants are typically responsible

¹⁴³ Ibid.

¹⁴⁴ Family Justice Council (n 46), section 2.

¹⁴⁵ Her Majesty's Courts and Tribunals Service (n 140).

¹⁴⁶ Ryan et al (September 2020), (n 5).

for serving orders (subject to the rule that they cannot affect personal service)¹⁴⁷ the research identified a risk that the court could register an order with the police which had not yet been served on the respondent in the proceedings, in which case action could not be taken to pursue a breach. National guidance to ensure there are no regional discrepancies in practice which can disadvantage applicants would therefore be sensible if amended procedures are going to be adopted in the long term.

¹⁴⁷ Family Procedure Rules 2010, rule 6.5 (3).

Theme 4: The rates at which non-molestation orders and occupation orders are granted compared to the rates at which they are sought

Theme 4 explores the rates at which orders are granted compared to the rates at which they are sought. Table 1 shows that regardless of the reduced availability of legal aid since 2013, more victims have accessed the family courts to pursue protection (albeit more have done so as litigants in person) with the number of applications for non-molestation orders and occupation orders increasing by 46.5% between 2012 and 2019, despite fewer women reporting experiencing domestic abuse in the year ending 2019 than 2012.¹⁴⁸ As discussed in publication (viii), LASPO may have contributed to an increased need for injunctive protection by introducing a requirement that applications for legal aid under the paragraph 12 exemption must be supported by gateway evidence.¹⁴⁹ Given a ‘relevant protective injunction’ (which includes a non-molestation or occupation order) constitutes gateway evidence¹⁵⁰ a victim could be motivated to secure a protective injunction to allow them to gain legal aid in another set of family proceedings (i.e., in divorce proceedings) where they otherwise may not have done so, rather than necessarily for the primary purpose of protecting themselves. Whilst studies support that protective injunctions continue to be the most frequently used evidence of domestic abuse¹⁵¹ further research is required to assess victim motivations for securing protection. As discussed above, however, the data from study 1 and study 2 also indicate that where legal aid is not available, some victims decide to take no action to secure protection (publications (ii) and (ix)) increasing the gap between the number of victims requiring protection and those who ultimately go on to make an application. Although this appears to conflict with statistics that more applications for protection are made annually post-LASPO, the data suggest that this issue disproportionately impacts those victims who are no longer eligible for legal aid. Accordingly, it is possible that the increase in the number of victims seeking protection is amongst those who are eligible for legal aid, who can afford to pay privately for legal representation and/or who are otherwise amenable to acting as a litigant in person.

Publications (i) and (iii) chart how prior to and during the pandemic, non-molestation orders have been sought and granted at a consistently higher rate than occupation orders. The data identifies few substantive barriers to securing non-molestation orders (save for the reduced prospects of a litigant in person preparing a successful application than a represented applicant), which can be attributed to the ‘generous’ and ‘victim focussed’ threshold criteria¹⁵² and to legislative provisions which allow the family court to make a non-molestation order in other ongoing family proceedings despite a formal application having not been made.¹⁵³ Year on year, more non-molestation orders are granted than sought (publication (ii)). In

¹⁴⁸ Office for National Statistics, *Domestic Abuse in England and Wales Overview: November 2019* (ONS, 2020).

¹⁴⁹ The Civil Legal Aid (Procedure) Regulations 2012, regulation 33 (1) (as amended by the Civil Legal Aid (Procedure) (Amendment) Regulations 2020).

¹⁵⁰ The Civil Legal Aid (Procedure) Regulations 2012, regulation 33 (as amended by the Civil Legal Aid (Procedure) (Amendment) Regulations 2020).

¹⁵¹ Syposz (n 9).

¹⁵² Burton (n 10), 110.

¹⁵³ Family Law Act 1996, s 42 (2) (b).

comparison, typically only around half of applications for occupation orders are successful, with this declining to below 40% in two quarters of 2020 (publication (i)). The data from study 2 (reported in publication (i)) suggest that this is principally the result of higher threshold criteria which is difficult for victims to satisfy, because the policy focus on re-housing victims has led to a perception that perpetrators struggle to secure alternative accommodation and because despite more recent case law indicating a slightly less restrictive approach than earlier cases which held that occupation orders were ‘draconian’ and ‘only justified in exceptional circumstances’¹⁵⁴ a more lenient approach is not always embraced by the judiciary. These findings therefore build on earlier research that occupation orders are granted sparingly because perceptions about the ‘sanctity of the family has for years lead the state, in the form of the judiciary and the police, to refrain from intervening for moral and privacy reasons’.¹⁵⁵ The data also shows that some judges seek to bypass the strict threshold criteria by instead granting non-molestation orders with a zonal clause, which in some instances may lead to weaker protection. Where occupation orders are granted, the data suggest this is on restricted terms and for a limited duration which reduces their effectiveness at preventing post-separation abuse and supporting victims to regulate their short and longer-term housing situation.

In addressing research question (ii), the increase in applications for non-molestation and occupation orders in 2020 suggest that victims who would have pursued an application but for the pandemic (i.e., those who are able to secure legal aid, privately fund representation or who are willing to act as litigants in person), have not been deterred or prevented from pursuing applications and that others who might not otherwise have needed legal protection (were it not for the pandemic), have generally sought it (publication (iii)). In relation to the rates at which orders are granted, the professionals in study 2 did not necessarily feel that the pandemic had affected the courts’ approach to granting occupation orders. Over 15% felt that the courts had been stricter, less than 3% considered they were more lenient and 34% reported no change in the courts’ approach. Nonetheless, a few respondents provided examples of the pandemic disrupting the ordinary progression of a case, such as hearings being delayed or rearranged where an order was not in place, leaving victims without interim protection. The respondents in study 4 (publication (iii)) noted that the pandemic had 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, factors which were likely to be relevant considerations within the discretionary criteria and which may have contributed to the reduction in successful applications during the pandemic. As such, whilst there may not have been an ostensible change in the courts’ approach, it does not necessarily follow that victims’ prospects of securing an order have not been compromised by the wider climate, a finding which is supported by the family court statistics during this period (publication (i)).

Looking to the future, publication (i) addresses research question (iii) by examining whether the introduction of DAPOs under the Domestic Abuse Act 2021 may offer a more accessible form of

¹⁵⁴ *Chalmers v Johns* [1999] 1 FLR 392.

¹⁵⁵ Blackburn and Graca (n 3), 24.

protection than non-molestation orders and occupation orders. Accessibility continues to be an important concept under the new legislation given the intention that DAPOs will become the ‘go to’ protective order.¹⁵⁶ The analysis broadly supports that DAPOs are either comparable in terms of accessibility or more accessible than existing protection orders, subject to a number of caveats. Primarily, the introduction of third-party applications is likely to ease the burden on victims to act when they feel unable to do so. 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. 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 under the Family Law Act 1996 would be pursued by litigants in person). This reflects earlier studies which demonstrate that non-legally qualified parties may be effective at influencing the outcomes of hearings because they can have a better understanding of court procedure and litigation conduct than many litigants in person.¹⁵⁷ Likewise, Durfee found that whilst advocates are not as effective as legal representatives, those petitioners who file with the assistance of an advocate are ‘slightly more’ likely to receive protection than those who file without any assistance.¹⁵⁸ Given that the Domestic Abuse Act 2021 will not result in more victims securing legal advice and representation (due to the same legal aid criteria applying as under the Family Law Act 1996) and that the requirement to prepare and file an application and statement will remain the same as under the current regime, some of the procedural barriers to protection discussed across the other themes are likely to remain under the new legislation where a victim initiates the application. This indicates that the recommendation for greater investment in IDVA/support services continue to be apt notwithstanding the new legislation.

In relation to the substantive tests for securing protection, the introduction of DAPOs is unlikely to make a significant difference for those seeking personal protection as the threshold criteria are broadly comparable to non-molestation orders. However, for those seeking an order regulating the occupation of the family home, the DAPO criteria seemingly brings the threshold criteria more in line with orders for personal protection. Accordingly, it is possible that all categories of applicants, whether or not legally qualified, 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’. Whilst many of the improvements will be made because of the provisions within the legislation, others will be dependent on the Act’s implementation. 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’.¹⁵⁹ Accordingly, publication (i) charts a need for resources to be dedicated to support professional third parties to pursue applications and to ensure the quality of their applications. Building on the findings of the previous themes there is also a need for good quality

¹⁵⁶ Home Office, *Policy Paper: Domestic Abuse Protection Notices/Orders Factsheet* (Home Office, 2020).

¹⁵⁷ Sandefur (n 129).

¹⁵⁸ Durfee (n 135).

¹⁵⁹ E. Stanko, *Intimate Intrusions: Women’s Experience of Male Violence (Routledge Revivals)* (London, Routledge 2013), 165.

information for lay people who may pursue applications on behalf of their friends or family members, since research suggests that many victims turn to their informal support networks for assistance with leaving an abusive relationship.¹⁶⁰

¹⁶⁰ R. Klein, *Responding to Intimate Violence against Women: The Role of Informal Networks* (Cambridge University Press, 2012).

Conclusions

The publications have provided empirical and doctrinal insights into the accessibility of non-molestation orders and occupation orders for victims of domestic abuse, drawing in particular on the impact of recent reforms (i.e., LASPO) and societal crises (i.e., Covid-19). The publications have also looked to the future, examining the extent to which DAPOs are likely to offer a more accessible form of protection than existing protective remedies. In addressing the three overarching research questions, four main themes emerged within the analyses, these being (1) access to support, legal advice and representation (2) the impact of being a litigant in person on pursuing and securing protection (3) the accessibility of the RAFC and (4) the rates at which non-molestation and occupation orders are granted compared to the rates at which they are sought. Examining these themes has led to the identification of barriers which impede a victim's ability to seek or secure non-molestation orders and occupation orders and the proposal of solutions which may minimise or eradicate some of these barriers. The papers have not suggested wholesale reform of the family justice system but have favoured practical changes which can be implemented with (often) minimal expense and relative ease and which have the potential to improve the experience of litigants, those who support/represent them and the family court itself. The exception to this is in the recognition that the legal aid means test must be reviewed and amended to reflect the level at which people can afford to pay for legal services.

The aim of theme 1 was to consider accessibility with reference to the availability of support, legal advice and representation following LASPO. The publications proposed that LASPO (and specifically difficulties satisfying the means test) has negatively affected the accessibility of protective injunctions, leading to an increase in both the number of litigants in person in applications for non-molestation and occupation orders and the number of victims taking no action to secure protection. The publications also examined the alternative routes to legal advice/representation which have emerged to 'fill the gap' where legal aid is not available to victims. Whilst the publications are broadly positive about the contribution that domestic abuse advocates and clinical educators/students can play in providing pro bono casework, they recognise that such services often have limited capacity to support significant numbers of victims. In the context of Covid-19, the publications explored the challenges and opportunities experienced by support services and other pro bono organisations in assisting victims in applications for protective orders. Whilst the research acknowledges the innovative ways in which organisations have adapted to deliver support, it also charts a decline in organisational capacity to provide support to litigants throughout family court proceedings (as a result of logistical, staffing and funding challenges) at a time where legal need has been heightened.

The aim of theme 2 was to consider the impact of being a litigant in person on pursuing and securing protection. The analysis reveals that litigants in person can experience barriers at all stages of the court process. The analysis also shows that victims of domestic abuse are particularly disadvantaged compared to other litigants in person because they may be vulnerable by reason of the abuse they have experienced

and because the quality of their participation in the proceedings may be compromised by the limited use of procedural safeguards. The findings indicate that a victim's unrepresented status (particularly at the application stage), can impact their prospects of securing protection and even though attempts have been made to make the application documents more user friendly for unrepresented litigants this is unlikely to have made a significant difference to the rates at which orders are granted.

The aim of theme 3 was to scrutinise the accessibility of the RAFC in applications for protective orders. The analysis shows that in some respects the RAFC has exacerbated barriers to protection for litigants in person by reducing opportunities for victims to access in person court-based support and by judges in some remote hearings placing increased importance on statements of case. The publications also highlight a continuing need for high quality accessible guidance to ensure that litigants in person are able to navigate the remote process for seeking protection. Nonetheless, the findings are generally optimistic about the capacity of the RAFC to ensure that protective order applications are prioritised and that protection is granted without undue delay. Further, the data suggest that some victims prefer remote hearings as they are better able to protect their safety and wellbeing. Whilst there is support for the continuation of remote ex parte and return hearings even once a safe return to the physical courtroom is possible, there is less practitioner support for the ongoing use of remote hearings in more substantive hearings, albeit this may conflict with victims' own preferences to continue attending remotely. Accordingly, the analysis concludes that in relation to contested hearings, decisions should be made on a case-by-case basis with regard to victims' wishes and preferences, representation status and access to technology.

The aim of theme 4 was to analyse the rates at which orders are granted compared to the rates at which they are sought. The data identified few substantive barriers to securing a non-molestation order. In contrast, the rate of successful applications for occupation orders is consistently low. This is principally the result of higher threshold criteria which is difficult for victims to satisfy, the policy focus on re-housing victims rather than perpetrators and because despite more recent case law indicating a slightly less restrictive approach than earlier cases which held that occupation orders were 'draconian' and 'only justified in exceptional circumstances' a more lenient approach is not always embraced by the judiciary. The findings are optimistic that DAPOs are likely to improve the accessibility of protective injunctions, both because of the potentially broad scope of third-party applicants which should reduce the reliance on victims to take action and because the threshold criteria are either equivalent to (in the case of non-molestation orders) or more lenient (for occupation orders) than existing protection. There is, however, a need for thoughtful implementation to ensure that existing problems are not simply transferred across to the new regime.

Since much of the research has been undertaken, it has been suggested that DAPOs are likely to become the 'go to' protective order.¹⁶¹ Regardless, the analysis within this PhD and the proposals therein remain relevant. Firstly, it has been proposed that DAPOs will be implemented following a regional roll out and

¹⁶¹ Home Office (n 156).

will not therefore be introduced nationally until ‘early 2023’.¹⁶² As such, there is still merit in acknowledging and taking steps to improve the accessibility of non-molestation orders and occupation orders to support those victims who will require protection in the short term. Secondly, there is no intention to repeal non-molestation orders and occupation orders once DAPOs become available. Accordingly, there will continue to be situations in which recourse to legacy remedies may be required. Thirdly, the procedural requirements and substantive tests which will apply to DAPOs will mirror many of the existing provisions under the Family Law Act 1996 for non-molestation orders and occupation orders, meaning that many of the issues discussed in the publications will continue to exist under the new regime. Finally, some of the findings (particularly those around procedural difficulties experienced by victims and the accessibility of the RAFC) have wider applicability to other family proceedings that victims may engage in on the breakdown of an abusive relationship. The outputs, when taken together, provide a comprehensive and holistic account of the procedural and substantive barriers to seeking and securing protection from a variety of professional, practitioner and lay client perspectives. The collection is an original point of reference for researchers, members of the legal profession, professionals supporting victims of abuse, social workers, police, educators, law reformers and academics from disciplines including law, criminology, and social policy.

¹⁶² Home Office, *Domestic Abuse Act 2021 – Commencement Schedule* (Home Office, 3 November 2021).

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Appendix 1: Publications

- (i) A. Speed and K. Richardson ‘Should I Stay or Should I Go Now? If I Go There Will be Trouble and if I Stay There Will be Double’: An Examination into the Present and Future of Orders Regulating the Family Home in England and Wales (2022) *Journal of Criminal Law* (accepted/in press).

(Pages 65 to 95 of this document)

- (ii) A. Speed, ‘Clinical Legal Education as an Effective Tool for Improving the Accessibility of Protective Injunctions for Victims of Domestic Abuse: A Case Study Example of the Models of Support Available at Northumbria University’ (2021) 28:2 *International Journal of Clinical Legal Education*, 66-116.

(Pages 96 to 146 of this document)

- (iii) A. Speed, K. Richardson, C. Thomson, C. and L. Coapes, ‘Covid-19 and the Family Courts: Key Practitioner Findings in Applications for Domestic Violence Remedy Orders’ (2021) 33:3 *Child and Family Law Quarterly*, 215-235.

(Pages 147 to 167 of this document)

- (iv) A. Speed, ‘Just-ish? An Analysis of Routes to Justice in Family Law Disputes in England and Wales’ (2020) 52:3 *Journal of Legal Pluralism and Unofficial Law*, 276-307.

(Pages 168 to 200 of this document)

- (v) 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.

(Pages 201 to 234 of this document)

- (vi) K. Richardson and A. Speed, ‘Two Worlds Apart: A Comparative Analysis of the Contrasting Approaches to Responding to Domestic Abuse Adopted by England and Wales and the Russian Federation’ (2019) 85:5 *The Journal of Criminal Law*, 320-351.

(Pages 235 to 266 of this document)

- (vii) L. Bengtsson and A. Speed, ‘A Case Study Approach: Legal Outreach Clinics at Northumbria University’ (2019) 26:1 *International Journal of Clinical Legal Education*, 179-215.

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- (viii) 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*, 135-152.

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Publications submitted and awaiting review

- (ix) A. Speed, 'Domestic Abuse and the Provision of Advocacy Services: Mapping Support for Victims in Family Proceedings in England and Wales' *Submitted to the Journal of Social Welfare and Family Law*.

(Pages 323 to 350 of this document)

**‘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 victims¹ which promotes positive longer-term outcomes for their safety, economic security and social support networks and causes less disruption to children of the family.² In contrast, victims who are required to secure short-term accommodation typically experience higher levels of housing instability³, unsuitable conditions⁴ and, for those turning to privately rented accommodation, increased housing costs.⁵ 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.⁶ Such assumptions are also reflected in housing policy, where academics have identified an over-reliance on the refuge model when responding to domestic abuse.⁷ Refuges are problematic insofar as poor resourcing means they often have limited capacity⁸ - a position which has worsened as a result of Covid-19.⁹ 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

¹ 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.

² 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.

³ 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.

⁴ 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.

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

⁶ SafeLives (n 1).

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

⁸ 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.

⁹ 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'.¹⁰

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.¹¹ 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 abuse¹², 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'¹³ 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.¹⁴ 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.¹⁵ Without access to appropriate remedies to regulate the family home, however, perpetrators are not held to account for their conduct¹⁶ and studies show that victims often remain in abusive relationships.¹⁷ 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.¹⁸ 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

¹⁰ 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+> accessed 15 August 2021; H. Abrahams, *Supporting Women after Domestic Violence. Loss, Trauma and Recovery* (London: Jessica Kingsley Publishers, 2007).

¹¹ Family Law Act 1996, ss 33-38.

¹² 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.

¹³ 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.

¹⁴ *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.

¹⁵ 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.

¹⁶ Breckenridge et al (n 2).

¹⁷ 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.

¹⁸ 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'.¹⁹

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.²⁰ 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'²¹. 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'²² 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.²³ This aligns with the government's intention for other forms of injunctive protection, such as non-molestation orders and restraining orders.²⁴ 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'.²⁵

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

¹⁹ 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.

²⁰ 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> accessed 2 September 2021.

²¹ Ibid.

²² 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.

²³ Ibid.

²⁴ 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'.

²⁵ 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.²⁶

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.²⁷ 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'.²⁸ 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.²⁹ 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.³⁰ 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

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

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

²⁸ Family Law Act 1996, s 62.

²⁹ 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.

³⁰ Family Law Act 1996, s 40.

can hypothetically be made indefinitely,³¹ those granted to other applicants can only be made for a maximum of six months but may be renewed on one or more occasions.³² 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.³³ 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'.³⁴ 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.³⁵ 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'.³⁶ Where the police issue a DVPN, they are obliged to make an application to the magistrates' court for a DVPO within 48 hours.³⁷ 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.³⁸ The order can prevent the perpetrator from returning

³¹ Family Law Act 1996, s 33(10).

³² Family Law Act 1996, s 35(10), s 36 (10), s 37(5).

³³ 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.

³⁴ Bates and Hester (n 12), 135.

³⁵ 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.

³⁶ Bates and Hester (n 12), 135.

³⁷ Crime and Security Act 2010, s 27.

³⁸ 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.³⁹ 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 England and Wales) 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 2021.⁴⁰ 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.⁴¹ 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.⁴² 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'.⁴³ 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'.⁴⁴ Further, the court must consider that an order is 'necessary and proportionate'.⁴⁵ 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.⁴⁶ Where a DAPO is granted, the court can impose any requirements they consider necessary to protect the person with the benefit of the order.⁴⁷ In common with the current law, this could include specific terms prohibiting the perpetrator from entering the premises or from evicting or excluding the victim⁴⁸, or terms more typically achieved through a non-molestation order, such as those prohibiting the perpetrator from

³⁹ Crime and Security Act 2010, s 28(10).

⁴⁰ The Domestic Abuse Act, ss 22-49.

⁴¹ Domestic Abuse Act 2021, s 28.

⁴² Family Law Act 1996, s 31.

⁴³ Family Law Act, s 42(2)(b).

⁴⁴ Domestic Abuse Act 2021, s 32.

⁴⁵ Ibid.

⁴⁶ Domestic Abuse Act 2021, s 1.

⁴⁷ Domestic Abuse Act 2021, s 35.

⁴⁸ Domestic Abuse Act 2021, s 35(5).

contacting the victim.⁴⁹ 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.⁵⁰

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.⁵¹ 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).⁵² 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’.⁵³ The rate at which occupation orders are granted is, however, considerably lower than equivalent rates for non-molestation orders⁵⁴ (where the number of orders granted consistently exceeds the number of applications - see table 2)⁵⁵ 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.⁵⁶ 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.⁵⁷ 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.⁵⁸

Table 1: occupation orders between 2013 and 2019

⁴⁹ Domestic Abuse Act 2021, s 35(4).

⁵⁰ Domestic Abuse Act 2021, s 35(6).

⁵¹ Bates and Hester (n 12).

⁵² 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.

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

⁵⁴ 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.

⁵⁵ 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.

⁵⁶ 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> accessed 17 September 2021.

⁵⁷ 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.

⁵⁸ 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).⁵⁹ 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.⁶⁰ 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)⁶¹ 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.⁶² 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.

⁵⁹ 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.

⁶⁰ 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.

⁶¹ Ministry of Justice (n 59).

⁶² 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.⁶³ 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).⁶⁴ 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

⁶³ Bates and Hester (n 12).

⁶⁴ 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.⁶⁵ Similarly, Bates and Hester found that for some perpetrators the presence of a protective injunction was sufficient to regulate their behaviour.⁶⁶ 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'.⁶⁷

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.⁶⁸ 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

⁶⁵ Cordier et al (n 12).

⁶⁶ Bates and Hester (n 12).

⁶⁷ Humphreys and Thiara (n 12), 201.

⁶⁸ 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> 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.⁶⁹ 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.⁷⁰ 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.⁷¹ 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 2019,⁷² 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

⁶⁹ 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.

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

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

⁷² 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.⁷³

Reflecting findings made in earlier studies that without a professional advocate litigants struggle to understand the law and litigation procedure,⁷⁴ 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.⁷⁵ 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'.⁷⁶

⁷³ J. Organ and J. Sigafos, *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> accessed 18 September 2021.

⁷⁴ 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.

⁷⁵ Speed et al (n 9).

⁷⁶ 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.⁷⁷ 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'.⁷⁸

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 evidence⁷⁹ 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,

⁷⁷ Ibid.

⁷⁸ Ibid, 7.

⁷⁹ 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.⁸⁰ 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.⁸¹ 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 be (or which have already been) implemented under The Domestic Abuse Act 2021. Nonetheless, it is important in supporting that there is a need for reform in this area. From Spring 2022, 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.⁸² 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, as of October 2021, victims of domestic abuse are automatically eligible for special measures in family proceedings because the court will assume their ability to participate or give evidence is diminished by reason of vulnerability.⁸³ This is a change from the previous position 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 strengthens the law, it does not guarantee protection, as whether special measures are ultimately provided will still depend on whether the court considers

⁸⁰ 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.

⁸¹ 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 > accessed 27 September 2021.

⁸² Domestic Abuse Act 2021, s 65.

⁸³ Domestic Abuse Act 2021, s 63.

they are necessary to assist 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'.⁸⁴ Provisions for third party applications for protective orders are not novel and are already in place for forced marriage protection orders⁸⁵ and FGM protection orders.⁸⁶ 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.⁸⁷ 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'.⁸⁸ 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'.⁸⁹ 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)⁹⁰ and families and friends of the person to be protected.⁹¹ 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.⁹² 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)'.⁹³ This is broader than forced marriage/FGM

⁸⁴ 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).

⁸⁵ Family Law Act 1996, s 63.

⁸⁶ Female Genital Mutilation Act 2003, sch 2 para 1.

⁸⁷ 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 Law*, 403-21.

⁸⁸ Burton (n 87), 139.

⁸⁹ Humphreys and Kaye (n 87), 406.

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

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

⁹² Domestic Abuse Act 2021, s 28(2)(b).

⁹³ 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.⁹⁴ 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.⁹⁵

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.⁹⁶ 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.⁹⁷ 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'.⁹⁸ 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.⁹⁹ The importance of obtaining the victim's views was clarified in *R v Picken*¹⁰⁰ 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.'¹⁰¹ 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)*¹⁰² 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

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

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

⁹⁶ Johnson (n 53), 8.

⁹⁷ Domestic Abuse Act 2021, s 33(1).

⁹⁸ Home Office (n 20), 50.

⁹⁹ 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.

¹⁰⁰ *R v Picken* [2006] EWCA Crim 2194

¹⁰¹ *Ibid*, 17

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

make their own decision about the most appropriate form of action/protection.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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'.¹⁰⁷ The present 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)'.¹⁰⁸ 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.¹⁰⁹ 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

¹⁰³ 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.

¹⁰⁴ 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.

¹⁰⁵ Durfee (n 76), 28.

¹⁰⁶ Kelly et al, (n 56).

¹⁰⁷ 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.

¹⁰⁸ Bates and Hester (n 12), 138.

¹⁰⁹ K. Richardson and A. Speed (n 104).

required 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.¹¹⁰ 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 or greater.¹¹¹ 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'.¹¹² 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.¹¹³

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'.¹¹⁴ 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

¹¹⁰ Home Office (n 20).

¹¹¹ 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).

¹¹² *G v G (Occupation Order)* [2000] 3 FCR 53.

¹¹³ Family Law Act 1996, s 35(6); Family Law Act 1996, s 36 (6).

¹¹⁴ *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'.¹¹⁵ Further, 'harm' has been interpreted broadly and in *Re L (Children) (Occupation Order)* it was stated that 'harm' was not limited to physical harm.¹¹⁶ 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.¹¹⁷

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.¹¹⁸ The court must be satisfied on the balance of probabilities that judicial intervention is required to protect the applicant from the respondent.¹¹⁹ 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'.¹²⁰ 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.¹²¹ 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

¹¹⁵ *Dolan v Corby* [2011] EWCA 1664.

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

¹¹⁷ *Chalmers v Johns* [1999] 1 FLA 392.

¹¹⁸ Family Law Act 1996, s 42(5).

¹¹⁹ *C v C* [2001] EWCA Civ 1625.

¹²⁰ *Burton* (n 13), 110.

¹²¹ 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.¹²² 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.¹²³ The court may grant leave only if it is satisfied that the child has sufficient understanding to make the proposed application.¹²⁴ 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’

¹²² The Domestic Abuse Act 2021, s 27(1).

¹²³ The Family Law Act 1996, s 43(1).

¹²⁴ 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.¹²⁵ 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'¹²⁶ 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'.¹²⁷ 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 end¹²⁸ or dealing with the ownership of the property as part of financial relief proceedings.¹²⁹ The

¹²⁵ The Domestic Abuse Act 2021, s 38(3).

¹²⁶ 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.

¹²⁷ *Ibid.*

¹²⁸ 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.

¹²⁹ 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.¹³⁰ 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.¹³¹ 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.¹³²

(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.¹³³ This practice was confirmed by the professionals surveyed. This makes

¹³⁰ Ministry of Justice (n 59).

¹³¹ 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> accessed 1 October 2021.

¹³² *Chechi v Bashier and Others* [1999] Fam 528.

¹³³ 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 1996.¹³⁴ 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.¹³⁵ 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

¹³⁴ Domestic Abuse Act 2021, s 34.

¹³⁵ Bates and Hester (n 12).

and Wales in which that person lives¹³⁶ 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.¹³⁷ Whilst there are limitations on the courts' powers to enforce compliance with such terms,¹³⁸ 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'¹³⁹. 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)'.¹⁴⁰ 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

¹³⁶ Domestic Abuse Act 2021, s 35.

¹³⁷ 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.

¹³⁸ *Nwogbe v Nwogbe* [2000] 2 FLR 774 [2000] 3 FCR 345.

¹³⁹ Domestic Abuse Act 2021, s 35.

¹⁴⁰ 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.¹⁴¹ It is well documented that separations can trigger abusive conduct.¹⁴² 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.¹⁴³ 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 unadvocated 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'*.¹⁴⁴ 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

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

¹⁴² Humphreys and Thiara (n 12).

¹⁴³ Humphreys and Thiara (n 12), 201.

¹⁴⁴ Cordier et al (n 12), 20.

abuse, as it is well documented that violence disproportionately takes place in the family home.¹⁴⁵ 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’.¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸ 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 existence¹⁴⁹. The Domestic Abuse Act 2021 states that a DAPO ‘takes effect on the day on which it is made’¹⁵⁰ 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

¹⁴⁵ 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).

¹⁴⁶ Humphreys and Thiara (n 12), 204.

¹⁴⁷ Ibid.

¹⁴⁸ Cordier et al (n 12).

¹⁴⁹ Family Law Act, s 42A (2).

¹⁵⁰ 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 abuse¹⁵¹ and that compliance relies on the ‘threat of consequences for breach’.¹⁵² 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.¹⁵³ This is a positive development given the threat of police involvement is usually a more powerful deterrent than the threat of civil action.¹⁵⁴ 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.¹⁵⁵

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.¹⁵⁶ 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.¹⁵⁷ 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

¹⁵¹ Humphreys and Thirara (n 12).

¹⁵² Bates and Hester (n 12), 135.

¹⁵³ Domestic Abuse Act 2021, s 39.

¹⁵⁴ Bates and Hester (n 12).

¹⁵⁵ Domestic Abuse Act 1996, s 35(6).

¹⁵⁶ 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.

¹⁵⁷ 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'.¹⁵⁸ 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.¹⁵⁹ 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'*.¹⁶⁰

Academics have queried whether perpetrators may be more likely to comply with an order obtained by a third party, particularly the police.¹⁶¹ 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.¹⁶² 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.¹⁶³ The same could be argued of DAPOs in that applying for the order may give third parties 'fuller ownership'.¹⁶⁴ 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 offence¹⁶⁵ 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.¹⁶⁶ 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

¹⁵⁸ E. Hitchings (n 103)

¹⁵⁹ Humphreys and Kaye (n 87).

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

¹⁶¹ Humphreys and Kaye (n 87); Law Commission (n 14).

¹⁶² Burton (n 87).

¹⁶³ *Ibid*, 142.

¹⁶⁴ *Ibid*.

¹⁶⁵ 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.

¹⁶⁶ 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 between 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.¹⁶⁷ The findings of Durfee's study also lends some support to this suggestion.¹⁶⁸ This is likely to be particularly true of domestic abuse support services who already regularly support victims through family court proceedings¹⁶⁹, 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

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

¹⁶⁸ Durfee (n 76).

¹⁶⁹ A. Speed, 'Domestic Abuse and the Provision of Advocacy Services: Mapping Support for Victims in Family 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’.¹⁷⁰ 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.¹⁷¹ 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.

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

¹⁷¹ R. Klein (n 95); C. Baker et al (n 19).

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**CLINICAL LEGAL EDUCATION AS AN EFFECTIVE TOOL FOR IMPROVING
THE ACCESSIBILITY OF PROTECTIVE INJUNCTIONS FOR VICTIMS OF
DOMESTIC ABUSE: A CASE STUDY EXAMPLE OF THE MODELS OF SUPPORT
AVAILABLE AT NORTHUMBRIA UNIVERSITY**

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ABSTRACT

Protective injunctions are at the forefront of the family justice system's response to protecting victims of domestic abuse. The accessibility of orders, however, has been compromised by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which has reduced the availability of public funding for victims of domestic abuse and led to an increase in victims representing themselves in such proceedings. Research indicates that without legal support, a victim's prospects of securing protection can be adversely affected, demonstrating a need for pro bono assistance for those who cannot afford to pay privately for legal services. Whilst the provision of pro bono support in areas of unmet need is a principal aim of clinical legal education, research shows that few clinical programs in England and Wales offer specialist services for victims of domestic abuse. This paper therefore considers the role that clinical legal education can play in improving the accessibility of protective injunctions. Part one sets out a review of recent reforms within the family justice system and analyses how they have created an increased demand for pro bono legal

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support for victims of domestic abuse. Part two examines the clinical landscape and the potential benefits to students of providing support to victims. By drawing on the case study of the Student Law Office at Northumbria University, part three sets out the various models of clinical legal education that may be utilised to support victims of domestic abuse. The benefits and limitations of each option for students and victims will also be considered. The paper is a helpful point of reference for clinicians and family law practitioners working in partnership with law school clinics who are considering offering support in this area.

INTRODUCTION

Since the 1970s protective injunctions have been at the forefront of the family justice system's response to protecting victims of domestic abuse. The demand for protective injunctions can be attributed, in part, to the low rates at which domestic abuse offences are prosecuted¹ and to victims prioritising their protection and that of any relevant children above the punishment of the perpetrator.² Over the last decade, however, reforms have taken place within the family justice system which have compromised

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¹ Over the last five years, there has been a decrease in the number of successful domestic abuse prosecutions year on year – from 70,853 in 2017, to 45,532 in 2020. This represents a fraction of the 758,941 domestic abuse offences which were recorded to the police in England and Wales in 2020. See Office of National Statistics, *Domestic abuse in England and Wales: year ending March 2017* (ONS: 2017); Office of National Statistics, *Domestic abuse in England and Wales overview: November 2020* (ONS: 2020).

² C. McGlynn, J. Downes, J and N Westmarland, 'Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences' in E. Zinsstag and M Keenan eds *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (2017) Routledge Frontiers of Criminal Justice, 179–191; J Herman, 'Justice from the Victim's Perspective' (2005) 11:5 *Journal of Violence Against Women*, 571-602.

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the accessibility of protective orders. The most notable change has been the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which has reduced the availability of public funding for victims of domestic abuse.³ Research indicates that LASPO has led to an increase in both the number of victims who do not take any action to secure protection through the family courts and the number of victims appearing as litigants in person in applications for protective injunctions.⁴ Many litigants in person experience difficulties navigating the court process⁵ and this is exacerbated for victims of domestic abuse whose ability to effectively participate in proceedings may be compromised by having to face their abuser in court.⁶ Research indicates that without legal support, a victim's prospects of securing protection can also be adversely affected, demonstrating a need for pro bono assistance for those who cannot afford to pay privately for legal services.⁷ Whilst the provision of pro bono support in areas of unmet need is a principal aim of clinical legal education, research shows that

³ D. Hirsch, *Priced out of Justice: Means Testing Legal Aid and Making Ends Meet* (Loughborough University Centre for Research in Social Policy, 2018).

⁴ Rights of Women, *Evidencing Domestic Violence: Nearly Three Years on* (London: Rights of Women, 2015); Ministry of Justice and National Statistics, *Family Court Statistics Quarterly: October to December 2020* (Ministry of Justice and National Statistics, 25 March 2021).

⁵ 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).

⁶ J. Birchall and S. Choudhry, *What About my Right not to be Abused? Domestic Abuse, Human Rights and the Family Courts* (Women's Aid, 2018); M. Coy, K. Perks, E. Scott and R. Tweedale, *Picking up the Pieces: Domestic Violence and Child Contact* (Rights of Women, 2012); 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.

⁷ A. Speed and K. Richardson, 'Should I Stay or Should I Go Now? If I Go There will be Trouble and If I Stay there will be Double: An Examination into the Present and Future of Orders Regulating the Family Home in Domestic Abuse Cases in England and Wales, Unpublished Paper; A. Durfee, 'Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders' (2009) 4(1) *Feminist Criminology*, 7-31.

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few clinical programs in England and Wales offer specialist services to support victims of domestic abuse.

Against this backdrop, this paper considers the role that clinical legal education can play in improving the accessibility of protective injunctions. Accessibility is interpreted broadly and within the paper is used to refer to the ease with which victims can access the family court to pursue an application and thereafter navigate the court process. Further, it refers to the rates at which orders are granted compared to the rates at which they are applied for, since this is indicative of a victims' prospects of securing protection. Part one sets out a review of recent reforms within the family justice system and analyses how they have created an increased demand for pro bono legal support for victims of domestic abuse. Part two then examines the clinical landscape and the potential benefits to students of providing such support. By drawing on the case study of the Student Law Office (SLO) at Northumbria University, part three sets out the various models of clinical legal education that may be utilised to support victims of domestic abuse. The benefits and limitations of each option for students and victims will also be considered. The paper is a helpful point of reference for clinicians and family law practitioners working in partnership with law school clinics who are considering offering support in this area.

PART ONE: A REVIEW OF THE CONTEXT AND EXISTING LITERATURE

Injunctive protection for victims of domestic abuse

In England and Wales, victims of domestic abuse can apply for injunctive protections in the civil courts or at the conclusion of a criminal trial (post-conviction or acquittal) under the Protection from Harassment Act 1997. More commonly, however, injunctive relief will be sought through the family courts because of the wider range of orders available and because ‘the issues surrounding an abusive relationship can rarely simply be dealt with by way of an injunctive order alone and other interrelated family proceedings may be required’.⁸ The two main forms of injunctive protection available through the family courts are non-molestation orders and occupation orders (although more specialised forms of protection exist in forced marriage protection orders⁹ and female genital mutilation protection orders¹⁰). Non-molestation orders aim to ‘prevent domestic abuse, stalking and harassment by prohibiting the offender from contacting the victim and/or attending certain places’.¹¹ In contrast, occupation orders regulate the family home. They can be used to declare existing rights in the

⁸ 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*, 324.

⁹ The Forced Marriage (Civil Protection) Act 2007 introduced provisions into section 63A(1) of the Family Law Act 1996 to protect a person being forced into a marriage, from any attempt at being forced into a marriage and by providing protection and assistance for those already forced into a marriage.

¹⁰ Section 73 of the Serious Crime Act 2015 inserted a new section 5A and Schedule 2 into the FGMA 2003 making provision for FGM protection orders.

¹¹ 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*, 135.

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property, determine who should or should not live in the property and can potentially exclude one of the parties from living in or attending a specified area around the home.¹² The remedies available to protect victims of domestic abuse are set to undergo reform shortly with the introduction of Domestic Abuse Protection Orders (DAPOs) through the Domestic Abuse Act 2021. 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'¹³. Whilst there is no intention at this point to repeal non-molestation orders and 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'.¹⁴ DAPOs are likely to be more accessible than non-molestation orders and occupation orders as it is anticipated that third parties (i.e. the police, domestic abuse support services, and friends and family of the victim who have leave of the court) will be able to pursue an application on the victims' behalf. Nonetheless, it is still envisaged that victims will be the main category of applicant given that protection orders are praised for empowering victims to decide when and how to access protection.¹⁵ At this point, however, there is no set date for the introduction of DAPOs, as the Home Office have announced their intention for regional pilots prior to a full nationwide rollout.

¹² Family Law Act 1996, ss 33-38.

¹³ Home Office, *Policy Paper: Domestic Abuse Protection Notices/Orders Factsheet* (Home Office, 2020).

¹⁴ *Ibid.*

¹⁵ Bates and Hester (n 11).

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Research indicates that for many victims, protective injunctions are an effective means of reducing post-separation violence and abuse. Cordier's systematic review, for example, found that across 25 studies, protective orders reduced the quantitative occurrence of abuse.¹⁶ This aligns with the findings of Humphreys and Kaye's study that the presence of a protective order made some women feel better protected.¹⁷

Proceedings for non-molestation orders and occupation orders are started by completing the relevant application form¹⁸ and preparing a witness statement which addresses the circumstances leading to the application. It is anticipated that the same procedural requirements will apply for DAPOs in most cases.¹⁹ There is currently no court fee to apply. The court may grant an injunction without notice to the respondent where it considers it 'just and convenient to do so'²⁰, having regard to the circumstances set out in the legislation.²¹ If the application is made without notice, the reasons why notice has not been given must clearly be stated in the witness statement.²² Where an order is made following a without notice hearing, the court must afford the respondent an opportunity to make representations relating to the order as soon as is just and convenient at a full hearing.²³ At the 'return' hearing,

¹⁶ 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.

¹⁷ 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.

¹⁸ Form FL401 applies to both forms of protection.

¹⁹ Domestic Abuse Act 2021, ss 27-49.

²⁰ Family Law Act 1996, s 45(1).

²¹ Family Law Act 1996, s 45(2).

²² Family Procedure Rules 2010, rule 10.2(4).

²³ Family Law Act 1996, s 45(3).

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negotiations will take place to determine whether the respondent is in agreement to the order continuing, or whether a contested hearing to determine the truth of the allegations is required. Proceedings which are not contested may therefore be concluded relatively quickly (i.e., within one month of the application) whilst those which are contested are likely to take up to six months to reach a disposal.

Barriers for victims of domestic abuse to access the family courts and secure protection

Reduced accessibility of legal advice and representation

The family justice system has undergone significant reform over the last decade, driven by the introduction of LASPO which came into effect in April 2013. LASPO removed legal aid from the scope of most private family law cases, except where strict criteria are met regarding domestic abuse (including forced marriage and female genital mutilation), child abduction or child abuse.²⁴ Victims applying for a protective injunction do not need to provide evidence that they have been a victim of domestic abuse to secure funding (as they would if they were starting divorce or child arrangements proceedings), however they must still satisfy the means and merits tests, which research indicates is prohibitive for many victims.²⁵ LASPO introduced changes in respect of means testing for legal aid including freezing the financial

²⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 1.

²⁵ Hirsch (n 8).

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thresholds, requiring all applicants to have capital under the assessed threshold and increasing the financial contributions which applicants may be required to make towards their legal costs. Despite the government's objective that victims of domestic abuse should continue to be eligible for legal aid, research suggests that in 2017, over 40% of victims were no longer able to access public funding.²⁶ More recently, there have been judicial developments which should positively impact the availability of legal aid in applications for protective injunctions, such as the Judgment in *R (GR) v Director of Legal Aid Casework*²⁷, which will allow the Legal Aid Agency to afford a 'nil' value to capital that victims cannot access ('trapped capital') in cases where they would otherwise pass the means assessment. Further, as a result of a separate legal challenge brought on behalf of RH by the Public Law Project and supported by The Law Society, the government agreed to change the rules on 'imaginary capital' by allowing for the full value of a person's mortgage to be deducted when considering the value of a property for the means test. This change was subsequently implemented in January 2021 through the Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020. Nonetheless, even with these deductions some victims will still have capital over the threshold. Other victims will not satisfy the means test based on having an income that exceeds the prescribed limits. As such,

²⁶ Legal Aid Practitioners Group (LAPG) *Manifesto for Legal Aid* (Second Edition, 2017).

²⁷ *R (GR) v Director of Legal Aid Casework* [2020] EWHC 3140 (Admin)

this development will not result in all victims of domestic abuse being eligible for funding.²⁸

Research indicates that the availability of funding directly impacts a victim's decision to seek protection. A survey of 239 women in the UK found that over half took no action in respect of their family law problem because they were not eligible for funding.²⁹ Similar findings were reported by Speed who noted that more than half (54%) of the domestic abuse specialists in her study felt that barriers to funding led to an increase in service users not pursuing legal claims where they may have done so previously.³⁰ Alternatively, victims who do not qualify for funding but who cannot afford to instruct a solicitor on a privately paying basis may, through limited alternatives, choose to represent themselves should they pursue proceedings.³¹ Statistics on representation group all 'domestic violence' family court cases together. However, they demonstrate a yearly increase in the number of unrepresented applicants since LASPO was introduced in April 2013, with 19.3% of applicants self-representing in applications for injunctive protection in 2013, compared to 40.3% in 2019.³²

²⁸ Speed and Richardson (n 7).

²⁹ Rights of Women (n 4).

³⁰ 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.

³¹ Trinder et al (n 5).

³² Ministry of Justice and National Statistics (n 4).

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Difficulties securing legal advice and representation have been compounded by austerity measures which have de-funded support services and charitable organisations who otherwise may have been well placed to guide victims through the court process on a pro bono basis.³³ As a result, it is now common for third sector organisations to provide one-off 'general' information about the court process (often by unqualified volunteers) rather than tailored advice or full casework due to high levels of demand.³⁴ Whilst domestic abuse support services are likely to be an exception to this, with research showing that many organisations have stepped up to offer some casework in family court proceedings, often these services are limited in the amount of time they can work with victims.³⁵ Further, support workers who are not qualified as Independent Domestic Violence Advisors (IDVAs) receive very little (if any) legal training. Research suggests that as a result, some professionals misunderstand the law or fail to appropriately manage victims' expectations about the legal process.³⁶ This has also been recognised by the Transparency Project who noted that 'parents are often given (well meaning) information or advice by support agencies (*domestic abuse services...* etc) that may include a mixture of what those

³³ J. Organ and J. Sigafoos, *The Impact of LASPO on Routes to Justice. Research Report 118* (Equality and Human Rights Commission, England; 2018).

³⁴ *Ibid.*

³⁵ Speed (n 30).

³⁶ *Ibid.*

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services *think* the law *is* or *should* be, but which isn't really what is likely to happen at all'.³⁷

Research demonstrates that, at least in the early days of the pandemic, Covid-19 exacerbated pre-existing barriers to accessing advice and support for many victims. The respondents to Speed et al's study highlighted the existence of physical barriers to seeking support where victims remained in the same home as their perpetrator.³⁸ In addition, they considered that as most victims are women, they were disproportionately more likely to take on physical and psychological burdens as caregivers, resulting in time barriers to accessing support. Ivendic et al found that whilst many support services had experienced a greater demand for their services, this was all driven by third party reporting/referrals, suggesting that under-reporting of domestic abuse was still present, particularly during periods of lockdown.³⁹ The impact of reduced support was exacerbated by an increase in the rates at which non-molestation orders and occupation orders were sought over the first year of the pandemic.⁴⁰ Although there has now been some return to 'normality' following the vaccine rollout, it is likely that some services will have not survived the pandemic

³⁷ The Transparency Project, *How do The Family Courts Deal with Cases about Children Where There Might be Domestic Abuse? A Guidance Note for Parents & Professionals* (The Transparency Project; 2018), 9-10.

³⁸ 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.

³⁹ R. Ivandic, T. Kirchmaier and B. Linton, *Changing Patterns of Domestic Abuse During Covid-19 Lockdown: Discussion Paper*. (Centre for Economic Performance, 2020).

⁴⁰ A. Speed, K. Richardson, C. Thomson and L. Coapes, 'Covid-19 and the Family Courts: Key Practitioner Findings in Applications for Domestic Violence Remedy Orders' (2021) 33:3 *Child and Family Law Quarterly*, 215-236.

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whilst others will still be operating at a reduced capacity. Statistics from January to March 2021 suggest that rates of applications for injunctive protection have not yet slowed and are 12% higher than the same period in 2020.⁴¹

Navigating the family court as a victim litigant in person

It is well documented that without a professional advocate, many litigants experience difficulties understanding the law and legal process. Moorhead and Sefton found, for example, that 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'.⁴² Unrepresented litigants are also more likely to experience difficulties in securing and funding evidence to help prove their case.⁴³ These issues are exacerbated for victims of abuse whose effective participation may be compromised by facing their perpetrator in the courtroom, notwithstanding that improvements to the current law around special measures and prohibitions on victims being cross examined by their perpetrator are set to be introduced by the Domestic Abuse Act 2021.⁴⁴

⁴¹ Ministry of Justice and National Statistics, *Family Court Statistics Quarterly: January to March 2021* (Ministry of Justice and National Statistics; 2021).

⁴² R. Moorhead and M. Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (London: Department for Constitutional Affairs; 2005), 256.

⁴³ 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*, 135-152.

⁴⁴ Family Procedure Rules 2010 rule 3A and Practice Direction 3AA; Domestic Abuse Act 2021, ss 63 and 65.

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Studies indicate that without legal representation victims' prospects of securing injunctive protection may be compromised. Durfee, for example, noted that 'even with 'victim-friendly' procedures and forms, individuals without legal representation are significantly less likely to have their requests for protection orders granted'.⁴⁵ Her study 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'.⁴⁶ 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. Whilst Durfee's study was conducted in the USA, similar findings have been reached in relation to applications for injunctive protection in

⁴⁵ Durfee (n 7), 7.

⁴⁶ Ibid, 24.

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England and Wales. Speed and Richardson's study into the accessibility of occupation orders, for example, found evidence of applications being refused for containing substantive deficits (i.e., insufficient information about the abuse) and minor procedural deficits (i.e., applications for occupation orders and non-molestation orders being filed as two separate application forms rather than on the same form), whilst a separate study also suggested that this issue continued once hearings were moved online because of Covid-19, as part of the Remote Access Family Court.⁴⁷

PART TWO: CLINICAL LEGAL EDUCATION AND SUPPORT FOR VICTIMS OF DOMESTIC ABUSE

The literature examined in the preceding section demonstrates that there is a clear need for pro bono legal advice and representation for victims of domestic abuse in applications for injunctive relief. Given that some of the central goals of clinical legal education are to render services to those who are unable to afford legal services, challenge injustice and imbue students with a social and professional responsibility to pursue social justice in society⁴⁸ supporting victims of domestic abuse in applications for injunctive protection would appear to be a worthwhile endeavour for clinical programmes, capable of promoting and upholding these ambitions. This has been

⁴⁷ Speed and Richardson (n 7), Speed et al (n 40).

⁴⁸ I. Byron, *The Relationship Between Social Justice and Clinical Legal Education: A Case Study of The Women's Law Clinic, Faculty of Law, University of Ibadan, Nigeria* (2012) Paper presented at the 11th International Journal of Clinical Legal Education Conference, Entering the Mainstream: Clinic for All.

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recognised by the American academics Breger and Hughes, who identify four main benefits – for victims and the students who support them – of incorporating teaching about domestic abuse into the clinical curriculum.⁴⁹ Firstly, they argue that it promotes access to justice for families in need. This argument draws on the idea considered above that ‘the legal system is currently confronted with increasing numbers of victims of family violence, primarily children and women, who are in dire need of legal representation and facing a system that simply cannot accommodate them... the unfortunate reality is that but for student clinic representation, many litigants would have no representation at all’.⁵⁰ Secondly, they argue that clinical teaching in the context of domestic abuse can provide an important foundational tool for teaching lawyering skills. Whilst this is arguably true of most practice areas, they note that cases involving domestic abuse typically possess characteristics that make them ‘particularly appropriate for clinical study’ including that applications for injunctive protection return to court regularly over a short period of time.⁵¹ Thirdly, Breger and Hughes recognise that domestic abuse is an evolving area of law and practice which intersects with many other legal topics which are typically taught in an undergraduate legal curriculum including personal injury/trespass to the person within tort law and offences against the person under criminal law. Finally, they argue that enabling students to engage with domestic abuse law in clinic can be a vehicle to inspire law

⁴⁹ M. Breger and T. Hughes, ‘Advancing the Future of Family Violence Law Pedagogy: The Founding of a Law School Clinic’ (2007) 41 *University of Michigan Journal of Law Reform*, 167-188.

⁵⁰ *Ibid*, 174.

⁵¹ *Ibid*, 176.

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graduates to practice family violence law and to educate the future bar and bench. Whilst inevitably not all students will go on to become family practitioners, law students are 'future judges, policy specialists, prosecutors and criminal defence attorneys' who need to be 'well-informed and sensitive to the issues they will encounter in practice'.⁵² Although Breger and Hughes were writing in the context of the American legal system, similar issues have been identified in England and Wales where despite there being extensive practice guidance, some professionals (including legal practitioners, the police and the judiciary) demonstrate a poor understanding of the dynamics of domestic abuse.⁵³

The above argument highlights a need for greater understanding of the impact of trauma and vulnerability in family court proceedings. Canadian clinicians Smythe et al recognise that practising areas such as domestic abuse law in clinic can address this gap by enabling students to become 'trauma informed' practitioners, capable of understanding 'how trauma occurs and its consequences, as well as being educated about the political context in which it has arisen'.⁵⁴ In turn, this enables clinical students to 'communicate, interpret narrative, and build trust – all of which are

⁵² Ibid, 179.

⁵³ R Hunter, A Barnett and F Kaganas, 'Introduction: Contact and Domestic Abuse' (2018) 40:4 *Journal of Social Welfare and Family Law*, 401-425; Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (Ministry of Justice: 2020), 1-216; 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.

⁵⁴ G. Smyth, D. Johnstone and J. Rogin, 'Trauma-Informed Lawyering in the Student Legal Clinic Setting: Increasing Competence in Trauma Informed Practice' (2021) 28:1 *International Journal of Clinical Legal Education*, 161.

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foundational to the lawyer-client relationship'.⁵⁵ Smythe et al acknowledge there are particular advantages of such work taking place in a clinical setting. Whilst recognising that trauma is a universal human experience, they also argue that it is 'experienced more often, and often with greater impact, by people who are marginalised within dominant power structures'.⁵⁶ This makes understanding trauma particularly relevant for lawyers in student clinics given that many clients who seek their support experience multiple intersecting forms of marginalisation.⁵⁷

Building on the idea that teaching clinical students to litigate on behalf of women subjected to abuse exposes them to different approaches to lawyering, Goodmark argues that clinics can develop students' understanding and experience of 'client-centered lawyering', which prioritises the empowerment of victims through assisting women to 'make their own choices and then working with them to realise those choices'.⁵⁸ She also argues, however, that with their focus on challenging injustice, clinics also encourage students to think beyond advocating for a particular individual and consider the ways that 'systems work to benefit or harm their clients and what they can do to improve or change those systems'.⁵⁹ In turn, they can contribute to the development of domestic abuse law and policy. She notes that in comparison to campaigners, practitioners and law makers, students can be 'less dogmatic about the

⁵⁵ Ibid, 149.

⁵⁶ Ibid, 150.

⁵⁷ Ibid.

⁵⁸ L. Goodmark, 'The Role of Clinical Legal Education in the Future of the Battered Women's Women' (2013) 22 *Buffalo Journal of Gender, Law and Social Policy*, 32.

⁵⁹ Ibid.

appropriate responses to domestic violence, less tied to the current law and policy and more open to thinking about a range of experiences and opportunities, enabling them to be more creative in their thinking'.⁶⁰ They are also more willing to acknowledge the limitations of the law in addressing domestic abuse and think about 'ways to find justice beyond the justice system'.⁶¹ This could include engaging clients in restorative justice, mediation and community-based justice. As this paper will go on to consider in part three, such forms of alternative dispute resolution continue to be largely discounted as a means of achieving a resolution for victims of domestic abuse, both within and outside a clinical setting in England and Wales.

In one of the only studies to discuss domestic abuse and clinical legal education in the context of England and Wales, Speed and Richardson evaluated student participation in the 16 Days of Activism against Gender-Based Violence campaign, part of which involved students providing one-off advice to victims of domestic abuse as part of an outreach clinic.⁶² Supporting Smythe et al, Speed and Richardson found that students who participated in the project demonstrated increased competency in understanding the breadth and scope of abusive conduct and recognising triggers that may indicate a client had been subject to abuse. In turn, this allowed the students to ask more effective fact-find questions, produce higher quality research and offer more tailored

⁶⁰ Ibid, 44.

⁶¹ Ibid, 35.

⁶² A. Speed and K. Richardson, 'Promoting Gender Justice Within the Clinical Curriculum: Evaluating Student Participation in the 16 Days of Activism against Gender-Based Violence Campaign' (2019) 26:1 *International Journal of Clinical Legal Education*, 87-131.

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support. Their data also suggests that law students are often drawn to legal issues which allow them to support individuals through a time of crisis. The students described finding value in the work, with feedback including 'working in this project has helped me learn and grow and I think become a more well-rounded individual never mind practitioner' and 'working in communities and with women where they seemingly have no other access to legal advice made it more satisfying that I was able to be a part of it'.⁶³ Supporting Breger and Hughes, following their participation in the campaign several of the students decided to pursue a career working with victims of domestic abuse, albeit not in the legal sector.

Reflecting that many clinics with an offering for victims of domestic abuse are based in the USA and Canada, most of the literature considered above is based on the experiences of North American clinicians. It is estimated, for example, that in 2010, there were 40 clinics in the USA dedicated primarily to domestic violence and a further 39 clinics primarily practising family law which were also likely to deal with domestic abuse cases.⁶⁴ Goodmark attributes this, in part, to the availability of funding through The Legal Assistance for Victims Grant Program which many legal clinics have been able to access. She notes that the funding was a 'tremendous boon for domestic violence clinics, because it made money available to provide civil legal services and train future generations of lawyers to provide civil legal assistance to women

⁶³ Ibid, 115.

⁶⁴ Goodmark (n 58), 30.

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subjected to abuse'.⁶⁵ Accordingly, she recognises that clinical legal education and the Violence against Women and Girls (VAWG) movement have had 'parallel and intersecting paths' with both movements developing alongside each other.⁶⁶ In contrast, the clinical legal education movement in England and Wales developed much later than in the USA.⁶⁷ Further, in England and Wales very few law school clinics hold legal aid contracts, and most are funded entirely by their institution, leading to restrictions both on the areas of practice and the extent of work that can be carried out for clients.⁶⁸

Whilst 70% of the 78 law school clinics in the United Kingdom who responded to the 2020 LawWorks survey reported providing family law services, less than 30% offered services in relation to domestic abuse.⁶⁹ This is an increase, however, on the position in 2014 when only 10 clinics offered family law services, one clinic specialised in supporting victims of domestic abuse and four clinics reported sending students on externships with a partner organisation which specialised in domestic abuse.⁷⁰ In terms of services offered, half of the respondents to the 2020 survey reported that their clinic provided generalist advice only, half provided quasi-legal services such as form

⁶⁵ Ibid, 31.

⁶⁶ Ibid, 27.

⁶⁷ O. Drummond and G. McKeever, *Access to Justice through University Law Clinics* (Ulster University and the Legal Education Foundation, 2015).

⁶⁸ One exception to the basic position that law clinics in England do not offer legally aided services is the University College London who were awarded a contract for housing and community care law in 2018.

⁶⁹ J. Sandbach and R. Grimes, *Law School Pro Bono and Clinic Report 2020* (LawWorks and CLEO; 2020).

⁷⁰ D. Carney, F. Dignan, R. Grimes, G. Kelly and R. Parker, *The LawWorks School Pro Bono and Clinic Report 2014* (LawWorks 2014).

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filing and McKenzie Friend services, 36% provided specialist advice and around 20% offered representation in court proceedings for clients.⁷¹ Either alongside or instead of client services, 30% of clinics engaged in law reform projects and nearly 70% offered students an opportunity to undertake public legal education. The conclusions that can be drawn from this data are that whilst domestic abuse is a growing area of practice in clinics, it is still relatively uncommon for students to engage in this area within their clinical curriculum. Further, for those that do, it is often in relation to discrete aspects of a case (i.e., akin to an unbundled service) or through providing non case work related services.

PART THREE: METHODS OF INCORPORATING SUPPORT FOR VICTIMS OF DOMESTIC ABUSE INTO THE CLINICAL CURRICULUM – THE CASE STUDY OF THE STUDENT LAW OFFICE

All Northumbria University students enrolled on the four-year M Law Exempting law degree (a programme which combines the undergraduate law degree with the requirements of the Legal Practice Course (LPC) or Bar Practitioner Training Course (BPTC)) undertake a year-long assessed clinical module in the SLO in the penultimate year of the degree programme. This option is also available to students on the LLB programme, and for LPC and BPTC students as an elective module in the second

⁷¹ Sandbach and Grimes (n 69).

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semester. Students provide pro bono advice and potentially representation to members of the public under the supervision of a qualified solicitor, barrister, or caseworker. Alongside their client work, students may also engage in public legal education work which aim to educate members of the public about their legal rights and responsibilities. More recently, with the development of a policy clinic within the SLO⁷² students have also been able to work in partnership with an external organisation to research, critique and make proposals for reforming the existing law. Around 200 students undertake work in the clinic each academic year.⁷³

Two of the clinicians (Kayliegh Richardson and the author) are family solicitors specialising in supporting victims of domestic abuse. Between them, they supervise around 24 clinical students each year. The development of initiatives to support victims of domestic abuse was the result of these two practitioners joining the SLO team in 2015 and 2016 respectively, together with an increase in requests for support within the clinic from victims of domestic abuse often in desperate need for protection and with no other prospects of assistance. It should be noted that this increase in requests is anecdotal given that the SLO does not maintain a record of the number of enquiries specifically from victims seeking injunctive protection and indeed, any such records would likely be unhelpful given that it is often only after receiving advice that

⁷² R. Dunn, L. Bengtsson and S. McConnell, 'The Policy Clinic at Northumbria University: Influencing Policy/Law Reform as an Effective Educational Tool for Students' (2020) 27:2 *International Journal of Clinical Legal Education*, 68-102.

⁷³ Information about the Student Law Office can be accessed at: <https://www.northumbria.ac.uk/about-us/academic-departments/northumbria-law-school/study/student-law-office/>.

some victims become aware that they require protection. Whilst advice and representation services are available every academic year, some of the other models of support operate on a more discrete basis, for example, where a partner organisation approaches the SLO to engage in a collaborative venture. The different initiatives, together with the benefits and limitations associated with each model, are considered in detail below.

(a) Providing initial advice

In line with the adage that knowledge is a route to empowerment, the provision of early advice is recognised as a cornerstone of access to justice.⁷⁴ Trinder et al note that ‘without some form of 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.⁷⁵ The provision of initial advice in the SLO therefore aims to increase victims’ knowledge about their legal options so they can make an informed decision about whether it is in their interests to seek protection. In this sense, the SLO embraces client-centered lawyering, as discussed by Goodmark, by recognising that ‘the client is best suited to

⁷⁴ Organ and Sigafos (n 33).

⁷⁵ Trinder et al (n 5), 37.

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assess her tolerance for risk and to determine the possible non-legal consequences of legal intervention'.⁷⁶

As with any client who comes to the SLO, the students take the lead on conducting the initial factfind appointment, researching the merits of the case, conducting an advice appointment, and confirming the advice in writing. However, the nature of domestic abuse cases means there are some additional considerations. Firstly, students must quickly become familiar with the legal aid criteria to enable them to carry out a preliminary assessment of the client's eligibility. In cases where it appears that a client is eligible, a referral will be made to a legal aid firm and the SLO will have no further involvement given that this is a preferable funding option. Supporting Goodmark, who argued that clinics encourage students to think beyond advocating for a particular individual, this provides students with an important introduction to the different options for funding cases and often sparks a conversation about the fairness of the decision-making criteria and the recent legal aid reforms.

Secondly, in contrast to other cases, advising a victim of domestic abuse requires the students to think about what other needs – such as for housing, welfare benefits and therapeutic counselling – a client may have. Whilst the students are not expected to act upon this, discussions should take place with the client about whether referrals to appropriate services should be made. The need for a holistic approach to advising clients suggests that there is also value in clinical models where students work in

⁷⁶ Goodmark (n 58), 31.

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partnership with external organisations, meaning a range of services can be provided under one roof. An example of such a project is the Future Living Hertford Family Law Clinic where students provide initial legal advice to victims at the facilities of a specialist provider of counselling and therapeutic support.⁷⁷

Thirdly, although true of all practice areas, but particularly evident in domestic abuse cases, safeguarding student wellbeing must be prioritised during the conduct of a case. At the start of the module, students are asked to confirm whether they feel comfortable working on cases involving domestic abuse and other sensitive issues. However, even where students have agreed to this, they may still experience vicarious trauma through their clients or else relive their own trauma.⁷⁸ As identified by Smythe et al, it is therefore vital that they 'employ modes of self-care' to counterbalance these effects.⁷⁹ Within the clinic, students are encouraged to prepare reflections on their experiences which can remain private or be shared with their supervisor. Regular debriefings also take place during weekly firm meetings. Whilst the author is not aware of any circumstances where this has been needed because of a students' participation in domestic abuse work, free on-site counselling services also exist for Northumbria University students.

⁷⁷ See <https://www.herts.ac.uk/study/schools-of-study/law/pro-bono-activities/future-living-hertford-family-law-clinic>.

⁷⁸ Smythe et al (n 54).

⁷⁹ Ibid, 161.

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The final consideration which distinguishes domestic abuse from other practice areas is the speed at which advice often needs to be provided. In many cases, the students will be aware that the case relates to domestic abuse protection, and this allows them to consider what additional information they require, conduct research, and begin formulating some basic advice in advance of the appointment. Invariably, however, there are some clients who will come to the SLO seeking advice about a separate matter (usually divorce or child arrangements) and it is only during the factfind appointment that it becomes apparent the client is experiencing domestic abuse and requires urgent protection. This may be identified as part of basic screening questions that the students have asked or because the students have picked up on subtle disclosures made by the client, which have been identified because of training the students receive at the start of the module. From a supervisory perspective, the need to identify disclosures is crucial in reducing the risk of a negligence claim where we fail to advise clients about any claims which may arise out of the abuse.⁸⁰ However, it also protects the client because otherwise requiring them to recount their experience on multiple occasions risks retraumatising them.⁸¹ Where domestic abuse is identified at an initial appointment, it is not acceptable for the usual process of researching and advising the client (which may take some weeks) to take place. Instead, the supervisor will need to work with the students to consider the extent of the retainer and, where

⁸⁰ M. Drew, 'Lawyer Malpractice and Domestic Violence: Are We Revictimising our Clients?' (2005) 39:1 *Family Law Quarterly*, 7-25.

⁸¹ *Ibid.*

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this is limited to initial advice only, conduct some basic research about the process of applying for protection and the merits of the client's application, so that the client receives some oral advice on the same or the following day. The supervisor may also join the advice appointment so that any of the client's questions can be addressed fully. More detailed research can then be carried out by the students before the advice is confirmed in writing. Consideration will also be given to whether there are any other local pro bono organisations who may be able to support the client through proceedings or whether a referral through CourtNav should be made.⁸²

On the one hand, the speed at which advice is provided in these cases is more reflective of legal practice (thereby upholding the clinical aim of giving students a realistic experience) where emergency applications are often issued on the same day that initial instructions are taken. On the other hand, however, the supervisor will likely need to provide higher levels of direction than in non-urgent cases. Whilst it is correct that this is somewhat counterintuitive to clinical objectives, it is the author's position that student autonomy cannot come at the cost of client safety. Further, the limitations of this are offset by the fact that alongside general clinical skills (i.e., research skills and written communication) working on a domestic abuse case also allows students to develop enhanced or specialised skills compared to other areas of law. Breger and Hughes argue, for example, that whilst the statutes which govern

⁸² CourtNav is a digital tool provided by RCJ Citizens Advice which can support a victim to prepare an application for injunctive protection. More information is available at: <https://injunction.courtnav.org.uk> accessed 14 October 2021.

applications for protection orders (in the English context, the Family Law Act 1996 and the Domestic Abuse Act 2021) are relatively straightforward instruments, meaning students are quickly able to develop a working understanding of the law and legal process, factually, cases are often 'complex and nuanced... enhancing law students' mastery of fact investigation, interviewing and client counselling'.⁸³ Further, in the author's experience, working with victims of domestic abuse challenges many of the students' initial misconceptions and judgements, such as a belief that physical abuse is more harmful than emotional abuse, that some forms of abusive conduct do not constitute domestic abuse (i.e., financial abuse) and failing to understand why many victims remain in abusive relationships. This suggests that working in clinic can improve students' understanding of the dynamics of domestic abuse, whilst also resulting in them becoming more sensitive, trauma informed practitioners who are capable of understanding how trauma occurs and its consequences.⁸⁴

From a client perspective, receiving tailored advice through the clinic empowers victims to make informed decisions about whether and when to seek protection. In contrast to online sources, where the relevance and quality of information is often difficult for victims to determine⁸⁵ advice received through the clinic has been tailored to an individual client's circumstances and approved by a qualified practitioner. Through facilitating referrals to other support services, clinics can also help clients

⁸³ Breger and Hughes (n 49), 176.

⁸⁴ Smythe et al (n 54).

⁸⁵ Trinder et al (n 5).

gain access to non-legal forms of support, including refuge accommodation and resettlement services, therapeutic support and community-based services.⁸⁶ A limitation of this model, however, is that support does not extend to preparing the initial application form or witness statement. Research consistently demonstrates that this is where assistance is particularly valuable, given that ‘errors and omissions in the preparatory work done by litigants in person impact on court staff workloads and on the conduct of the hearing itself’⁸⁷ and that applications prepared by victims without any assistance may in some circumstances be more likely to result in an application being refused.⁸⁸ For those clinics already offering initial advice in these cases, consideration should therefore be given to whether there is the capacity and expertise to extend support to the application stage. Where resourcing is an issue, clinics could follow the partnership model, such as between City University London law school and the National Centre for Domestic Violence, where the students conduct a telephone appointment and thereafter prepare the witness statement for court.⁸⁹ Without such support, clinics may improve accessibility of protective orders by empowering victims to pursue an order, but fail to arm clients with the skills to increase the prospects of their application being granted.

⁸⁶ L. Kelly, *Combating Violence against Women: Minimum Standards for Support Services* (Directorate General of Human Rights and Legal Affairs, Council of Europe; Strasbourg, 2008).

⁸⁷ *Ibid.*

⁸⁸ Speed and Richardson (n 7); Durfee (n 7).

⁸⁹ V. Lachkovic, *McKenzie Friends for Victims of Domestic Violence: Training Law Students to Assist the Court and the Victim* (Paper delivered at the 8th Worldwide GAJE Conference, Eskisehir, Turkey, July 2015).

(b) Casework/representation

In appropriate cases, such as where the victim has no other form of support and the supervising solicitor has capacity and sufficiently enthusiastic students, the SLO will conduct casework and representation on behalf of victims in injunction proceedings. Whilst it is the supervising solicitor who will go on the court record as the representative, the students remain the point of contact with the client, conducting research and preparing advice as required, complying with court directions, and assisting the client to collect evidence. It has been recognised that injunction proceedings are well suited to being practised within a clinical setting because proceedings are usually concluded in between one and six months, meaning students can 'typically draft at least one pleading, interview several witnesses, negotiate, appear in court and potentially conduct a trial all within a single academic period'.⁹⁰ Whilst the workload is likely to be relatively high throughout this period, the students are rewarded by gaining a holistic understanding of the law and the legal process. In turn, they gain more opportunities to develop their case management skills, ability to strategise and experience managing a client relationship than when services are restricted to initial advice.

Injunction proceedings also differ from other types of cases in that they are often started on an ex-parte (i.e., without notice) basis. This provides students an opportunity to exercise their advocacy skills in an uncontested and therefore

⁹⁰ Breger and Hughes (n 49), 177.

potentially less challenging environment. Following the *ex-parte* hearing, research suggests that less than 14% of respondents in injunction proceedings secure representation (based on figures from 2019 and 2020)⁹¹, meaning that even at the return hearing stage, students are likely to have more understanding of the legal and factual issues in dispute than their opponent. As recognised by Speed et al, injunction applications (at least until they become contested) are usually conducted by junior fee earners and it is in such proceedings that paralegals and trainee solicitors cut their teeth in the courtroom.⁹² Accordingly, for those students seeking a career in family law, the opportunity to develop their advocacy skills at such an early stage is useful experience for what is to come. Proceedings for injunctive protection are typically heard in judge's chambers within the family court or in the magistrate's court.⁹³ Whilst *prima facie* clinical students do not have rights of audience, the Legal Services Act 2007 provides that a person is an exempt person for the purpose of exercising a rights of audience before a court if they are conducting litigation under the supervision of an authorised person (i.e. a qualified solicitor).⁹⁴ These rights have subsequently been extended to apply in the family court under the Crime and Courts Act 2013.⁹⁵ The provisions do not, however, apply to cases heard in the magistrates court and therefore a students' ability to conduct advocacy will depend on which court the

⁹¹ National Statistics and Family Court Statistics, *Family Court Statistics Quarterly Jan – March 2021* (National Statistics and Family Court Statistics, 2021).

⁹² Speed et al (n 40).

⁹³ Kelly (n 86).

⁹⁴ The Legal Services Act 2007, sch 3 para 1(7).

⁹⁵ The Crime and Courts Act 2013, sch 10 part 2 para 98(1).

hearing is allocated to. In the author's experience, when faced with the opportunity to conduct advocacy, most students opt to clerk the hearing (i.e., by observing the proceedings and keeping an attendance note of the matters discussed). This is potentially reflective of student demographics in the SLO where most students are prospective solicitors in the third year of their undergraduate studies. The position may, therefore, be different for clinicians supervising prospective barristers or those who undertake a clinical programme as part of a postgraduate programme, who may have more confidence and incentive to develop advocacy skills from this early stage.

It is recognised that starting a full representation model is not viable in all clinics, principally due to limitations on resourcing. In contrast to the USA, where full representation domestic abuse clinics are popular, many law school clinics in the UK are poorly resourced.⁹⁶ Academics have acknowledged that law is a particularly underfunded subject area due to a misconception that it is a solely classroom-based subject, meaning it attracts the lowest level of per student funding.⁹⁷ Funding issues have been exacerbated by cuts to state funding for higher education which have led to increased scrutiny of the resources allocated to clinical activity⁹⁸ and more recently, by Covid-19 which has impacted income streams at many institutions, at least in the short term. Resourcing can impact a law school's capacity to conduct injunction proceedings because clinics need to be staffed by solicitors and barristers, whose

⁹⁶ Drummond and McKeever (n 67).

⁹⁷ J. Marson, A. Wilson and M. Van Hoorebeek, 'The Necessity of Clinical Legal Education in University Law Schools: a UK Perspective' (2005) 7 *International Journal of Clinical Legal Education*, 29-43.

⁹⁸ Drummond and McKeever (n 67).

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practising certificates must be renewed each year. Further, staffing resources affect the amount of time that can be dedicated to clinical activities. The LawWorks study identified that 70% of clinical supervision in the UK is provided by members of law school's academic staff.⁹⁹ Academic staff typically teach across multiple modules and increasingly have administration and research commitments which may reduce their capacity to develop and lead new clinical offerings. In the author's experience, supervising injunction proceedings can be particularly onerous at the outset where cases are made on an urgent basis, given that cases are usually taken on at the start of the academic year when the students have the least experience. Moreover, only 65% of clinics in the UK currently operate outside of term time.¹⁰⁰ This would preclude the remaining 35% from providing a full representation service, given that cases may operate all year round. From an institutional perspective, however, there are merits in supporting clinicians to deliver ambitious projects, both because students report considering the availability of clinical programmes in deciding where to apply to/attend university and because of the availability of awards which can enhance a university's reputation. Supporting this, Northumbria Law School was awarded the 'Best New Pro Bono Activity' at the LawWorks and Attorney General Student Pro Bono Awards 2018 in recognition of the SLO's work supporting victims of abuse.

From a client perspective, there are clear benefits to providing casework assistance. As Trinder et al recognise, 'much of the work in a family case is conducted before and

⁹⁹ Sandbach and Grimes (n 69).

¹⁰⁰ *Ibid.*

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between hearings rather than in the courtroom itself'.¹⁰¹ Offering casework can therefore alleviate this pressure on victims at a time when they may be uprooting their lives following the end of an abusive relationship. The important role of casework, however, does not detract from the need for full representation services given that 'the court process is predicated upon a full representation model, and this becomes even more apparent when litigants in person reach the courtroom'.¹⁰² Litigants in person are more likely to participate in hearings at a 'lower intensity' yet make more mistakes.¹⁰³ In the context of domestic abuse, representation also has value in preventing victims from being required to present their case in the presence of her perpetrator, which is likely to be distressing notwithstanding the availability of special measures.

Regardless of the scope of support offered by law school clinics, there will always be limitations on such services. The number of victims who can be supported by the SLO, for example, is correlated to the level of support offered, meaning that the two SLO family practitioners who specialise in domestic abuse only have capacity to take on a handful of cases on a full representation basis each year (the exact number will depend on the number of cases which are resolved after the return hearing and the number which are contested). In addition, some cases will be taken on with a more limited retainer. Supervisors may also take on non-domestic abuse cases. If support was

¹⁰¹ Trinder et al (n 5), 35.

¹⁰² Ibid, 53.

¹⁰³ Moorhead and Sefton (n 42), 255.

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provided on an advice-only basis, however, higher numbers could receive *some* assistance. Family court statistics show that there are between 4,500 and 5,500 applications for occupation orders each year (and more than 20,000 applications for non-molestation orders) with between a third and half of applications in any given year being made by litigants in person.¹⁰⁴ As such, the number of victims supported through the clinic is a drop in the ocean compared to the number of victims seeking support, albeit it is anticipated that with the introduction of DAPOs some of these applications may be pursued by VAWG stakeholders (i.e. the police and domestic abuse support services) once DAPOs are introduced. A further limitation concerns inter-related proceedings. As highlighted elsewhere by the author, injunction proceedings usually precede other family applications, including divorce and child arrangements.¹⁰⁵ Due to the limitations on capacity, it would be unusual if support could also be provided in interrelated proceedings. As such, victims may find that whilst they benefit from legal representation from the clinic in one set of proceedings, they face no choice but to act as a litigant in person in the other proceedings.

(c) Policy work

¹⁰⁴ 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.

¹⁰⁵ Richardson and Speed (n 8).

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Covid-19 posed challenges for victims of domestic abuse, with reports that in the first lockdown the frequency and severity of abuse worsened for many victims who remained in a relationship with their abuser.¹⁰⁶ Covid also posed challenges for law school clinics, with clinicians identifying that supervisors had to think creatively and act fast to keep clinical programmes running.¹⁰⁷ Given that there was a marked reduction in the availability of pro bono support for victims in family court proceedings at the early stages of the pandemic¹⁰⁸ the most effective way to support victims seeking protection during this time would arguably have been to continue offering client services remotely. Whilst some clinics have reported setting up remote advice-only clinics serving victims of abuse during this period¹⁰⁹ the SLO ultimately did not operate a live-client model during the 2020/21 academic year because of concerns around protecting client data and maintaining confidentiality where students were not able to attend the clinic due to university closures. As a result, Covid-19 presented an opportunity for the SLO family law practitioners to find innovative solutions to supporting victims seeking protection, whilst also meeting the educational aims of the module. In response, a decision was made to undertake a policy project which clinicians may otherwise not have had capacity to supervise due to the amount of time ordinarily dedicated to providing a full representation service.

¹⁰⁶ Ivandic et al (n 39); 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).

¹⁰⁷ A. Thurston and D. Kirsch, 'Clinics in Time of Crisis: Responding to the Covid-19 Outbreak' (2020) 27:4 *The International Journal of Clinical Legal Education*, 179-195.

¹⁰⁸ Speed et al (n 38).

¹⁰⁹ Thurston and Kirsch (n 107).

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Whilst it is well-documented that in the USA clinics are involved in 'domestic abuse task forces and coordinating councils; engage in legislative reform to address deficiencies in the legal system and in the law; and study the operation of police and courts, making suggestions for improvement' the author is only aware of one other policy project (which was supervised by the author's colleagues Kayliegh Richardson and Rachel Dunn in 2019 and which is not discussed further in this paper) conducted in a clinic in relation to domestic abuse. The author has not been able to find any published case studies from similar projects taking place in the UK, suggesting that policy work in the context of domestic abuse is relatively uncommon.¹¹⁰

The project saw 15 clinical students conducting research on behalf of the national charity Surviving Economic Abuse (SEA). The research explored trends in the rates at which occupation orders were sought and granted and aimed to identify any barriers victims face to securing protection. SEA was motivated to commission the project because of a perception that their service users' applications for occupation orders were frequently unsuccessful. The clinicians considered that the project could uphold the social justice aims of clinical education due to its focus on the importance of maintaining a robust legal response to domestic abuse and because the project was underpinned by a shared recognition between the clinicians and SEA that 'women who want to invoke the power of the civil and criminal laws should have access to a system that provides a timely, effective and victim-centered response'.¹¹¹ Data was

¹¹⁰ Goodmark (n 58), 33.

¹¹¹ *Ibid.*

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collected through an analysis of family court statistics, a questionnaire of professionals who represented or otherwise supported victims through proceedings for injunctive protection and in-depth interviews with victims who had applied for an occupation order. Whilst this project involved a new partnership with an external organisation, it would also be possible for students to undertake legal research in 'an area of concern raised by a client case'.¹¹² However, working for an external organisation was beneficial in that it appeared to give the students a sense of ownership of the project and accountability in terms of managing tight timescales.

Supporting Dunn et al's findings the project upheld the pedagogic aims of clinical education by allowing the students to undertake a wide range of activities on behalf of their client including 'conducting a literature review of the relevant area of law to explore the background and to appreciate the importance of the research', 'analysing the data collected to gain the experience of working with raw data and deciding how to code that data in order to report on their findings' and 'writing up their research findings in an evaluation report for their client which includes recommendations for law and/or policy reform'.¹¹³ In common with the advice and representation models considered above, engaging in policy work allowed the students to develop the skills assessed in most clinical modules, including teamwork, research skills, written communication, critical analysis, the ability to strategise, knowledge and understanding of the law and reflection skills. The project also facilitated the students

¹¹² Dunn et al (n 72), 72.

¹¹³ *Ibid*, 73.

to develop skills that they otherwise might not have. In contrast to live client work, for example, which only requires students to consider how the present legal position impacts a client, the policy project required the students to examine the law in its context and analyse the impact of past and forthcoming changes to the legal landscape including LASPO, Covid-19 and the Domestic Abuse Act 2021. Moreover, participating in the project gave the students an opportunity to develop ‘first-hand experience of the crucial role a lawyer can play in recommending and influencing law reform for the greater public good’.¹¹⁴ This supports the idea that policy work in the field of domestic abuse can bring together scholarship and activism, when these worlds may ordinarily be quite separate.¹¹⁵ The data analysed by the students highlighted clear deficiencies in the law including that the strict threshold criteria is difficult for victims to satisfy, that the courts are hesitant to grant victims extensive protection over the family home and that barriers to securing orders particularly impact litigants in person. These findings make a significant and original contribution to the existing knowledge in this area, suggesting that policy work conducted in clinics can be ‘an essential part of the dedicated working on behalf of women subjected to abuse’.¹¹⁶

A limitation of the project from a student perspective, however, was that due to the participants involving potentially vulnerable subjects, ethical approval was refused

¹¹⁴ *Ibid*, 77.

¹¹⁵ E. Schneider, ‘Violence against Women and Legal Education: An Essay for Mary Joe Frug’ (1992) 26 *New England Law Review*, 843-875.

¹¹⁶ Dunn et al (n 72).

for the students to conduct interviews with the victims. As such, this restricted their involvement in some parts of the project and placed an increased workload on the supervising solicitors. This decision is somewhat at odds with the fact in the ordinary course of the module, the students would have been able to conduct fact-find and advice appointments with victims as part of a live client case. A further limitation was that as the students were not also running a live client case in conjunction with their policy work, there were some gaps in the students' practical experience of the law, meaning they were not always able to appreciate the 'symbiosis between individual representation and policy work'.¹¹⁷ This suggests that there would be value in engaging in hybrid policy/live client model, as discussed by Dunn et al.¹¹⁸

In terms of the benefit to victims of domestic abuse, policy work has the potential to make a difference to greater numbers than live client work. In contrast to advice services, the policy work undertaken for this project could not lead to a reduction the numbers of unrepresented litigants. However, insofar as the recommendations made within the report are taken on board, it could contribute to improvements in the court process. As such, it offers a qualitatively different form of support for victims. Effecting change through policy research is not, however, a guaranteed outcome and whether the recommendations are reviewed by the appropriate bodies and thereafter acted upon will ultimately depend on the channels through which the work is disseminated, the connections between the clinic and/or underlying client and law

¹¹⁷ Goodmark (n 58), 33.

¹¹⁸ Dunn et al (n 72).

reformers and the quality of the research. This is something which clinicians involved in policy work must consider at the outset of a project to maximise the prospects of the work achieving its goals. Given that our policy work for SEA only concluded in May 2021, it is potentially too soon to see what, if any, impact the work will have. A further benefit to victims may result from engaging in policy research as a research participant. Many of the victims who were interviewed as part of the study with SEA volunteered that their rationale for participating was to improve the family court process and the effectiveness of remedies for other victims, often because of their own difficult experience. Studies also suggest that participating in research around domestic abuse and ‘sharing their story’ is a key component of ‘thrivership’ for victims – the transition from surviving to thriving after domestic abuse.¹¹⁹

(d) Public legal education: developing the capacity of others to assist victims

It is well documented that specialist domestic abuse organisations offer advocacy services to support victims throughout legal proceedings.¹²⁰ Research suggests that in contrast to other pro bono organisations, support services often engage in more extensive levels of casework, including assisting women to identify their legal needs, prepare and file court paperwork, comply with court directions, and attending

¹¹⁹ I. Heywood, D. Sammut and C. Bradbury-Jones, ‘A Qualitative Exploration of ‘Thrivership’ Among Women who have Experienced Domestic Violence and Abuse: Development of a New Model’ (2019) 19:106 *BMC Women’s Health*, 1-15.

¹²⁰ Speed (n 30); Kelly (n 86).

hearings in a supportive capacity.¹²¹ Whilst it is promising that such support is available to victims, it is nonetheless concerning that research has identified that some support workers lack a sufficient working understanding of the law and this compromises the quality of information provided to service users.¹²² This is particularly worrying in light of the introduction of DAPOs which may permit support workers to make applications for protection on behalf of victims.¹²³ The data therefore identifies a need for better training for IDVAs and support workers to improve the quality of support for victims in family court proceedings. Alongside this, there is a recognised need for legally accurate, accessible, and up-to-date materials for litigants in person themselves.¹²⁴

Drawing on these findings, the family clinicians in the SLO held discussions with a local women's organisation to identify their (and their service users') legal needs and consider how these could be met. Three needs were identified (1) training for IDVAs/support workers about the options available for victims of domestic abuse to pursue a civil claim for compensation against their perpetrator (2) training for IDVAs/support workers about preparing an effective application for protective injunctions and (3) written factsheets for victims of domestic abuse about the process

¹²¹ Speed (n 30).

¹²² *Ibid.*

¹²³ 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 for DAPOs without prior permission of the court include 'local authorities, probation service providers, *specialist domestic abuse advisers* and specialist non-statutory support services (for example, *refuge support staff*). See Home Office, Ministry of Justice and Ministry of Housing, Communities and Local Government, *Domestic Abuse Bill: Delegated Powers Memorandum* (Home Office, 2021), para 24.

¹²⁴ Trinder et al (n 5).

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of applying for a non-molestation order or occupation order which could be distributed to service users from the women's organisation. Whilst in this case there was an existing relationship between the clinicians and the support service, given that research supports a need for training within these organisations and the fact that third sector organisations often do not have the budget to pay for such training, there would be merit in developing new relationships to achieve this purpose. Alternatively, given that only 38% of the participants to the Civil and Social Justice Panel Survey claimed to understand their rights in the case of domestic abuse, there would also be value in clinical students offering training directly to women's groups about their legal options.¹²⁵

This project is currently ongoing and therefore the benefits and limitations of this model are still being experienced. To date, the students have prepared and delivered a training session on civil claims for compensation and the factsheets are being finalised. It is anticipated that training on preparing effective applications for protective injunctions will take place in the next academic year, which will likely coincide with the introduction of DAPOs. Given that this work does not attract strict deadlines, the benefit of public legal education activities is that they can be delivered at any point in the academic calendar, either as a standalone project or to bolster other clinical activities. Further, whilst the materials need to be approved by a clinician with

¹²⁵ Reported in L. Wintersteiger, *Legal Needs, Legal Capability and the Role of Public Legal Education: A Report by Law for Life, The Foundation for Public Legal Education* (Law for Life and the Legal Education Foundation).

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a good knowledge and understanding of the law, this does not necessarily need to be a qualified practitioner. From a student perspective, public legal education activities allow students to work on behalf of VAWG stakeholders who operate outside a legal setting. This is particularly valuable for those students who may be interested in pursuing a career in domestic abuse work but who do not wish to qualify as a solicitor. For those who do wish to have a career in law, it is common for junior practitioners to deliver Continuing Professional Development training to external organisation and therefore such activities are reflective of work the students may be expected to undertake from an early stage in their career.

The support service has provided feedback that the training which has been delivered to date has improved the knowledge of support workers and increased their capacity and confidence to support women in these claims. Further, following Durfee's findings, it is anticipated that improving support workers' ability to prepare an effective court application may improve victims' prospects of securing protection.¹²⁶ In relation to the factsheets, it is recognised that the provision of informative materials is not an adequate substitute for tailored legal advice and that 'the support needs of litigants in person will not be met solely by relying upon written or online materials'.¹²⁷ Further, such materials are unlikely to assist litigants who experience language and/or literacy difficulties. This suggests that the provision of written materials may be most effective when used in conjunction with other models outlined

¹²⁶ Durfee (n 7).

¹²⁷ Trinder et al (n 5), 108.

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above, such as where clients receive tailored one-off advice about their case and are able to discuss some of the information contained in a factsheet. Whilst invariably such an approach will not be possible in all cases, it would address concerns raised by academics that some litigants in person also need to have the opportunity to have verbal explanations or face-to-face support and that the effective use of written materials is also 'dependent upon a baseline level of legal knowledge and understanding'.¹²⁸

Nonetheless, the use of written resources is not redundant. By providing information about the process of applying for a protective injunction written directly for a litigant in person audience, the factsheets will go some way to help address the 'overwhelming need for more and better information for litigants in person at every stage of the court process'.¹²⁹ Further, given many litigants in person take a 'reactive or passive approach to help-seeking'¹³⁰ it is hoped that making the resources available at a venue where they may be attending for other therapeutic services (i.e., the women's organisation) will assist their accessibility. Preparing the materials as part of a clinical module can also provide some assurance about the quality of information. This can be achieved by including the university/clinic logo and, if applicable, a statement indicating that the information has been reviewed by a qualified practitioner.

¹²⁸ Moorhead and Sefton (n 42), 257; Trinder et al (n 5), 108.

¹²⁹ Trinder et al (n 5), 105.

¹³⁰ *Ibid*, 106.

A note on models of dispute resolution outside the formal justice system

Academics have observed that ‘from their inception, clinics recognised that there are women for whom the legal system provides no benefit and, in fact, can be harmful’.¹³¹ Some scholars have therefore queried whether clinics can play a role in supporting victims of domestic abuse to resolve their disputes away from the formal justice system. Goodmark, for example, notes that ‘few clinics restrict themselves to litigating within the criminal or civil justice systems; most domestic violence clinics seek other forms of justice for their clients’.¹³² She argues that in comparison to practitioners and advocates in the VAWG movement, law students are not ‘entrenched in the position that interventions like mediation are unsafe and, therefore, unsuitable for women subjected to abuse’ and are better able to think creatively to find innovative solutions for women.¹³³ Further, she posits that to develop responses to domestic abuse, clinics could ‘test and assess’ what role models of dispute resolution such as mediation, victim-offender dialogue and restorative justice could play in domestic violence cases ‘before attempts are made to implement such schemas more broadly’.¹³⁴

None of the models pursued at Northumbria University involve supporting women to seek protection through routes outside of the formal justice system. Whilst

¹³¹ Goodmark (n 58), 33.

¹³² *Ibid.*, 46.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

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elsewhere the author has weighed up the potential merits of victims of domestic abuse entering into alternative dispute resolution in financial and children matters¹³⁵ these approaches are simply untenable for victims seeking protection, where an order of the court is required to obtain legally enforceable protection. Research consistently demonstrates that the threat of criminal action is a powerful means of securing compliance with an injunction, a finding which has led to breach of non-molestation orders and forthcoming DAPOs becoming a criminal offence.¹³⁶ Accordingly, supporting a victim to secure an agreement which has no legal standing through alternative dispute resolution would be a disservice to victims by leaving them with substantially weaker protection than is available through the courts.

In relation to other family law disputes where domestic abuse is or has been prevalent, it remains the case that alternative dispute resolution is still widely discouraged in England and Wales. The Domestic Abuse Guidelines for Prosecutors¹³⁷ and the ACPO Guidance on Restorative Justice¹³⁸, for example, provide that police policy does not support the use of restorative justice for domestic abuse in intimate partner cases due to the complex and protracted nature of domestic abuse offences. Likewise, the Family Procedure Rules 2010 seek to remove obstacles to victims accessing the courts, by providing an exemption for victims of domestic abuse (and those needing to issue

¹³⁵ A. Speed, 'Just-ish? An Analysis of Routes to Justice in Family Law Disputes in England and Wales' (2020) 52:3 *The Journal of Legal Pluralism and Unofficial Law*, 276-307.

¹³⁶ Bates and Hester (n 11).

¹³⁷ Crown Prosecution Service (CPS), *Domestic Abuse Guidelines for Prosecutors* (CPS; 29 September 2021).

¹³⁸ Association of Chief Police Officers (ACPO), *Restorative Justice Guidance and Minimum Standards* (2011).

proceedings urgently) to attend a preliminary Mediation Information and Assessment Meeting (MIAM) prior to starting court proceedings.¹³⁹ In relation to victims who do not receive legal aid, court proceedings also remain a more cost-effective means of securing protection given that there is no court fee to apply for a protective injunction and litigants in person will not incur any costs of representation. This can be contrasted to mediation where the charge (outside a clinical setting) is around £140 per hour.¹⁴⁰ Accordingly, whilst in other practice areas clinicians have recognised the need to reform clinical education to account for the fact that 'litigation is no longer the default model of resolution of legal disputes'¹⁴¹ facilitating alternative dispute resolution with victims of domestic abuse in a clinical setting could give students a misleading impression of practice, which is counterintuitive to the educational aims of clinical education. It is recognised that outside a clinical setting, LASPO has resulted in both a decline in the overall number of family law cases being mediated¹⁴² and an increase in cases being mediated which exhibit 'higher conflict levels and/or more complex problems such as... where there are significant power imbalances between the parties', because of pressures on mediators not to screen out cases.¹⁴³ Barlow notes that by 'withdrawing legal aid for (prior) legal advice (as well as representation at

¹³⁹ Family Procedure Rules 2010, rule 3.8.

¹⁴⁰ Family Mediation Council, *Family Mediation Council Survey Results* (FMC; 2019).

¹⁴¹ K. Tokarz and A. Appell, 'Introduction: New Directions in ADR and Clinical Legal Education' (2010) 34 *Washington University Journal of Law and Policy*, 1-9; K. Emery, 'Assisting Indigent Families in Conflict: A Pro Bono Test Drive for a Family Alternative Dispute Resolution (ADR) Clinic' (2010) *Washington University Journal of Law and Policy*, 239-259.

¹⁴² A. Barlow, 'Rising to the Post-LASPO Challenge: How Should Mediation Respond?' (2017) 39:2 *Journal of Social Welfare and Family Law*, 203-222.

¹⁴³ *Ibid*, 205.

court) and making mediation the only legally aided out of court dispute resolution option, those who could not pay were effectively given the stark choice of mediating an agreement or representing themselves in court'.¹⁴⁴ She therefore describes that mediation was 'likely to become a Hobson's choice for many, a constraint which in itself often militates against a successful mediated outcome'.¹⁴⁵ Accordingly, it is suggested that the use of mediation within the current landscape is not indicative of a progressive or creative approach to supporting victims, but is instead the product of a family justice system at breaking point where desperate attempts are being made to divert cases elsewhere.¹⁴⁶

CONCLUDING THOUGHTS

By examining the various models through which the SLO supports victims of domestic abuse, this paper has sought to highlight how clinical legal education can be an effective tool for improving the accessibility of protection orders. The analysis demonstrates that whilst the number of law school clinics offering domestic abuse services is still low, such services can be incorporated into most clinical settings, whether through more resource intensive models like case work and policy projects or in less onerous models such as public legal education activities. Further, the analysis suggests that the impact of clinical activities in improving the accessibility of

¹⁴⁴ Ibid, 204.

¹⁴⁵ Ibid, 205.

¹⁴⁶ Speed (n 135).

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protective orders can be evidenced in various ways, including through a reduction in the numbers of litigants in person in applications for protection (even if not in a way that is statistically significant), in building the capacity of others to support victims in proceedings (and with the introduction of DAPOs, to potentially make applications on their behalf) and in making evidenced-based proposals to make the legal process for securing protection more victim-focussed. Just as significantly, however, the literature also suggests that by exposing clinical students to domestic abuse work at an early stage in their career, future practitioners will enter practice with a strong understanding about the dynamics of domestic abuse and a commitment to supporting clients in a way that is client-centered and trauma-informed. These findings, it is argued, provide a compelling case for practitioners to consider extending their clinical offering and develop the presence of domestic abuse in clinics in the UK.

Covid-19 and the family courts: key practitioner findings in applications for domestic violence remedy orders

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Keywords: Covid-19 – remote family court – domestic abuse – access to justice

In the year following the introduction of social distancing measures in March 2020, quarterly applications for non-molestation orders in England and Wales increased by up to 27 percent whilst applications for occupation orders increased by up to 22 percent compared with the previous year. The heightened need for recourse to the family courts during this time supports a more general concern that rates of domestic abuse have increased during the pandemic. This paper presents the findings of in-depth interviews conducted with professionals in the North East of England who have represented or otherwise supported victims of domestic abuse in the family courts since the start of the Covid-19 pandemic. The aims of this article are not to 'name and shame' any particular court, but rather to evaluate the capacity of the remote family court to provide a safe and fair process for victims of domestic abuse. Where appropriate, the authors will also make recommendations for improving practitioners' and litigants' experiences within the current restrictions.

Introduction

In the initial weeks after social distancing measures were introduced in March 2020, reports emerged that patterns of domestic abuse were changing, with research indicating that the frequency and severity of abuse had worsened for many victims who remained in a relationship with their abuser.¹ Family court statistics regarding the two principal forms of domestic violence remedy orders, non-molestation orders and occupation orders, support this claim. Applications for non-molestation orders increased by 12 percent between January and March 2020, 26 percent between April and June 2020, 27 percent between July and September and 23 percent between October and December 2020 as against the same periods in 2019, representing an overall annual increase of 22 percent.² Similarly, applications for occupation orders increased by eight percent between January and March 2020, 17 percent between April

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1 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); Women's Aid, *A Perfect Storm: The impact of the Covid-19 pandemic on domestic abuse survivors and the services supporting them* (Womens Aid, August 2020); N van Gelder, A Peterman, A Potts, M O'Donnell, K Thompson, N Shah and S Oertelt-Prigione, 'Covid-19: Reducing the risk of infection might increase the risk of intimate partner violence' (2020) 21 *EClinical Medicine* 1; A Speed, K Richardson, C Thomson, '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.

2 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: www.gov.uk/government/statistics/family-court-statistics-quarterly. Last accessed 24 April 2021.

and June 2020, 22 percent between July and September and three percent between October and December 2020, an average increase of 12.5 percent.³ These statistics indicate that the family courts' approach to prioritising applications for injunctive protection as 'work that must be done' in the face of the pandemic has been both necessary and successful in ensuring victims continue to have access to protective remedies during this time.⁴ Nonetheless, the literature also reveals that some victims have experienced barriers to the remote family court, both as a result of social distancing measures and because pre-existing barriers to justice have been exacerbated in the current climate.⁵

Whilst earlier research has focussed on the ability of victims of domestic abuse to access statutory and third sector support services during the pandemic,⁶ this paper focusses on the response of the family court. It explores the findings from in-depth interviews conducted with professionals in the North East of England who have represented or otherwise supported victims of domestic abuse in applications for injunctive protection in the family courts since social distancing measures were introduced. There are four main types of injunctive protection available through the family courts – non-molestation orders,⁷ occupation orders,⁸ forced marriage protection orders⁹ and female genital mutilation protection orders.¹⁰ Since the latter two specialist remedies are sought far less frequently, this article will focus on the most heavily used forms of protection, non-molestation orders and occupation orders. However, it is clear that many of the issues raised will have a similar effect on victims applying for all forms of injunctive protection. This article aims not to 'name and shame' any particular court, but rather to evaluate the capacity of the remote family court to provide a safe and fair process for victims of domestic abuse. Where appropriate, the authors also make recommendations for improving practitioners' and litigants' experiences within the current restrictions, bearing in mind the possibility that some reliance on remote courts may continue even after pandemic-related reasons for their use no longer apply.¹¹

Domestic violence remedy orders

The most commonly sought family law injunctions, non-molestation orders, aim to 'prevent domestic abuse, stalking and harassment by prohibiting the offender from contacting the victim and/or attending certain places'.¹² Additionally, or alternatively, victims may require an occupation order to exclude the perpetrator from the family home or otherwise regulate the home's occupation following a relationship breakdown. Occupation orders are both applied for and granted at a much lower rate than non-molestation orders, reflecting a series of judgments confirming that they should only be granted in 'exceptional circumstances' because of the 'draconian effect' of excluding a perpetrator from the property.¹³ More recent case law has

3 Ibid.

4 Courts and Tribunals Judiciary, 'Coronavirus (COVID-19) update from the Lord Chief Justice': www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/. Last accessed 8 March 2021.

5 Speed et al, above n 1.

6 C Gunby, L Isham, S Damery, J Taylor and C Bradbury-Jones, 'Sexual Violence and Covid-19: all silent on the home front' (2020) 3:2 *Journal of Gender-Based Violence* 421; M Sacco, F Caputo, P Ricci, F Sicilia, L De Aloe, C Bonetta, F Cordasco, C Scalise, G Cacciatore, A Zibetti, S Gratteri and I Aquila, 'The impact of the Covid-19 pandemic on domestic violence: The dark side of home isolation during quarantine' (2020) 88:2 *Medico-Legal Journal* 71.

7 Family Law Act 1996, s 42.

8 Ibid, ss 33–38.

9 Ibid, s 63.

10 Female Genital Mutilation Act 2003, Sch 2, para 1.

11 Nuffield Family Justice Observatory, *New rapid consultation into family justice recovery plans* (NFJO, June 2021).

12 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* 135.

13 See *Chalmers v Johns* [1999] 1 FLR 392; *G v G (Occupation Order: Conduct)* [2000] 2 FLR 36; *Dolan v Corby* [2011] EWCA Civ 1664, [2012] 2 FLR 1031.

indicated a slightly less restrictive approach to granting occupation orders. In *Dolan v Corby* for example, Black LJ stated that ‘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’.¹⁴ Further, it was held in *Re L (Children) (Occupation Order)*¹⁵ that ‘harm’ should be interpreted broadly and was not limited to physical harm. This less restrictive approach, however, does not appear to be reflected in an increased willingness to grant orders, with research indicating that occupation orders have in fact become more difficult to obtain over the last five years.¹⁶ Where orders are granted, however, the court has jurisdiction to determine who should or should not live in all or part of the property and can exclude one of the parties from living in or entering a specified area around the home. Orders can also deal with practical arrangements such as who will bear responsibility for payment of the rent or mortgage on the property and whether the occupying party should pay a rent to the party who has been excluded.¹⁷

Domestic abuse and the remote family court

At the outset of the pandemic, applications for injunctive protection were categorised as ‘work that must be done’ by the family courts.¹⁸ This meant that new and existing applications were progressed, with hearings being held remotely. The following sections will consider some of the key implications of the pandemic on accessing non-molestation orders and occupation orders.

Access to advice, representation and support services

Following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), legal aid was removed from the scope of private family law proceedings unless specified evidence could be produced of domestic abuse or child abuse, or the application related to a protective injunction under the Family Law Act 1996. However, whilst LASPO intended to preserve legal aid for victims of domestic abuse, the rates of unrepresented applicants have increased year on year, including in domestic abuse cases.¹⁹ Research indicates that approximately 40 percent of victims do not qualify for legal aid, primarily because they are unable to satisfy the strict means test.²⁰ Although the number of victims with legal representation has not been adversely impacted by the pandemic,²¹ it is widely reported that social distancing measures have reduced both formal and informal support networks to whom victims might ordinarily turn for help leaving abusive relationships and seeking legal recourse in cases where they do not qualify for funding.²²

In the voluntary sector, the scope and availability of assistance has been limited by difficulties in moving to online delivery, the availability of technology for service users, a reduction in staffing and volunteers, and a loss of funding income.²³ Women’s Aid identified that 84 percent of respondents to their study reported being forced to reduce or cancel one or more of their

¹⁴ *Dolan v Corby*, *ibid*, para [27].

¹⁵ *Re L (Children) (Occupation Order: absence of domestic violence)* [2012] EWCA Civ 721, [2012] All ER (D) 189 (Jun).

¹⁶ K Richardson and A Speed, ‘Should I Stay or Should I Go Now? If I Go There Will be Trouble and if I Stay There Will be Double: An Examination of Trends in Accessing Occupation Orders in England and Wales’ (unpublished paper, 2021).

¹⁷ Family Law Act 1996, s 40.

¹⁸ Courts and Tribunals Judiciary, above n 4.

¹⁹ Ministry of Justice and National Statistics, ‘Family Court Tables: October to December 2020’, Table 11: www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020. Last accessed 24 April 2021.

²⁰ D Hirsch, *Priced out of Justice: Means Testing Legal Aid and Making Ends Meet* (Loughborough University Centre for Research in Social Policy, 2018).

²¹ Ministry of Justice and National Statistics, above n 2.

²² Speed et al, above n 1; Women’s Aid, above n 1.

²³ Speed et al, above n 1.

services owing to Covid-19.²⁴ These findings support the Nuffield Family Justice Observatory conclusions that domestic abuse services are only able to offer 'very limited levels of support in the current circumstances'.²⁵ A key area where limitations on services have been felt is in the level of support provided to victims during court proceedings. In Speed et al's study, 40 out of the 51 respondent organisations reported usually providing support to victims of domestic abuse whilst at court.²⁶ At the outset of the pandemic, however, only 17 were continuing to provide this support – a reduction of 42 percent. This finding is concerning because research indicates that support services are often one of the first sources of information about victims' legal options and, for many victims, are a precursor to engagement with legal services or the family courts.²⁷ In the absence of legal advice, it is often Independent Domestic Violence Advisors (IDVAs) who attend hearings with clients, assist them with preparing the paperwork, collect evidence and ensure they have necessary special measures in place.²⁸ Support services are therefore able to minimise many of the barriers to the courts including distrust in the justice system, fear of retaliation from the perpetrator and concerns about traumatising and insensitive processes.²⁹ Subsequently, approximately £25 million has been allocated to enable specialist Violence against Women and Girls charities to continue delivering core services and respond to needs generated as a result of the pandemic.³⁰ This is clearly necessary and welcome funding. However, it is yet to be seen whether this has enabled more charities to support victims through legal proceedings or whether the funds have been committed to back-office costs.

The reduction in service provision for victims has been compounded by an increase in barriers to seeking support. In Richardson and Speed's study, the majority of professionals surveyed (52.6 percent) reported a change in the number of enquiries received specifically in relation to occupation orders since March 2020.³¹ There was a split between those who felt that the number of enquiries had increased (42.1 percent) and those reporting that they had received fewer enquiries (18.4 percent). The absence of a shared experience across all professionals was mirrored in Speed et al's study of domestic abuse support services, which found that the pandemic had not resulted in higher rates of general requests for assistance amongst all domestic abuse support services.³² Although 21 percent of the organisations cited an increase in requests, nearly double the number of respondents – 41 percent – had experienced a decrease in calls and web-based contacts. The respondents highlighted that the primary reason for this was the existence of physical barriers to seeking support where victims remained in the same home as their perpetrator. In addition, they considered that victims (a disproportionate number of whom are women) take on additional physical and psychological burdens as caregivers during pandemics and humanitarian crises, resulting in time barriers to accessing support, a finding which is supported in previous literature.³³ Ivendic et al found that whilst many support

24 Women's Aid, above n 1.

25 Nuffield Family Justice Observatory, *Remote hearings in the family justice system: a rapid consultation* (NFJO, May 2020).

26 Speed et al, above n 1.

27 L Kelly, *Combating violence against women: minimum standards for support services* (Directorate General of Human Rights and Legal Affairs, Council of Europe, 2008); C Sullivan, 'Understanding How Domestic Violence Support Services Promote Survivor Well-being: A Conceptual Model' (2018) 33 *Journal of Family Violence* 123.

28 Speed et al, above n 1.

29 Kelly, above n 27; Sullivan, above n 27.

30 Ministry of Justice, 'Covid-19 funding for domestic abuse and sexual violence support services': www.gov.uk/guidance/covid-19-funding-for-domestic-abuse-and-sexual-violence-support-services. Last accessed 23 April 2021.

31 Richardson and Speed, above n 16.

32 In the study, 21% of organisations had reported an increase in requests for support whilst 41% noted a decrease. See Speed et al, above n 1.

33 S Gearheart, M Perez-Patron, T Hammond, D Goldberg, A Klein, and J Horney, 'The Impact of National Disasters on Domestic Violence: An analysis of Reports of Simple Assault in Florida (1999–2007)' (2018) 5:2 *Journal of Violence and Gender* 87; N Renwick, 'The 'Nameless Fever: The HIV/AIDS Pandemic and China's Women' (2002) 23:2 *Third World*

services had experienced a greater demand for their services, this was all driven by third party reporting/referrals, suggesting that under-reporting of domestic abuse was still present, particularly during periods of lockdown.³⁴ Responding to the need to engage victims in creative ways, and in line with the approach taken in other jurisdictions, efforts have since turned to establishing ‘safe spaces’ within public venues (such as pharmacies and supermarkets) to allow victims who remain in the same home as their abuser to speak to a professional safely and confidentially about their options.³⁵ As at the end of October 2020, over a quarter of pharmacies were participating in the scheme and safe spaces had been used over 3,700 times, demonstrating a clear need for such an initiative.³⁶

Access to the virtual court room and protective remedies

Throughout the pandemic, the family courts have sought to improve accessibility for victims seeking protective injunctions by enabling applications to be made by post or email. This removes the usual requirement for applications to be made in person. This change in practice is mirrored in other jurisdictions, such as Peru and Puerto Rico, where applications for protective injunctions are currently being allowed via WhatsApp or email.³⁷ Whilst this is a step in the right direction, for victims who appear as litigants in person, the process of applying for protection can be problematic. Although there is no court fee for pursuing an application for a domestic abuse-related injunction and therefore there are limited financial barriers to applying, practitioners have noted that the process ‘presumes victims are able to locate a safe and confidential space away from their abuser, complete an application, draft a witness statement and attend a telephone hearing’.³⁸ Aside from practical difficulties, many self-representing litigants understandably lack the substantive knowledge about what information should be included in the application documents and therefore may not put forward their strongest legal arguments to improve their prospects of securing a protective order.³⁹

As demonstrated in Tables 1 and 2 below,⁴⁰ there has been a higher than average number of applications for both non-molestation orders and occupation orders throughout all quarters of the pandemic in 2020. This suggests that the vast majority of victims who would have pursued an application absent the pandemic have not been deterred or prevented from pursuing applications, despite potentially facing difficulties in accessing support services and/or the relevant technology and that others who might not otherwise have needed legal protection, have sought it. Applications have continued in similar proportions to previous years, with roughly 83 percent relating to non-molestation orders and 17 percent to occupation orders.⁴¹

Quarterly 377; R Rezaeian, ‘The Association Between Natural Disasters and Violence: A Systematic Review of the Literature and a Call for more Epidemiological Studies’ (2013) 18:12 *Journal of Research in Medical Sciences* 1103.

34 Ivandic et al, above n 1.

35 For more information about the scheme, see: <https://uksaysnomore.org/safespaces/>.

36 Hestia and General Pharmaceutical Council, ‘A Safe Space has Saved my Life: How Pharmacies are Helping People Find a Way Out of Domestic Abuse’: www.pharmacyregulation.org/regulate/article/safe-space-has-saved-my-life-how-pharmacies-are-helping-people-find-way-out. Last accessed 9 April 2021.

37 The World Bank, ‘The Shadow Pandemic: Violence Against Women During Covid-19’: <https://blogs.worldbank.org/developmenttalk/shadow-pandemic-violence-against-women-during-covid-19>. Last accessed 4 March 2021.

38 Speed et al, above n 1.

39 Richardson and Speed, above n 16.

40 Figures derived 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’: www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2020. Last visited 20 May 2021.

41 Ministry of Justice and National Statistics, ‘Family Court Statistics Quarterly: April to June 2020’: www.gov.uk/government/publications/family-court-statistics-quarterly-april-to-june-2020/family-court-statistics-quarterly-april-to-june-2020. Last accessed 10 April 2021. Ministry of Justice and National Statistics, ‘Family Court Statistics Quarterly: July to September 2020’: www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2020. Last accessed 10 April 2021.

Table 1: Occupation orders – 2020

Quarters of 2020	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 2: Non-molestation orders – 2020

Quarters of 2020	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%

In terms of orders granted, however, the number of occupation orders have declined, as compared to the same period in 2019. Whilst this is consistent with a more general trend that the number of occupation orders granted have been falling over the last five years,⁴² it is particularly concerning that in all quarters of 2020, fewer than half of applications for occupation orders were successful, whilst this fell below 40 percent in two quarters – a larger fall than in other years. This can be contrasted with the equivalent rates for non-molestation orders (see Table 2), where consistently more orders are granted compared to the number of applications. This can be attributed to the court's power under section 42(2)(b) of the Family Law Act 1996 to make a non-molestation order where the parties are already engaged in family proceedings without a formal application having been made. There is no equivalent provision in relation to occupation orders. Research also suggests that the criteria for securing non-molestation orders are 'generous' and 'victim-focussed',⁴³ requiring the court to have regard to the need to secure the health, safety and wellbeing of the applicant and any relevant child.⁴⁴ There must be evidence of molestation,⁴⁵ the applicant must need protection and the court must be satisfied on the balance of probabilities that judicial intervention is required to control the respondent's behaviour.⁴⁶ Over 92 percent of the 40 practitioners surveyed by Richardson and Speed agreed this was an easier threshold to reach than in occupation order proceedings, with their balance of harm test and wider discretionary checklist of factors, used to determine precisely what order to make (where the balance of harm test requires that *an* order be made) or whether to make an order at all (where that test is not met in the applicant's

42 Richardson and Speed, above n 16.

43 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.

44 Family Law Act 1996, s 42(5).

45 *C v C (Non-molestation order: jurisdiction)* [1998] 1 FLR 554.

46 *C v C* [2001] EWCA Civ 1625.

favour).⁴⁷ The checklist that applies depends on the section under which the application is being made but will include the housing needs and housing/financial resources of each of the parties; the parties' conduct; and the likely effect of an order not being made on the health, safety or well-being of the parties and any relevant child.⁴⁸ As the findings section will consider, many people's increased dependence on the family home as a result of Covid-19 and the difficulty of finding alternative accommodation may go some way to explaining why the courts have been more reluctant to grant occupation orders during the pandemic.

If injunctive protection is granted, an order will only become effective from the point that it is served on the respondent. Prior to Covid-19, non-molestation orders and occupation orders were served personally, pursuant to rule 10.6(1) of the Family Procedure Rules 2010, which provides that 'the applicant must, as soon as reasonably practicable, serve on the respondent personally . . . a copy of the order'. Following the introduction of social distancing measures, the majority of courts have either taken the view that personal service continues to be mandatory or that 'good reasons' (that is those over and above the existence of the pandemic) are required to dispense with the requirement for personal service.⁴⁹ In these courts, personal service has continued, albeit some modifications may be required to ensure the safety of the process server and the recipient. In contrast, however, a small number of courts have automatically permitted alternative means of service, typically through first class post to the respondent's last known address and via electronic means such as email, text or WhatsApp.⁵⁰ To secure the required clarity and consistency, a temporary Practice Direction 36U was implemented on 3 August 2020 which is expected to remain in place until 30 September 2021. This confirms that the court can grant alternative service in respect of applications and orders for family court injunctions.

However, whilst the approach of Practice Direction 36U can be commended for supporting victims by providing flexibility where personal service is proving difficult, other related justice agencies have adopted stricter processes. In the early stages of the pandemic, it was reported that the Crown Prosecution Service (CPS) had been refusing to prosecute alleged breaches of protection orders which had been served through email and/or WhatsApp. This has been reflected in policing practices, with one force informing a respondent that the CPS would not pursue him because they would not be able to prove that he 'read the papers'.⁵¹ In another case, an applicant had been advised that the CPS would not pursue a respondent who had been served via WhatsApp because he could 'legitimately plead he had not taken it seriously because of the medium by which it was served'.⁵² Given that 'the effectiveness of a protection order relies on the threat of consequences for breach', this approach is concerning because it imposes a higher standard than is required by law.⁵³ In order to be prosecuted for breaching a family law injunction, a respondent simply needs to be aware of its existence and not its contents, regardless of how it is served.⁵⁴ This approach has also exacerbated difficulties which existed prior to Covid-19 about the low frequency of enforcement regarding breaches of protective injunctions. Bates and Hester, for example, note that owing to cuts to legal aid and an increase in litigants in person, the police are not always notified that orders have been made and/or

47 Richardson and Speed, above n 16.

48 Burton, above n 43.

49 R Cooper and M Horton, 'Non-molestation orders: valid service in the time of Coronavirus' (June 2020): www.familylawweek.co.uk/site.aspx?i=ed211488. Last accessed 24 March 2021; R Cooper and M Horton (July 2020) 'Non-molestation orders: valid service in the time of Coronavirus (Part 2)': www.familylawweek.co.uk/site.aspx?i=ed212030. Last accessed 24 March 2021.

50 Ibid.

51 Ibid.

52 Ibid.

53 Bates and Hester, above n 12, 138.

54 Family Law Act 1996, s 42A(2).

properly served.⁵⁵ Even when orders are sent to the police, there are often delays in the police recording orders or subsequent breaches.⁵⁶ Likewise, Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services found evidence that victims often reported multiple breaches to the police before any action was taken, leading to delays and reduced confidence in the authorities.⁵⁷ The Inspectorate concluded that 'breaches are not always reaching court and these measures are at risk of becoming a toothless instrument'.⁵⁸

Ensuring victim safety and participation

The court has discretion about how applications for protective injunctions are heard. Whilst ex parte applications are likely to be dealt with via telephone, subsequent hearings could be conducted in the courtroom (either fully attended or as a hybrid hearing), by telephone or through a video platform. The Family Justice Council (FJC)'s guidance on special measures in remote and hybrid hearings indicates that victims should be consulted about their preferred mode of participation prior to a hearing being arranged.⁵⁹ Whilst this is commendable, it is also likely to add to already high levels of court administration. Moreover, it is unclear what rights a victim will have if their preference cannot be accommodated or if the victim and perpetrator have different preferences. In all cases, the guidance provides that victims should be informed about the format for the hearing and provided a joining link (if applicable) in good time.⁶⁰ This guidance was implemented in response to findings by the Nuffield Family Justice Observatory that parties have often been given very late notice of hearings.⁶¹

In relation to the conduct of remote hearings, the guidance requires the court to be mindful of the 'invasive, (re)traumatising and endangering' nature of hearings for victims of abuse.⁶² This is an acknowledgement that remote hearings may pose different, but no less important, safety and wellbeing risks from those entailed in in-person hearings. They provide an opportunity for perpetrators to 'see and note details of the victims' private, safe space, which may also be used to track them down, break into their home, continue the exercise of coercive control or harass or intimidate them in other ways'.⁶³ Newcastle Crown Court has attempted to overcome this issue within criminal proceedings where the defendant attends in-person and the victim provides evidence remotely. In such cases, the court is using moveable monitors, which can be manoeuvred into positions where they can only be seen by the judge, jury and counsel (not the defendant or public gallery) when a vulnerable victim or witness is giving evidence over video link.⁶⁴ This is possible in criminal proceedings, where the defendant will be present in the courtroom itself. It is more difficult in family proceedings, where both the applicant and respondent may be attending remotely on the same video call.

⁵⁵ Bates and Hester, above n 12.

⁵⁶ Ibid.

⁵⁷ Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services, *A progress report on the police response to domestic abuse* (HMICFRS, 2017).

⁵⁸ Her Majesty's Inspectorate of Constabulary, *Increasingly everyone's business: A progress report on the police response to domestic abuse* (HMIC, 2015), 59.

⁵⁹ Family Justice Council, *Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings* (FJC, November 2020), s 2.

⁶⁰ Ibid.

⁶¹ Nuffield Family Justice Observatory, *Remote Hearings in the Family Justice System: Reflections and Experiences* (NFJO, September 2020).

⁶² Family Justice Council, above n 59, s 4.

⁶³ Ibid.

⁶⁴ Northumbria Police, 'New Technology to Make it Easier for Vulnerable Victims and Witnesses to Give Evidence at Newcastle Crown Court and Help Bring Criminals to Justice': <https://beta.northumbria.police.uk/latest-news/2021/february/new-technology-to-make-it-easier-for-vulnerable-victims-witnesses-to-give-evidence-at-newcastle-crown-court-and-help-bring-criminals-to-justice/>. Last accessed 16 April 2021.

To mitigate risks to victims in family court proceedings, the FJC guidance recommends that a number of procedural safeguards should be implemented.⁶⁵ Primarily, a victim should never be left alone in a hearing with the perpetrator or the perpetrator's legal representative. Further, in order to reduce the risk of the court providing a forum for further abusive conduct, the guidance recommends that victims use a blurred out/generic background or that they participate in the hearing from a neutral space (such as a legal representative's office, should they have one). Victims can be permitted to join a remote call by audio only or, where not required to give evidence, a victim may be excused from attending at all. Inevitably, the option to be excused from a hearing will only be available to represented litigants.

To assist litigants in person, the guidance provides that either party should (subject to the judge's power of refusal) be allowed to be accompanied by a supporter or McKenzie Friend.⁶⁶ This is particularly important in light of findings by the Nuffield Family Justice Observatory that some judges have questioned the necessity of support workers or otherwise made it difficult for them to engage in court proceedings by listing or rescheduling hearings at the last minute.⁶⁷ Moreover, that study found that litigants were often not even informed about their right to have a supporter or advocate present at the hearing.

Methodology

The paper draws on data obtained from 15 in-depth interviews with professionals in the North East of England who had participated in remote and/or hybrid hearings in the family courts since social distancing measures were introduced. The interviews took place between September and December 2020. This paper draws specifically on findings relating to proceedings for non-molestation orders and occupation orders. The findings in relation to private and public children proceedings are reported separately.⁶⁸

The study is one of the first of its kind to consider the effectiveness of the remote family court during the pandemic. The Nuffield Family Justice Observatory has published two reports on the capacity of the remote family court to provide fairness and justice for court users, but those reports were based primarily on quantitative survey data.⁶⁹ Based instead on in-depth interviews, this is the first paper to provide qualitative understandings of some of the issues raised in the Nuffield Family Justice Observatory's reports. Further, this is the only study to offer specific insight into the experiences of practitioners supporting family court users during this time.

Semi-structured interviews were used to elicit respondents' feelings, create openness and expose new areas not initially considered by the researchers.⁷⁰ All interviews were conducted remotely, using either Microsoft Teams or telephone. This decision was one of 'methodological necessity' owing to the lockdown regulations.⁷¹ Johnson et al recognise that whilst interviews conducted remotely 'do not significantly differ in interview length, subjective interviewer ratings and substantive coding, they likely do often come at a cost to the richness of information produced'.⁷² This is largely because in-person interviews 'provide the most natural conversational setting, the strongest foundation for building rapport, and the best opportunity to

65 Family Justice Council, above n 59, s 3.

66 Ibid, s 4.

67 Nuffield Family Justice Observatory, above n 61.

68 K Richardson, A Speed, C Thomson and L Coapes, 'Covid-19 and the Family Courts: Key Practitioner Findings in Children Cases' (2021) 43(4) *Journal of Social Welfare and Family Law* (forthcoming).

69 Nuffield Family Justice Observatory, above n 25; Nuffield Family Justice Observatory, above n 61.

70 S Rahman, 'The Advantages and Disadvantages of Using Qualitative and Quantitative Approaches and Methods in Language "Testing and Assessment" Research: A Literature Review' (2017) 6:1 *Journal of Education and Learning* 102.

71 D Johnson, C Scheitle and E Ecklund, 'Beyond the In-Person Interview? How Interview Quality Varies Across In-person, Telephone and Skype Interviews' (2019) *Social Science Computer Review* 3.

72 Ibid, 1.

observe visual and emotional cues', whereas remote interviews can be 'difficult to manage, more likely to result in misunderstandings and limited in their ability to generate meaningful conversations'.⁷³ The authors consider that the risk of remote interviewing resulting in misunderstanding or otherwise affecting the validity of the findings was mitigated by their experience as family law practitioners. Whilst the authors had not participated in remote hearings themselves, they are experienced in both conducting fact-finding exercises and discussing cases with other professionals. As a result, the interviews were overwhelmingly conversational and detailed interactions. Further, using video conferencing facilities for most of the interviews ensured that at least some non-verbal and emotional cues could be identified.

The 15 interviewees in this study comprised: seven qualified solicitors, two trainee solicitors, one paralegal, two barristers, two volunteers at a court-based service and one representative of Cafcass. All except one of the respondents were female. Six of the legal professionals worked in predominantly legal aid practices, whilst two described their work as mostly privately paid. Two of the solicitors worked for different local authorities in the region, while the others were in private practice.

The respondents had varying experiences of supporting victims of abuse throughout the pandemic. Given that applications for injunctive protection are typically considered lower-level advocacy (at least until the point at which they become contested), it is perhaps unsurprising that the trainee solicitors and paralegal interviewed reported that preparing applications and attending *ex parte* and return hearings was a considerable part of their day-to-day work. These respondents reported overwhelmingly representing victims in proceedings. Two of the respondents volunteered at a court-based charity that supports litigants in person (both victims and perpetrators) in applications for injunctive protection, alongside other family and civil proceedings. The remaining professionals specialised in private and/or public children law, but had either encountered domestic abuse as a welfare/safeguarding concern within those proceedings or had clients who required a protective injunction, leading to interrelated proceedings being commenced. One respondent, for example, noted 'in the majority of private law cases . . . there are some allegations of domestic abuse'. This mirrors Barnett's findings that the prevalence of domestic abuse in private law children cases is considerably higher than in the general population, with the studies cited in her report indicating that allegations or findings of domestic abuse are made in up to 62 percent of cases.⁷⁴ Several of the qualified practitioners reported that they also supervised trainees and paralegals and so oversaw the conduct of any domestic abuse proceedings.

In terms of geographical spread, the respondents' offices were located in various places across the region: mostly Newcastle (seven) and Durham/Darlington (four), but with two in Sunderland and one in each of South Tyneside and Northumberland. Many of the interviewees reported having experiences of multiple courts in the North-East region over the relevant period. The data focus on the *geographic* region of the North East of England rather than the *judicial* region (which also includes York, Bradford, Sheffield, Leeds and Hull). Whilst a regional study, many of the issues that have emerged will resonate with the national and international legal community.

Respondents were recruited as a snowball (or chain-referral) sample. Naderifar et al note that 'in snowball sampling, the fragile population is selected in a social context and in a multi-stage process . . . [A]fter gaining access to the preliminary samples, the samples begin to introduce other people to take part in the research . . . [T]his process will continue in a semi-automatic

⁷³ Ibid, 2–3.

⁷⁴ A Barnett, *Domestic Abuse and Private Law Children Cases: A Literature Review* (Ministry of Justice, 2020).

and chain-like manner until data saturation'.⁷⁵ As the research team comprised family law practitioners, initial access proved unproblematic and referrals to other colleagues were forthcoming. Qualitative thematic analysis was conducted on the interview data using NVivo, which is recognised for providing a more rigorous method of coding than manual or other digital processes.⁷⁶ Two of the authors separately coded three of the interview transcripts to ensure a consistent approach. Thereafter, each of the remaining transcripts were coded by one of those two authors. Following the work of Lisa Given, saturation was considered to be reached at the point in coding where there were 'mounting instances of the same codes', but no new codes or themes emerged from the data.⁷⁷

Limitations of the study

A limitation of the study relates to the findings on litigants in person. The family court statistics on legal representation, which group all 'domestic violence' family court cases together, indicate an increase in the number of unrepresented applicants from 3,313 in 2015 to 6,423 in 2020.⁷⁸ Trinder et al's study recognised that most litigants in person are acting as such because they are ineligible for, or have been unable to obtain, legal aid, but cannot afford legal representation.⁷⁹ Only around one-quarter of the respondents in that study appeared in person out of choice.⁸⁰ Whilst it is a central claim of the article that the move to remote hearings has exacerbated pre-existing barriers to the family courts for litigants in person, the authors had no direct contact with litigants themselves. Instead, the data on which these findings are reached reflect the experiences and perceptions of the professionals interviewed. Moreover, as the respondents in this study worked in varied settings, their interactions with litigants in person were also varied. Principally, the respondents reported facing unrepresented opponents (or other parties) in the cases in which they were involved. However, the two volunteers who worked at a court-based charity had roles that involved them providing practical and emotional assistance to litigants in person before, during and after family court hearings. And the trainee solicitors and paralegal interviewed also reported triaging prospective clients and endeavouring to facilitate referrals to alternative sources of advice and support where the individuals were not eligible for legal aid.

Earlier studies have highlighted that there is value in seeking practitioners' views about the challenges faced by litigants in person because of their understanding of legal process and the issues being litigated.⁸¹ The authors are nonetheless mindful that, as legal professionals conducting interviews with other practitioners, the researchers and respondents may have had common understandings and shared experiences 'about' litigants in person that are reflected in the data. This absence of data 'from' litigants in person represents a gap in this research. The authors have sought to address this in a separate study which draws on litigants in persons' experiences of applying for non-molestation orders and occupation orders.⁸²

75 M Naderifar, F Ghaljaei and H Goli, 'Snowball Sampling: A Purposeful Method of Sampling in Qualitative Research Strides' (2017) 14:3 *Development of Medical Education* 3.

76 R Hoover and A Koerber, 'Using NVivo to Answer the Challenges of Qualitative Research in Professional Communication: Benefits and Best Practices Tutorial' (2011) 54:1 *IEEE Transactions on Professional Communication* 68.

77 L Given, *100 Questions (and Answers) About Qualitative Research* (Sage, 2016), 135.

78 Ministry of Justice, 'Family Court Statistics Quarterly: October to December 2020' (National Statistics, 25 March 2021) at: www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020. Last accessed 20 May 2021.

79 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).

80 *Ibid.*

81 Trinder et al, above n 79; Nuffield Family Justice Observatory, above n 25; Nuffield Family Justice Observatory, above n 61.

82 Richardson and Speed, above n 16.

The second limitation of the data is that, given the small sample size, it cannot claim to be representative of all professionals who have represented or supported parties in applications for injunctive protection during the Covid-19 pandemic, either in the North East or across England and Wales more generally. Nonetheless, as the preceding section has outlined, the interviewees comprised practitioners in different roles, at different stages of their careers and operating from varied settings. The authors therefore consider that the data collected present a fairly comprehensive – at least a wide-ranging – picture of the experiences of practitioners working in this area and the small sample size does not undermine the value of these findings.

Findings and discussion

Leaving abusive relationships and seeking legal advice

Many of the respondents felt that victims were prevented from leaving abusive situations during periods of lockdown because of difficulties in seeking advice about their legal options when they remain living with a partner. The difficulties raised related primarily to physical barriers to reporting rather than an absence of available support. One respondent noted, 'I've had clients calling in when they've gone out for their walk, exercising. But that's difficult because they're not in a place where they can really talk in detail about it'. Moreover, in the first lockdown between March and June 2020, respondents felt victims were confused about whether they could flee to the safety of a friend/family member's house. The same respondent reported 'a lot of clients were ringing in saying "I don't know if I can leave this situation. I'm not allowed to go to my family's address"'. These findings are consistent with research conducted by Hohl and Johnson, which identified a sharp decline during the first lockdown in victims telling police they had recently separated or attempted to separate.⁸³ Further, data from Women's Aid highlighted that, during the first lockdown, nearly 68 percent of victims felt that they had no one to turn to and over 48 percent reported feeling that they could not leave/get away from their partner because of the pandemic.⁸⁴ It is possible that this position has somewhat improved in subsequent periods of lockdown as the government issued guidance that 'household isolation instructions as a result of coronavirus do not apply if you need to leave your home to escape domestic abuse'.⁸⁵

As soon as the first lockdown restrictions eased in around June 2020, many of the respondents noticed an increase in instructions for non-molestation orders and occupation orders.

'I've done more (applications for non-molestation orders) in the last few months than I have the whole time I've been here.'

'At the very beginning of lockdown, we were quite quiet . . . but as soon as they eased restrictions a little bit, it was mental. I was personally taking on three to four new cases a week.'

'There was a massive increase. It's eased off a little bit now, but when lockdown eased, it went up massively.'

'The new cases we've got, there seems to be a massive increase in domestic violence within the home during the lockdown, the first lockdown period . . . I think it is going to come out in the next few months to be honest; I don't think that's going to be something that's just immediately apparent.'

⁸³ K Hohl and K Johnson, 'A Crisis Exposed – How Covid-19 is Impacting Domestic Abuse Reported to the Police': <https://campaignforsocialscience.org.uk/news/a-crisis-exposed-how-covid-19-is-impacting-domestic-abuse-reported-to-the-police/>. Last accessed 21 April 2021.

⁸⁴ Women's Aid, above n 1.

⁸⁵ Home Office, 'Domestic Abuse: Get Help During the Coronavirus (Covid-19) Pandemic': www.gov.uk/guidance/domestic-abuse-how-to-get-help. Last accessed 18 April 2021.

The data therefore indicate that victims found it easier to contact legal professionals and apply for protection once lockdown measures had been lifted. This is consistent with Hohl and Johnson's findings that, where domestic abuse features in a relationship, separations are delayed until restrictions are eased.⁸⁶ Similarly, in Richardson and Speed's study, the professionals surveyed identified that, for many victims, lockdown measures were a 'final straw'.⁸⁷ One of the respondents in their study noted that 'lockdown has resulted in a significant increase in domestic abuse, with victims who have experienced abuse for years feeling that it has become so significant as a result of being with their abuser constantly that once lockdown rules were lifted, they finally sought support and advice'.⁸⁸ Furthermore, family court statistics indicate that whilst 8,844 applications for non-molestation orders and occupation orders were made between April and June 2020 when the UK was in the first lockdown,⁸⁹ this increased to 9,944 applications between July and September 2020 once lockdown restrictions had been eased.⁹⁰

Effectiveness of remote platforms

The respondents reported that ex parte and return hearings for injunctive protection had mainly taken place via telephone (BT Meet Me) and contested hearings had predominantly been conducted through a video platform (most commonly, CVP). This is broadly in line with the interim practice guidance for the Designated Family Centre for Cleveland, Durham and Northumbria issued on 7 April 2020, which states that hearings under Part 4 of the Family Law Act 1996 (non-molestation orders and occupation orders) will be dealt with via telephone or Skype.⁹¹ In relation to FJC guidance on remote hearings, there was no indication by any of the respondents that victims had been consulted about their preferred method of holding the hearing for either ex parte or return hearings. For final hearings, however, the respondents reported that parties were required to prepare a 'case plan' indicating their client's preferred forum. There is clearly scope for greater consultation at earlier stages of proceedings. It was not clear from the data how often preferences were accommodated or how disputes between the parties about their preferred forums were resolved. Inevitably, litigants in person will find it difficult to weigh up their options without the benefit of legal assistance.

Overall, the respondents considered that remote hearings worked well for ex parte and return hearings. Echoing previous research, which found that non-molestation orders were still being granted 'swiftly'⁹² and 'without delay',⁹³ the respondents in this study praised the speedy and straightforward nature of telephone hearings. However, there appeared to be inconsistency as to whether representatives were being provided with a designated hearing time for ex parte hearings. The respondents noted that being allocated a specific time allowed them to manage their time more effectively than being placed in the list and waiting for a judge to call. Having an advance hearing time also brings clear benefits for self-representing litigants, who need to find a safe and private space to conduct the hearing. A strict interpretation of the FJC special measures guidance supports victims being provided with a time for ex parte hearings in order to reduce potential anxiety.

86 Hohl and Johnson, above n 83.

87 Richardson and Speed, above n 16.

88 Ibid.

89 Ministry of Justice and National Statistics (April to June 2020): www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2020. Last accessed 20 May 2021.

90 Ministry of Justice and National Statistics (July to September 2020): www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2020. Last accessed 19 May 2021.

91 HHJ Hudson and HHJ Matthews QC, 'Interim Practice Guidance (4) for Cleveland, Durham and Northumbria Designated Family Court', paras 6.2, 6.6, 6.8: <https://wmflba.files.wordpress.com/2020/05/newcastle-teeside-dfj-areas-interim-guidance-v3-7apr20.pdf>. Last accessed 18 April 2021.

92 Nuffield Family Justice Observatory, above n 25; Nuffield Family Justice Observatory, above n 61.

93 Speed et al, above n 1, 567.

All of the respondents identified benefits to remote hearings both for themselves and their clients. For practitioners, remote hearings were reported to save time compared to in-person hearings because of the removal of travel and waiting time. For clients, remote hearings were seen to better protect the safety of victims because they did not need to come ‘face-to-face’ with their perpetrator and litigants had greater control over the nature of their participation (for example, by opting to turn off their video or blur their background). Several respondents reported that when given the option, clients overwhelmingly opted for remote hearings over attending in person ‘just because they feel more comfortable’. This contrasts with the findings of the Nuffield Family Justice Observatory, where victims reported feeling unsafe when they had to listen to or see their alleged abuser from their own home.⁹⁴ Commenting specifically on the first Nuffield report, one of the respondents noted:

‘It heavily criticised remote hearings being used for domestic violence at home and I was quite surprised by it. I suppose in one respect, it does kind of invite that abuser in your house and seeing what’s in your house. But on the other hand, you’ve got that level of protection there that being in court can’t [provide] or that anxiety building up waiting to go in a separate room or whatever. So my view is yeah it probably is beneficial but that isn’t what’s come back from that report.’

In contrast to in-person hearings, the respondents identified that a benefit of remote hearings was that victims are not dependent on judges approving the use of special measures or courts having appropriate facilities in place. Two respondents gave the following examples of where special measures had not been forthcoming at in-person hearings:

‘I had a judge who took a screen away from a mum and the perpetrator was a litigant in person . . . he allowed him to cross-examine her without a screen. I was flabbergasted so I had to complain about it, it had been horrendous domestic abuse . . . the fear in that woman’s eyes, you could just see . . . if it was to be dealt with remotely then it works because you’ve almost got the screen there ready for you.’

‘I’ve had cases where we’ve walked in and screens haven’t been in place when they should have and so with remote hearings you don’t have to deal with all of that.’

These findings are consistent with research which indicates that special measures in many family courts are granted on an ad hoc and inconsistent basis.⁹⁵ As well as lacking available good quality screens and space for separate waiting areas, research suggests that some judges refuse the use of special measures or question their necessity.⁹⁶ Whilst the literature noted above specifically relates to private law children proceedings, the underlying procedural rules that empower judges to grant special measures apply to all ‘family proceedings’.⁹⁷ In addition, given that many of the difficulties in securing special measures relate to the condition of the court estate rather than the nature of the proceedings, similar issues are likely to be encountered in applications for injunctive protection. In practice, where proceedings for both injunctive protection and child arrangements have been initiated, proceedings will often be consolidated and heard together.

Considerably less research has been conducted about the use of special measures in injunctive proceedings. However, Richardson and Speed have considered this in the context of occupation

⁹⁴ Nuffield Family Justice Observatory, above n 61.

⁹⁵ J Birchall and S Choudhry, *What About my Right not to be Abused? Domestic Abuse, Human Rights and the Family Courts* (Women’s Aid, 2018); M Coy, K Perks, E Scott and R Tweedale, *Picking up the Pieces: Domestic Violence and Child Contact* (Rights of Women, 2012); 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.

⁹⁶ Coy et al (2012), *ibid*; Coy et al (2015), *ibid*.

⁹⁷ Family Procedure Rules 2010, Part 3A and Practice Direction 3AA.

orders in relation to in-person hearings.⁹⁸ In their study, most of the professionals surveyed reported that special measures were granted in the majority (between 75 percent and 100 percent) of the cases in which they were requested. That said, when asked about why a request for special measures might be rejected, the professionals reported issues similar to those identified in the private law children literature, namely a lack of equipment/facilities, administration issues, insufficient time to put the measures in place or the judge not being persuaded that they were necessary.⁹⁹ Concerns were also raised about the judiciary's awareness 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 together' or that the victim 'can't be that frightened' because they have allowed child contact. Further, whilst five out of the six victims interviewed as part of Richardson and Speed's study were offered a separate waiting room before the court hearing, none were offered other forms of special measures such as screens and many of them did not know that this option was available. One of the interviewees 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'.¹⁰⁰ Another of their participants was directly cross-examined by their perpetrator. This would undoubtedly have impacted the evidence that these victims were able to provide to the court.

These findings are concerning given the evidence that many victims who attend court without special measures find the experience traumatising and degrading.¹⁰¹ Attempts have recently been made to address this issue through provisions in the Domestic Abuse Act 2021, which has created a statutory presumption that special measures should be granted to victims of domestic abuse because 'the quality of [a victim's] evidence and participation in proceedings is likely to be diminished by reason of vulnerability'.¹⁰² The Act also prohibits direct cross-examination of victims where there is evidence of domestic abuse.¹⁰³ Whilst these provisions derive from recommendations made in the Ministry of Justice's Harm Report,¹⁰⁴ which focussed on private law children proceedings, they will apply across all family proceedings, including applications for injunctive protection. Until these provisions of the Act come into force, judges must show willingness to grant participation directions under Part 3A and Practice Direction 3AA of the Family Procedure Rules 2010, if and when there is a return to in-person hearings, to ensure that the quality of victims' participation and evidence is not compromised.

The respondents to this study generally agreed that remote hearings should continue for ex parte and some return hearings even after it was safe to return to the physical courtroom. However, it was noted that remote hearings pose a bigger challenge in return hearings where one of the parties is self-representing, where it is not uncommon for the applicant's representatives only to have an address for service and no other contact details, which precludes the possibility of pre-hearing negotiations. Court administrators need to be vigilant in securing sufficient details for these discussions to take place, potentially by sending a short questionnaire to respondents alongside the application form and notice of hearing. In contrast, at in-person hearings, the respondents to this study mentioned that discussions often led to agreements being reached, such as cases being disposed of by undertakings or orders continuing without any

98 Richardson and Speed, above n 16.

99 Ibid.

100 Ibid.

101 Birchall and Choudry, above n 96; Coy et al (2012), above n 96; Coy et al (2015), above n 96.

102 Domestic Abuse Act 2021, s 63.

103 Ibid, s 65.

104 Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (MoJ, 2020).

findings being made; of course, undertakings should not be accepted where there has been actual or threatened violence against the applicant or child.¹⁰⁵ In the absence of these discussions, a higher number of cases may become contested, not necessarily owing to legal complexity. Where additional contact details cannot be obtained, it would be prudent for judges to take a robust approach in exploring the options for settling the dispute at the outset of return hearings or set aside time for such negotiations to take place within an allocated hearing time. This point is illustrated by one of the respondents, who noted:

‘In my contested hearing in August, we were saying we would accept an undertaking, rather than findings being made. And I think if we were maybe there [in person] before [the hearing] and explained it they would have understood. But we had to explain it in the hearing. And the respondent just said “no” and findings got made against him. Obviously, it was good for our client, but I don’t think he had had that help there to really understand what he was really saying no to.’

In another case, a respondent discussed the delays caused by judges being unwilling/unable to provide time for the parties to negotiate:

‘The client was interrupting a lot . . . and the judge did say “if this was live there may be an opportunity for me to adjourn while you have a discussion about it”. As to whether they wanted basically a fact finding hearing on allegations of domestic abuse, because the indication was that the former partner may actually not want to go down that route. And so they may have been able to have a discussion, if we were actually in court and say, “right, you know, how are we going to progress that?” You can’t do that [in remote hearings]. So that means they have to go away to decide. And then we wait until, you know, for another three or four weeks . . . So there’s disadvantages in that sense without any doubt.’

Where both parties were represented, respondents accepted there remained more scope for negotiations to take place, as they would prior to in-person hearings.

‘I have been on one case where the other party has a solicitor, and the judge did ask that the parties got together ahead to discuss this specific issue. And so that was organised by the solicitors involved.’

The vast majority of respondents questioned whether remote hearings were appropriate for final contested applications. One respondent noted that video platforms were far from ideal for final hearings because technical issues such as delays and feedback interrupted the clarity of parties’ evidence, whilst another was concerned that remote hearings made it difficult for a judge to assess clients’ credibility and empathise with their situation. Based on these respondents’ accounts, there appeared to be a conflict between representatives’ preference for their clients to appear in person, and victims’ preference to attend remotely to safeguard their wellbeing.

Availability of remedies

Consistent with the family court statistics, the respondents identified a disparity between the ease with which non-molestation orders are granted compared to occupation orders. It was noted that occupation orders are currently ‘very difficult to get’ and ‘the court rarely grants occupation orders’, whilst another respondent described that with non-molestation orders ‘the judge has read through the papers, they’ve usually agreed it before . . . the only question they have is about the metres’ distance [on “stay away” clauses]’. The difference in treatment was

¹⁰⁵ Family Law Act 1996, s 46(3A).

attributed not only to the usual (pre-pandemic) difficulties in satisfying the strict balance of harm test, but to perceived difficulties for respondents to secure alternative accommodation with informal support networks (who may be clinically vulnerable or otherwise not willing to accommodate non-household members at this time) and increased reliance on the family home by perpetrators working from home. The view that occupation orders have been more difficult to secure is supported by the family court statistics, which demonstrate that the number of successful orders has declined during the pandemic.¹⁰⁶

The declining number of occupation orders is concerning for several reasons. Primarily, respondents to non-molestation orders with a ‘stay away’ clause (regulating whether a perpetrator can attend the vicinity of the family home) cannot be ordered to pay (or make contributions to) the rent, mortgage payments or other outgoings, nor can they be required to grant possession or permission to use the contents of the house.¹⁰⁷ These powers are often necessary to protect victims’ financial wellbeing, particularly in cases of economic abuse. At present, the only other remedy available to remove an unwilling perpetrator is a Domestic Violence Protection Order (DVPO) which can exclude a perpetrator from the home for up to 28 days.¹⁰⁸ However, this relies on the proactivity of the police at a time where resources are already stretched. In any event, the short duration of DVPOs offers limited benefit in supporting victims to regulate the occupation of the family home for any meaningful amount of time. DVPOs/DVPNs will soon be replaced by Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs) through the Domestic Abuse Act 2021. Whilst the main features of DAPNs/DAPOs will be the same as their predecessor, orders can be granted for a potentially unlimited duration which may make them a more viable alternative to occupation orders.¹⁰⁹

In relation to longer term options for regulating the family home, a victim may seek to divorce the perpetrator and deal with the family home as part of financial arrangements. However, there are continuing delays and backlogs in progressing ‘non-urgent’ cases, such as applications for financial relief. The limited availability of other family law remedies means that victims may not be able to achieve financial independence from the perpetrator. Moreover, social distancing measures have reduced the availability of alternative accommodation for victims, which increases the risk that women will stay in abusive situations.¹¹⁰ Speed et al’s study identified a 26 percent reduction in refuge accommodation across the UK since March 2020.¹¹¹ Women’s Aid estimates that in England this is closer to 41 percent.¹¹² Both studies highlight that refuges have closed due to capacity issues, the lack of suitable follow-on accommodation, and to minimise the risks posed by communal living. As a result, refuges have experienced a considerable loss of income which may jeopardise their ability to re-open and provide accommodation in a post-Covid-19 landscape.

¹⁰⁶ Richardson and Speed, above n 16.

¹⁰⁷ The court’s power to make such provisions as adjuncts to occupation orders can be found in the Family Law Act 1996, s 40. However, as the case of *Nwogbe v Nwogbe* [2000] 2 FLR 744 illustrates, the courts do not have the power to enforce provisions requiring payments to third parties.

¹⁰⁸ Crime and Security Act 2010, ss 27–29.

¹⁰⁹ Domestic Abuse Act 2021, ss 22–46. The commencement date for DAPOs/DAPNs has not yet been determined.

¹¹⁰ Previous studies have identified that women who had experienced domestic abuse referred to the lack of alternative housing options as having an impact on their ability to leave abusive relationships. See A Clough, J Draughon, V Nije-Carr, C Rollins and N Glass, ‘“Having Housing Made Everything Else Possible”: Affordable, Safe and Stable Housing for Women Survivors of Violence’ (2014) 13:5 *Qualitative Social Work* 671.

¹¹¹ Speed et al, above n 1.

¹¹² Women’s Aid, above n 1.

Litigants in person

It was clear that the respondents perceived there to be problems for litigants in person accessing support and advice at all stages of the court process. Where victims were not eligible for funding, practitioners reported feeling unsure about where to refer them for legal advice, given that some of the pro bono organisations in the region remained closed and many were operating at a reduced capacity. The Nuffield Family Justice Observatory report similarly found that 42 percent of professionals did not know what support is currently available to litigants in person.¹¹³ These findings suggest there would be merit in a central database of pro bono advice organisations so that representatives have a clear referral route when contacted by litigants in need of support.

In particular, respondents to this study acknowledged that the closure of the courts and the transition to filing applications for injunctive protection electronically was likely to have reduced physical opportunities for victims to seek support. This is because, prior to the pandemic, litigants in person wishing to file an application were likely to be signposted by court staff to Support Through Court, who could then assist with the preparation of the preliminary documents. Whilst Support Through Court are still assisting unrepresented court users remotely, a litigant does need to know that the service exists. Moreover, as one respondent mentioned, Support Through Court in Newcastle was operating at a reduced capacity during the initial stages of the pandemic. This is consistent with the findings of the Nuffield Family Justice Observatory, where respondents from other regions noted that 'Support Through Court is . . . a scarce resource and in the vast majority of cases not available' and 'while members are aware that the Support Through Court service is available, they have not generally seen evidence of the service being available during hearings'.¹¹⁴ Demand for services is currently likely to considerably exceed the availability of volunteers.

Several respondents highlighted that the disadvantage caused by limited practical assistance being available to litigants in person was exacerbated by judges in remote hearings placing increased importance on statements of case, compared to in-person hearings.

'One big issue is if you're a litigant in person and your statement is not very detailed, the court's saying they're not going to hear any oral evidence at a without notice hearing. But the litigant might not have put enough evidence in there to get a non-molestation order.'

'They might just have put in what's happened recently, whereas we'd put in all the acts of serious physical violence. And most of the time when I'm speaking to a client, they don't give me times and dates which is probably one of the most important things when you get cross-examined.'

Under the interim guidance for the North East, judges in the region will not hear oral evidence as a matter of course at remote ex parte hearings.¹¹⁵ The guidance states, 'it is important therefore that applicants set out their case for emergency protection in a written statement so that the Court can consider whether the case is appropriate to be considered without notice to the other party and requires protection through a non-molestation order'.¹¹⁶ However, this guidance must not be interpreted so as to deny litigants in person an opportunity to provide more information about their case where there are deficiencies in their written application. Evidence provided by a local judge at the North East Local Family Justice Board seminar in August 2020 indicates that this guidance is being interpreted strictly and may need to be

113 Nuffield Family Justice Observatory, above n 61, 30.

114 Ibid.

115 HHJ Hudson and HHJ Matthews QC, above n 91.

116 Ibid, para 6.3.

reviewed. A judge from the region noted that several applications for injunctive protection have been refused during the pandemic on the basis that they contained irrelevant information about historical incidences of abuse and insufficient information about recent events which formed the basis of the application. The litigants in question were not told (either during the hearing or afterwards) why their application had been refused or given an opportunity to remedy the defects. This exposes victims to further risk of harm and indicates that an approach which is more empathetic and ‘attuned to lay parties’ is required from some judges.¹¹⁷ This is also likely to impact applicants’ trust in the justice system and view of the courts’ appreciation of the seriousness of domestic abuse. Following recommendations from the Nuffield Family Justice Observatory, courts may also wish to consider appointing at least one judge as a member of the Litigant in Person Support Network to ensure access to the latest information about how self-representing litigants can be supported.¹¹⁸

These findings demonstrate a need for specific guidance to assist self-representing litigants prepare applications. Trinder et al observed that a single authoritative ‘official’ family court website should be established with all resources self-representing litigants need in one place.¹¹⁹ This research confirms the potential value of such a website. Several respondents working in legal aid practice also highlighted that the digital service provided by RCJ Citizens Advice, CourtNav, had recently launched a module for protective injunctions and this had increasingly been used throughout the pandemic for new referrals. Litigants can register for free online and are asked questions, the answers to which are used to generate and complete the relevant court form and supporting witness statement. On completion, the application is sent to a panel law firm of the litigant’s choice who will assess their eligibility for legal aid. In the event that they are not eligible, the case can be reviewed by legal advisors at RCJ Citizens Advice. Currently, only a handful of legal aid practices in the North East are registered to receive applications through CourtNav and there is scope for the Local Family Justice Board to disseminate information regarding its benefits, both for legal aid practices and litigants. Moreover, domestic abuse support services unable to assist litigants with preparing application documents should refer litigants to this tool.

Service

Respondents noted that, at the outset of the pandemic, most injunctive orders were served via substituted service, typically through postal service, Facebook or WhatsApp. This approach is consistent with regional guidance.¹²⁰ Whilst this approach has been affirmed by Practice Direction 36U, respondents noted a gradual return to using process servers in the latter part of 2020. There was no indication whether this was because process servers had developed Covid-secure means of personal service or whether there had been difficulties with enforcing orders which had been served electronically because of the CPS’s stricter protocol. However, given that a significant number of orders have been served through electronic means over this period, it would clearly be in the interests of victims for the family courts, CPS North East and the relevant Police and Crime Commissioners to reach a local agreement that upholds the law and puts victims first by ensuring perpetrators are not able to use the technicality of a lack of personal service to ‘defeat the purpose for which the order was designed’.¹²¹

The main issue that respondents identified with service, however, related to delays in the court preparing orders. A few respondents noted that they had waited weeks for orders to be typed

¹¹⁷ Nuffield Family Justice Observatory, above n 61, 1.

¹¹⁸ *Ibid.*

¹¹⁹ Trinder et al, above n 79.

¹²⁰ HHJ Hudson and HHJ Matthews QC, above n 91, para 6.5.

¹²¹ Cooper and, Horton above n 49.

up owing to administrative backlogs, whilst one respondent waited over a month and a half for a minor amendment to be made to a non-molestation order. This delay is perhaps unsurprising, given the cuts made to court staffing over recent years: the number of full-time staff employed by HMCTS fell from 20,392 in 2010 to 14,269 in 2017.¹²² A similar issue was identified by the respondents to the Nuffield Family Justice Observatory study, who felt there were insufficient staff to support the administration process.¹²³ The Family Procedure Rules 2010 stipulate that non-molestation orders are only enforceable once they have been served and that this should be done as soon as reasonably practicable.¹²⁴ For criminal law purposes, a respondent is bound by the order once he is made aware of its existence.¹²⁵ A respondent to an *ex parte* protective order, however, will not become aware of the order until he is served. Accordingly, any delays in preparing the order and effecting service could put the victim at further risk of harm. To speed up the process, practitioners should ensure they assist the court by providing a draft order.

Once service has taken place, the order must be registered with the police: Rule 10.10 of the Family Procedure Rules 2010 states that 'where the court makes an occupation order to which a power of arrest is attached or a non-molestation order, a copy of the order must be delivered to the officer for the time being in charge of the police station for the applicant's address or such other police station as the court may specify'. The general position under rule 10.10 is that the applicant is to serve the order on the police unless the court has also served the order itself on the respondent because the applicant is a litigant in person or the court has made an order of its own volition. This provision seeks to protect litigants in person who may not be familiar with the required procedural steps. This position has been somewhat modified for represented applicants by the North East regional guidance, which states that 'at the conclusion of the hearing, the Court will draw any orders and will send them to the relevant police force'.¹²⁶ Respondents in this study identified some potential difficulties with this revised approach, however. Particularly, where applicants (or their representatives) were required to serve orders, there was a risk that the court could register an order with the police which had not yet been served on the respondent in the proceedings, in which case action could not be taken to pursue a breach. Accordingly, one respondent to our study felt that it would be more logical for the applicant's representative to take responsibility for both service and registration with the police, as would happen pre-Covid-19. If this cannot happen, there must be clear communication between the different parties to ensure that each party has correctly fulfilled their responsibilities.

Conclusions

This study reveals that remote hearings can work effectively for *ex parte* and return hearings where an application is made to the family court for injunctive protection. The authors recommend that in a post-Covid-19 landscape, victims should continue to be given the option to attend these hearings remotely, perhaps with similar procedures being implemented to those currently in Newcastle Crown Court, whereby the alleged perpetrator is prevented from seeing the victim during the hearing. This would facilitate compliance with section 63 of the Domestic Abuse Act 2021 and ensure victim safety, particularly at a time when the courts are busy and separate waiting areas are difficult to facilitate. Concerns have been raised by practitioners

122 F Kaganas, 'Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy' (2017) 39: 2 *Journal of Social Welfare and Family Law*, 168; Transform Justice, 'Court Closures Briefing' (2018): www.transformjustice.org.uk/wp-content/uploads/2018/02/Court-Closures-Briefing.pdf. Last accessed 20 May 2021.

123 Nuffield Family Justice Observatory, above n 61.

124 Family Procedure Rules 2010, r 10.6.

125 Family Law Act 1996, s 42A(2).

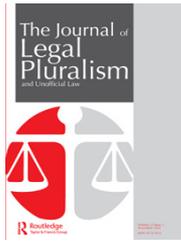
126 HHJ Hudson and HHJ Matthews QC, above n 91, para 6.4.

about the quality of evidence provided by video link at contested final hearings, so there needs either to be significant financial investment in video link facilities to bring them up to the standard of the criminal courts or other types of special measures may need to be considered for those hearings.

Regardless of those measures, it is imperative that victims are also able to access legal advice and support before, during and after proceedings. The authors therefore recommend that a national database of service providers be created, together with a comprehensive website of accessible information, in line with the proposals of Trinder et al.¹²⁷ In the short term, the CourtNav service should be publicised widely as a resource which can be used by litigants in person. It is also imperative that the issues with service are resolved as a matter of urgency to ensure that breaches can be dealt with appropriately by the police and the CPS, which requires consultation at a local level between practitioners, the judiciary and the CPS.

At the heart of all these proposals is a requirement for a joined-up, multi-agency approach to domestic abuse. But this can only be achieved by each agency involved being appropriately funded and resourced. This issue was at the forefront of the debate around the Domestic Abuse Act 2021 and must continue to be the focus of discussion in this area.

¹²⁷ Trinder et al, above n 79.



Just-ish? An analysis of routes to justice in family law disputes in England and Wales

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Just-ish? An analysis of routes to justice in family law disputes in England and Wales

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ABSTRACT

It is widely documented that the formal family justice system in England and Wales is in crisis. The family courts are plagued by delays and backlogs, whilst parties struggle to secure access to advice and representation due to cuts to public funding. Increasingly, litigants face economic, physical and cultural barriers to courts brought about by rising court fees, reforms to the court system and demographic changes which have resulted in diverse family forms for whom the family courts may have little legitimacy. The first part of this article examines how recent changes to family law and policy in England and Wales have reduced the ease with which parties are able to achieve procedural and substantive justice through the family courts. The second part of the article analyses how forums of dispute resolution which are delivered by non-state actors, but which rely on the state for their authority, have evolved to fill this justice gap and are therefore indicative of a move towards ‘weak’ legal pluralism in the context of family justice. It is argued that although the family courts are still an important cornerstone of the justice landscape, alternative forums of dispute resolution increasingly play a positive role in enabling disputants to achieve their procedural and substantive goals and this is strengthened by a weak approach to legal pluralism which upholds the autonomy of the parties whilst also ensuring necessary protections and safeguards for vulnerable litigants. The article therefore challenges critics of weak pluralism, who perceive that reliance on state recognition precludes institutions playing an important role outside of the state hierarchy.

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Introduction

It is widely documented that the formal family justice system in England and Wales is in crisis (Amnesty International 2016; Richardson and Speed 2019; The Law Society of England and Wales 2017). The family courts are plagued by delays and backlogs whilst parties struggle to secure access to advice and representation due to cuts to public funding (Amnesty International 2016; Ministry of Justice 2019; Organ and Sigafos 2018; The Law Society of England and Wales 2017). Increasingly,

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litigants face economic and physical barriers to accessing the family courts brought about by rising court fees and reforms to the court system which have resulted in reduced staffing and closures to the court estate (Kaganas 2017; Ministry of Justice 2019). At the same time, there has been a general withdrawal by the state in the governance of some family cases on the basis that many family law disputes relate primarily to relationship rather than legal issues which the courts are not equipped to deal with (Hunt 2004). Over the last few decades, England has also experienced wide-scale demographic changes as a result of globalisation and the spread of human rights, resulting in a diverse family forms for whom traditional family law and practice may have little relevance and legitimacy (Gangoli, Bates, and Hester 2020; Stark 2006; Sullivan 2010). These changes, it is argued, have reduced the ease with which parties are able to achieve justice through the family courts in England and Wales, and, in many cases, have made them a less appealing and less accessible route to resolving family law disputes. More fundamentally, many of the measures undermine the principles of equality, fairness and accessibility for all, on which the formal justice system is predicated (Piche 2017).

The first part of this article sets out an in-depth analysis of the recent changes to the family justice landscape in England and Wales and their impact on access to justice. Whilst the definition of justice is much debated, for the purposes of this discussion it is conceptualised as referring to the procedural and substantive ways through which an outcome is reached. Procedural justice emphasises that ‘people’s behaviour and their reactions to legal authorities are based to a striking degree on their assessments of the fairness of the process by which legal authorities make decisions and treat members of the public’ (Tyler 2003, 284). Procedural justice is driven by a number of factors including whether decisions are made in a neutral and unbiased way, whether litigants feel treated with dignity and respect, whether they understand how decisions are made and whether they have an opportunity to state their case (Epstein 2002; Lagratta and Bowen 2014). Justice institutions can fail to provide procedural justice, ‘in scope’ (by failing to adjudicate cases within their scope or going beyond their purview), ‘through procedure’ (by using improper means to resolve a conflict), or ‘in outcome’ (by reaching an unjust outcome notwithstanding that they have complied with the appropriate scope and procedure) (Ehrenberg 2003, 189). Proponents of procedural justice highlight a relationship, both positive and negative, between the treatment people receive by justice officials and the trust they confer in justice institutions and their willingness to comply with outcomes (Ibid). In contrast, substantive justice is concerned with the morality, legitimacy and efficacy of legal rules (Lovis-McMahon 2011). This is important because if laws themselves are unfair, the process by which an outcome is reached is largely immaterial. Moreover, as Goodmark argues ‘whether the process can be deemed just may depend in large measure upon what outcome an individual hopes to achieve’ (2015, 712).

The second part of the article analyses how forums of dispute resolution which are delivered by non-state actors but which rely on the state for their authority – notably mediation, arbitration and religious tribunals – have evolved to fill the justice gap created by these changes and are indicative of a move towards ‘weak’ legal pluralism in the context of family justice. This shift, it is argued, has been driven both by the

UK government through recent policy initiatives and the justice needs of litigants. Legal institutions can be regarded as ‘weak’ where it is ‘only through the state’s willingness to grant powers to other methods of adjudication that legal pluralism is given acceptance’ (Von Benda-Beckmann and Turner 2018, 262). This can be contrasted against ‘deep’ pluralism which arises where different legal orders have ‘separate and distinct sources of content and legitimacy’ (Woodman 1999, 10). This article argues that alternative forums of dispute resolution are capable of playing a positive role in dispute resolution in appropriate cases and may more closely align to participants’ procedural and substantive goals. This is supported by a weak approach to pluralism which upholds the parties’ autonomy whilst also ensuring necessary protections and safeguards for vulnerable litigants. Challenging critics who argue that weak pluralism is a ‘technique of governance’ utilised by the state and is therefore not true pluralism (Sezgin 2004, 101), this article makes a unique contribution to the literature by arguing that reliance on state recognition is a positive development for family justice and does not necessarily preclude institutions playing an ‘important role in facilitating justice outside of the state hierarchy’ (Corrin 2017, 307).

Part 1: Recent changes to the family justice system and their impact on justice

Barriers to the family courts

Over the last decade, a range of cost-saving measures have been implemented by the UK government as part of wide-scale family justice reform. The measures mark a fundamental shift away from post-war policies which regarded access to justice as a fundamental right and which sought to ‘ameliorate the variety of barriers that may exist to participation and inclusion in the legal system, as a result of structural disadvantage and the unequal distribution of resources in society’ (Mant 2017, 249). In contrast, many of the policies outlined below are illustrative of a shift towards neoliberalism and the ‘economisation’ of family justice, in which the value of policies are no longer assessed by their effectiveness in promoting equality, fairness and accessibility but by their cost-effectiveness, their contribution to economic growth or reducing the national deficit (Ibid). The impact of this, it is argued, has been to reduce the capacity of the family courts to facilitate procedural and substantive justice and place increased reliance on alternative methods of adjudication. This follows a wealth of literature which documents that in the developing and developed world, non-state methods of dispute resolution are utilised where there are barriers of entry to the state system (Akers 2016; Janse, Ronald. 2013; M’Cormack 2018; Piche 2017).

Cuts to legal aid

Arguably, the most significant barrier to justice followed the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which came into effect in April 2013. LASPO removed from the scope of legal aid private family law cases except where strict criteria are met regarding domestic violence (including forced marriage and female genital mutilation), child abduction and child abuse (LASPO 2012, Sch 1). The government defended the decision to restrict funding on

the basis that 'legal aid is not routinely justified for ancillary relief and children proceedings' (Ministry of Justice 2010, 6). In relation to private law children cases, the government argued that 'the provision of legal aid is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases' (Ibid, 70). The result was that £350 million was removed from the legal aid budget in 2013, with further annual cuts of approximately £268 million until 2018 (Ministry of Justice and The Legal Aid Agency 2014). In the year ending April 2013, legal aid was granted in 925,000 cases. The following year, this fell to 497,000 - a decrease of 46% (LAPG 2017).

The two main difficulties with securing legal aid are providing the necessary gateway evidence to demonstrate that an applicant falls within the required exemption and satisfying the legal aid means test. In relation to gateway evidence for victims of domestic abuse, the initial legal aid regulations contained restrictive forms of acceptable evidence including evidence that a respondent had been arrested, cautioned, bailed or convicted for a domestic abuse offence or a letter from a relevant health professional or a multi-agency risk assessment conference confirming that the applicant is or has been at risk of harm from the respondent (The Civil Legal Aid (Procedure) Regulations 2012). Controversially, at the onset of the legislation, much of this evidence needed to relate to incidents that took place within the two years prior to the date of the legal aid application. Many victims were unable to meet these requirements due to not reporting the abuse or it taking place outside of the relevant time periods. In addition, the restrictive gateway evidence did not accommodate difficult to evidence forms of domestic abuse such as financial abuse. The consequence was that many victims of domestic abuse were not eligible for legal aid and therefore able to secure the representation they needed in court proceedings (Amnesty International 2016; The Law Society of England and Wales 2017). In February 2016, the Court of Appeal found that the limited evidence requirements prevented survivors of abuse from qualifying for legal aid and were therefore unlawful (*Rights of Women v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91). The court described that there was a 'formidable catalogue of areas of domestic violence not reached by a statute whose purpose is to reach just such cases' (Ibid, 44). In April 2016, new regulations were introduced extending the 24-month time limit to 60 months and introducing new forms of acceptable gateway evidence for financial abuse into regulation 33(2) of the Civil Legal Aid (Procedure) (Amendment) Regulations 2016. The regulations were subsequently amended again in January 2018 to remove the time limit on abuse evidence and to broaden the scope of acceptable gateway evidence to include letters from domestic violence support organisations, independent domestic violence advocates and housing support officers.

Whilst the amendments have clearly been a positive development, it remains the case that many victims are still not able to secure the necessary evidence. Domestic abuse is an underreported offence and many victims cannot therefore obtain evidence from the police (Office of National Statistics 2019). Research has also highlighted that some organisations are not willing to prepare letters that would allow a victim to secure legal aid, charge fees for preparing letters which are unaffordable and that victims experience data protection issues when attempting to access evidence from the police (Syposz 2017).

Even if a victim of abuse is able to secure the necessary gateway evidence, they must still satisfy the means test. LASPO introduced significant changes in respect of means testing for legal aid including freezing the financial thresholds, requiring all applicants to have capital under the assessed threshold and increasing the financial contributions which applicants may be required to make towards their legal costs. This has created further barriers to the family courts, with large numbers of people who would have previously been eligible for legal aid now being unable to obtain help (Hirsch 2018). Despite the government's objective that victims of domestic abuse should continue to be eligible for legal aid, research demonstrates that over 40% of victims are no longer able to access public funding (LAPG 2017). Whilst the government have committed to reviewing the legal aid means test, it is unlikely that wide-reaching revisions will be made, in light of the cost-saving objectives.

Parties who no longer qualify for legal aid but who cannot afford to instruct a solicitor on a privately paying basis have no option but to represent themselves in the family courts, should they decide to pursue proceedings (Trinder et al. 2014). Court statistics demonstrate that between January and March 2020, neither the applicant nor respondent had representation in 39% of cases, an increase of 25% since the same period in 2013 (Ministry of Justice 2020). Difficulties securing access to advice and representation have been compounded by austerity measures which have defunded support services and charitable organisations who otherwise may have been well placed to guide litigants through the court process on a pro bono basis (Organ and Sigafoos 2018). It is now common for organisations to provide one-off 'general' advice (often by unqualified volunteers) rather than full representation due to high levels of demand, which may be of limited assistance (Amnesty International 2016; Organ and Sigafoos 2018). As such, even litigants who do receive some advice are required to handle their cases to a considerable extent without support.

The obstacles that parties without legal representation face are well documented. Potential litigants without access to early legal advice may not have sufficient knowledge of their legal rights to understand they have a case (Sullivan 2010). They may also struggle to identify the key issues in dispute and put forward their strongest legal arguments (Richardson and Speed 2019). In the case of applicants, this can result in cases lacking merit or serial applications (Trinder et al. 2014). Litigants in person report experiencing difficulties with following court procedures including feeling unable to prepare and file paperwork, comply with directions, and secure necessary evidence, such as appointing and funding relevant experts (Organ and Sigafoos 2018). These factors invariably impact the participatory nature of family proceedings as litigants may not have sufficient opportunity to be heard and findings/decisions may be reached on the basis of insufficient information.

It follows that the effects of these barriers have led some potential litigants to take no action through the family courts leaving their issues unresolved. A survey of 239 women in the UK found that over half of the respondents took no action in relation to their family law problem because they were not eligible for funding (Rights of Women 2015). Whilst the small scale nature of this study means it cannot claim to be representative of all litigants' experiences, it nonetheless supports the argument that LASPO has, and continues to, discourage not only 'unnecessary' litigation as

intended but also necessary litigation (Organ and Sigafoos 2018). This is further supported by court statistics which indicate that the number of court applications has fallen as a result of LASPO, with an overall decrease of 15% in children matters and 10% for financial cases (Hunter, Rosemary. 2017).

Rising court fees

Economic barriers to the formal justice system have been exacerbated by rising court fees. Court fees to commence family proceedings typically cost a few hundred pounds. A litigant who wishes to divorce their spouse will incur a court fee of £550 to file a petition, a cost which has increased by 35% from £410 since 2016 (House of Lords Secondary Legislation Scrutiny Committee 2015). This represents over 200% of the actual cost of processing an uncontested divorce, which the Ministry of Justice estimate is £270 (Ibid). Various applications may also need to be made within proceedings which attract separate court fees.

Simply put, court fees are not affordable for all litigants. There are two potential mechanisms which exist to facilitate access to the family courts in relation to costs. The first is through court fees not being charged in proceedings for protective injunctions including non-molestation orders, occupation orders, forced marriage protection orders and female genital mutilation protection orders. This reflects the fact that these proceedings involve a potential victim seeking protection against an alleged perpetrator of abuse and that such conduct is not their fault. Whilst this provision is helpful to some extent, its benefit is limited by virtue of the fact that issues surrounding an abusive relationship can rarely be dealt with by way of an injunctive order alone and ancillary proceedings are usually required (Richardson and Speed 2019). The second mechanism is through the availability of waivers and reductions, known as fee remission. Fee remission is a sliding scale of reductions to court fees based on the income and capital resources of the applicant. However, many applicants will not qualify for assistance despite not having sufficient income to pay the fee.

Court users question the value for money of court fees, and this is increasingly part of their decision making process when deciding whether to start proceedings, particularly amongst those with fewer financial resources (Pereira et al. 2014). Research conducted prior to recent fee increases, highlights that parties sought better value from the family courts to justify increases in fees, both in the efficiency of cases and the quality of information and service they were provided (Ibid). Despite increases taking place, there is little evidence that this investment in the family courts has been met with improved service, as will be considered below.

Reduction in the court estate

The HMCTS Reform Programme started in 2014 with the aim of modernising the court system through increasing the use of technology and reducing the court estate where utilisation rates are low. It has been stated that these measures would facilitate access to justice as the savings could be reinvested into other parts of an overburdened system (Ministry of Justice 2016). To facilitate this, since 2010 approximately 258 court and tribunal closures have taken place with a further 36 expected to close in the foreseeable future (House of Commons Justice Committee 2019). Closures of

the court estate effect the ease with which litigants are able to access and experience the family courts. The Justice Committee recommend that 90% of court users should be able to access their nearest court venue and return home 'within the same day' (Ibid). This is a considerable increase from the previous recommendation of 'within one hour' (Ibid).

In relation to family law, there has been further disruption to the court system through the creation of the single family court and the centralised divorce centres in 2014, which have exacerbated difficulties for parties to access local courts or judges with relevant expertise. An example of this can be seen in the 2018 closure of the Durham Civil and Family Justice Centre as the regional North East Divorce Centre, which was moved some 116 miles away to Bradford. Subsequently (and in part as a result of the backlog of cases generated by Covid-19) this has temporarily been moved to Liverpool, a distance of 160 miles from Durham. Whilst it is hoped that any necessary hearings would be heard closer to the petitioner's home, this cannot be guaranteed. Moreover, the changes have broadened the categories of judges who are able to hear family cases to now include employment judges. Some judges may therefore lack the necessary knowledge to adjudicate family law cases which may result in 'critical issues or questions being overlooked' (Kaganas 2014, 156).

Court closures have been mirrored by a reduction in court staff who are available to process paperwork and hear cases. It is reported that the number of full-time staff employed by HMCTS fell from 20,392 in 2010 to 14,269 in 2017 and the number of magistrates has fallen by half (Transform Justice 2018). HMCTS have stated that they will contribute £250 million of the money saved from the closure of courts to the £1 billion which the digital reform is estimated to cost (House of Commons Justice Committee 2019). In family law, there has been a shift towards electronic applications with online divorce proceedings becoming available to the public on 1 May 2018. Further pilots are underway in relation to electronic applications in financial relief, public and private law children proceedings. Whilst electronic submission of documents and hearings taking place via video link may increase the physical accessibility of courts, it will only do so for those who have access to computers and the technical expertise to use them. Further, it is vital that such services are fit for purpose. Whilst on the one hand it has been reported that during the pilot phase there was a 95% decrease in the number of divorce applications being returned because of mistakes compared to the paper forms, the former President of the Family Division, Sir James Munby, has also reported that video links in 'too many' family courts are 'a disgrace, prone to the links failing and with desperately poor sound and picture quality', although more financial resources are being invested in this following the Covid-19 outbreak (HMCTS 2018; Munby 2017, 12).

Resourcing difficulties have resulted in a back-log of cases and increased the time taken to resolve matters. Hunt's(2004) study of private children cases identified that 75% of the respondents reported experiencing delays. Delays undermine the parties' faith in procedural justice by giving the impression that cases are dealt with inefficiently. They also preclude judicial continuity in many cases, leading parties to lack faith in a judge's understanding of the issues and capacity to reach a fair outcome and adversely affect the parties' mental health (Ibid). Delays have been exacerbated

by the increase of litigants in person (Organ and Sigafos 2018; The Ministry of Justice 2019; Trinder et al. 2014). Self-representing litigants are less amenable to out of court negotiations meaning a higher proportion of cases may become protracted, not necessarily through legal complexity (Richardson and Speed 2019). This is because unrepresented litigants often avoid communicating directly with the other party or their representatives due to animosity, distrust and fear, and instead engage in litigation by correspondence (Trinder et al. 2014).

An under-resourced system is also less able to put individualised interventions in place to protect the needs of litigants. In cases where language barriers may preclude proper engagement in proceedings for example, litigants require access to good quality and independent interpreters, which are not always available. Specialised interventions may also be required in cases where domestic abuse is alleged. Recent studies have highlighted that family courts provide a forum for abusive and controlling behaviours to continue, because victims may have to face their perpetrator directly during hearings (Birchall and Choudhry 2018; Thiara and Harrison 2016). In addition, they may be expected to cross-examine their abuser or be cross-examined by them, as this practice is not yet prohibited in the family courts. There have been some developments in the substantive law to discourage this practice (see Practice Direction 12J Family Procedure Rules 2010 which advises that ‘the judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties’) however until the Domestic Abuse Bill 2019–2021 is finally implemented, the current guidance is best practice rather than a statutory provision. Unsurprisingly, victims of domestic abuse report finding the experience of being cross-examined by their alleged abuser traumatising (Birchall and Choudhry 2018; Coy et al. 2012, 2015).

Moreover, research indicates that special measures (such as separate waiting areas or staggered start/departure times) are often not available because of a lack of space within court buildings or because poor quality technology does not allow victims to give evidence from a separate location or behind a partition (Trinder et al. 2014). Almost half of the legal professionals surveyed by Coy et al. (2012, 2015) reported that special measures were not advertised for vulnerable court users and some judges refused the use of special measures. For these victims, the family courts can be a traumatising and unsafe space. This situation should, to some extent, be improved by the introduction of Part 3A and Practice Direction 3AA to the Family Procedure Rules 2010 which permits the option of ordering appropriate measures to address any difficulties the parties may face giving evidence by reason of being vulnerable. Whilst this is a step in the right direction, stronger protection in the form of statutory protection is necessary to remove any element of judicial discretion.

Culturally diverse family forms

The measures outlined above have taken place at a time where family forms and dynamics are changing in England and Wales as a result of globalisation, increased migration and the spread of human rights (Stark 2006). Sir James Munby (2018) recognised that families in the UK take countless forms, driven by religious secularism and pluralism and the increasing number of transnational families. In this context, disputants may have loyalties to ‘multiple often conflicting normative frameworks

including religious personal laws and the practice of cultural customs' (Corradi and Desmet 2015, 226; Parashar 2013). The existence of religious and personal laws indicate that many diasporic communities are already governed by legal pluralism because 'unofficial laws find ways to survive in an alien milieu whether official law recognises the reality or not' (Yilmaz 2005, 49). Personal and religious laws may sit uncomfortably within the formal legal system which is premised on the 'separation of the public and private spheres and does not recognise systems of non state-regulated law for different communities' (Bano 2007, 5). Religious laws are treated as 'ethnic customs' by the state which undermines the central role they play in many diasporic communities (Ibid, 6). As the examples below illustrate, there are tensions between the desirability of state regulation of normative orders (particularly for vulnerable parties) and the need for alternative forums of dispute resolution which prioritise parties' preferences for disputes to be handled in accordance with religious laws.

At one end of the spectrum, there are areas of family law which state law does not currently regulate. An example which aptly illustrates this point is the regulation of Islamic nikah ceremonies, which are conducted in England or Wales but do not comply with the requirements of the Marriage Act 1949. In such cases, state laws do not recognise a nikah as creating a legally valid marriage and the parties may effectively be treated as cohabitantes by the state (O'Sullivan and Jackson 2017). Family law does not regulate the relationship breakdown between unmarried cohabitants and the family courts cannot make a determination about the distribution of financial assets. Instead, as this article will examine, the parties have recourse to sharia councils, which were established primarily to deal with the issue of religious-only marriages (Vora 2020). There are a variety of reasons why Muslim couples choose not to enter into a civil ceremony and the rationale underpinning these decisions raises important questions about the desirability of state regulation of Muslim marriages. In Akhtar's (2018) study, respondents commonly identified that a civil marriage did not represent a 'real' marriage given its entirely non-religious focus. Others did not believe that the state should be involved in private matters relating to marriage. The majority of respondents considered that sharia laws provided sufficient protection in respect of marriage formation and dissolution, despite not being recognised by the state. They did not necessarily wish to see religious law formally codified and given recognition by the state and were accepting that in other aspects of life, living in a secular country required them to live by the 'law of the land'. For these respondents, a nikah ceremony could therefore be seen to provide the participants 'the opportunity to remember, reaffirm and recommit to traditions and beliefs from their inherited culture' or more simply, to prioritise religious personal laws (Vora 2020, 149). For these parties, it is arguably appropriate that they have recourse to a forum which is able to adjudicate issues arising from their relationship breakdown according to religious personal laws. This reflects Parveen's observations that 'it would seem incongruous that ... entry into a marriage is, at the very least, imbued with some personal religious dynamic involving a connection to God, if exit out of it does not carry some religious significance also' (2017, 40). This approach is further supported by evidence that family law practitioners have attempted to terminate religious divorces in a manner which is ineffective because they lack the requisite knowledge of religious laws

and practice or they have used religious divorces as a bargaining tool in child arrangement negotiations which potentially places women at risk of agreeing to unsuitable contact proposals (Bano 2008; Shah-Kazemi 2001).

Whilst this approach upholds the parties' autonomy, other scholars have highlighted that the decision to enter into a religious-only marriage is not always a reflection of those parties' decisions and determinations about state law as against religious law and for some parties will be the result of a lack of understanding about the legal protection that a nikah ceremony provides or the imbalance of power within relationships which makes negotiations about entering into a civil marriage difficult (O'Sullivan and Jackson 2017; Vora 2020). This has led to various proposals for reforming the current law. Many of these suggestions focus on the importance of ensuring that Muslim couples are granted state protection. Siddiqui et al (2018) for example, suggested changes to the Marriage Act 1949 to ensure civil marriages are conducted prior to or at the same time as a Nikah ceremony. In light of Akhtar's (2018) findings, this proposal is problematic given that many Muslims do not accept the state's legitimacy in regulating marriage formation. In contrast, others have demonstrated more of a commitment to deep pluralism by proposing that Nikah ceremonies should be given the same legal recognition as marriages conducted in accordance with the Church of England, Judaism and The Society of Friends (Quakers) who are already permitted within the Marriage Act 1949 to determine and apply their own laws relating to the formation of marriage (Shah 2013). Alternatively, Eekelaar (2013) argues that if any ceremony, such as a nikah ceremony, is acceptable within the religion concerned, that ought to be considered sufficient to give rise to a legal marriage. Although these final two proposals give greater credence to religious authorities, they would still lead to the state recognition (and therefore regulation) of religious marriages, which is clearly against the wishes of some Muslims. Potentially, a better solution would be to reform laws relating to cohabitation (another area which is not regulated by family law) to ensure that those who do wish to seek state support in the event of a relationship breakdown are able to access an appropriate remedy but those who wish to negotiate their own paths outside of the state have recourse to suitable forums.

At the other end of the spectrum, there have been various legislative attempts to utilise state law as a political tool to challenge normative orders. Many theorists support such an approach on the basis that 'practices that go on the name of custom can be inhumane' (Parashar 2013, 15; Dhagamwar 2003). Bano recognises that the state is most likely to intervene when personal laws are 'deemed unreasonable', 'clash with the principles of English laws' or are incompatible with human rights obligations under international law (2007, 6). In such cases, state intervention is necessary to remedy the 'lack of space in the English system for appropriate solutions to dilemmas facing people' (Warraich 2001, 11). An example of the government seeking to challenge normative orders through state legislation is the introduction of Forced Marriage Protection Orders (through the Forced Marriage (Civil Protection) Act 2007) in 2008 to protect individuals from being forced into marriage or to protect someone who has already been forced into marriage. In July 2014 similar provisions were made for potential victims of female genital mutilation (FGM), through the Serious Crime Act 2015. These measures have been met with some success, indicating

that they were a welcomed intervention. In 2018 alone, 467 applications for forced marriage and FGM protection orders were granted (Ministry of Justice and National Statistics 2019). Whilst the desirability of state regulation in this context has not necessarily been challenged, the method by which the state have created a 'space within the existing framework' has received criticism for failing to take into account the gendered natures of these crimes or the structural power imbalances which exist in many communities and allow harmful practices against women to thrive (Gill and Anitha 2009). Women and girls in honour-based communities, for example, may fear taking their cases to the family courts because of practices which sustain patriarchy and shame women if they resolve 'private' family issues in a forum outside of the community (Siddiqui 2018). Laws without effective implementation mechanisms are not therefore a sufficient deterrent, particularly in light of reduced public funding and resources for specialised support services who support women in abusive situations (Gill and Anitha 2009).

The next part of this article examines the extent to which plural legal systems have evolved to fill the justice gap created by the above changes and analyses whether forums of dispute resolution delivered by non-state actors are capable of facilitating procedural and substantive justice for family law disputants.

Part 2: Pluralist legal systems in the family justice landscape

Mediation

As part of the shift towards neoliberalism, the government sought to encourage people to take greater personal responsibility for their problems by utilising 'alternative sources of help, advice or routes to resolution' (Ministry of Justice 2010, 16). The proposals for the legal aid reforms stated that 'it would be in the best interest of those involved in private law family cases which do not involve domestic violence to take a more direct role in their resolution ... keeping court proceedings to the minimum necessary' (Ibid, 43). Litigation was perceived as inappropriate owing to the fact that many family disputes are primarily about conflicts within relationships which the courts are not equipped to deal with. The Executive Summary of the Family Justice Review referred to the fact that 'the state cannot fix fractured relationships or create a balanced, inclusive family life after separation where this was not the case before separation' (Norgrove 2011, 4.1). Barlow argues that against this backdrop, the promotion of mediation with its focus on 'family privacy, cooperation and couple empowerment' and its rejection of an 'adversarial stance' and 'expensive paternalism' should 'come as no surprise' (2017, 203–204). The government's rationale for supporting mediation therefore draws on Edwards' assertion that 'alternative dispute resolution processes are allowed and often encouraged because the state deems them useful for addressing real and perceived inefficiencies and injustices of traditional court systems' (1986, 668).

Mediation as evidence of legal pluralism

The first incentive which the government adopted to facilitate a change in parties' engagement with mediation was retaining legal aid for mediation (where the parties are financially eligible) despite making sweeping cuts across family law more

generally. Barlow argues that by ‘withdrawing legal aid for (prior) legal advice (as well as representation at court) and making mediation the only legally aided out of court dispute resolution option, those who could not pay were effectively given the stark choice of mediating an agreement or representing themselves in court’ (2017, 204). This, it was argued, compromised the voluntary nature of mediation and positioned it not as a parallel legal forum, but in many cases, the only viable option. Barlow describes that ‘mediation was therefore likely to become a Hobson’s choice for many, a constraint which in itself often militates against a successful mediated outcome’ (2017, 205). Secondly, and more fundamentally for voluntary participation in mediation, the government gave mediation information and assessment meetings (MIAMs) statutory footing through section 10 of the Children and Families Act 2014. Since 22 April 2014, all parties wishing to issue financial relief proceedings or an application under the Children Act 1989 must first attend a MIAM unless they fall within one of the stated exemptions under the Family Procedure Rules 2010. The purpose of a MIAM is to provide information about mediation, assess the parties for legal aid and determine their suitability for mediation (Morris 2013). However, the expectation that mediators should be able to accommodate a large volume of family cases in order to ease the burden on the family courts has placed pressure on mediators not to ‘screen out unsuitable cases’ through the MIAM process, due to a lack of alternatives (Barlow 2017). The Family Mediation Council (FMC) survey demonstrates that 97% of cases were assessed as suitable for mediation (2019). Therefore, whilst the government stopped short of making mediation mandatory in family cases, it was anticipated that MIAMs, together with financial incentives to mediate, would be a precursor to the majority of parties then attending mediation (Barlow 2017).

In contrast to government expectations, however, rates of attendance at MIAMs currently stand at a third of pre-LASPO levels whilst mediation starts have experienced a 50% drop since LASPO (Ministry of Justice 2019). This is largely attributed to the fact that wider cuts to family legal aid resulted in many disputants being unaware of the requirement to attend a MIAM by reducing their engagement with solicitors who are most likely to encourage mediation (Richardson and Speed 2019). Prior to LASPO, over 80% of referrals to publicly funded MIAMs were made by solicitors holding a legal aid contract whereas immediately following LASPO, this dropped to less than 10% (Ministry of Justice and the Legal Aid Agency 2017). Potential applicants may also feel that there is little point in attending a MIAM because there is no compulsion for the respondent to do the same. In many instances, MIAMs have become a ‘tick box’ exercise which enables an application to be made to court. Barlow therefore argues that ‘LASPO has failed to change the culture of family dispute resolution’ (2017, 206) and has led to parallel systems of dispute resolution (i.e. the family court and mediation), despite the government’s intention that measures would curtail the choice of options available.

Mediation in the family context can be seen as an example of ‘weak’ pluralism because despite allowing non-state actors to adjudicate the mediation process, the government have sought to retain a high degree of control through the provision of public funding, compulsory MIAMs and ensuring that decisions made by the parties in mediation can only be made legally binding where they are approved by a judge in

the family courts. Swenson refers to this as ‘complementary’ legal pluralism because ‘the state has effectively outsourced alternative forums... or at least tactically licensed dispute venues’ (2018, 445). But what about the laws that are drawn on in the mediation process? Are these dictated by the state? This has given rise to a conflict amongst theorists as to whether the parties do, or should, have complete freedom regarding the scope of the relevant laws which govern their dispute or whether mediation should be regarded as a continuation of the formal justice system in which only state laws should apply. On the one hand, unlike in arbitration, mediating parties are not required to confine themselves to one particular governing law and the principles guiding the mediation and choice of law do not have to be formally stated. This gives greater freedom for parties to rely on religious and/or personal laws in addition to or as an alternative to state laws. Whilst many mediators (particularly those accredited by the FMC) are qualified lawyers, they are not practicing in this capacity in their role as a mediator and instead their role typically involves providing impartial information to assist the parties in reaching a resolution, which may not necessarily be supported by the state law (Hitchings and Miles 2016). This has led theorists such as Stevenson (2015) to argue that the parties’ autonomy should be respected in facilitating them to reach a settlement on their own terms. However, there are some exceptions to the principle that the substantive law which governs mediation is entirely separate from state law. In children cases, for example, mediators who are accredited by the FMC are required to have regard to the welfare of the child, mirroring the statutory provision under section 1 of the Children Act 1989. Moreover, many clients will not wish to rely on religious or personal laws throughout mediation and will align their settlement proposals to an outcome that may be reached by the family courts. Challenging the idea that mediators are ‘neutral’, they can support disputants either by flagging up problematic issues with settlement proposals or by more explicitly highlighting where proposals are inequitable (Hitchings and Miles 2016). In addition, the FMC Code of Practice states that ‘if the parties consent’ the mediator may inform them that the resolution that they are considering falls outside the parameters which a court might approve or order (2018, 6.2). Hitchings and Miles have raised concerns about settlements based on anything other than the application of state laws. They argue...

The achievement of a settlement with which both parties are content might be regarded as a sufficient goal – what the parties’ legal rights might be is neither here nor there if both are content. But in a society governed by law... we should be concerned that parties who have what is, on one level, a *legal* dispute should have at least a basic understanding of what the law would suggest as an appropriate settlement outcome or range of outcomes. Otherwise, the autonomy apparently exercised in mediation devolves into a somewhat limited, formal autonomy only, and the supposed freedom of choice being exercised somewhat empty (2016, 176).

This argument is particularly credible in light of the fact that many parties no longer have access to legal advice which was previously used ‘to good collaborative effect’ to support parties undertaking mediation (Barlow 2017, 205). This also impacts cases where the complete separation of mediation from the formal justice system could allow one party to abuse power imbalances which renders one party vulnerable to an outcome that is not supported by state laws – a criticism which is frequently levied at

unaccredited mediation delivered by religious tribunals (Reiss 2009; Wilson 2010). Diduck (2014) argues that the potential for a party's human rights to be undermined by separating state laws from the outcome has implications both on 'the attainment of individual justice between the parties' and 'for the damage it does to the socially valuable norms expressed in family law' (quoted in Hitchings and Miles 2016, 177). However, in England and Wales there are safeguards in place to protect against this, not least that mediation is discouraged in cases where domestic abuse is alleged. Moreover, as mediated agreements are not legally binding, the parties still have recourse to a family court (based on the application of state laws) if the agreement places one party at a disadvantage and they wish to challenge this. In the event the parties do submit a consent order to the court to make the agreement legally binding, the ultimate decision about the fairness of the agreement will be for a family court judge to decide.

Can mediation facilitate procedural and substantive justice?

One of the main claims made by the government is that mediation is, in many cases, more cost effective than family court adjudication (Ministry of Justice 2010). In part, this has been achieved by the continued provision of legal aid for those with fewer financial resources. Legal aid for mediation is not dependent on the parties satisfying an exemption relating to domestic abuse or child abuse and therefore has a broader applicability in mediation than it does for court proceedings. However, the parties must still satisfy the legal aid means test outlined above and will not therefore be available to all. In cases where one party is eligible for public funding, the government will also fund the first mediation session for both parties. Following this, the party who is eligible for legal aid will continue to receive funding for their share of the mediation session whilst the non-eligible party will be required to pay privately for their share. To ensure that parties are still able to receive some legal advice in relation to their dispute (a concern referred to above) the government also introduced the Help with Family Mediation scheme. This applies where one of the parties is eligible for legal aid and funds a solicitor to provide legal advice in relation to the agreement and to prepare a consent order reflecting the basis of the agreement which can then be submitted to the court for approval. The benefit of this scheme is that it enables mediated agreements to be made legally binding thereby reducing the prospect of parties rescinding on the agreements, which may result in further court intervention. There have, however, been difficulties reported with the Help with Family Mediation scheme. Hunter notes that the low fees offered to solicitors to provide advice and prepare the consent order (£150 for legal advice and £200 to prepare the consent order) is insufficient to adequately compensate solicitors for their time spent and 'the level of risk assumed in reviewing agreements and seeking orders in a context of limited information' (2017, 198). As a result, the scheme has resulted in fewer than anticipated applications (Family Mediation Task Force 2014). Nonetheless, the government has refused proposals to increase fees which would lead to improved solicitor engagement with the scheme (Hunter 2017). In the small number of cases where the parties are both eligible for legal aid funding, are able to reach an

agreement and receive assistance from a solicitor with formalising the agreement, there are clear benefits of mediation compared to the family courts.

In cases where the parties do not satisfy the legal aid means test, they will be required to fund the sessions themselves. The FMC survey (2019) indicated that there is a great variance in the hourly rates charged by mediators, with the average cost being £140 per hour. As with the issue of funding a legal representative, it is not simply the case that someone who is not eligible for legal aid can afford mediation services, where there is no guarantee that an agreement will be reached. The FMC survey (2019) indicates that the average cost for both parties to attend mediation is £1,641. The extent to which this is cheaper than court proceedings will depend on a number of factors including whether the parties would receive fee remission, pay privately for legal representation and how many sessions are required to reach an agreement.

Mediation is also purported to be a timelier process than proceedings through the family courts. In line with the adage that 'justice delayed is justice denied', mediation may therefore be viewed by the parties as procedurally advantageous. In contrast to the family courts which are frequently operating beyond their capacity, there has been a steady increase in mediation services in part because of the expected uptake in family mediation following LASPO (Hunter 2017). Following LASPO, the market was 'at least saturated, if not flooded with suppliers' (Ibid, 194). Whilst some of these suppliers have since gone out of business following the reduction in mediation, mediation sessions can usually be organised promptly at a time that is convenient for the parties. Whether a case is resolved more quickly than the courts will depend on whether an agreement is reached during mediation, which is by no means guaranteed. Statistics from the FMC survey (2019) indicate that mediation sessions are typically 90 minutes in length (as opposed to court hearings which can take days if not weeks) and that in 2019, agreements were reached in the vast majority (over 70%) of cases. Whilst the data does not examine how many sessions were required to resolve disputes, other studies have suggested this is typically within a single or a few sessions (Wojkowska 2006). Presumably, by this point the mediator will gauge whether the parties are too far apart in their views for the sessions to be conducive to a resolution. However, for those 30% of cases where the dispute is left unresolved, the parties may subsequently decide to make an application to court and face further delays. In such cases, unless the parties have managed to narrow the issues, mediation is likely to be viewed as drawing out the length of time to secure an outcome.

Mediators seek to promote procedural justice by affording both parties equal time to put forward their case and by treating the parties with respect. Waldman and Ojelabi 2016 argue that many mediation Codes of Conduct view that 'if sufficient attention is paid to process, the resulting agreement will be substantively fair' (2016, 413). However, they note a paradox in that mediators are encouraged to remain neutral which precludes them having an interest in a fair outcome, whilst at the same time they are expected to prevent substantive injustices. Moreover, they recognise that in many jurisdictions, mediators are non-lawyers who lack the necessary expertise to assess substantive justice. In England and Wales, the provisions considered in the previous section which allow a mediator to provide the parties with some guidance about the substantive fairness and workability of the proposed agreement will be

beneficial to protect against substantive unfairness, assuming they have an appropriate knowledge of the law. The extent of the mediator's involvement in the process and the parties' ability to meet their objectives is also likely to be driven by the type of mediation entered into. The two dominant types of mediation in England and Wales are settlement-seeking mediation and transformative mediation (Hitchings and Miles 2016). Outside of mediation regulated by the FMC, mediation can also have reconciliatory aims which is particularly common in religious tribunals. Settlement-seeking mediation requires the parties to 'put aside their emotions' and focus on reaching an outcome which both parties are amenable to, although there may be some compromise (Ibid). This method is more closely aligned to the outcome focussed nature of court proceedings. Hitchings and Miles note that the 'parties' emotional readiness is a key factor to achieving a settlement and not all parties will be in the right place emotionally' (2016, 180). In contrast, transformative mediation seeks to change the parties' interaction and approach to conflict and is likely to require more therapeutic intervention from the mediator. Transformative mediation bears a resemblance to restorative justice which is practiced outside of the criminal justice system. Stevenson has noted that there is increasing pressure on parties entering into mediation to 'achieve a settlement as a measure of success' because of the government's objectives to ease the burden on the family courts, particularly for parties who are in receipt of legal aid (2015, 716). As such, publicly funded clients whose substantive aims are primarily transformative, may instead be shoehorned into a settlement-seeking process which does not align with their aims.

A related issue is that the government focus on mediation has increased the scope of cases which mediation is now expected to deal with. Barlow notes that cases following LASPO typically exhibit 'higher conflict levels and/or more complex problems such as partners with mental health issues, drug and alcohol abuse or where there were significant power imbalances between the parties' (2017, 205). This, together with pressure on mediators not to screen out 'unsuitable' cases, has led to an increase in cases which prior to LASPO would not have been mediated. Given the current legal climate, however, it is possible that mediation may in some instances be a safer and more compassionate alternative to the court in cases where there are power imbalances despite it being best practice that they should not be able to assist in such disputes. Firstly, the vast majority of mediators (over 80%) report receiving face-to-face training in conducting mediation where there has been domestic abuse in the family and 90% feel confident facilitating mediation in domestic abuse cases (FMC Survey 2019). Secondly, procedural safeguards can be put in place to protect victims throughout the mediation process. The parties can be seen separately ('shuttle mediation'), thereby reducing pressure on the vulnerable party to reach an agreement and the prospect of dispute resolution being used as a tool to perpetuate abusive conduct. Arrangements can be made for the parties to arrive and leave at separate points. This can be contrasted to the position in court proceedings which has been outlined above. It is a misconception that vulnerable parties are not encouraged to settle their disputes if their cases are adjudicated through the courts (Barnett 2015). Thirdly, unlike in the family courts, which often do not have the dual capacity to provide both legal and psychological interventions, mediators can (especially for privately paying clients) sometimes offer therapeutic services alongside settlement

seeking (Davis 2006). Within the criminal justice system, therapeutic forms of intervention which share common features with mediation, such as restorative justice, have proved successful in both allowing victims of abuse to secure a more tailored range of outcomes than through the legal process and enabling victims to play an active role in their recovery (McGlynn, Westmarland, and Godden 2012). However, there are limitations of mediation, not least that mediators are unable to remove a perpetrator from the family home and as the agreements reached have no legal effect, criminal sanctions cannot be pursued if they are breached. In these cases, it is vital that disputants have access to protective injunctions through the family courts. This leads Davis to conclude that 'mediation is an appropriate means to resolve domestic violence cases only if it does so effectively and in accordance with notions of even handedness and fairness to both parties' (2006, 253).

Arbitration

Arbitration is a less popular forum of alternative dispute resolution for resolving family law matters. Whilst arbitration has flourished in England and Wales for centuries, the scope of family law arbitration has only developed over the last few decades led by pressure on the court system and a number of judgments which have established that in family cases greater weight is to be given to the parties' autonomy (Dalling 2013; *Radmacher v Granatino* [2010] UKSC 42). Another noticeable change in the family law arena is the cultural shift towards greater transparency in the courts and more family cases being conducted in an open court which has resulted in a greater demand for a method of dispute resolution which is both legally binding and offers the parties' privacy. Whilst arbitration is not expected to deal with a high volume of cases in the same way as mediation, recent developments in family arbitration can also be linked to LASPO. Kennett (2016) recognises that the development of arbitration cannot be separated from its social, cultural and political context, regardless of the fact that arbitrating parties typically have adequate financial resources and so are less affected by LASPO. She notes, 'a common thread in the story of the development of arbitration for the resolution of family law disputes is the overburdening or breakdown of the judicial system. In that sense, there is a state interest in relieving the courts of as much of their family dispute resolution function as is compatible with the requirements of public policy' (Ibid, 4). In 2012, just before the introduction of LASPO, the Institute of Family Law Arbitrators (IFLA) launched the Family Law Arbitration Financial Scheme to provide arbitration for financial and property disputes in family cases. Subsequently, in 2016, the IFLA launched the Family Law Arbitration Children Scheme. Arbitration has a more restricted scope than mediation in that there are certain children disputes which it cannot adjudicate (notably child abduction and prohibited steps orders) and because it is prohibitively expensive for the vast majority of disputants.

Arbitration as evidence of legal pluralism

Paulsson (2010) argues that there are a number of competing propositions regarding arbitration as a form of legal pluralism. Some theorists reject the conceptualisation of

arbitration as evidence of pluralism on the basis that it ‘lives or dies according to the law of the place of arbitration’ (referred to as the ‘territorial approach’) (Ibid, 2). This can be seen to some extent in family law arbitration in England and Wales because practitioners operating under the IFLA scheme rules must adhere to the mandatory provision that the governing law must be that of England and Wales, thereby limiting the parties’ autonomy (Article 3 of the IFLA Arbitration Rules). However, not all family law arbitration is practiced under the IFLA rules. For example, owing to section 46(1)(b) of the Arbitration Act 1996 which permits parties to rely on certain normative orders to govern their dispute, some religious tribunals now operate as arbitration tribunals. A number of court Judgments have supported this, including *Musawi v RE International* [2008] 1 Lloyd’s Rep 326 where the court accepted the use of Sharia law as the choice of arbitrating law. Accordingly, the territorial approach does not fully reflect the position in England and Wales. Nor can it be said that arbitration is an entirely ‘autonomous legal order’ given that state law (the Arbitration Act 1996) sets out the procedural provisions which must be adhered to in the arbitration process regardless of the substantive laws or normative orders which are applied during the arbitral process. Moreover, there are circumstances in which the courts are willing to intervene to challenge an arbitral award. Section 68 of the Arbitration Act 1996 states that an award or determination may be challenged if there has been a serious irregularity that has caused or will cause substantial injustice. In addition, under section 69, an arbitration agreement can be appealed on a point of law although the parties can agree to contract out of this section. These important safeguards apply both to cases practiced under the IFLA schemes and by religious tribunals.

On the basis that family law arbitration falls somewhere between these two approaches, by potentially giving effect to diverse legal and normative orders whilst simultaneously relying on the state for its legitimacy, arbitration can be understood as ‘horizontal weak’ pluralism (Reiss 2009). It is ‘weak’ rather than ‘deep’ pluralism owing to the safeguards provided in state legislation – the Arbitration Act 1996. However, because the decisions have the same effect as those made by the family courts, and are not ordinarily hierarchically arranged, the decisions have ‘horizontal’ effect. This can be contrasted to mediation which is ‘vertical weak pluralism’ because decisions of mediators have less authority than those made by the family court. Developing this further, Swenson (2018) recognises that because of its close relationship with the state, arbitration can also be described as ‘complementary legal pluralism’. He notes that arbitration agreements ‘facilitate the evasion of state law and legal process, but the extent of circumvention depends on the policy preferences of state officials. In all instances, these processes are integrated into, and fall under the ultimate regulatory purview of, the state, exist at its pleasure, and largely depend on state courts for enforcement’ (Ibid, 445). Swenson (2018) argues that complementary forms of dispute resolution are often allowed to practice because they are seen to uphold the requirement for the rule of law and principles of legal certainty. Moreover, there are benefits to the government in this approach, not least that the state has an interest in ensuring that financial settlements ‘do not impose welfare responsibilities on the state’ and that arrangements on separation or divorce are ‘adequate to limit damage to individual family members to relieve it of the costs of caring for such individuals and to prevent wider harmful impact on society’ (Kennett 2016, 5).

Can arbitration facilitate procedural and substantive justice?

As a form of alternative dispute resolution, arbitration seeks to prioritise the parties' autonomy more so than any other out of court practice. In commercial law, for example, the parties are free to select the choice of law governing the dispute together with the arbitrator who will adjudicate and the rules guiding the process (Weixia 2019). In family law proceedings, however, there are a number of important restrictions which reduce the parties' autonomy. Firstly, as highlighted above, it is a mandatory principle under IFLA that arbitration must be conducted in accordance with the laws of England and Wales. Whilst this has been justified as a result of the 'sensitivity of family law issues' and may promote compliance with human rights norms, it may marginalise mainstream arbitration for those who would prefer their personal religious laws to govern the dispute, who instead may seek recourse from a religious tribunal operating as an arbitration tribunal (Kennett 2016). Moreover, it does not adequately address the needs of transnational families who wish for the state laws of a foreign jurisdiction to govern their dispute. Given that family law arbitration in England and Wales is in its infancy, it is possible that further developments to accommodate international laws may be adopted in time. Secondly, Kennett (2016) acknowledges that more stipulations may be placed on the choice of family law arbitrator than in a commercial context, including the qualifications held by the arbitrator, the number of years of professional practice in family law, and the levels of dispute resolution training. The IFLA guidelines state that in court proceedings, 'there is no guarantee that the appointed judge will have specialist knowledge or experience in resolving disputes concerning children nor be conversant with the often highly complex financial arrangements the parties are seeking to unravel ... a family arbitrator is an experienced family lawyer who specialises in financial and/or children disputes' (ifla.org.uk). Accordingly, whilst such restrictions reduce the autonomy of the parties, they also ensure that arbitrators possess the necessary skills to adjudicate family disputes. Furthermore, there are still some procedural areas of arbitration where parties have much greater control over the proceedings than in family court hearings. This includes deciding whether the process is dealt with on papers, via telephone or through face-to-face hearings, whether issues are determined sequentially or all at once and whether experts are appointed to provide evidence.

Family law arbitration can also be distinguished from other forms of arbitration on the basis that the parties may lack familiarity with the law and legal processes and so 'should be provided with guarantees that their dispute is being handled in a correct and professional manner' (Kennett 2016, 13). As a result, there are a number of safeguards to ensure that the procedure is fair, including that the process is regulated by the IFLA scheme rules which attempt to protect one party from gaining an advantage over the other. Practice Guidance issued by the judiciary on 26 July 2018 provides that the physical and emotional safety of any children concerned must be prioritised in handling the dispute and by taking appropriate care not to make an order that will put the child concerned or the parties at avoidable future risk. Kennett (2016) argues that this places an indirect obligation on arbitrators to ensure that any determination is in accordance with a child's best interests, mirroring the provision in the Children Act 1989. Moreover, prior to commencing the arbitration process,

the parties are required to complete a safeguarding questionnaire. Paragraph 5.1 and 5.2 of Practice Direction 12B to the Family Procedure Rules 2010 states that arbitration is unlikely to be appropriate in situations involving domestic violence, drug and/or alcohol misuse and mental illness. Kennett highlights that in practice however, power imbalances are often considered 'less problematic owing to the quasi-judicial role of the arbitrator and the possibility of legal representation of the parties' (2016, 13). Furthermore, the courts are able to intervene in arbitration proceedings to exercise powers not available to an arbitrator, such as granting a protective injunction.

Procedural safeguards are particularly important owing to the finality of arbitration proceedings. By and large, the courts have been willing to approve and uphold arbitration agreements in family proceedings. In the case of *S v S* [2014] EWHC 7, Sir James Munby stated at para 19, 'where the parties have bound themselves... to accept an arbitral award of the kind provided for by the IFLA Scheme, this generates, as it seems to me, a single magnetic factor of determinative importance'. Moreover, in cases where one of the parties wishes to challenge the arbitrator's determination, he noted that an application should be made to the court but that the court would adopt 'an appropriately robust approach' (Ibid, 25).

In contrast to mediation, arbitration is not intended to deal with a high volume of cases. This is in no small part attributed to the costs involved. Legal aid is not available for arbitration proceedings and the default position is that each party will pay half of the costs of the arbitration, which will vary based on whether hearings are dealt with on paper or in person but are likely to significantly exceed family court fees. In addition, the parties may incur venue hire costs and experts' fees (which are usually borne equally) and will be responsible for the costs of their own legal representatives. The IFLA guidelines state that legal representation is strongly recommended owing to the binding nature of arbitration proceedings (ifla.org.uk). Mirroring the statutory provisions under the Family Procedure Rules 2010 the arbitrator has discretion to order a party to pay the costs incurred by another party if they display unreasonable conduct however orders are likely to be rare given the voluntary nature of the proceedings. Accordingly, arbitration is reserved for those with the financial means to fund a case. The costs involved in arbitration mean that resolutions are often reached more speedily than through the court process. In contrast to family court proceedings, the parties are not required to attend a MIAM and arbitration meetings can be dealt with at the convenience of the parties. Given that the parties are legally represented, arbitration does not experience many of the delays that are common in the courts. Meetings can be listed at short notice to deal with any issues which may arise during the proceedings. This has the potential to make the process less acrimonious, regardless of the fact that arbitration is not necessarily a conciliatory process. The costs involved also justify the parties having greater control over the venue where arbitration is held. Arbitration can take place at a location which is both physically accessible to the parties and guarantees the parties' privacy – a feature which is particularly important in high profile cases.

Religious tribunals

Religious tribunals are common across many major world faiths however in England and Wales they are most prevalent in Judaism (through the Beth Din) and in Islam

(through sharia councils) (Hofri-Wingradow 2010). This analysis will primarily focus on the operation of sharia councils due to the paucity of literature on service users' experiences of the Beth Din. Religious tribunals are popular ecclesiastical mechanisms for administering religious family law, conducting mediation, granting religious divorces and producing expert opinions on religious law for the family courts (Douglas et al. 2011). Both institutions have a long standing in England and Wales. Whilst Batei Din have been well established for over 100 years, the first sharia council was reported in the 1980s although prior to this, Islamic family law was typically dealt with on an informal basis by Imams within mosques (Bano 2007). It is estimated there are between 30 and 85 sharia councils operating in England and Wales and there is a Beth Din in most major cities across England (Siddiqui et al 2018). Both organisations are structured so as to reflect the variety of religious traditions within each faith, although they are organised differently. Whilst there are separate Batei Din for the major Jewish movements, each sharia council comprises different schools of thought in Islam and panel members from diverse diasporic communities. This latter approach has the potential to affect internal power struggles and differences in accepted practices, interpretations of religious law and the substantive rulings that are reached (Bano 2007). Moreover, there is no guarantee that the demographic makeup of each council will be representative of the local communities that it serves (Ibid).

Religious tribunals as evidence of legal pluralism

Yilmaz (2000) describes a number of conditions which give rise to alternative forums of dispute resolution within Islam, many of which have been alluded to earlier in this article. These include a preference for resolving disputes privately within Muslim tradition, communities not recognising the authority and legitimacy of state laws to the same extent as religious laws, and the failure of the state to recognise religious laws as a plural legal order. Yilmaz (2000) therefore positions the emergence of sharia councils within a discourse of custom, preference for religious law and state failings to create a space for personal laws. In contrast, in Judaism, greater space has been made for Jewish religious laws by the state in England and Wales, which may reduce the scope of, and reliance on, religious adjudication. Jewish marriages receive special protection under the Marriage Act 1949, meaning they are not required to comply with the same formalities as many other faiths and therefore have greater religious and legal autonomy in marriage formation. Further, if one of the parties seeks to prevent the religious divorce, section 10 A of the Matrimonial Causes Act 1973 allows either party to apply to the family courts to prevent the decree absolute being given until steps have been taken to dissolve the marriage in accordance with Jewish law, a provision which is not available to other faiths. It is also possible to include a 'get clause' within a consent order requiring the parties to cooperate with the Beth Din to ensure the completion of the Get. Fried (2004) argues that notwithstanding the availability of the family courts, there are religious obligations on Jews to utilise religious forums for their disputes. She argues that 'a central principle of halacha is that disputes between Jews should be adjudicated in duly-constituted rabbinical courts' (Ibid, 637). Moreover, choosing a secular court despite the availability of a Jewish court is seen to undermine the authority of religious laws and legal systems, and creates an inference

‘that the Ben Din lacks either the capability or sophistication to adjudicate an issue according to halach’ (Ibid). It is therefore presented as a religious and moral duty for Jewish disputants to seek religious, rather than legal, adjudication.

Scholars argue that religious tribunals are illustrative of ‘weak’ legal pluralism in the sense that there is ‘one ultimate sovereign law with varying subcategories of law which function in a quasi-autonomous fashion’ (Reiss 2009; Yilmaz 2005, 16). The recognition of religious tribunals as ‘semi-autonomous’ draws on the work of Moore who describes that a semi-autonomous social field...

Can generate rules and customs and symbols internally but is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance (1978, 720).

Bano argues that sharia councils fit within this conceptualisation of semi-autonomous social fields because they ‘place very little demands on the state and the councils remain autonomous but also recognise the power of the state’ (2007, 12). Nonetheless, Bano (2007) also acknowledges that some Islamic scholars have sought complete autonomy from the state through the recognition of sharia law as an alternate system to state laws. Whilst attempts to achieve this deep level of legal pluralism continue to be rejected by the state, sharia councils have, to some extent, achieved their aims by practising as arbitration tribunals. Batei Din can also be considered a semi-autonomous institution. However, unlike sharia councils there is greater interface with the state through the provision of matrimonial legislation specifically aimed at Jewish couples which simultaneously grants the Jewish faith increased autonomy (in marriage formation) and protection (through the Matrimonial Causes Act 1973). Arguably, this has led to Batei Din demonstrating lower levels of resistance to state involvement.

There are, however, important operational differences between the Beth Din and Sharia councils, which impact they extent to which they are legally pluralist and, more importantly, have implications for the state and those who use religious tribunals. These distinctions principally relate to the enforceability of decisions. In relation to the Beth Din, decisions made in the resolution of family matters are recognised as religiously and morally binding but the parties are able to take their case to the family courts for a Judgment according to state laws. This reflects the concept of ‘consensual compact’ or, more simply, that the powers of a religious body are derived from the agreement of its members (Sandberg 2011). This recognises that the state and religions institutions retain their own jurisdiction and the state will only intervene to enforce the laws of a religious organisation where there is a financial or policy reason doing so (Douglas et al. 2011). Following Reiss this can be seen as ‘vertical weak pluralism’ because legal systems are ‘hierarchically arranged’ with the decisions of the Beth Din occupying a lower level of authority than decisions made by the state (2009, 762).

In contrast, since 2008, some sharia councils have begun practicing under the Arbitration Act 1996 which allows disputes adjudicated outside the formal courts to be recognised subject to public policy, a procedural irregularity or the arbitrator failing to conduct the proceedings fairly and impartially (sections 33 and 68 of the

Arbitration Act 1996). Reiss (2009) argues that by reframing sharia councils as arbitration tribunals, sharia law has inadvertently been incorporated alongside state laws. Moreover, it allows decisions of sharia councils to be legally binding and precludes further recourse to the state courts insofar as procedural requirements are satisfied. Reiss considers that sharia councils which operate as binding arbitration tribunals take the form of 'horizontal weak pluralism', following the rationale explored above (Ibid, 762). Whilst Reiss (2009) does not take issue with the use of sharia councils operating in a manner similar to Beth Din – in fact, she recognises benefits of non-binding adjudication over secular courts in saving costs, time and preserving the relationship between the parties – she raises concerns about the binding nature of sharia court decisions, given they do not represent the values of 'British laws' and have a poor judicial record in their treatment of women. Whilst this approach can be criticised for failing to account for the autonomy of the parties in selecting the choice of law regulating the dispute, and for essentialising Britishness, it nonetheless raises an important question about the extent to which religious tribunals can facilitate justice for their services users.

Can religious tribunals facilitate procedural and substantive justice?

The vast majority of applicants to religious tribunals are women (Bano 2007; Parveen 2017; Shah-Kazemi 2001). This is not a coincidence but is reflective of substantive religious laws and practices which treat women and men unequally and result in women usually being unable to secure a religious divorce without recourse to tribunals (Reiss 2009; Wilson 2010). In Judaism, for example, the right to apply for a religious divorce is reserved solely for the husband. Section 10A of the Matrimonial Causes Act 1973 may be of limited effect where the husband is not concerned about securing a civil divorce. In such circumstances, a female spouse may turn to the Beth Din for pressure to be applied to the husband to agree to a Get which may or may not prove successful. Likewise, within Islam, whilst the male spouse is able to unilaterally declare a talaq in order to divorce his wife, if he does not consent to his wife also having this right, she will need to apply to a sharia council for a religious ruling about the divorce. This can be achieved through a khula (divorce by agreement at the initiation of the wife) or a faskh (divorce based on the fault of the husband).

Research has consistently demonstrated that women's substantive goal in using religious tribunals is to secure a religious divorce (Bano 2008; Parveen 2017; Shah-Kazemi 2001). There are a number of reasons why a religious divorce is important to women. In the same sense that a religious marriage allows adherents to demonstrate a commitment to their faith, a religious divorce is of 'personal and spiritual significance, thus enabling women to move on with their lives whilst maintaining their connection with God' (Parveen 2017, 40). In some branches of Judaism, securing a religious divorce is of particular importance for future generations because a wife who has not secured a Get is prohibited, along with any children born to her, from (re)marrying within the Jewish faith. In Parveen's (2017) study of sharia councils, none of the women felt that a civil divorce alone would be sufficient for them to consider themselves divorced. Over 80% of the respondents in Akhtar's study highlighted that a local imam would be their first point of call for seeking advice about ending a

marriage, indicating that their 'religious obligations came first, before considering their formal obligations before the state' (2013, 285). More recent studies have also highlighted that barriers to the family courts play a role in women's motivations to secure a religious divorce. Siddiqui et al (2018) identified that the higher costs of a civil divorce (if this is available) and the perception that it is quicker to secure a religious divorce lead some women to instead utilise tribunal services.

The fact that women display a preference for securing a religious divorce but must engage the services of a tribunal to do so (if agreement is not forthcoming) raises an important question about whether women are coerced into utilising religious tribunals. Wilson (2010) argues that the absence of other options is a form of coercion in and of itself. However, a number of recent studies have sought to challenge this notion. Shah-Kazemi (2001) observed that many women use sharia councils as an expression of their religious identity. Her study highlighted that women's diasporic backgrounds play a key role in the way in which they seek to use councils and therefore the rationale for engaging is not uniform. In Akhtar's (2013) study, 75% of the respondents felt that Islamic law either governed or played a significant role in their lives and would therefore prefer to utilise sharia councils above the family courts (on the hypothetical basis that they were able to deal with religious divorces) because they lacked trust in Judge's understanding of religious law. These findings align with Parveen who recognised the existence of sharia councils as a 'matter of religious freedom for some Muslims', even for those who recognised the inherently patriarchal nature of the tribunals (2017, 42). Bano (2008) paints a slightly more complex picture. She observed that whilst many women accepted the authority of sharia councils in cases where they were the applicants (i.e. in religious divorce cases), they were more likely to challenge their jurisdiction in ancillary proceedings, such as those relating to child arrangements. In cases where the civil courts remain an option to women, it is therefore vital that they are aware of all options so that an informed decision can be made about which justice process to engage with. This requires transparency from tribunals about the extent of their authority and particularly whether they are acting in the capacity of an arbitration tribunal which may preclude further recourse to the family courts.

The extent to which women are able to meet their substantive goals through religious tribunals will vary from case to case. In religious divorce cases, for example, a woman's ability to secure a Get will depend on her husband's receptiveness to this pressure. In relation to sharia councils, Bano argues that securing a divorce is by no means 'the guaranteed nor the inexorable outcome' (2008, 297) owing in part to the tensions between women's objectives to divorce and the sharia councils' focus on reconciliation. However, other studies have suggested that many women are able to achieve this aim in their interactions with councils, albeit concerns have been raised about the procedural means through which this is secured. Parveen (2017) interviewed 17 women and found that all but one (who chose to withdraw her case) were able to secure a religious divorce. Similarly, Siddiqui et al observed that 'divorces were very rarely refused' (2018, 16). Importantly, as decisions of tribunals are 'religious rulings', councils are expected to provide a justification for their decision in a similar manner to secular court judgments (Parveen 2017). Shah-Kazemi (2001)

noted that this provides a site of resistance for some women who are able to effectively challenge unfavourable positions adopted by tribunals. Women are able to do this because of their familiarity with religious laws, something which they may not be able to achieve as litigants in the family courts. Similarly, Parveen (2017) observed that if women do not agree with the council's decision, they either find evidence to support their preferred ruling or engage the services of an alternative council. This allows an element of 'forum shopping' that is not available in the family courts. In many cases, women will therefore play an active role in determinations made by tribunals.

But what if decisions reached through religious tribunals are fundamentally at odds with women's human rights or, in applicable cases, the decisions which might have been reached through the family courts? A number of solutions have been posited to address this concern. At one end of the spectrum, some theorists have advocated a ban of religious tribunals owing to their incompatibility with Western values. This argument is generally dismissed on the basis that banning tribunals will not remove a need for them given that family courts are not able to grant religious divorces and will increase the number of women who remain in unhappy and potentially unsafe marriages (Parveen 2017). As such, banning tribunals are likely to drive them further under the radar which may have negative implications for women's rights. In contrast, Wilson (2010) argues that better protection for women within minority communities could be achieved through inclusion of their religious laws within state laws, to promote consistency and human rights legislation. However, this approach is problematic in assuming homogeneity amongst religious groups and practices which renders them amenable to codification. Moreover, many religious laws cannot simply be included in state laws in a manner that is consistent with Western human rights laws. At the other end of the spectrum, Raday (2003) recognises that consent to religious practices should be accepted even if it disadvantages a party. Whilst this approach seeks to recognise women's autonomy in using religious tribunals it does little to protect vulnerable women from harm, particularly in cases where there are concerns about the validity of a parties' consent. A sensible middle ground which seeks to balance women's autonomy and protection can be found in Parveen's suggestion that 'the aim should be to find a balance between enabling freedom of choice for Muslims to enter and leave a relationship in a manner which accords with their faith and providing the protection of the state for vulnerable women or women who wish to access state mechanisms and state law' (2017, 168). This would involve restricting the scope of religious tribunals to areas which state law does not regulate (i.e. in the context of Islam, marriage formation and dissolution) whilst ensuring the availability and accessibility of remedies for women in areas where state law does have an interest (i.e. children and financial remedies). This proposition lends support from Parveen's (2017) study which identified that women were more inclined to accept the decisions of the family courts in disputes concerning finances and children as opposed to marriage disputes. Only a minority of women expressed a preference for these disputes to be regulated by a sharia council because, regardless of whether this was to their detriment, they had 'faith that the application of God's true law is justice' (Ibid, 243).

From a procedural justice perspective, however, women also seek a closer relationship between sharia councils and civil courts in marriage disputes. This reflects that

women who have been through both a sharia council process and a civil divorce, often report having a 'better' experience with the family courts due to them demonstrating greater professionalism and efficiency (Ibid). Most of the respondents in Parveen's (2017) study felt that it would be less confusing to combine the religious and civil divorce process whilst other respondents felt that greater cooperation between the two institutions would lead to a greater awareness of what the other is doing and would prevent male spouses from giving inconsistent evidence in different forums. Greater cooperation could also reduce the time taken to dispose of cases. It is not unusual for cases in sharia councils to take between two to three years to reach a resolution – which may lead to higher rates of attrition than if the process was dealt with promptly (Shah-Kazemi 2001). This is largely attributed to the amount of time dedicated to exploring the possibility of reconciliation and because sharia councils experience similar resourcing issues to the family courts. However, given that this would impose an additional administrative burden on the family courts, it seems unlikely the government would encourage the court service to develop a relationship with sharia councils, regardless of the procedural benefits this may yield.

A further procedural concern relates to the failure of sharia councils to safeguard women both through an emphasis on reconciliation and in cases where domestic abuse is alleged. In contrast to the Beth Din, where the parties will be encouraged to seek counselling if they are not sure they wish to secure a divorce, sharia councils oblige the parties to undertake meetings with the principle aim of reconciliation (Douglas et al. 2011). This is clearly against the wishes of some women who view it as an unnecessary and inappropriate procedural requirement (Bano 2008; Parveen 2017). For some women, this practice places a disproportionate level of pressure on vulnerable women to remain in unhappy relationships. Moreover, it has been recognised as creating a space for some husbands to justify their behaviour and facilitate better substantive outcomes for themselves (Bano 2008). Data suggests that sharia councils remain willing to hold meetings where women raise objections or where allegations of abuse are made, and worse still, where civil orders relating to domestic abuse are in place which are likely to be breached by face-to-face meetings (Bano 2008, 2017; Parveen 2017). This process is particularly concerning in light of the fact that tribunals are comprised of all male scholars and in the overwhelming majority of cases, women do not have the benefit of representation (legal or otherwise) throughout the meetings (Parveen 2017; Siddiqui et al 2018). Perceptions of reconciliation meetings are not entirely negative, however, demonstrating that their impact on procedural justice will not be the same for all Muslim women. For some women, particularly those where there was not an imbalance of power, these meetings provide a helpful forum for women to genuinely rule out the possibility of reconciliation (Bano 2008). Others report that this process provides male spouses an opportunity to understand and come to terms with the divorce and is therefore worthwhile (Ibid).

The problematic nature of reconciliation meetings have led many theorists to consider the ways in which practices could be improved in this area. One approach would be to give women a choice about the decision to engage in reconciliation meetings thereby preserving the option for those who wish to explore reconciliation. Another option would be for sharia councils to collect data on their success rates of

effecting reconciliations, so they can assess whether this requirement achieves any real benefit (Parveen 2017). Going further, Siddiqui et al (2018) recommended that sharia councils should be subject to either external regulation (over and above the procedural safeguards outlined in the Arbitration Act 1996) to promote consistency, transparency and accountability in reconciliation practices. The idea of regulation, however, remains controversial as opponents regard this as the state sanctioning councils and giving legitimacy to a legal system which has a poor record of treating women. A number of practical safeguards could also minimise the level of distress experienced by women. Drawing on the mediation model, 'shuttle meetings' would reduce the need for women to come into contact with their husbands through the reconciliation process. Women must also be supported to bring informal or formal support to these meetings. Finally, sharia councils should also explore the possibility of appointing female members to ensure that women are represented on panels.

Concluding thoughts

The changes to the formal justice landscape examined in part one of this article have had profound consequences on the ability of disputants to achieve procedural and substantive justice through the family courts and have invariably made them a less appealing and less accessible forum for resolving disputes. This, it has been argued, has brought about a need to reconceptualise the family justice landscape as a pluralist legal order, by moving beyond an understanding of state based adjudication (i.e. the family courts) as the only route for resolving disputes and recognising the contribution that alternative forums of dispute resolution make in meeting the procedural and substantive aims of disputants. In some instances, the UK government has been the driving force behind pluralist initiatives, as evidenced by policies aimed at incentivising mediation and in their acceptance that religious tribunals can act as arbitration tribunals. Although mediation uptake has been lower than anticipated, this is not necessarily a reflection of its capacity to meet the needs of disputants, but is both the product of wider cost-saving policies which have adversely impacted the accessibility of mediation (albeit to a lesser extent than the family courts) and an unrealistic expectation that litigants would change their approach to dispute resolution instantaneously following the introduction of LASPO. In other instances, however, the development of legal pluralism in family law has been driven by the needs of litigants. The development of family law arbitration over the last decade for example, reflects a desire on the part of some disputants for a private dispute resolution process which prioritises a speedy resolution and the autonomy of the parties. Likewise, religious tribunals have increased in scope and authority over the last few decades to give effect to parties' preferences for relying on religious laws and to provide a remedy which the state is unable to offer. All of the forums of alternative dispute resolution considered throughout this article can be regarded as 'weak' pluralism as it is only through the state's willingness to grant powers to other methods of adjudication that legal pluralism is given acceptance. As the analysis in part two of this article has examined however, reliance on state recognition does not necessarily preclude institutions playing an important role in delivering justice, outside of the state hierarchy. Moreover,

there is some evidence that state support for alternative methods of dispute resolution may enhance the ability of these forums to meet the procedural and substantive justice aims of disputants, through the provision of public funding, ensuring compliance with human rights norms and by providing recourse to the family courts for enforcement of orders or in instances of procedural irregularities. Weak pluralism can therefore be seen to provide a balance between respecting the parties' autonomy and providing procedural and substantive protections, which deeper levels of pluralism might not achieve. Going forward, state policy must therefore seek to recognise the benefits of weak pluralism and work to reduce the limitations of both state and non-state systems to better facilitate justice for all.

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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

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Abstract

On 23 March 2020, the United Kingdom (UK) government introduced new measures aimed at reducing the spread of coronavirus (Covid-19). These measures directed the closure of non-essential businesses and venues, prohibited all public gatherings of more than two people and required everyone to stay at home except for very limited purposes. The rationale behind the measures was clear: Stay Home, Stay Safe, Save Lives. Within days of the lockdown coming into force, reports emerged within the media that services supporting victims of gender-based violence (GBV) were facing an unprecedented increase in demand for assistance, indicating that cases of abuse were on the rise. Although GBV is not caused by lockdown measures, evidence indicates that they may increase the incidence rate and/or the severity of GBV in households where it is already being perpetrated. These findings are in line with existing research which demonstrates that natural disasters, disease and other forms of conflict leave citizens (particularly women and girls) vulnerable to GBV. Preventing and responding to GBV in times of humanitarian crises is a vital but challenging endeavour. Whilst support services struggle to secure adequate resources and capacity, restrictions on leaving the house mean that victims face barriers to reporting abuse and seeking help. Within this context, this article will analyse the impact of Covid-19 on the ability of victims of GBV to access justice. The first part of this article will explore the role of GBV organisations in the UK, the impact of humanitarian crises on reported rates of GBV, and how GBV can be mitigated during the

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Covid-19 outbreak. The second part of the article examines the effectiveness of the response to the crisis from government and public sector agencies including Her Majesty's Courts and Tribunal Service (HMCTS), the Crown Prosecution Service (CPS) and the police. The third and final part of the article presents the findings of a UK wide study conducted by the authors into the impact of Covid-19 on GBV organisations and victims. Throughout the article, recommendations are made as to the ways in which GBV organisations could be more effectively supported to ensure justice for victims at this critical time.

Keywords

Domestic abuse, Covid-19, access to justice, gender-based violence

Introduction

On 23 March 2020, the United Kingdom (UK) government introduced new measures aimed at reducing the spread of coronavirus (Covid-19). These measures directed the closure of non-essential businesses and venues, prohibited all public gatherings of more than two people and required everyone to stay at home except for very limited purposes such as for daily exercise, travelling to work where this cannot be done from home, or to purchase basic necessities.¹ Anyone leaving their home for one of the permitted reasons during the 'lockdown' period must practise 'social distancing' by ensuring they remain two metres apart from anyone outside their household. For the purpose of this article, these are more generally referred to as the 'lockdown' measures. In England, these measures were given statutory footing through the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ('the Regulations') which came into force on 26 March 2020, however broadly similar provisions have been enacted across all devolved nations.² The measures are to be reviewed every 21 days.³ At the time of writing this article, they remain in force with additional amendments to the original regulations.⁴

Within days of the lockdown measures coming into force, reports emerged within the media that services supporting victims⁵ of gender-based violence (GBV) were facing an unprecedented increase in demand for support.⁶ The UK's largest domestic abuse charity, Refuge, reported an increase in the numbers of calls and web-based contacts over various 24-hour periods of between 25% and 700% compared to pre-lockdown levels.⁷ The Respect telephone line for male victims of abuse similarly reported a weekly increase of 16.6% in the number of calls received with traffic to their advice website rising by up to 125%.⁸ In the same

1. See the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. <<https://www.legislation.gov.uk/uk/si/2020/350/contents/made>> accessed 14 April 2020; helpful government guidance on the Regulations has also been published at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876279/Full_guidance_on_staying_at_home_and_away_from_others_1_.pdf> accessed 12 April 2020.

2. For example, Scotland has introduced The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, Wales have introduced The Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020 and Northern Ireland has The Health Protection (Coronavirus, Restrictions) (Northern Ireland) Regulations 2020.

3. Regulation 3(2) (n 4).

4. At the time of writing, the latest amendment is Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No4) Regulations 2020, SI 2020/588.

5. For the purpose of consistency in this article the term 'victim' is used, rather than 'survivor' to denote the fact that the authors are often discussing families who continue to experience abuse.

6. See *The Guardian* (28 March 2020) 'Lockdowns around the world bring rise in domestic violence' <<https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence>> accessed 12 April 2020.

7. Refuge Press Release (9 April 2020) <<https://www.refuge.org.uk/refuge-sees-calls-and-contacts-to-national-domestic-abuse-helpline-rise-by-120-overnight/>> accessed 17 April 2020; Refuge Press Release (11 April 2020) <<https://www.refuge.org.uk/refuge-response-to-home-secretary-announcement-of-support-for-domestic-abuse-victims/>> accessed 17 April 2020.

8. *The Guardian* (6 April 2020) 'UK domestic abuse helplines report surge in calls during lockdown' <<https://www.theguardian.com/society/2020/apr/09/uk-domestic-abuse-helplines-report-surge-in-calls-during-lockdown>> accessed 17 April 2020.

week, they recorded an increase of over 26% in requests for support from perpetrators of abuse.⁹ Similar findings have been reported globally.¹⁰

Against this background, this article will analyse the impact of Covid-19 on the ability of victims of GBV to access justice. Justice will look different for every victim of GBV and may change depending on at what point in time they are asked. This may include public exposure of the perpetrator, in the hope of preventing others from experiencing similar harm,¹¹ securing their or their children's safety through an injunctive order or achieving financial independence from the perpetrator. For many, a safe place to call home will be a priority, particularly at a time when 'home' is more important than ever. 'Justice' may or may not therefore involve recourse to the formal court system.

The first section of this article will explore the role of GBV organisations in the UK, the impact of humanitarian crises on reported rates of GBV, and how GBV can be mitigated during the Covid-19 outbreak. The second section will examine the effectiveness of the response to the crisis from government and public sector agencies including Her Majesty's Courts and Tribunal Service (HMCTS), the Crown Prosecution Service (CPS) and the police. The third part of the article will present the findings of a UK wide study into the impact of Covid-19 on GBV organisations and victims. Throughout the article, recommendations will be put forward as to the ways in which GBV organisations could be more effectively supported to ensure justice for victims. These recommendations were also submitted to the UK Government as part of the Home Office's call for evidence on the preparedness for Covid-19.¹²

Understanding GBV

GBV describes abuse which results in 'physical, sexual, psychological or economic harm or suffering [disproportionately to women], including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.¹³ The majority of GBV relates to interpersonal violence including domestic abuse, sexual violence, forced marriage, female genital mutilation, stalking, honour based violence and abuse and human trafficking.¹⁴ The Equality and Human Rights Commission recognise that GBV is the result of unequal power relations, patriarchal social structures and socialisation practices which reflect wider gender inequalities.¹⁵ GBV is often conceptualised as being synonymous with 'Violence against Women and Girls' (VAWG)¹⁶ because women and girls are disproportionately victims of abuse whilst men are more likely to be perpetrators.¹⁷ GBV is

9. Ibid.

10. *Oregon Live* (20 March 2020) 'Calls to Oregon's domestic violence crisis lines spike amid coronavirus crisis' <<https://www.oregonlive.com/crime/2020/03/calls-to-oregons-domestic-violence-crisis-lines-spike-amid-coronavirus-crisis.html>> accessed 15 April 2020; *South China Morning Post* (14 April 2020) 'Appease, defuse, enlist a friend: domestic violence in coronavirus lockdown, how to reduce the risk of it, and precautions to take' <<https://www.scmp.com/lifestyle/health-wellness/article/3079582/appease-defuse-enlist-friend-domestic-violence>> accessed 10 April 2020.

11. J Herman, 'Justice from the Victim's Perspective' (2005) *Violence Against Women*.

12. K Richardson, A Speed, C Thomson, 'Written Evidence Submitted by Northumbria Law School (COR0049)' (Home Affairs Committee) <<https://committees.parliament.uk/writtenevidence/2119/html/>> accessed on 12 May 2020.

13. See Article 3a of The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) <<https://rm.coe.int/168008482e>> accessed 16 April 2020.

14. S Montesanti, 'The Role of Structural and Interpersonal Violence in the Lives of Women: A Conceptual Shift in Prevention of Gender-based Violence' (2015) 15 *BMC Women's Health* 93.

15. The Equality and Human Rights Commission, 'Response of the Equality and Human Rights Commission to the Consultation: Transforming the Response to Domestic Abuse' (2018) <<https://www.equalityhumanrights.com/sites/default/files/consultation-response-transforming-response-to-domestic-abuse-may-2018.pdf>> accessed 18 April 2020.

16. The European Institute for Gender Inequality, *Strategic Framework on Violence against Women 2015-2018* (Publications Office of the European Union, Luxembourg 2015).

17. M Hester, 'Who Does What to Whom? Gender and Domestic Violence Perpetrators in English Police Records' (2013) 10 *European Journal of Criminology* 623-637; A Myhill, 'Measuring Domestic Violence: Context is Everything' (2017) 1(1) *Journal of Gender-Based Violence* 33-44; A Myhill 'Measuring Coercive Control: What can we Learn from National Population Surveys?' (2015) 21(3) *Violence Against Women* 355-375; S Walby and J Towers, 'Measuring Violence to End Violence: Mainstreaming Gender' (2017) 1 *Journal of Gender-Based Violence* 11-31.

most commonly committed within family relationships¹⁸ however it can also be perpetrated by the state failing to take active measures to protect its citizens from abuses.¹⁹

(i) The impact of ‘crisis’ on rates of GBV

Measures such as ‘social distancing’ and ‘lockdown’ do not cause GBV.²⁰ Neither does the stress, anxiety and economic hardship that may be felt by the existence of a pandemic. This would oversimplify the causes of a complex, deep-rooted and pervasive phenomenon and downplay the autonomy of the perpetrator by seeking to provide a justification for their behaviour. There is, however, evidence that these factors may increase the incidence rate and/or the severity of GBV in households where it is already being perpetrated. Risk factors for GBV include alcohol and drug use, frustration at being unable to support one’s family, female isolation, and crowding, all of which may be heightened during periods of lockdown.²¹ The World Health Organisation has identified that disasters increase vulnerability to violence because of the scarcity of basic provisions, destruction of social networks, breakdown of law enforcement and social support programmes and disruptions to the economy.²²

There is a wealth of existing research which suggests that these risk factors both during and following natural disasters, disease and other forms of conflict leave citizens (and particularly women and girls) vulnerable to GBV.²³ Gearhart et al’s study in Florida, USA, found that exposure to natural disasters exceeding 199 days resulted in increases of reports in simple assaults by around 78 per year.²⁴ In the aftermath of Hurricane Katrina in 2005, there was over a 30% increase in emotional abuse and nearly a 50% increase in physical abuse amongst women experiencing domestic abuse.²⁵ Likewise, after Hurricane Harvey in 2017, domestic abuse organisations identified an increase in strangulation, kicking, beating, stabbing and other injuries with weapons.²⁶ Similar patterns already seem to be emerging in relation to Covid-19. It has been

18. Montesanti (n 14).

19. See The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (commonly referred to as The Istanbul Convention). The Convention, which the UK government signed in June 2012, but is yet to ratify, imposes obligations on the government to establish appropriate support services for victims of GBV including a free national telephone hotline; medical, psychological and legal counselling; and help with housing through the provision of refuges.

20. N Westmarel and R Bell (19 March 2020) ‘Coronavirus lockdown is a dangerous time for victims of domestic abuse—here’s what you need to know’ <<https://theconversation.com/coronavirus-lockdown-is-a-dangerous-time-for-victims-of-domestic-abuse-heres-what-you-need-to-know-134072>> accessed 05 April 2020.

21. L Heise, M Ellsberg and M Gottmoeller, ‘A Global Overview of Gender-based Violence’ (2002) 8(1) *The International Journal of Gynaecology and Obstetrics* S5–S14; L Kiss, L Schraiber, C Zimmerman, N Gouveia and CH Watts, ‘Gender-based Violence and Socioeconomic Inequalities; Does Living in more Deprived Neighbourhoods Increase Women’s Risk of Intimate Partner Violence?’ (2012) 74(8) *Journal of Social Science and Medicine* 1172–1179; K Deribe, B Beyene, A Tolla, P Memiah, S Biadgillign and A Amberbir, ‘Magnitude and Correlates of Intimate Partner Violence Against Women and Its Outcome in Southwest Ethiopia’ (2012) 7(4) *PLoS One*; K McCarthy, R Mehta and N Haberland, ‘Gender, Power and Violence: A Systematic Review of Measures and Their Association with Male Perpetration of IPV’ (2018) 13(11) *PLoS One*.

22. World Health Organisation: Department of Injuries and Violence Prevention (2005) ‘Violence and disasters’ <https://www.who.int/violence_injury_prevention/publications/violence/violence_disasters.pdf> accessed 10 April 2020.

23. M Rezaeian, ‘The Association Between Natural Disasters and Violence: A Systematic Review of the Literature and a Call for more Epidemiological Studies’ (2013) 18(12) *Journal of Research in Medical Sciences* 1103–1107; I Cerna-Turoff, H Fischer, S Mayhew and K Devries, ‘Violence Against Children and Natural Disasters: A Systematic Review and Meta-analysis of Quantitative Evidence’ (2019) 14(5) *PLoS One*; S Swiss and J Giller, ‘Rape as a Crime of War: A Medical Perspective’ (1993) 270 *Journal of the American Medical Association* 612–615; N Renwick, ‘The ‘Nameless Fever’: The HIV/AIDS Pandemic and China’s Women’ (2002) 23(2) *Third World Quarterly* 377–393.

24. S Gearheart, M Perez-Patron, T Hammond, D Goldberg, A Klein and J Horney, ‘The Impact of National Disasters on Domestic Violence: An analysis of Reports of Simple Assault in Florida (1999–2007)’ (2018) 5(2) *Journal of Violence and Gender*.

25. J Schumacher, S Coffey, F Norris, M Tracy, K Clements and S Galea, ‘Intimate Partner Violence and Hurricane Katrina: Predictors and Associated Mental Health Outcomes’, (2012) 25(5) *Journal of Violence and Victims* 588–603.

26. S Wagers (8 April 2020) <<https://theconversation.com/domestic-violence-growing-in-wake-of-coronavirus-outbreak-135598>> accessed 10 May 2020.

reported that perpetrators have threatened to throw victims out of the house to increase the prospect of them catching the virus²⁷ or have used a victim's reliance on them to obtain food or medication as a means of control.²⁸

There is limited data available about the impact of Covid-19 on the reporting of GBV offences in the UK. The only police force to have released this data at the time of writing is Avon and Somerset Police who have recorded a 20.9% increase in domestic abuse incidents during the first two weeks of the lockdown—from 718 to 868 reports.²⁹ In addition, in the six weeks up to 19 April 2020, the Metropolitan Police Service (MPS) made 4,093 arrests for domestic abuse offences across London.³⁰ Since 9 March 2020, the MPS have issued 73 Domestic Violence Protection Orders and 90 Domestic Violence Protection Notices.³¹ At least 16 domestic abuse related murders took place in the UK between 23 March 2020 and 12 April 2020.³² Whilst this indicates that cases of abuse may be increasing, any data collected within the UK is likely to underestimate the gravity of the situation and therefore should be treated with caution. This is because there is no statutory definition of GBV within domestic law, which may lead to differences in police forces categorising offences. In addition, most forms of GBV are underreported even in times of stability.³³ In their April 2020 Survivor Survey, Women's Aid found that 80% of victims reported that isolation had led to their informal support networks decreasing and 78% reported that Covid-19 had made it more difficult for them to leave their abuser.³⁴

(ii) The Role of GBV Support Services in the UK

It is estimated that during 2016/2017 approximately 154,306 women in England used specialist GBV support services³⁵ and 27,767 women and children were placed in refuges for victims of abuse.³⁶ As at May 2018 there were 219 providers running 363 local services throughout England.³⁷ Kelly notes that the term support service, 'encompasses organisations providing a range of options that enable women [and sometimes men] to create safety, seek justice and undo the harms of violence'.³⁸ Services are provided either by non-government organisations (NGOs) or government agencies.³⁹ They are founded on the principles of confidentiality and empowerment and are free at the time of need.⁴⁰ Research suggests that they positively impact the wellbeing of victims and their children; increase their sense of self-efficacy and their hope for the future

27. *TIME* (18 March 2020) 'As cities around the world go on lockdown, victims of domestic abuse look for a way out' <<https://time.com/5803887/coronavirus-domestic-violence-victims/>> accessed 12 April 2020.

28. Women's Aid, 'Survivors say domestic abuse is escalating under lockdown' (28 April 2020) <<https://www.womensaid.org.uk/survivors-say-domestic-abuse-is-escalating-under-lockdown/>> accessed 30 April 2020.

29. See *The Guardian* (n 8).

30. Metropolitan Police, 'Over 4,000 domestic abuse arrests made since COVID-19 restrictions introduced' (24 April 2020) <<http://news.met.police.uk/news/over-4000-domestic-abuse-arrests-made-since-covid-19-restrictions-introduced-400900>> accessed 27 April 2020.

31. *Ibid.*

32. J Grierson, 'Domestic abuse killings 'more than double' amid Covid-19 lockdown' (15 April 2020) <<https://www.theguardian.com/society/2020/apr/15/domestic-abuse-killings-more-than-double-amid-covid-19-lockdown>> accessed 26 April 2020.

33. HM Government, 'Transforming the Response to Domestic Abuse' (Government Consultation, 8 March 2018). <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf> accessed 17 April 2020; Women's Aid, 'Survival and Beyond: The Domestic Abuse Report 2017' (2017) <<https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/Survival-and-Beyond.pdf>> accessed 14 April 2020.

34. Women's Aid (n 28).

35. *Ibid.*

36. *Ibid.*

37. *Ibid.*

38. L Kelly (September 2008), 'Combating violence against women: minimum standards for support services' Council of Europe, p. 10 <[https://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/EG-VAW-CONF\(2007\)Study%20rev.en.pdf](https://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/EG-VAW-CONF(2007)Study%20rev.en.pdf)> accessed 2 May 2020.

39. *Ibid.*

40. *Ibid.*

and improve their access to community resources and opportunities.⁴¹ Victims who have received support experience lower levels of re-abuse, an improved quality of life, higher self-esteem and decreased mental health difficulties.⁴²

(iii) Mitigating the risks of GBV during the Covid-19 outbreak

Responding to victims' needs and preventing further abuses is a vital but challenging endeavour. The Inter-Agency Standing Committee (IASC) have highlighted that in times of humanitarian crises a holistic and multi-agency approach must be co-ordinated from the earliest stages to ensure protection for victims.⁴³ The IASC GBV guidelines state:

Survivors/victims of GBV need assistance to cope with the harmful consequences. They may need healthcare, psychological and social support, security, and legal redress. At the same time, prevention activities must be put in place to address causes and contributing factors to GBV in the setting. Providers must be knowledgeable, skilled, and compassionate in order to help the survivor/victim, and to establish effective preventive measures. Prevention and response to GBV therefore require coordinated action from actors from many sectors and agencies.⁴⁴

This aligns with research by Kelly which suggests that GBV organisations should be key partners in the development of effective interventions by state agencies, especially law enforcement and the legal system.⁴⁵ The Global Protection Cluster and the IASC have published guidance on identifying and mitigating GBV risks within the Covid-19 response.⁴⁶ This recognises that GBV service provision is likely to be reduced and/or operate differently than under normal circumstances. They advocate that, where possible, provision and utilisation of GBV support services are improved. Staff and volunteers in all sectors should also be equipped to provide accurate, up-to-date information on available GBV services and be aware of current limitations. They recommend that GBV organisations document trends in safety risks for vulnerable populations and utilise this information to inform programming adaptations and advocacy with local/national governments. The IASC recommend that the UNICEF Availability, Accessibility, Acceptability and Quality Framework (AAAQ Framework)⁴⁷ is utilised as an essential part of GBV mitigation. This is a tool which assesses the barriers which may impede access to services through the use of pre-set questions.

The VAWG sector has also issued a joint statement to the Government which identified priorities for action.⁴⁸ This included providing 'an immediate cash injection' to ensure that organisations supporting victims of GBV remain resilient and are able to meet the heightened demand for their services; reimbursing lost refuge income as a result of refuges closing their doors to new entrants; investing in technology and remote working to ensure victims can access support via telephone or online; classifying VAWG professionals as key workers; delivering a clear public message about the scale, nature and impact of abuse and the

41. C Sullivan, 'Understanding How Domestic Violence Support Services Promote Survivor Well-being: A Conceptual Model' (2018) 33 *Journal of Family Violence* 123–131.

42. Ibid.

43. The Inter-Agency Standing Committee 'Integrating gender-based violence interventions in humanitarian action: reducing risk, promoting resilience and aiding recovery' (August 2015) <https://interagencystandingcommittee.org/system/files/guidelines_for_integrating_gender_based_violence_interventions_in_humanitarian_action.pdf> accessed 14 May 2020.

44. Ibid.

45. See Kelly (n 38).

46. The Global Protection Cluster and the Inter-Agency Standing Committee 'Identifying and mitigating gender-based violence risks within the Covid-19 response' (6 April 2020) <<https://gbvguidelines.org/wp/wp-content/uploads/2020/04/Interagency-GBV-risk-mitigation-and-Covid-tipsheet.pdf>> accessed 21 April 2020.

47. UNICEF Availability, Accessibility, Acceptability and Quality Framework: A tool to Identify potential barriers to accessing services in humanitarian settings. <<https://gbvguidelines.org/wp/wp-content/uploads/2019/11/AAAQ-framework-BW-print.pdf>> accessed 21 April 2020.

48. Women's Aid 'VAWG Sector Statement on Covid-19' (20 March 2020) <<https://www.womensaid.org.uk/vawg-sector-statement-on-covid-19/>> accessed 8 April 2020.

support services available to victims; and ensuring that women are represented in the national and global responses to Covid-19 to challenge gender-stereotypes.⁴⁹

At the time of writing, the Government have announced a number of financial packages to support GBV organisations and their service users. On 8 April 2020, it was confirmed that frontline charities would benefit from an additional £750 million package of support to enable vital work to continue during the Covid-19 outbreak.⁵⁰ It was stated that frontline charities would include those supporting domestic abuse victims, to assist with the potential increased demand for such services in consequence of the pandemic.⁵¹ HM Treasury has indicated that £360 million of the financial support will be directly allocated by government departments to charities providing key services and supporting *vulnerable* people during the crisis.⁵² The majority of the total funding, approximately £200 million, will be received by hospices; the remaining funds are to be received by, ‘St Johns Ambulance and the Citizens Advice Bureau . . . as well as charities supporting vulnerable children, victims of domestic abuse, or disabled people’.⁵³

Within three days of funding being announced, the Home Secretary launched a national campaign to reach out to those at risk of abuse under the hashtag ‘#YouAreNotAlone’. The purpose of the campaign is to inform those at risk that they can still access support services and that the police remain on hand.⁵⁴ Furthermore, the Home Secretary announced £2 million to enhance online support services and helplines for domestic abuse, as well as securing support from Fujitsu to provide IT expertise to smaller domestic abuse charities. Although in the early stages, these proposals have not yet produced clear strategies and limited information is available about how funding is to be allocated. There still remains some degree of uncertainty as to how the £750 million will be, and is being, allocated. It is understood that applications to the National Lottery Fund opened on 22 May 2020, some two months after lockdown began.⁵⁵ The fact that they are only deciding applications on the order that they come in, is bound to disadvantage smaller organisations. The pots of funding are very limited, from £300 to £10,000, with some consideration of grants above £10,000 to cover costs for six months after the award.⁵⁶ The National Lottery Community Fund states that they will consider larger amounts for larger organisations, which provide services for multiple areas.⁵⁷

The ‘Justice’ Response to Covid-19

This section examines the effectiveness of the response to the crisis from government ‘justice’ agencies including HMCTS, the CPS and the police. The analysis reveals that within both the family and criminal justice system, there are barriers for victims of GBV in accessing the court system and navigating a remote court process. The analysis also illustrates that, as much of the guidance has been prepared hastily in a piecemeal approach, insufficient consideration has been given to the potential impact of many policies on victims of GBV.

49. Ibid.

50. HM Treasury, ‘Chancellor of the Exchequer, Rishi Sunak on economic support for the charity sector’ (8 April 2020) <<https://www.gov.uk/government/news/chancellor-sets-out-extra-750-million-coronavirus-funding-for-frontline-charities>> accessed 14 April 2020.

51. HM Treasury, ‘Chancellor sets out extra £750 Million coronavirus funding for frontline charities’ (8 April 2020) <<https://www.gov.uk/government/news/chancellor-sets-out-extra-750-million-coronavirus-funding-for-frontline-charities>> accessed 14 April 2020.

52. Ibid.

53. Ibid.

54. Home Office and The Rt Hon Priti Patel MP, ‘Home Secretary announces support for domestic abuse victims’ (11 April 2020) <<https://www.gov.uk/government/news/home-secretary-announces-support-for-domestic-abuse-victims>> accessed 14 April 2020.

55. The National Lottery Community Fund ‘Learn about applying for emergency COVID-19 funding in England’ <<https://www.tnlcommunityfund.org.uk/funding/covid-19/learn-about-applying-for-emergency-funding-in-england#item-2>> accessed 6 July 2020.

56. Ibid.

57. Ibid.

(a) The family justice response

The current threat of Covid-19 has brought unprecedented change to, and demand on, the justice system. This led to the Lord Chief Justice announcing on 17 March 2020 ‘it is not realistic to support that it will be business as usual, but it is of vital importance that the administration of justice does not grind to a halt . . .’⁵⁸ In seeking to manage its response to the pandemic, HMCTS initially detailed three main objectives: minimise the impact of the coronavirus outbreak on HMCTS staff, the judiciary and court and tribunal users; ensure sites remain open for business wherever possible and identify alternative arrangements to maintain essential services; and to minimise disruption for non-essential services that cannot proceed as normal.⁵⁹ To that end, at the time of writing, of 351 active courts, only 159 buildings remain open to the public for essential face-to-face hearings; a further 116 are categorised as, ‘staffed courts’ where only staff and judges attend to facilitate and conduct virtual or telephone hearings.⁶⁰ The remaining 76 courts are temporarily closed.⁶¹

A promising indication from HMCTS, is that civil proceedings in the Magistrates’ Court involving vulnerable victims are deemed urgent and are, therefore, prioritised.⁶² Among those civil and family proceedings considered urgent are: injunctions, emergency protection and breaches of injunctions.⁶³ Although it is positive that injunctive relief for GBV victims remains available, the government guidance for emergency injunctions presumes that victims are able to locate a safe space away from their abuser, complete an application, draft a witness statement and attend a telephone hearing.⁶⁴ The difficulties are further compounded where victims are unable to access legal aid and who, therefore, have to navigate a telephone hearing unrepresented, potentially even in the same home as their abuser.⁶⁵ It has been proposed that local authorities arrange a space where parents in care proceedings can access hearings remotely.⁶⁶ This is a simple and effective recommendation that could be used to facilitate hearings involving GBV.

Consideration has been afforded to litigants in person who may have difficulty conducting a hearing through electronic means, which would mitigate against the use of telephone hearings. The resounding call from senior judiciary is for professionals and judges to have a ‘willingness to be imaginative in the use of remote technology’.⁶⁷ Although sections 53–57 Coronavirus Act 2020 permit the use of video and audio technology in criminal courts and tribunals during the pandemic, there is no mention of the civil and family courts in England. For hearings in the High Court however, the Senior Courts Act 1981 makes clear that business may be conducted at *any* place in England and Wales.⁶⁸ This is also true of the Court of Appeal⁶⁹ and the Family Court.⁷⁰ There is also contemplation of the judge sitting at a remote location in FPR PD22A.⁷¹ The court is obliged to manage cases in furtherance of the overriding objective with case management powers

58. Court and Tribunals Judiciary, ‘Coronavirus (COVID-19) update from the Lord Chief Justice’ (17 March 2020) <<https://www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/>> accessed 24 April 2020.

59. HM Courts and Tribunals Service, ‘HMCTS priorities during coronavirus outbreak’ (19 March 2020 and updated 6 April 2020) <<https://www.gov.uk/guidance/hmcts-priorities-during-coronavirus-outbreak>> accessed 24 April 2020.

60. The Law Society, ‘Coronavirus (COVID-19): Court and Tribunal building status’ (24 April 2020) <<https://www.lawsociety.org.uk/support-services/advice/articles/coronavirus-court-and-tribunal-building-status/>> accessed 25 April 2020.

61. *Ibid.*

62. See HM Courts and Tribunals Service (n 59).

63. *Ibid.*

64. The Law Society, ‘COVID-19 lockdown puts domestic abuse victims at risk’ (8 April 2020) <<https://www.lawsociety.org.uk/news/press-releases/coronavirus-covid-19-lockdown-puts-domestic-abuse-victims-at-risk/>> accessed 25 April 2020.

65. *Ibid.*

66. Mr Justice MacDonald, ‘The Remote Access Family Court’ (16 April 2020) Courts and Tribunals Judiciary <<https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-4-Final-16.04.20.pdf>> accessed on 14 May 2020.

67. Courts and Tribunals Judiciary, ‘Coronavirus (COVID-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts’ (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 25 April 2020.

68. Senior Courts Act 1981, s 71.

69. Senior Courts Act 1981, s 57.

70. Matrimonial and Family Proceedings Act 1984, s31B, as amended by the Crime and Courts Act 2013.

71. Family Procedure Rules 2010, 2010/2955, PD22A, Annex 3, para 2.

extending to making use of technology.⁷² This is not an additional practice direction resulting from the pandemic; rather, it is an existing practice direction considered in the ordinary course of proceedings.

This is not to say that remote hearings are without difficulty. Hearings before Magistrates are not taking place due to the lack of IT equipment and feasibility of being assisted remotely by the Legal Adviser if points of law are raised.⁷³ It is also difficult to see how effective support can be given during a hearing to an unrepresented victim by a support service or a McKenzie Friend, while also maintaining social distancing. A resolution to such remote support may be considered as part of the bespoke IT remote court system which is in development. Alongside this, there needs to be heavy government investment in the IT infrastructure of GBV organisations.

At the time of writing, court users are required to engage with telephone conferencing and Skype for Business until the much-anticipated ‘Cloud Video Platform’ is fully introduced, after which, there will be a bespoke IT solution designed specifically for court hearings. This will be an improvement on the current approach of adapting to technology intended for conducting ordinary meetings outside of the legal profession.⁷⁴ It will be interesting to determine whether this acts as the catalyst for expediting technology-enhanced court reform, more generally. Mr Justice MacDonald acknowledged that there is currently no specific recommended IT platform for parties, advocates and the court to use; it is recommended that they choose from a ‘suite’ or, ‘smörgåsbord’ of available platforms.⁷⁵ The judiciary have been provided useful guides for the various platforms by the Family Law Bar Association (FLBA) along with guidance from HMCTS.⁷⁶ Unfortunately, there appear to be no such guides on the court process for legal representatives and lay parties. A simple guide has been recommended by the judiciary however this is yet to be implemented.⁷⁷ The current guide for lay people in relation to domestic abuse injunction applications needs to be updated to cater for online hearings, as there is no mention of remote hearings in the current online guidance.⁷⁸ These issues could be readily addressed through video clips with instructions/guides for how to effectively use the platforms, as well as detailing the expectations of the court on the parties and their legal representatives. The clips could be made available on the government, judiciary and GBV organisations’ websites, as well as on social media and YouTube. This would promote transparency in the family justice system at a critical time.

The security of these online platforms is also uncertain given the recent craze for ‘Zoombombing’ where uninvited individuals access meetings hosted on the platform Zoom.⁷⁹ This has led to a number of companies preventing their employees from using the technology and Zoom being suspended in Singapore.⁸⁰ The lack of security cannot be conducive to confidentiality and legal professional privilege. Depending on the perpetrator of the Zoombombing, it could well place the victim at risk of further harassment or lead to reporting restrictions being breached. The security risk also extends to the parties taking pictures of those involved in the hearing, as well as recording elements or the whole of the hearing. Unfortunately, it is noted by the judiciary that this risk will have to be accepted in the short-term as the benefit of seeking justice outweighs the risk: ‘the perfect cannot be permitted to be the enemy of the good’.⁸¹

Current guidance states that ‘steps should be taken to avoid matters that detract from the ordinary gravitas of a court hearing’,⁸² but inevitably ‘that gravitas is lost’ as ‘in practice... a preoccupation with the

72. Family Procedure Rules 2010, 2010/2955, r1.4(2)(k).

73. See Courts and Tribunals Judiciary (n 67) 5.4.3.

74. See Courts and Tribunals Judiciary (n 67) 1.2—Mr Justice MacDonald refers to parties and advocates also using Zoom and Lifesize.

75. See Courts and Tribunals Judiciary (n 67) 1.3.

76. See Courts and Tribunals Judiciary (n 67) 5.6.

77. See Courts and Tribunals Judiciary (n 67) 5.19.

78. HM Courts and Tribunals Service, ‘Domestic violence injunctions under the Family Law Act’ (1 April 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717671/fl700-eng.pdf> accessed 26 April 2020.

79. BBC News, ‘Zoombombing targeted with new version of app’ (23 April 2020) <<https://www.bbc.co.uk/news/business-52392084>> accessed 25 April 2020.

80. Ibid.

81. See Courts and Tribunals Judiciary (n 67) 5.20.

82. See Courts and Tribunals Judiciary (n 67) 3.2.1.

technology distract[s] people's attention from the substantive content of the case'.⁸³ In contrast, others have noted, 'it felt comfortable and familiar relatively quickly' and that witnesses might feel less intimidated.⁸⁴ The decision as to whether a hearing is to take place remotely, be adjourned or take place face-to-face remains a judicial one for the allocated judge, supported by their leadership judges.⁸⁵ It would, however, be useful for the judicial decision-making criteria to be published for practitioners and the public. This would perhaps alleviate the risk of appeals based on Article 6 of the Human Rights Act 1998 (Right to a Fair Trial).

It was announced on 19 March 2020 that the definition of a key worker included, 'those essential to the running of the justice system'.⁸⁶ At that time, there was no clear guidance in relation to who was deemed 'essential'. The Law Society subsequently clarified that only certain categories of legal practitioners were essential to the running of the justice system; including:

1. Advocates required to appear before a court or tribunal including prosecutors;
2. Other legal practitioners required to support the administration of justice including duty solicitors and barristers, legal executives, paralegals and others who work on imminent or ongoing court or tribunal hearings;
3. Solicitors and barristers advising people living in institutions or deprived of their liberty; and
4. Legal practitioners providing advice or attending a hearing for an urgent matter relating, for example, to the safeguarding of children or vulnerable adults, or a public safety matter.⁸⁷

It is agreed that these keyworkers are vital for facilitating access to justice, but there must be consideration of extending keyworker status to those advising victims of GBV more generally. There are occasions where victims do not feel able to immediately issue proceedings for injunctive protection; they may just require advice from a legal representative about their legal options. There is often work with the victim that is undertaken following proceedings, or advice provided to GBV organisations, which would not be regarded as an endeavour of a keyworker. The effect of this lack of keyworker status, and an inability to bill for work undertaken, has resulted in firms suspending practice and furloughing solicitors, legal executives and support staff. Furthermore, there is no mention of GBV organisation staff and volunteers being made keyworkers. This inevitably hinders access to justice for victims of GBV.

(b) The criminal justice response

On 23 March 2020, the Lord Chief Justice announced a number of changes to criminal court operations in line with the lockdown measures announced by the government.⁸⁸ Guidance was provided that hearings in the Crown Court should take place remotely where this can be done lawfully and other hearings can progress if 'suitable arrangements can be made to ensure distancing'.⁸⁹ It was suggested that telephone, video and other technology should be used to facilitate this, where possible. The Coronavirus Act 2020 was enacted two days later. Unlike the civil and family courts, the Coronavirus Act 2020 makes specific provision in sections 53–57 for the procedure to be followed where video and audio technology is to be used in criminal proceedings.

83. Transparency Project, 'Remote justice: a family perspective' (29 March 2020) <<http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/>> accessed 25 April 2020.

84. *Ibid.*

85. See Courts and Tribunals Judiciary (n 67) 3.4.1.

86. Cabinet Office / Department for Education, 'Guidance for schools, childcare providers, colleges and local authorities in England on maintaining educational provision' (19 March 2020) <<https://www.gov.uk/government/publications/coronavirus-covid-19-maintaining-educational-provision/guidance-for-schools-colleges-and-local-authorities-on-maintaining-educational-provision>> accessed 25 April 2020.

87. The Law Society, 'Update on legal practitioner key workers' (23 March 2020) <<https://www.lawsociety.org.uk/news/stories/update-on-legal-practitioner-keyworkers/#>> accessed 25 April 2020.

88. The Lord Burnett of Maldon, Lord Chief Justice, 'Review of court arrangements due to COVID-19, message from the Lord Chief Justice' (23 March 2020). Available at: <<https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/>> accessed 14 May 2020.

89. *Ibid.* (para 2).

Specifically, sections 53 and 54 (with reference to Schedules 23 and 24 of the Act) deal with the ‘expansion and availability of live links’. This extends the powers under the Criminal Justice Act 2003, allowing the court to direct that any party and/or a judge or justice is to take part in eligible criminal proceedings by live audio or video link.

Those provisions rely on courts having the appropriate technology in place. This is worrying given concerns that have been raised repeatedly by the judiciary over the last 5 years about the poor quality IT technology currently being used in court proceedings.⁹⁰ The Lord Chief Justice states that courts will need to ‘make best possible use of the equipment currently available’.⁹¹ Research conducted by Gibbs into the use of video technology in the criminal courts suggested that it would cost ‘millions’ to make the system ‘fit for purpose’.⁹² With the amount of government funding already being allocated to businesses and health services as a result of Covid-19, it is difficult to see where additional funding will come from.

This issue was alleviated somewhat by the temporary prohibition placed on jury trials and confirmation that the provisions in the Coronavirus Act 2020 do not extend to jury participation.⁹³ This makes the Crown Court largely redundant and limits the use of technology to directions hearings and bail applications. Trials underway at the time that lockdown measures were introduced were able to continue, albeit the Lord Chief Justice acknowledged that it may be necessary to adjourn these trials for a short time to ensure that social distancing measures can be put in place.

Whilst this may mean that issues with technology are less of a priority for the criminal courts, the delay in trials being heard has other more negative consequences. As the CPS have acknowledged this will ‘have a long-term impact on the criminal justice system, particularly in relation to the expanding pipeline of cases waiting to be heard’.⁹⁴ The Institute for Government recognises that a six month shutdown of courts would lead to a 60% increase in wait times in the Crown Court ‘from 18 weeks to 29 weeks’.⁹⁵ This has potentially significant cost consequences. It is estimated that it will cost £220 million and a period of two years to return wait times to a pre-lockdown level.⁹⁶ It is somewhat ironic that this is the exact same amount that it was hoped would have now been saved through the civil and criminal legal aid reforms,⁹⁷ although stage 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) review has indicated that the real amount saved to date is much lower.⁹⁸

For many victims of GBV, these changes could lead to indefinite delays of criminal trials. Bishop et al suggest that one of the main reasons why a victim may disengage with a prosecution is due to ‘dissatisfaction, or fear of, the court process’.⁹⁹ The indefinite delay of these criminal trials could lead to dissatisfaction and therefore disengagement. In the year ending March 2019, 53% of prosecutions for domestic abuse related

90. See for example: C Thomas, ‘2016 UK Judicial Attitude Survey’ (2017) UCL Judicial Institute, 25–35; Sir James Munby ‘View from the President’s Chambers (16): January 2017’ (2017) <<https://www.judiciary.uk/wp-content/uploads/2014/08/view-from-the-president-of-family-division-16-jan-17.pdf>> accessed 14 May 2020.

91. See The Lord Burnett of Maldon, Lord Chief Justice (n 88).

92. P Gibbs, ‘Defendants on video—conveyor belt justice or a revolution in access?’ (2017) (London: Transform Justice) <https://www.barrowcadbury.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf> accessed 14 May 2020.

93. See The Lord Burnett of Maldon, Lord Chief Justice (n 88); Coronavirus Act 2020, Sch 23, Para 2(2)(1B).

94. Crown Prosecution Service, ‘Coronavirus: Interim CPS Case Review Guidance—Application of the Public Interest Covid-19 crisis response’ (14 April 2020) <<https://www.cps.gov.uk/legal-guidance/coronavirus-interim-cps-case-review-guidance-application-public-interest-covid-19>> accessed 14 May 2020.

95. The Institute for Government, ‘The criminal justice system: How government reforms and coronavirus will affect policing, courts and prisons’, p. 7 (29 April 2020) <<https://www.instituteforgovernment.org.uk/sites/default/files/publications/criminal-justice-system.pdf>> accessed 30 April 2020.

96. *Ibid.*

97. Ministry of Justice, ‘Transforming legal aid: delivering a more credible and efficient system’, p. 5 (9 April 2013) <<https://www.justice.gov.uk/downloads/consultations/transforming-legal-aid.pdf>> accessed 30 April 2020.

98. Ministry of Justice, ‘Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)’ (February 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf> accessed 30 April 2020.

99. C Bishop and V Bettinson, ‘Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offence of ‘Controlling or Coercive Behaviour’ (2018) 22(1) *The International Journal of Evidence & Proof*. Page 6.

offences were not progressed due to evidential difficulties arising from the victim not supporting further action.¹⁰⁰ This already significant amount is only likely to rise with so many trials now being delayed.

i. Evidential Issues

Even where trials can progress at a later date and the victim is still willing to engage with the process, the quality of their evidence could be detrimentally impacted by any delays. It is widely accepted that delays can lead to memory decay or distortion that in turn may lead to discrepancies between the evidence being provided in an initial interview and that provided during cross-examination months or sometimes years later.¹⁰¹ Whilst criminal practice dictates that there will still be a need to ‘test’ evidence at trial, the effect of delay must be considered and it may be necessary to rely more heavily on witness statements taken at the time of police intervention.

This in itself raises another issue related to the lockdown measures: how should police proactively continue to take statements from victims and witnesses? The CPS have issued best practice guidance for police forces seeking to obtain statements over the telephone whilst the lockdown measures are in place.¹⁰² It should be noted that there is no legal requirement on police officers to avoid taking statements face to face. The guidance simply acknowledges that this may be the preference of some officers in order to protect against the risk of infection, especially given the widespread lack of available Personal Protective Equipment (PPE). Witness statements taken over the phone should be subsequently verified by the witness signing the document, but a digital signature is permitted and this can be actioned using email. Alternatively, the statement can be posted to the witness for them to sign in ink and return. The guidance also indicates that it should be made clear on the statement itself that it was taken over the telephone.

Whilst this method for remote statements may be suitable for some witnesses, caution should be taken taking a statement over the telephone from a victim of GBV, especially at a time when it may be more difficult for them to seek support from a specialist service. Taking statements remotely, rather than face to face at the time of an incident potentially increases the risk of the victim being influenced by the perpetrator or associates. Crucially for victims of GBV, the CPS guidance indicates that the police officer taking the statement must consider if ‘there is a risk of harm to the witness if the statement was to be intercepted when sent by e-mail or post’.¹⁰³ This guidance should be updated to indicate that the police officer taking the statement should consider whether there is a risk of the witness being influenced as to the contents of the statement if it is not taken face to face.

An interview of the suspect will also be necessary in most cases in order to ‘pursue all reasonable lines of enquiry’, as required under section 23 Criminal Procedure and Investigations Act 1996. An interview protocol was therefore agreed for use during the Covid-19 outbreak.¹⁰⁴ This places a duty on the police ‘to ensure that all reasonably practicable steps are taken to protect visitors to the custody suite, including legal representatives, from infection with Covid-19’.¹⁰⁵ This includes providing PPE, if appropriate. Domestic abuse and other GBV offences do not fall within the categories of cases that allow for the interview to be dispensed with. The protocol therefore provides three options for how the police station interview can progress:

100. Office for National Statistics, *Domestic abuse in England and Wales: year ending March 2019* (Office for National Statistics, 25 November 2019).

101. See for example: J Read and D Connolly, ‘The Effects of Delay on Long-term Memory for Witnessed Events’ (2007) *Handbook of Eyewitness Psychology: Volume 1 Memory for Events*; C Boydell and J Read, ‘Accuracy of and Confidence in Mock Jailhouse Informants’ Recall of Criminal Accounts’ (2011) 25 *Applied Cognitive Psychology* 255–264.

102. Crown Prosecution Service, ‘Statements Obtained Over the Telephone—Best Practice Guidance’ (2020) <https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Telephone-Statements-Best-Practice-Guidance.pdf> accessed 14 May 2020.

103. *Ibid.*

104. The Law Society, ‘Coronavirus (COVID-19) interview protocol’ (2 April 2020) <<https://www.lawsociety.org.uk/support-services/advice/articles/coronavirus-covid-19-interview-protocol/>> accessed 14 May 2020.

105. *Ibid.* para 8.

1. Completely virtual interview—all parties dial in to a Custody Laptop with the Officer in Charge in the interview room recording and suspect in the Virtual Custody room.
2. Partial virtual interview—Officer and Interviewee in interview room, legal representative appears via a video link.
3. All parties physically required due to the serious nature of the case—all persons will be issued with the appropriate PPE and given instructions on how to use this.¹⁰⁶

This should allow for interviews with suspects to take place in most cases involving a GBV related offence. Where none of those three options are available, the protocol sets out the procedure for a written statement to be taken under caution instead.¹⁰⁷

(ii) Is prosecution a proportionate response?

This is a question that prosecutors are always required to ask themselves under paragraph 14.4 of The Code for Crown Prosecutors, but is a question that the CPS have suggested needs particular consideration during the Covid-19 outbreak.¹⁰⁸ For live cases, the CPS have clarified that the outbreak will amount to ‘a change in circumstances’ under paragraph 3.6 of The Code for Crown Prosecutors and they should therefore be considering whether this has any impact on the public interest in continuing a case.¹⁰⁹ In their Coronavirus Interim Case Review Guidance, the CPS recommend:

When considering whether prosecution or continuing proceedings is a proportionate response, this factor must be weighed with all other relevant public interest factors, such as the seriousness of the offence and the circumstances of and the harm caused to the victim, to form an overall assessment of the public interest.¹¹⁰

In GBV cases ‘the circumstances of and the harm caused to the victim’ will be particularly important and it is hoped that, in applying this guidance, the CPS will take the view that continuing prosecutions in those cases will be in the public interest. No specific guidance is provided as to these types of cases, only that ‘each case must be decided on its own facts and merits’.¹¹¹

Guidance specifies that ‘high risk domestic abuse’ cases will require an immediate charging decision.¹¹² Other relevant offences that may involve GBV and require an immediate charging decision include: ‘serious violence’ and ‘serious sexual offences’. In those cases ‘the defendant will be placed before the next available court, for an application to remand them in custody’, using remote technology.¹¹³ The Bail Act considerations noted as being particularly relevant in those cases are: ‘seriousness of offence and likely sentence; risk of further offending; and interference with witnesses’.¹¹⁴

Other Rape and Serious Sexual Offence and domestic abuse offences are categorised as ‘high priority—non-custody bail cases’.¹¹⁵ These will be cases where the CPS does not consider it necessary to remand the perpetrator in custody, but where bail conditions are required to protect the victim, prevent interference with witnesses and prevent further offending. The Covid-19 response guidance indicates that in those cases a long court bail date should be given of 28 days where there is an anticipated guilty plea and 56 days where there is

106. See The Law Society (n 104), para 14.

107. Ibid Annex B.

108. Crown Prosecution Service (n 94) paras 8 and 9.

109. Ibid.

110. Ibid para 11.

111. Ibid para 12.

112. National Police Chiefs’ Council and Crown Prosecution Service, ‘Interim CPS Charging Protocol—Covid-19 crisis response’ (31 March 2020) <https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Interim-CPS-Charging-Protocol-Covid-19-crisis-response.pdf> accessed 14 May 2020, para 10.

113. Ibid para 6.

114. Ibid para 10.

115. Ibid para 14.

an anticipated not guilty plea.¹¹⁶ The hope is that by that time the current crisis has passed trials can be progressed.

Of particular concern for GBV cases, is the reference in the Coronavirus Interim Case Review Guidance to the need for prosecutors to actively seek to determine whether witnesses will still support the prosecution and attend court.¹¹⁷ Similarly, the Interim Charging Protocol makes clear that the strength of the evidence (which could potentially be the victim's statement alone) will be a relevant factor in the application to withhold bail.¹¹⁸ As previously addressed, victim participation is frequently an issue in GBV cases, an issue only likely to be heightened by delays in trials being heard and a reduction in available support services. It would therefore be concerning if the CPS decide to discontinue prosecutions as a result of victims no longer wishing to engage with a system that is now entrenched in delay. The guidance does indicate that consideration needs to be given to whether witnesses require support to secure their attendance. The work of Independent Domestic Violence Advisors (IDVAs) and Independent Sexual Violence Advisors (ISVAs) is an important aspect of the criminal justice system and it is imperative that GBV organisations continue to receive the vital funding they require during and post Covid-19 outbreak. This is an issue that will be discussed in the key findings section.

(iii) Early release of offenders

It is necessary to consider the position of those who are already serving prison sentences and the impact that Covid-19 has had and will continue to have on the prison service. This is both in terms of enabling social distancing within prisons where there are cases of Covid-19 and also dealing with the reduction in staff numbers as staff are required to self-isolate at home. This is an issue that has been considered across the world, with France, Germany, Canada, Australia and some states in the USA having already announced plans to release some prisoners early.¹¹⁹

The Northern Ireland Justice Minister announced the 'Covid-19—Temporary Release of Prisoners Scheme' on 30 March 2020.¹²⁰ Through this scheme, the Northern Ireland Department of Justice will consider the early release of some prisoners to alleviate the pressure on the prison system caused by the Covid-19 outbreak. In her ministerial statement, the Justice Minister acknowledged that 'such a move is contrary to the ethos of the justice system and will cause distress to victims and their families' but argued that this is justified to protect staff and other inmates. Of relevance to this article are the exclusions which mean that prisoners who are serving a sentence for an offence involving 'domestic violence or cruelty' or an offence 'perpetrated on the grounds of race, religion or sexual orientation' are not eligible for early release under the scheme.

The government announced similar plans for England and Wales on 4 April 2020.¹²¹ The press release makes clear that this will only apply to 'low risk offenders who are within two months of their release date'. Anyone convicted of a violent or sexual offence will not be eligible. It is not clear from the limited information available whether individuals who have been convicted of non-physical domestic abuse and GBV offences will be eligible, such as those who have been convicted under section 76 Serious Crime Act 2015 or of harassment or stalking offences under the Protection from Harassment Act 1997. Further clarification needs to be provided as to what offences will and will not come within the exclusions.

116. *Ibid* para 13.

117. *Ibid* para 16.

118. *Ibid* para 7.

119. BBC News, 'Coronavirus: Low-risk prisoners set for early release' (4 April 2020). <<https://www.bbc.co.uk/news/uk-52165919>> accessed 14 May 2020.

120. Northern Ireland Department of Justice, 'Covid-19—Temporary Release of Prisoners Scheme' (30 March 2020). <<https://www.justice-ni.gov.uk/news/covid-19-temporary-release-prisoners-scheme>> accessed 14 May 2020.

121. Ministry of Justice, 'Press release: Measures announced to protect NHS from coronavirus risk in prisons' (4 April 2020). <<https://www.gov.uk/government/news/measures-announced-to-protect-nhs-from-coronavirus-risk-in-prisons>> accessed 14 May 2020.

The Scottish Parliament have confirmed that ‘those serving sentences for domestic abuse offences and those with non-harassment orders’ would be excluded from the early release scheme.¹²² It was also confirmed that ‘Prison Governors will have the power to veto any individual from early release, where there is evidence that they would present an immediate risk to an identified individual’.¹²³ Most crucially for victims of GBV, the Scottish Parliament are consulting on changes to the Victim Notification Scheme, which will mean that that ‘victims and their families who have signed up to receive updates will be informed if their perpetrator will be released under these arrangements’.¹²⁴ These exclusions should limit the number of victims of GBV who will be impacted by the early release scheme in any event.

It is crucial that offenders of all types of GBV offences are excluded from the early release schemes or, if they are to be released early, appropriate provision is put in place to ensure that the victim is protected, informed and supported. This will include placing strict probation restrictions on the offender, including the monitoring of electronic communications as well as electronic tagging.

Methodology

As this article has already considered, there is a wealth of literature regarding the impact of humanitarian crises on the incidence rate and severity of GBV. There are, however, fewer empirical studies which document the impact of such crises on the ability of victims to access justice. This study aims to address this gap in the research. At the time of designing this study, the authors became aware that Women’s Aid were conducting a similar enquiry.¹²⁵ There are some fundamental differences between the two research projects however the most prominent of which is that whilst the Women’s Aid study focusses exclusively on female victims of abuse, 57% of the respondents to this study reported supporting male victims of abuse and 50% support people who identify as non-binary/gender queer. It is the authors’ position that this study is therefore more comprehensive in its scope. Nonetheless, given that both sets of data potentially comprise substantially the same respondents, a comparison of the findings would test the validity and reliability of this study. Unfortunately, at the time of writing, the findings of the Women’s Aid study are not yet in the public domain.

An online questionnaire was designed to elicit information about the impact of Covid-19 on the ability of GBV services to operate and support victims in the current climate. The study received ethical approval from Northumbria University. A request to participate in the study was sent by email to all GBV organisations listed in the Women’s Aid and Mankind directories that had a contact email address recorded. In total, 321 organisations were contacted using this method. Of those organisations contacted, the authors received an automated response email from 43 of the email addresses indicating that the email could not be delivered. This was either due to the email address not being recognised or the email being blocked as suspected spam. In total, the email was therefore received by 278 organisations. In addition, the authors sent out a general call to organisations on Twitter. It is impossible to say how many, if any, additional organisations this will have reached.

The authors received 52 responses. The respondents were asked to indicate the name of their organisation in order to prevent duplicate responses. At the analysis stage, all responses were collated and anonymised. It was noted that three separate organisations provided duplicate responses. In one case, the responses were cited as coming from exactly the same organisation and therefore one set of answers to the quantitative questions was deleted, at random and the duplication has not been counted in the overall response rate. The authors did, however, analyse all the qualitative data provided by the organisation in both responses, on the basis that this would provide us with a more in-depth insight into the work of that organisation. In the second case, it was identified that one set of responses was provided by the domestic abuse organisation, whilst the other was from the refuge attached to that organisation. In that case, a decision was made to retain both responses given

122. H Yousaf, ‘Coronavirus (COVID-19) update: Cabinet Secretary for Justice statement 21 April 2020’ (Edinburgh: Scottish Parliament). <<https://www.gov.scot/publications/coronavirus-covid-19-update-cabinet-secretary-humza-yousaf-statement-21-april-2020/>> accessed 14 May 2020, para 59.

123. Ibid para 60.

124. Ibid para 64.

125. Women’s Aid <<http://www.womensgrid.org.uk/?p=12066>> accessed 2 May 2020.

that the impact on both services may have been different. In the final case, the responses appeared to be provided by two different branches operating under the same umbrella organisation. Again, the decision was made to include both of these responses. For the purposes of the statistical analysis, 51 responses were therefore analysed and are represented in the findings.

Based on the number of organisations that the authors are confident received the survey, the questionnaire had a response rate of 18%. In relation to representativeness, there is no central database of GBV organisations in the UK however research indicates there are approximately 363 services across England alone.¹²⁶ As the authors contacted 321 across the UK, it is indicative that the research could not be representative of all GBV organisations across the UK. The response rate of 18% meant that the data gathered from the questionnaire also cannot claim to be representative of the organisations within the Women's Aid and Mankind directories. It is said that a non-response rate of 20% is a reasonable amount of missing data which does not jeopardise the representativeness of the sample.¹²⁷ In the present study, the non-response rate was 82%. Despite this, responses were received from a diverse range of organisations including those who specialise in supporting black and minority ethnic (BAME) victims, male victims and LGBT victims. The respondents also varied in size and geographical presence. Whilst some of the responding organisations were large commissioned organisations with a national offering, others were small services or were located in rural settings, funded solely through charitable grants. As Figure 1 below illustrates, responses have been obtained from all regions of the UK. It is the authors' position that the response rate does not therefore undermine the important findings identified from this enquiry.

A number of the respondent organisations operate in multiple geographical regions and therefore fall into more than one of the above sections.

The respondents have experience supporting service users with a broad range of GBV offences. Over 98% of the organisations support victims of domestic abuse; 71% support victims of sexual abuse; 60% support victims of honour-based violence and abuse; 54% support service users who had experienced or been threatened with forced marriage; and 40% assist victims of threatened or actual female genital mutilation. In addition, the respondents support victims with GBV offences not previously considered by the authors including modern slavery; human trafficking; child sexual exploitation; exploitative prostitution and stalking. A few organisations

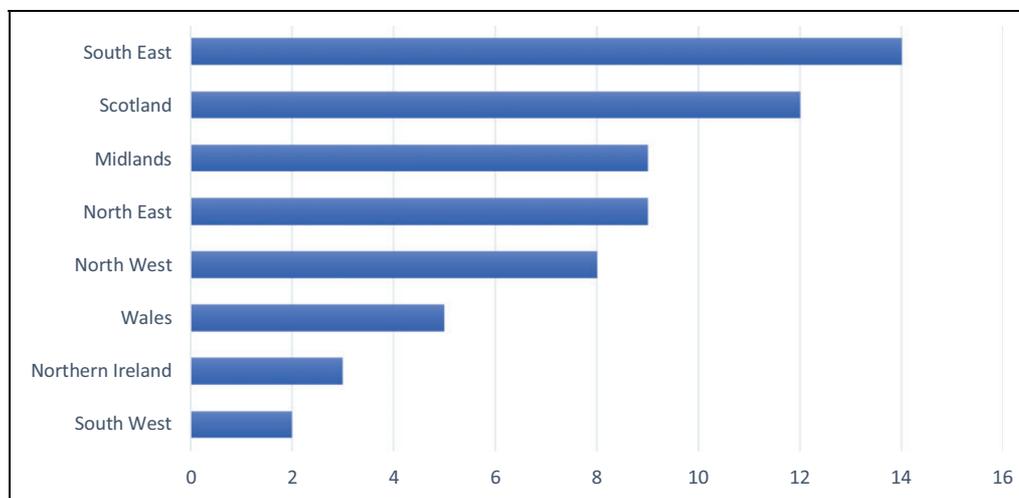


Figure 1. Geographical representation.

126. See Women's Aid (n 34).

127. JM Schuman, *Conversations at Random* (Wiley, New York 1974).

stated that they also support young people who experience dating abuse. This reflects that in England and Wales, the statutory definition of domestic abuse contained in the Domestic Abuse Bill 2020 regards violence between people under the age of 16 as child abuse rather than domestic abuse. Despite this, many academics and practitioners still regard this as a form of GBV.

The questionnaire was hosted by onlinesurveys.ac.uk (previously Bristol Online). It opened on 31 March 2020 and remained open for completion until 23 April 2020. The responses therefore present a snapshot in the experiences of the respondent organisations during the first few weeks after lockdown measures were implemented. It is recognised that at this time, the organisational response to the Covid-19 outbreak may still have been evolving and therefore if the questionnaire was repeated at a later date, different data may be obtained. The benefit of using a questionnaire is it allowed for the quick collection of data from a large number of organisations across distant geographical regions (i.e. the entire UK).¹²⁸ In addition, questionnaires are widely regarded as an appropriate method to test peoples' attitudes, beliefs, views and opinions in relation to a particular topic.¹²⁹ The questionnaire was free to design, albeit the University pays a subscription for the use of the hosting service. Online Surveys was specifically used because, in addition to providing design tools, the service offered features that assist with data collection and analysis. A combination of closed and open questions were used in order to obtain both quantitative and qualitative data. The benefit of eliciting quantitative data is that it enabled patterns to be identified from the research population and variables to be measured. As Rasinger notes, quantitative methods aim to investigate the answers to questions 'starting with how many, how much, to what extent'.¹³⁰ However, quantitative data fails to ascertain deeper underlying meanings and explanations.¹³¹ Accordingly, including open questions and free text boxes enabled the authors to record attitudes and feelings in order to provide depth to the quantitative data. As Rahman notes, qualitative questions create openness, encouraging participants to expand on their responses and open up on new areas which have not initially been considered.¹³²

A statistical analysis was conducted utilising the analysis software on Online Surveys. The qualitative data was analysed using thematic analysis to identify any common themes or patterns in the free text comments made by the respondents. Thematic analysis enabled both similarities and differences to be identified in the data set,¹³³ something the authors felt important given the wide range of responding organisations. The three authors separately coded the qualitative data using NVivo to ensure reliability and consistency of the data analysis.¹³⁴ NVivo is recognised for providing a more rigorous yet efficient method of coding compared to manual or other digital processes.¹³⁵ After coding the data, the authors compared the codes they had identified and found them to be consistent, adding validity to the findings. They then categorised the codes into themes. Those themes and codes are set out in the diagram below and will be explored in the 'findings and analysis' section.

Findings and Analysis

This section outlines the findings of the questionnaire. The key themes that will be examined are; impact on service provision; financial support, funding and resources; access to justice and public messaging. These

128. B Wright, 'Researching Internet-Based Populations: Advantages and Disadvantages of Online Survey Research, Online Questionnaire Authoring Software Packages, and Web Survey Services' (2005) 10(3) *Journal of Computer-Mediated Communication* <<https://academic.oup.com/jcmc/article/10/3/JCMC1034/4614509>>.

129. See, for example, M McConville and W Chui, *Research Methods for Law* (Edinburgh University Press, 2007).

130. S Rasinger, *Quantitative research in linguistics: An introduction* (A & C Black, 2013).

131. NK Denzin and YS Lincoln, *The landscape of qualitative research: Theories and issues* (SAGE Publications, London 1998).

132. S Rahman, 'The Advantages and Disadvantages of Using Qualitative and Quantitative Approaches and Methods in Language "Testing and Assessment" Research: A Literature Review' (2017) 6(1) *Journal of Education and Learning*.

133. V Brawn and V Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77–101.

134. M Schreier, 'Qualitative Content Analysis' in *The SAGE Handbook of Qualitative Data Analysis* (SAGE Publishing, 2014) 179.

135. R Hoover and L Koerber, 'Using NVivo to Answer the Challenges of Qualitative Research in Professional Communication: Benefits and Best Practices' (2011) 54(1) *IEEE Transactions on Professional Communication*.

findings and the recommendations which follow were submitted for consideration to the UK Government as part of the Home Office's call for evidence on the preparedness for Covid-19.¹³⁶

(a) Impact on service provision

The respondents were asked to provide a summary of the services provided prior to the Covid-19 outbreak. These broadly fell into the categories identified by Sullivan as; providing information about rights, options and experiences; carrying out safety planning; building skills; offering encouragement, empathy, and respect; providing supportive counselling; increasing access to community resources and opportunities; increasing social support and community connections; and carrying out community change and systems change work.¹³⁷ The list below provides a breakdown of the types of services which were provided in each category albeit some services may in practice fall within multiple categories:

- (a) **Information about rights / options:** helpline and website information services; advice about making police reports, protective injunctions and the court process.
- (b) **Safety planning:** Crisis intervention; multi-agency risk assessment conference services; refuge services.
- (c) **Offering encouragement, empathy and respect:** helpline and website information services; group and individual counselling and support groups.
- (d) **Supportive counselling:** Group and individual counselling; recovery programmes such as the Freedom Programme; parenting programmes; children's services including play and drama therapy; helpline services; early intervention work with children who have witnessed abuse; whole family support.
- (e) **Access to community resources:** referrals to law firms; support with claiming welfare benefits and securing finances; housing support; referrals to foodbanks; adult and children outreach services.
- (f) **Social support and community connections:** IDVAs based in community settings; attending appointments with service users (such as medical and legal appointments and court hearings); food and clothes donations; childcare; specialist work with women in prisons.
- (g) **Community change/systems change work:** delivering training for other professionals; awareness raising within schools and through educative campaigns; ambassador groups; local and national advocacy.

The findings demonstrate that access to justice for victims can be achieved through service provision in a number of key ways. Firstly, it was clear that the respondents played a role in providing 'legal support' to their service users, including through facilitating referrals to legal practitioners, attending appointments with them, helping service users to complete application forms and statements and/or providing practical and emotional assistance during court proceedings. For many victims, recourse through the criminal and family justice systems will be vital to their sense of justice.¹³⁸ As Kelly identifies 'negotiating criminal and civil justice systems is complex in any eventuality, however in the aftermath of violence it can be all the more daunting'.¹³⁹ Support services are able to minimise some of the barriers to the courts, including lack of legal knowledge and understanding of victims' rights; distrust in the justice system; fear of retaliation from the perpetrator and concerns about traumatising and insensitive processes.¹⁴⁰ This has been recognised by Kelly who notes that the role of support workers in ensuring that rights are realised is a 'keystone in UK responses to domestic and

136. Written Evidence published at < <https://committees.parliament.uk/work/184/home-office-preparedness-for-covid19-coronavirus/publications/written-evidence/?page=3>> accessed 29 April 2020.

137. See Sullivan (n 41).

138. See Herman (n 11).

139. See Kelly (n 38).

140. United Nations Office of Drugs and Crime 'Handbook for the judiciary on effective criminal justice responses to gender-based violence against women and girls' <https://www.unodc.org/pdf/criminal_justice/HB_for_the_Judiciary_on_Effective_Criminal_Justice_Women_and_Girls_E_book.pdf> accessed 5 May 2020.

Table 1. Themes and codes.

Service Provision	Financial Support, Funding and Resources	Access to Justice and public messaging
Activities Advice about options/rights Community support/connections Empathy, empowerment and respect Legal support Safety planning Skill development Support groups Systems change work Decrease in reports for help Increase in reports for help Additional services offered (lockdown) New ways of working Ongoing services Reduced services Postponed services Refuge closures to new entrants Staff flexibility Working from home Virtual services Government guidance Trustee and board decision making Male victims Children and Young People Mental health Housing provision Increased refuge capacity Retaining emergency support Same level of referrals Staff wellbeing	Covid-19 administration Covid-19 related funding Scottish government funding Local business and charity support Additional support required for organisations (non-financial) Additional support required for service users Funding reductions Covid-19 related funding requirements PPE Refuge demand Covid-19 related technology requirements Staff retention Volunteer retention Remote working Increased workload Cancelled events Government advice	Access to legal advice Criminal justice Family courts Operation of the courts Child contact Fleeing abuse Incidences of violence and abuse Isolation Police reporting Technology (courts) Travel barriers Awareness/ Understanding Court delays Code words Education packs Information sharing

sexual violence... here knowledge is a route to empowerment'.¹⁴¹ As other studies have highlighted however, 'justice' is not always achieved through conventional legal proceedings. McGlynn's study, for example, highlighted that 'recognition', 'a voice' and 'meaningful consequences' were core components of victims' perceptions of justice.¹⁴² Similarly, the United Nations Secretary-General's guiding principles for GBV service provision recognise the role of 'empowerment' in supporting victims to achieve justice. The key principles are:

- Promoting the well-being, physical safety and economic security of victims and enabling them to overcome the multiple consequences of violence to rebuild their lives.
- Working from understandings of violence against women, which neither excuse or justify men's violence or blames victims.
- Empowering and enabling victims to take control of their lives.

141. See Kelly (n 38) 13.

142. C McGlynn; J Downes and N Westmarland, 'Seeking justice for survivors of sexual violence: Recognition, voice and consequences' in Zinsstag, Estelle and Keenan, Marie (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge Frontiers of Criminal Justice. Routledge, 2017), 179–191.

- Ensuring that victims have access to appropriate services and that a range of support options are available that take into account the particular access needs of women facing multiple discrimination.
- Ensuring that service providers are skilled, gender-sensitive, have ongoing training and conduct their work in accordance with clear guidelines, protocols and ethics codes and, where possible, provide female staff.
- Maintaining the confidentiality and privacy of the victim.
- Co-operating and co-ordinating with all other relevant services.
- Monitoring and evaluating service provision, seeking participation of service users.¹⁴³

The second way that GBV support services promote justice through service provision is by delivering projects aimed at upholding these principles. As this section will go on to consider, these principles were at the forefront of much of the work carried out by the respondents.

Helplines (and their web-based alternative, web chats) preserve privacy and confidentiality, provide information free of charge and often are a route into other services.¹⁴⁴ They are recognised as a lifeline for victims who are hesitant to seek help and particularly those who live in rural areas.¹⁴⁵ They are a critical part of the UK's access to justice response under the Istanbul Convention alongside the provision of refuge accommodation.¹⁴⁶ Although the UK government has not yet ratified the Convention, prior to the Covid-19 outbreak, they committed £1.1 million per year (up until 2022) to support seven helpline services including a national helpline for victims of domestic abuse, LGBT victims of abuse, male victims of abuse, perpetrators of domestic abuse, stalking, 'honour'-based violence and abuse; and revenge porn.¹⁴⁷ As this article has already discussed, since lockdown measures began, news headlines have reported that services supporting victims of GBV were facing an unprecedented increase in demand for support, indicating that cases of abuse were on the rise.¹⁴⁸ 84% of the respondents to this study reported providing a telephone helpline or online facility for victims of GBV to report violence and seek help. Importantly, none of the respondents indicated that they had closed their helplines as a result of Covid-19. In contrast, a number of organisations stated that they had increased the capacity of their helplines by extending the hours/days of service. This indicates that victims of abuse continued to be able to secure initial information about their rights and options during this time.

In contrast to the position portrayed in the media, the findings of this study demonstrate that not all support services experienced an increase in hotline calls/online reports of violence. The vast majority (79%) of the respondents who operated a helpline noted a change since the introduction of the lockdown measures. There was a mixed response as to whether organisations cited an increase or decrease in calls/reports. Eleven organisations (21%) reported an increase in calls/reports. Quoted increases ranged from 25% to 120% which is broadly in line with the statistics which have been cited in the media.¹⁴⁹ As has already been discussed, whilst an increase in requests for help does not directly correlate to an increase in abuse, there is evidence that risk factors for GBV become more prevalent during times of humanitarian crises.¹⁵⁰ Research carried out by Women's Aid indicates that 67% of victims currently experiencing abuse reported that it had worsened during lockdown and over a third of victims with children reported an increase in abuse directed towards their

143. See Kelly (n 38) 16.

144. See Kelly (n 38).

145. See Kelly (n 38).

146. See Article 24 of the Istanbul Convention (n 21) which requires states to establish and maintain a helpline for victims of GBV.

147. Home Office (October 2019) 'Ratification of the Council of Europe Convention on Combating Violence against women and Girls and Domestic Violence (Istanbul Convention)—2019 Report on Progress' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843509/CCS0919132732-001_Istanbul_Convention_2019_Report_Option_A_Web_Accessible.pdf> accessed 5 May 2020.

148. See *The Guardian* (n 8).

149. See Refuge Press Release (n 7); *The Guardian* (n 8).

150. See Heise (n 21); Kiss (n 21); Deribe (n 21); World Health Organisation (n 22).

children.¹⁵¹ As such, it may be tentatively inferred that some victims are experiencing higher rates of abuse during lockdown.

It was found that 21 of the responding organisations (41%) had experienced a decrease in calls/reports. These organisations did not state that this was because abuse had decreased during lockdown. Instead, they considered that victims faced increased barriers to seeking support even though helplines remained open. A number of the organisations noted that agencies which typically refer victims to their service were closed, resulting in fewer referrals. Respondents also expressed concern that victims isolating with their perpetrators and working from home had no practical opportunity to seek help. Previous epidemics have demonstrated that women typically take on additional physical and psychological burdens as caregivers which results in time barriers to accessing services.¹⁵² The overly simplistic message that there is a dramatic increase in calls to services is potentially damaging as it may lead the public to disengage if they believe that all victims are able to seek help. Furthermore, victims may not feel able to contact a stretched service if the message is solely that the services are inundated with enquiries. A more balanced approach to the reporting of this issue is therefore required.

The above data demonstrates that alongside helpline and webchat facilities, victims need to be afforded opportunities to seek help in more accessible ways. In their written evidence to the UK government, the authors suggested that this could be achieved by GBV organisations setting up pop-up booths in supermarkets and/or pharmacies where GBV victims would sit 1:1 with a trained support worker, who is available remotely using a computer to promote social distancing.¹⁵³ This recommendation would be assisted by only one member of the family being able to enter the store during lockdown. It was noted that in Columbia, supermarkets and pharmacies have been designated as safe spaces for domestic abuse to be reported,¹⁵⁴ whilst in France, grocery stores are housing pop-up services.¹⁵⁵ This recommendation was therefore in line with the approach being adopted in other jurisdictions. On 1 May 2020, it was announced that victims of abuse would be able to contact support services in 'safe spaces' installed in Boots consultation rooms.¹⁵⁶ Whilst in the consultation room, people will have access to the National Domestic Abuse Helpline; Men's Advice Line, the Domestic Abuse and Forced Marriage Helpline (Scotland); and the Domestic and Sexual Abuse Helpline (Northern Ireland). This was an initiative developed by Boots in collaboration with GBV organisations and is undoubtedly a step in the right direction. The UK Government should support other pharmacies and supermarkets to develop similar 'safe spaces'.

The study demonstrated that in some instances, justice for victims may be compromised because of a reduction or withdrawal of some support services. It was reported that 78.8% of respondents had withdrawn or delayed services. This finding is in line with the Global Protection Cluster and the IASC guidance which recognises that many organisations will deliver a 'reduced service provision' during the lockdown period.¹⁵⁷ The main services which had been postponed or cancelled were fundraising events, community-based educational activities, face-to-face support groups and therapeutic work for adults, children and young people. Whilst many services were moved online, inevitably this was not possible for all services. Given the appreciation that children can experience 'short and long term cognitive, behavioural and emotional effects as a result of witnessing domestic abuse',¹⁵⁸ it is concerning that many of the services which were directed at children and young people had to be withdrawn completely.

151. See Women's Aid (n 28).

152. R Holmes, Bhuvanendra 'Preventing and responding to gender-based violence in humanitarian crises' (January 2014) Humanitarian Practice Network <https://assets.publishing.service.gov.uk/media/57a089b2ed915d3cfd0003a8/GBV_in_emergencies_NP_77_web.pdf> accessed on 20 April 2020.

153. K Richardson, A Speed and C Thomson, <<https://committees.parliament.uk/committee/83/home-affairs-committee/publications/written-evidence/?page=3>> accessed on 2 May 2020.

154. *News Trust*, <<https://news.trust.org/item/20200423012221-ci2sy>> accessed 5 May 2020.

155. *TIME* (n 27).

156. Boots (1 May 2020) <<https://www.boots-uk.com/our-stories/boots-pharmacy-consultation-rooms-become-safe-spaces-for-victims-of-domestic-abuse/>> accessed on 4 May 2020.

157. See the Global Protection Cluster and the IASC Guidance (n 46).

158. All-Party Parliamentary Group (APPG) on Domestic Violence, *Domestic Abuse, Child Contact and the Family Courts* (Parliamentary Briefing, London 2016).

It was noted that 30 of the respondents (57.7%) offered a refuge service. It was reassuring that in all cases, existing occupants were able to remain in the refuge accommodation, however, 26.7% of those respondents had closed their doors to new entrants. This was either as a result of the lockdown measures or because they were already at capacity. The data therefore indicates that there is reduced accommodation for victims of abuse during Covid-19. The decision to close was typically made by the occupants themselves or the organisation's trustees because of the increased risk that communal accommodation posed to transmission of the virus and therefore the health of the residents. This decision, whilst understandable, seems to be at odds with the government's current guidance that refuge accommodation can stay open.¹⁵⁹ Closing refuges reduces the availability of accommodation for victims fleeing abuse during the lockdown. This is particularly concerning because of the reported increase in domestic abuse at this time¹⁶⁰ and because there have been extensive cuts to refuge funding in recent years which may compromise their ability to operate in a post Covid-19 landscape. Research indicates that since 2010, local authorities have reduced refuge funding by £6.8 million.¹⁶¹ Data collected by Women's Aid indicates that in 2019, 64% of refuge referrals were declined due to capacity issues; less than 50% of refuges were able to accept women with more than two children and only 5% of refuge vacancies could accommodate women with no recourse to public funds.¹⁶² The number of refuge bed spaces in England is currently 30% below the number recommended by the Council of Europe.¹⁶³ The severity of this is underpinned by the Judgment in the case of *AT v Hungary* which held that failure to provide access to immediate protection (the victim could not access a refuge and had no legal or other recourse to safety) will mean a state is in violation of CEDAW.¹⁶⁴

The second difficulty in closing refuges to new entrants is that it reduces the level of income received by support services as they are unable to claim housing benefit for empty refuge accommodation. This potentially impacts the viability of the refuge or support service in the future. Even in those refuges which remained open to new entrants, rental income had been lost, albeit to a lesser extent. This is because beds were vacant for longer as a result of government guidance that accommodation should not be cleaned for 72 hours after a resident has moved out.¹⁶⁵ In line with the recommendations of the VAWG sector statement, it would be appropriate for refuges to be reimbursed this lost income to ensure that there are not further refuge closures as a result of Covid-19.

There was evidence that the lockdown had resulted in the respondents offering additional and/or alternative services to support users that had not been provided prior to the lockdown measures. This finding accords with the Global Protection Cluster and the IASC guidance on identifying and mitigating GBV risks within the Covid-19 response, which recognised that GBV service provision was likely to 'operate differently' than under normal conditions.¹⁶⁶ Over 61% of the respondents reported providing additional services. Drawing on Sullivan's categorisation, this included social support (providing practical assistance such as food parcels, collecting prescriptions, paying emergency housing costs for families and providing toy boxes to children); community resources and systems change work (developing blogs, preparing information packs for schools and delivering training to individuals and organisations who may come into contact with victims during the lockdown) and supportive counselling (by moving permitted services online, expanding channels of communication including through social media, text chat rooms and live chat services and by extending the

159. Ministry of Housing, Communities and Local Government and Public Health England 'Covid-19: guidance on isolation for domestic abuse safe-accommodation settings' (March 2020) <<https://www.gov.uk/government/publications/covid-19-guidance-for-domestic-abuse-safe-accommodation-provision>> accessed 6 May 2020.

160. See Women's Aid (n 28).

161. *The Guardian* (23 March 2018) <<https://www.theguardian.com/society/2018/mar/23/council-funding-womens-refuges-cut-since-2010-england-wales-scotland?>> accessed 5 May 2020.

162. Women's Aid (2020) 'The Domestic Abuse Report 2020: The Annual Audit' <<https://www.womensaid.org.uk/research-and-publications/the-domestic-abuse-report/>> accessed 4 May 2020.

163. *Ibid.*

164. CEDAW Committee Decision 2005 Communication No.2/2003.

165. While this was reported by one of the respondent organisations, it was not clear who this guidance had been provided from. This guidance was not included in the Ministry of Housing, Communities and Local Government and Public Health England 'Covid-19: guidance on isolation for domestic abuse safe-accommodation settings' (n 159).

166. See the Global Protection Cluster and the IASC Guidance (n 46).

availability of these services). The aim of these additional services was to improve the well-being of service users and enhance the visibility of the respondents to potential and existing users. Community-based services also play a key role in promoting healthy gender roles and highlighting the nature and scope of GBV. Such services are therefore especially important at a time when GBV may be experiencing a higher incident rate.

(b) Financial support, funding and resources

As noted above, on 8 April 2020, it was confirmed that frontline charities would benefit from an additional £750 million package of support to enable vital work to continue during the Covid-19 outbreak.¹⁶⁷ There still remains a degree of uncertainty as to how those funds will be allocated and how they will support the organisations given the limited amounts available per charity, as above. The Home Affairs Committee also recognised that there was no published strategy of funding allocation, as at 24 April 2020.¹⁶⁸

The respondents were asked whether they have received any additional financial support over and above that already being provided prior to the outbreak to keep their services running. It was stated that 78.4% have received no additional funding. Of those services that had received additional funding in this UK wide study, there is generally no national or regional consistency evident from the responses, with the responses indicating somewhat of a postcode lottery for funding allocation. This is with the exception of the Scottish government, which has distributed funds to Women's Aid, though not from the government package referred to above. Women's Aid in Scotland has further allocated those funds to other services to help sustain their practices. There must be credit afforded to the Scottish government as a number of respondents acknowledged receipt of funding.¹⁶⁹

One organisation also reported receiving an '*offer of practical help from Police and Crime Commissioner*' though it is mentioned that this assistance has not yet materialised. This is a reminder of the need to follow through on promises of assistance. It is unclear as to whether the offer from this Police and Crime Commissioner is linked with the £750 million government distribution. Dame Vera Baird QC has informed the Home Affairs Committee that half of the £750 million fund would be distributed through central government departments, while the other half would be distributed through local authorities and Police and Crime Commissioners.¹⁷⁰

It is integral to the organisations' business continuity across the whole of the UK that the government funding must be provided across all devolved nations and constituencies to as many GBV services as possible. This is also recognised in the plea from one respondent: '*we need the funding promised to be released as soon as possible*'. Moreover, it is crucial that funding is allocated to all GBV organisations, rather than just larger, commissioned organisations. The impact of a lack of funding, or of expedited mechanisms to provide funding, is clear in the reported statistics.¹⁷¹ There is also a request from one respondent for greater clarity to be announced by the government as to, '*the impact this will have on annual reports and figures and how funders will show leniency towards this*'. This comment feeds into the overwhelming drive by the authors for the government to release one, clear platform for advice to the public and to service providers.

It is vital that services which can be conducted remotely, continue to operate during lockdown in order that the, '*administration of justice does not grind to a halt . . .*',¹⁷² however a number of organisations reported

167. HM Treasury (n 50).

168. Home Affairs Committee, 'Home Office Preparedness for Covid-19 (Coronavirus): domestic abuse and risks of harm within the home' (24 April 2020), House of Commons, Second Report of Session 2019-21, <<https://publications.parliament.uk/pa/cm5801/cmselect/cmhaff/321/321.pdf>> accessed 10 May 2020.

169. One respondent said, 'the Scottish Government has made funding available for Women's Aid groups and Rape Crisis centres to manage the crisis'. Another respondent noted, 'the Scottish Government has ensured Scottish Women's Aid will receive £1.35 million over six months. We are currently awaiting an allocation of £15,000 as an initial payment to support us'.

170. Home Affairs Committee (n 168).

171. There have been more than 4,000 domestic abuse related arrests made across London in the six weeks leading up to 19 April 2020, while domestic abuse calls have risen by about a third. Cdr Sue Williams said that from 9 March 2020, the number of charges and cautions had risen 24% compared to last year. BBC News, 'Coronavirus: Met Police making 100 domestic violence arrests a day' (24 April) <<https://www.bbc.co.uk/news/uk-england-london-52418650>> accessed 9 May 2020.

172. Court and Tribunals Judiciary (n 58).

barriers to moving services online such as resourcing electronic equipment for staff, volunteers and service users and ensuring victims could access online services due to the close proximity to their perpetrator. GBV organisations therefore need to be able to access additional funding to source the technology and specialist IT advice that they require to do this (regardless of whether or not they are experiencing an increased demand for their services). This could include technology for them to offer online web chat facilities and decoy websites or be as simple as them procuring additional telephones for their home workers. This recommendation would mitigate the effect of removing face-to-face programme and group support sessions discussed above and mirrors the VAWG sector statement on Covid-19, which highlighted that support services require considerable investment in technology. It is acknowledged that there is a proposed £2 million fund to assist with technology for domestic abuse charities, on top of the more general funding previously discussed. At the time of writing, this funding has not been allocated.

GBV organisations will also benefit from guidance about how to utilise their online presence to increase their donation income. This recommendation would also allow government funds to be preserved and could form part of the Home Secretary's domestic abuse campaign. The funding for increased and improved IT infrastructure could extend to training in how to upload useful material online by the services, from help sheets to blogs and vlogs. Moreover, there should be material for children in need uploaded to their school websites and portals. The Home Secretary has announced that the government has sourced support from Fujitsu to provide IT expertise to smaller domestic abuse organisations.¹⁷³ The data indicates that this expertise will be invaluable to these organisations and needs to be rolled out urgently to sustain the provision of services by GBV organisations.

It is recognised that there are smaller funding pots available, with respondents reporting that small grants have been received for mobile phones, laptops and tablets, from councils, the STV Children Appeals Funds, Norfolk Community Foundation and Lloyds Bank Foundation. It is important that the services are made aware of the available offers of assistance, howsoever small. It is therefore unfortunate that only 15 organisations responded that they had been made aware of financial and non-financial support available to their organisations in light of the outbreak. The responses detailed that they had been contacted by businesses who offered non-financial support, as well as receiving emails regarding small grants. Furthermore, one respondent was awaiting news of whether they would benefit from resilience funding from the Scottish government, as well as The Martin Lewis Resilience Fund. There was hope from one respondent of the possibility of sourcing staff and volunteers from other services for service delivery. These offers, as well as the available funding and grant opportunities, are likely appreciated by the services, however the process of obtaining them can sometimes be a barrier.¹⁷⁴

The reality is that funding needs to be more accessible for smaller organisations. There must be a reduction in paperwork involved for funding applications. The authors suggest that there be an automatic entitlement to funding to cover temporary running costs, similar to the temporary reduced evidence requirements for legal aid. It must be recognised by government that GBV organisations have already faced a considerable period of financial cuts as a result of the austerity measures. It is important that these small grants are supplemented with longer-term sustainable funding, an issue raised by a number of the respondents.¹⁷⁵ The cessation or suspension of funding arises from various channels; for instance, one respondent noted that, '*lottery have delayed the funding until September*', while another referenced their loss of income from fundraising; in their case, this was £150,000 from events such as the London Marathon. Another respondent referred to the loss of £10,000 - £15,000 annual profit from closure of their charity shop, which can have a drastic effect on a small organisation. In consequence of that lack of income, projects are unable to progress, and staff members are lost. Until the longer-term needs of the services are sated, organisations have noted their uncertain fiscal position will

173. Home Office and The Rt Hon Priti Patel MP (n 54).

174. One respondent identified 'we have been sent information of pots of funding we can apply for but we do not have the capacity to complete the applications because it is also end of year and our Business Support Team do not have the capacity'.

175. One respondent noted '[T]iny little pots of money that can go towards some of the costs but really they are just a drop in the ocean. We can and will have to furlough virus staff at some point from unfunded services due to loss of other income as a result of [Covid]'. Another respondent said 'We are ok for now but not longer-term. We have concerns as so many funding streams [are] diverted to providing emergency support and not sustaining the longer term'.

result in a reduction in both services and staff. Further non-financial assistance to GBV services could constitute a 6 to 12 month breathing space by way of a mortgage holiday on their working premises, as well as the current proposed 12-month business rates relief 100% exemption, rather than the usual maximum of 80% rates exemption. It is noted that services are expending time and resources on the drafting of policies for staff to work from home, as well as navigating GDPR issues. It is recommended that the government publish comprehensive and accessible guidance and templates to support services in their policy drafting.

The authors support the recommendation of the VAWG sector statement on Covid-19, which advocates repurposing the final £15 million Tampon Tax round as unrestricted grant funding to specialist GBV services to ensure that they can cope and adapt. The authors however do not propose that the funds be limited solely to women's services as requested in the VAWG sector statement; rather the monies should be made available to all victims of GBV.

A number of the respondents identified receiving non-financial support from various channels to help run their services and refuges. There was no evidence that this support had emanated from the government. Instead, references were made to supermarkets providing food for the services' clients, funders extending funding periods, newspapers offering free/discounted advertising space and donated items of food and equipment. Furthermore, a respondent provided the following heart-warming, but tragic reality:

The staff of our local Superdrug all clubbed together and bought us a range of toiletries for our support packs. We are currently distributing support / self care packs to women and activity packs to children & young people in our service. [P]eople such as Superdrug staff have been donating . . . items to us . . . Staff at our local Lidl are asking for food donations for the women and families we support. Our local police force have been amazing in helping us facilitate safe exits for women trapped . . . [where] travel has to be officially authori[s]ed.

Refuge services are critical both during and immediately following lockdown. As at 19 April 2020, the Ministry of Housing, Communities and Local Government stated its priority was 'making sure refuge services stay open and are accessible'.¹⁷⁶ The data from this study demonstrates that this approach is misguided because not all refuges are being provided with the appropriate funding and resources to stay open. For example, until May 2020, testing for Covid-19 was not available to those living in refuge accommodation. Refuge providers may feel more confident accepting new entrants if they have been screened prior to entry. The availability of testing could therefore increase the number of refuge spaces available. In addition, a number of respondents reported concerns around protecting the safety of the staff members who were required to visit refuge accommodation through the provision of PPE. The current government guidance for staff working in refuges is that staff and professionals are able to enter and leave unaffected areas as required.¹⁷⁷ The guidance also advises that continuity of staff should be maintained where possible and staff should follow 'infection control procedures', including washing their hands for 20 seconds more frequently than usual and covering their mouth when coughing or sneezing.¹⁷⁸ Disappointingly, the guidance does not make any reference to the provision of PPE for refuge workers. It is recommended that staff should be provided PPE in the same way as it is given to care workers. This must be provided free of charge, reflecting that support workers are putting their health, and the health of their families, at risk in providing these critical services. Support services should also be provided with guidance about effectively using and disposing of PPE as they are not medical professionals with experience of using PPE. This would help avoid the concerning situation outlined by one respondent: '*volunteers have made us material masks when we were struggling for the correct PPE we require*'.

In the event that there is insufficient refuge stock for victims fleeing violence during lockdown, the government must arrange for alternative accommodation. The authors initially considered that empty hotels, apartments or even empty nightingale hospitals may be a good temporary solution as this would support the

176. *The Guardian* (19 April 2020) <<https://www.theguardian.com/society/2020/apr/19/hotels-refuge-abuse-snobbed>> accessed 5 May 2020.

177. Ministry of Housing (n 159).

178. *Ibid.*

UK's hospitality industry whilst providing accommodation which would not place further people at risk through the use of shared refuged spaces. The cost of this would need to be underwritten by the government. This is in line with the approach being adopted in other European countries including France and Germany.¹⁷⁹ On 11 April 2020, the Government stated its commitment to look at alternative accommodation to support refugees.¹⁸⁰ Many of the respondents anticipated that demand for refuge accommodation would increase when lockdown measures were lifted. One respondent commented:

At the moment it is early days. The key issue for us is what we do when this ends. Much like Christmas and New Year, women will hold it together in their homes while the lockdown is on. As soon as it ends, we will see a massive influx of women looking for accommodation.

In identifying suitable alternative accommodation for housing victims, the potential for a long-term escalation in housing need must be taken into account. Hotels and apartments are likely to re-open as lockdown measures are eased. In addition, nightingale hospitals will either be utilised for the 'second wave' of virus cases or returned to their former purpose. A better approach would therefore be for the government to provide additional funds to increase the capacity of existing refuge accommodation. For longer term accommodation, requiring housing authorities to give priority need to victims of GBV seeking rehousing is vital. This recommendation was included in the authors' written evidence to the government on the preparedness for Covid-19. Subsequently, on 1 May 2020, the Communities Secretary Robert Jenrick announced that the government would be 'ensuring that the victims of domestic violence get the priority need status that they need to access local housing services much more easily . . .'.¹⁸¹ Whilst this policy is admirable in ending the postcode lottery of support for those fleeing violence, it is vital this provision extends to any victim of GBV, not just domestic abuse. In addition, the government must not impose unnecessarily strict evidential requirements on victims to demonstrate that they are a victim of abuse, as they have done in other areas, such as legal aid.

The IASC advocate that in order to prevent and respond to GBV during Covid-19, provision and utilisation of GBV support services should be improved.¹⁸² The data from this study indicates that this is potentially undermined by a lack of resources and the increase in Covid-19 related administration that organisations face. This includes applying for pots of funding, redesigning policies and ensuring staff and volunteers have the resources to work from home. The IASC has also suggested that GBV support services document trends in safety risks for vulnerable populations and utilise this information to inform programming adaptations and advocacy with local/national governments. As this article has already stressed, funding is required for additional technology to support organisations with delivering services and developing their capacity in this climate. The proposed government funding needs to be allocated forthwith to all support services, and further clarification is required as to the application process and allocation criteria. The application process must not be arduous so as to detract from vital work carried out by the services.

Guidance also recommends that staff and volunteers in all sectors should be equipped to provide accurate, up-to-date information on available GBV services and be aware of current limitations on any services.¹⁸³ At present, there is no UK wide database of GBV organisations and therefore no way of achieving this ambition. The creation of a database, akin to Companies House or the Charity Commission, would achieve a number of purposes. Primarily, it could act as a public access site for victims to have an easily accessible and full directory of services area by area. In addition, it would facilitate the payment of government funding and ensure that organisations are not required to complete lengthy funding applications. The creation of a database

179. World Economic Forum (1 April 2020) <<https://www.weforum.org/agenda/2020/04/france-domestic-abuse-coronavirus-covid19-lockdown-hotels/>> accessed 5 May 2020.

180. Home Affairs Committee <<https://publications.parliament.uk/pa/cm5801/cmselect/cmhaff/321/32105.htm>> accessed 10 May 2020.

181. ITV <<https://www.itv.com/news/2020-05-02/coronavirus-daily-briefing-robert-jenrick-dr-jenny-harries-testing-tracing/>> accessed 5 May 2020.

182. See the Global Protection Cluster and the IASC Guidance (n 46).

183. *Ibid.*

should therefore be a priority. This is highlighted by the fact that the authors received 43 automated responses indicating that our email to the services in the Women's Aid and Mankind directories could not be delivered. As above, this was either due to the email address not being recognised or the email being blocked as suspected spam. This could hinder access to justice for potential service users.

Finally, the respondents were asked whether Covid-19 was likely to impact whether they are able to retain staff and/or volunteers to provide support services. This has the potential to impact access to justice by jeopardising the ongoing viability of organisations. Over 41% of the respondents reported concerns about staff and volunteer retention. The reasons for this were varied. In a few organisations, short term staffing difficulties were anticipated because some staff had been furloughed under the Coronavirus Job Retention Scheme. In another organisation, funding which had been granted prior to the introduction of the lockdown measures had been postponed, meaning a new member of staff would not be able to join until the funding became available. Other organisations reported that reductions in funding more generally as a result of Covid-19 may impact their ability to retain staff in the longer term. Many respondents reported an expectation that they would lose volunteers as a result of the lockdown measures. Some of the respondents felt that volunteers would disengage while there was limited work for them, whilst others cited an increase in childcare and workload commitments as reasons why some volunteers would be unable to continue volunteering over this period. The authors argue that an increase in technology funding will allow links with volunteers to be maintained. A Covid-19 accreditation for volunteers through an online learning or webinar programme would also assist with retaining engagement and subsequently addressing a potential greater demand on the services.

(c) Access to justice and public messaging

As already addressed above, the court system in the UK is a vital component in ensuring access to justice for victims of GBV, provided it is underpinned by the appropriate support services. 40 out of 51 (78.4%) of the organisations that responded to the survey usually provide support to victims of GBV whilst at court, but only 17 were continuing to provide this support during the outbreak. No further insight was provided by the remaining 23 services as to why they had chosen to withdraw this particular service. Pressures on resources and the inability to provide face to face services already addressed in this article may form part of their reasoning.

Not surprisingly, of the organisations that continued to provide this service, many raised concerns about the associated delay in criminal trials being heard. The main criticism voiced by organisations was around the lack of communication with victims about those delays and when their cases may be heard. In many ways this is not surprising, as it is difficult to predict when the courts will be fully up and running again. In order to prevent more victims disengaging with the process, it is imperative that HMCTS has a clear plan in place for how it is going to clear the backlog of cases that will exist without jeopardising a victim's access to justice. As discussed earlier, this will not be without significant expense.¹⁸⁴

Three services also raised concerns about the 'early release scheme'. As highlighted above, it is unlikely that this scheme will apply to offenders of domestic abuse or other GBV. Better information sharing to make this clear would put minds at rest. If, through a loophole in the current guidance, any GBV offender is to be released early, it will be important that victims are informed so that they can seek the appropriate support from services in advance.

Several organisations indicated that they have supported victims at remand hearings, which continue to take place. One organisation raised concerns that police bail would be used instead of a perpetrator being remanded in custody. As explained above, the 'Interim CPS Charging Protocol' will apply to decisions to remand or bail a perpetrator. Whilst this means that perpetrators will continue to be remanded in 'high risk' cases, in other cases, a perpetrator may be given a long bail date with bail conditions attached to protect the victim. It is necessary for support services to be kept informed about such decisions to be able to appropriately assist the victim in safety planning.

184. The Institute for Government (n 95).

Another service raised concerns that more lenient sentences would be given to perpetrators of domestic abuse. There have in fact been no changes to the sentencing guidelines in domestic abuse cases. Again, this could be an indicator that better information sharing is needed with support services and the wider public. A lack of understanding about these issues could make victims more reluctant to disclose abuse or engage with the criminal justice process.

As discussed, the criminal justice system is just one avenue for protection for victims of GBV. The other arm of protection comes from the family justice system. Many academics have discussed the so called 'choice' that victims of GBV have in deciding with which justice system to engage.¹⁸⁵ Indeed, there is nothing preventing them engaging with both systems or neither. This 'choice' has always been somewhat limited in the fact that victims have very little power in the criminal justice system, with their role being a prosecution witness or complainant.¹⁸⁶ It is not a victim's choice whether criminal proceedings are pursued, rather that decision belongs to the CPS. That 'choice' may appear to be even further reduced now that some trials are being indefinitely delayed.

This makes the role of the family courts even more important. The family courts continued to hear cases during lockdown, albeit in a new format, using remote technology. Unlike the civil courts, this technology was seldom used by the family courts prior to the Covid-19 lockdown. Many of the organisations reported assisting victims with the virtual court process, but there were large discrepancies in their reports of how hearings were now taking place, pointing to a possible inconsistency in approach across the UK. Some organisations reported supporting victims with video conferences, others reported courts dealing with matters 'on paper' and others reported hearings taking place 'over the phone'. Each of these methods is not without problems.

The main criticisms of video conferencing are around the ability of a litigant in person to access this technology and the home environment in which these hearings are then taking place. One support service summed up their experience of assisting victims with video conferencing:

... the women we support are experiencing higher levels of anxiety due to Family Courts trying to undertake hearings using video conferencing. Many women feel deeply uncomfortable about their children being present in their homes while this is undertaken. Some are also not very confident in the technology and don't feel supported by the courts to use it.

Likewise, if the victim is applying for a protective order, it is possible that the perpetrator is living in the home with them and this can cause further difficulties. One organisation reported that some courts were now dealing with applications on paper. Whilst this addresses the issue of not having to attend a hearing in front of children or their abuser, it raises other access to justice issues. The same organisation explained that this approach places extra importance on the application and witness statement because there is no opportunity for a Judge to ask additional questions:

This is ok for the clients that we assist as we make sure that their statements are constructed by solicitors, to give the best possible chance of success. We are concerned however about those who do not reach out for help and assistance, this could jeopardize their case.

The President of the Family Court, Sir Andrew McFarlane, has now addressed the approach to remote hearings in the case of *Re B (Children) (Remote Hearing: Interim Care Order)*.¹⁸⁷ The president criticised the use of telephone hearings, noting that there is a '*qualitative difference between a remote hearing conducted*

185. E Hitchens, 'A Consequence of Blurring the Boundaries Less Choice for the Victims of Domestic Violence?' (2006) 5(1) *Social Policy and Society* 91–101; J Herman, *Trauma and Recovery: From Domestic Abuse to Political Terror* (Basic Books, New York 1992); 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)* 313–336.

186. 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(5) *The Journal of Criminal Law* 320–351.

187. *Re B (Children) (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584.

over the telephone and one undertaken via a video platform'. If he was this critical of telephone hearings, it can only be imagined what qualitative difference he would highlight between a live hearing and an application being dealt with on paper. Sir Andrew surmised that the 'default option' should always be video conferencing in urgent cases. This case involved emergency care proceedings, but could equally have application to other urgent family court proceedings.

That said, support services have also been complimentary of the approach of the family courts in being 'flexible and reactive to each person's circumstances'. Therefore, whilst video conferencing should be the 'default', the court should be flexible where the victim's home circumstances are such that this would not be appropriate. Whilst leaving it to judicial discretion means there is a likely risk of inconsistency, enforcing a rigid approach to family court proceedings could deter victims from making an application. Perhaps a short additional court form for litigants in person to complete, asking them a series of short questions about their home environment and access to technology is the answer. This will allow the judge hearing the case to make an informed decision as to how the hearing can best take place. It is crucial that reflection and development is undertaken throughout this unprecedented period.

Worryingly, some responses indicate that victims and support services are not aware that the family courts even remain in operation.¹⁸⁸ Given the important role that the family courts play in ensuring immediate protection for victims and their children, it is vital that clear information is circulated widely about which courts are open and how applications can be made remotely. While this information has been made available to practitioners, the restrictions in legal aid mean that many family court users will be litigants in person.¹⁸⁹ Four of the support services specifically mentioned the links they had with local solicitors who were keeping them 'up to date with legal procedures' and providing legal advice to their service users. It was not clear from the responses whether this legal advice was being provided on a pro-bono basis or whether it was subject to legal aid funding eligibility.

It could be argued that access to legal advice and representation is always crucial to the smooth running of the family court system, but that is never truer than now. Not only do court users have the usual legal concepts and procedures to get to grips with but, as previously discussed, they also need to do this using remote technology, which they may never have experienced before or which they do not have the ability to access. Removal of the legal aid means test during the Covid-19 outbreak would ensure that all victims of domestic abuse are able to seek legal advice and support in accessing the new 'virtual' family court. If the provision of legal aid cannot be expanded, as very minimum a media campaign is required to make clear that the family courts are still in operation and can be accessed for emergency orders. This would be beneficial to victims, many of whom may not be engaging with a support service or have any access to legal advice.

For those victims who have been able to obtain the support, and in some cases legal advice, to be able to pursue proceedings during lockdown, the feedback from support services is largely positive. The majority of the survey responses on this subject related to emergency injunctions, most commonly non-molestation orders. They report that orders are still being granted 'without delay' and that the feedback from their service users was suggesting that remote hearings were working for those types of applications.¹⁹⁰

One organisation did suggest that service of emergency orders needs to be considered. They suggested that: '*Service of these orders are critical, and we feel that the courts need to be more open minded about service and accept alternative service as personal service is not appropriate at this time*'. While at first glance, there may appear a benefit to the applicant of relaxing service, this would raise potential human rights issues and could potentially jeopardise future criminal proceedings for a breach. Personal service is a crucial part of the

188. 'Some clients we are coming across have not thought they could still access the family courts for orders during this time, so haven't spoken to solicitors'; 'our experience is that the courts have stopped operating. We are advising our clients to keep their children with them, as to keep going from one household to another leaves them vulnerable to picking up the virus'.

189. According to the latest Family Court Statistics, in 2019 81% of private law family cases involved at least one of the parties having no legal representation: Ministry of Justice, '*Family Court Statistics Quarterly* (England and Wales, 2019), October to December 2019 including 2019 annual trends'.

190. 'We are dealing with emergency orders and so the Court process is a big part of our journey with the service user. The courts have moved to remote hearings and client feedback so far would suggest that this is working.'; 'Non-molestation orders are being granted without delay'.

non-molestation order process, in that the respondent must be aware of an order before a breach can be considered a criminal offence.¹⁹¹ Without this, a respondent could face loss of liberty for breaching an order of which they were never even aware. To remove this element of the process, could also potentially jeopardise a future criminal conviction, if the respondent's receipt of the order is in doubt. In any event, in a time of lockdown, it could surely be argued that it should be easier to locate a respondent and provide them with personal service. Provided court bailiffs are issued with appropriate PPE, there is no reason why service could not be effected personally in a safe way for all involved.

In contrast, the feedback in relation to child arrangements issues is less positive. Some services reported that their local court was '*only taking urgent cases so family court cases regarding issues like child contact are currently not being heard*'. The current version of the Remote Access Family Court guidance, details three categories of prioritisation: work that must be done, work that will be done and work that the court will do its best to accommodate.¹⁹² As regards to work associated with children matters that must be done, the guidance specifically details Emergency Protection Orders, Interim Care Orders, Secure Accommodation Orders, urgent applications in private law children cases and Child Abduction Orders.¹⁹³ The work that will be done is the gatekeeping and allocation of public law and private law cases and the processing of orders, documentation and correspondence in public law cases.¹⁹⁴ The work that the court will do its best to accommodate is the processing of orders, documentation and correspondence in private law cases and adoption orders.¹⁹⁵

In completing work on these matters, it was noted by the President of the Family Division in *Re B (Children) (Remote Hearing: Interim Care Order)* that the fundamental principles of substantive law and procedural fairness are unchanged.¹⁹⁶ This requirement from the President is difficult to maintain under the great pressures faced in practice, which he has rightfully acknowledged. Without significant funding in technology and the justice system more generally, the judiciary has been left to navigate outdated systems with skeleton staff. This places great pressure on the parties, representatives, professionals and the court. In the *Re B* judgment, the President explained the pressures that the family courts are under during lockdown and surmised that the pressures of remote court processes had no doubt led to the wrong decision being made in this case:

By the time the Recorder started to hear his first case, he had already been working for at least three hours. The hearings took place by telephone, as was then the practice in that court, with the Recorder at his home address and the other participants at various locations elsewhere . . .

. . . During the course of the morning the Recorder received a continuous stream of bundles, documents and position statements in the other two cases . . .

. . . At 17.57 the hearing concluded. By that time the Recorder had been working, almost continuously and mainly on the telephone, for 10½ hours. Our observation is that, although we have found the decision in this case to have been unquestionably wrong, the nature of the workload faced by the Recorder, experienced as he is, was surely a contributory factor.¹⁹⁷

It is inevitable that this increased demand will lead to further appeals akin to *Re A (Children) (Remote Hearing: Care and Placement Orders)*¹⁹⁸ and *Re B (Children) (Remote Hearing: Interim Care Order)*.¹⁹⁹ It is clear from these cases that greater training is needed on the relevant guidance for the judiciary at this time of crisis, particularly in respect of urgent cases that cannot be adjourned until such time as lockdown measures

191. Family Law Act 1996, section 42A(2).

192. MacDonald (n 66), 3.1.

193. Ibid.

194. Ibid.

195. Ibid.

196. *Re B (Children) (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584.

197. Ibid.

198. *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583.

199. See *Re B* (n 196).

are relaxed.²⁰⁰ Some court users may be frustrated at having their case adjourned, though it is important that this hierarchy and prioritisation is utilised effectively to ensure the safe running of the court, as supported by the Court of Appeal in *Re B*:

Alongside other courts and tribunals, the Family Court continues to discharge its duties, particularly in urgent child protection cases. The effective use of communication technology is indispensable to this ability to continue to deliver justice. A remote hearing, where it is appropriate, can replicate some but not all of the characteristics of a fully attended hearing. Provided good practice is followed, it will be a fair hearing, but we must be alert to ensure that the dynamics and demands of the remote process do not impinge upon the fundamental principles. In particular, experience shows that remote hearings place additional, and in some cases, considerable burdens on the participants. The court must therefore seek to ensure that it does not become overloaded and must make a hard-headed distinction between those decisions that must be prioritised and those that must unfortunately wait until proper time is available.²⁰¹

The family court was already at breaking point long before the lockdown was introduced²⁰² but it is clear from the Judgments discussed above that current circumstances have stretched the system even further. This means that difficult decisions need to be made as to which cases need to be heard urgently through this remote system and which cases can wait. A blanket delay for private law cases is not the answer and ignores the significant risk of harm to children in witnessing domestic abuse or other GBV. The fundamental principle of the Children Act 1989 is to ensure that the child's welfare is the court's paramount consideration.²⁰³ This principle cannot be undermined at any point of the Covid-19 outbreak, despite the many challenges faced. The authors would therefore argue that any new applications for child arrangements orders involving such allegations should be treated as urgent and therefore prioritised, with clear guidance being issued to the judiciary to this effect.

In cases where there is an existing child arrangements order in place, there has been conflicting advice from the government on lockdown restrictions, which the President of the Family Division sought to clarify in, 'Coronavirus Crisis: Guidance on Compliance with Family Court Child Arrangements Order':

... where Coronavirus restrictions cause the letter of a court order to be varied, the spirit of the order should nevertheless be delivered by making safe alternative arrangements for the child.²⁰⁴

Where the withholding of time with the child arises and an application is made to the court, there will be consideration as to whether a person with parental responsibility acted reasonably to ensure the safety of the child. This is sound advice but has not been made particularly visible for parents in dispute. The guidance is clear and located on the judiciary website, though this is often not the most obvious place for litigants in person to look and must be addressed by the government. Knowledge of the guidance will serve a useful purpose in clarifying the parties' positions and responsibilities.

In domestic abuse cases, pressure could be alleviated from the family courts, if the police were more willing to issue Domestic Violence Protection Notices (DVPNs) and apply for Domestic Violence Protection Orders (DVPOs) on a victim's behalf through the Magistrates Court, which remain open for cases. In the survey, several organisations voiced criticisms of the perceived unwillingness by the police to do so. As the police will be the applicant in those cases, it removes the need for victims to use remote court technology in circumstances where their home environment may not allow for this. While those orders only last for a short

200. See *Re A* (n 198).

201. See *Re B* (n 196).

202. 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(2) *Journal of Social Welfare and Family Law* 135–152.

203. Children Act 1989, s 1(1).

204. The Rt. Hon. Sir Andrew McFarlane, 'Coronavirus Crisis: Guidance on Compliance with Family Court Child Arrangements Order' (24 March 2020, updated 31 March 2020) Court and Tribunals Judiciary <<https://www.judiciary.uk/wp-content/uploads/2020/03/Coronavirus-public-guidance-updated-31-March.pdf>> accessed 8 May 2020.

period of 28 days, they would allow the victim space and time to seek support from a relevant service in relation to their longer-term safety planning. DVPOs and DVPNs are both evidence of domestic abuse that can be used in support of a legal aid application, therefore, subject to meeting the financial eligibility test, a victim should then be able to access legal advice about potential family court orders including those discussed above. Where a non-molestation order or occupation order has already been granted by the family courts, the authors would recommend that there be an automatic extension of those orders until the next listed hearing, or for a period of six months, whichever is sooner. Again, this would go some way to easing the pressure that the family courts are currently experiencing.

Aside from concerns about the lack of DVPNs and DVPOs, the feedback from organisations on their interaction with police forces during the lockdown period is overall very positive. Referrals continue to be made by the police to support services and vice versa. Only one organisation described '*less reports to police*' but did not expand on this statement to provide us with any insight into why this is the case and whether they were referring to reporting by victims or support services. Support services report quicker response times and reports of police forces going above and beyond to assist victims with exit strategies where travel is an issue.

It is clear from the respondents that there is a need for all agencies to continue collaborative working in order to aid victims in their safety planning, whether or not that involves court proceedings. Victims can only make informed decisions about their safety planning if they (and the services/agencies supporting them) are fully aware of all the current available options. While there are now a large number of guidance notes available online (many of which have been discussed in this article), they tend to be directed towards professionals, not the victims themselves. New issues are being raised on an almost daily basis, meaning that many of those guidance notes have been reviewed and new versions produced, leading to further confusion among practitioners.²⁰⁵ Victims need access to clear information about all of their options during lockdown, if they are expected to engage with any process or service. The proposals previously outlined regarding media campaigns and access to advice lines in 'safe spaces' will go some way towards this. They should also be supported by one comprehensive webpage, outlining in non-legalistic language, the current legal position and options available for all victims of GBV, not just those experiencing domestic abuse. The information on the gov.uk website must be consolidated, simplified and made specific to the Covid-19 lockdown.

Conclusion

At a time when victims of GBV are at increased risk of abuse, and there are more barriers to seeking help, preventing and responding to GBV must be a national priority. GBV support services are often at the forefront of the access to justice response, working in partnership with victims and their children to provide life-saving information and support. As this article has examined, the work of such services is prized for reducing rates of re-victimisation, providing victims with effective safety strategies, increasing the mental well-being of service users and developing their access to community resources and opportunities.²⁰⁶

This study goes some way to documenting the experiences of GBV support services during this unprecedented time. Importantly, it hopes to dispel reports that all GBV support services are facing an unprecedented increase in demand for their services during this time, as this did not reflect the experiences of all participants in this study. The findings indicate that while services have been able to demonstrate resilience in the weeks following the lockdown measures, many of the respondent services are facing tough times ahead. This is for a variety of reasons including concerns about staff/volunteer retention; loss of funding; increased administration; resourcing difficulties in moving vital services online and delivering services in a safe and effective manner.

GBV organisations do not operate within a vacuum and policies adopted by wider government and state agencies inevitably impact their ability to effectively support victims. The government approach to supporting victims of abuse throughout the Covid-19 outbreak has developed in a piecemeal approach, reflecting the rapidly changing nature of the situation. The government response has largely revolved around its social

205. MacDonald (n 66) 3.2.1.

206. See Sullivan (n 41).

media campaign to reassure those affected that support services remain available during this time, together with the proposed financial packages for domestic abuse support services and charitable organisations more generally. At the time of writing, the campaign has become little more than a token slogan which has arguably made no meaningful difference to the ability of victims to seek help. In addition, the proposed funding has not been made available to organisations quick enough and urgent clarification is required about how organisations can apply and the criteria by which funding will be allocated. If the government fail to take the action required now, many organisations will not be able to withstand the coming months and the government's own message will be considerably undermined.

The authors made a number of recommendations to prevent and effectively respond to GBV at this time. These recommendations were underpinned by the key findings of this research study as discussed in the preceding sections. Broadly, the recommendations fall within the three overarching headings identified in the research. These were (a) impact on service provision (b) staffing, funding and resources and (c) access to justice and public messaging.

In relation to service provision, it was recommended that funding and technical support is provided to organisations to ensure that they are able to deliver core services online and to identify innovative ways of engaging with victims, which does not put them at increased risk. It is also recognised that both organisations and service users may require access to devices to enable them to deliver or receive these services. To ensure that victims are supported in making initial requests for help (i.e. where there is no existing relationship with a support service) it was recommended that pop-up booths be set up in supermarkets and/or pharmacies where domestic abuse victims could sit 1:1 with a trained charity worker who is located remotely. This would particularly assist victims who are unable to call a helpline because they are being closely monitored. The provision of refuge accommodation is a core service of many organisations. The authors recommended that adequate testing is made available to residents of refuges, particularly those with shared living spaces. PPE must be provided to support workers and professionals who ensure the safe running of the refuges on a day-to-day basis. Organisations must be reimbursed for lost income arising from any refuge closures. In the event that there is insufficient refuge accommodation for victims fleeing abuse, suitable alternative accommodation must be sourced. In the longer term, housing authorities must consider individuals fleeing abuse as priority need for local authority housing.

In relation to staffing and resourcing, it was recommended that funding must be fairly and promptly distributed across all types of support services, not just to larger commissioned services. As many of the respondents reported facing increased Covid-19 related administration, it is vital that the level of paperwork involved in applying for pots of funding is kept to a minimum or this will disproportionately impact smaller services. In addition, greater clarity and transparency is required in relation to which charities will benefit from government funding. In light of the reduced income that many organisations will face, the government should work with online training providers to inform the charities of how to utilise their online presence to increase their donation income, for example through online fundraising events. It is recommended that a 6–12 month breathing space should be offered to services following lockdown. In order to ease administration relating to the allocation of funding, a database/register of GBV support services should be devised. This could be akin to the Companies House and Charity Commission websites. It would also act as a public access site for victims to have an easily accessible and full directory of services area by area.

In relation to access to justice, the government must recognise that the justice system has experienced considerable funding cuts as a result of austerity measures and LASPO which has negatively affected its ability to operate effectively prior to the pandemic. This has resulted in an administrative backlog of cases as a result of the reduction in court staffing and the court estate. It is vital that HMCTS receives a funding injection to resource more judges and court administrators to preside over hearings and address the mounting court administration. If there is no financial injection, the justice system may reach its breaking point. To reduce the number of self-representing litigants and provide support for victims of abuse, it is imperative that the Legal Aid Agency remove the strict legal aid means threshold and evidence requirements to secure legal aid. Alternatively, if this is not feasible and there continues to be a high number of self-representing litigants in the family courts, there must be clearer guidance for the public on the current operation of the courts, including which applications are still being heard and how they are being heard. The authors consider it is problematic that current guidance is directed at professionals given the number of litigants in person in the

family courts. As support services are finding it difficult to learn about the changes to the court, it is anticipated they would also find this guidance useful. The need for written guidance for members of the public is particularly evident in relation to child contact. To ease the pressure on the courts, it is recommended that there should be an automatic extension of family law injunctions. The police should also be more regularly exercising their ability to apply to the magistrates' courts for DVPOs during lockdown.

Finally, in relation to public messaging, there is urgent need for clarification as part of the Home Secretary's campaign that the police will attend the home of victims following a GBV incident, notwithstanding lockdown measures. The campaign could also clarify that victims are able to leave their home to access GBV support services (as this should fall within Regulation 6 on the basis that they are accessing a critical public service/escaping harm); and finally that victims and/or perpetrators can leave their home for a few days following an argument. A campaign of this nature would offer some reassurance to victims, while also indicating to perpetrators that abuse during the lockdown will not go unnoticed. It is suggested this public messaging could be achieved as part of the Daily National Briefing and repeated as part of a televised campaign.

As this article has examined, some recommendations have now been implemented. Their impact on supporting and upholding the rights of victims in the coming months will be kept under review. On 27 April 2020, the Home Affairs Committee published a series of recommendations aimed at securing the rights of victims.²⁰⁷ Many of the published recommendations mirror those contained in this article. It is reassuring therefore, that across many different sectors, the call for action is the same. As the Home Affairs Committee have identified, 'without strong action to tackle domestic abuse and support victims during the Covid-19 pandemic, society will be dealing with the devastating consequences for a generation'.²⁰⁸ The evidence is now before the government and only time will tell whether they listen and provide an effective response.

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207. Home Affairs Committee (n 180).

208. *Ibid.*



Two Worlds Apart: A Comparative Analysis of the Effectiveness of Domestic Abuse Law and Policy in England and Wales and the Russian Federation

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Abstract

In 2015, s 76 of the Serious Crime Act 2015 introduced the new criminal offence of ‘controlling or coercive behaviour in an intimate or family relationship’. This is just one of many steps the UK government have taken in recent years to acknowledge the different forms of domestic abuse and power imbalances that can be present in intimate relationships. In contrast, in February 2017, the Russian government passed an amendment to the Russian Criminal Code to decriminalise some forms of assault, a step which many human rights activists have opposed. This article will compare the seemingly dichotomous approaches to domestic abuse adopted by England and Wales and Russia and will examine the effectiveness of both approaches in deterring domestic violence, providing adequate support for victims and meeting state obligations under international law. There has been extensive commentary on the approach to domestic abuse in England, the USA and Australia. In comparison, consideration of the approach in the Russian Federation is limited. This is in part due to the approach taken in Russia to dealing with domestic abuse as a private issue and the associated lack of available data. This article seeks to go behind closed doors to explore the Russian approach to tackling domestic abuse in a way that it has not previously been considered.

Keywords

Domestic abuse, comparative law, control and coercion, criminalisation

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Introduction

Domestic abuse is a large-scale problem in England and Wales, with recent statistics indicating that in the year ending March 2018, 1.23 million women and 695,000 men had experienced domestic abuse.¹ These statistics are more concerning because it is generally accepted that incidents of domestic abuse are under-reported.² The statistics also only consider domestic abuse experienced by adults aged 16–59 years, ignoring domestic abuse experienced in younger teenage relationships or between individuals aged 60 and above. Bows found that 43 per cent of homicides of older people recorded between 2010 and 2015 were in fact domestic homicides.³ The real figures for domestic abuse experienced in England and Wales are therefore likely to be much higher than those highlighted by the Office for National Statistics. The key reasons suggested by academics and practitioners for this underreporting is considered later in this article.

In England and Wales, domestic abuse is understood to be a gendered offence in that it is both a cause and a consequence of gender inequality. This is because physical and emotional abuse, domestic servitude, forced marriage, female genital mutilation, sexual violence and harassment are disproportionately perpetrated against women and girls.⁴ Women are twice as likely as men to experience domestic abuse and men are more likely to be perpetrators.⁵ On average, two women are killed each week by their current or former partner in England and Wales.⁶ The Home Office Statutory Guidance Framework on Controlling or Coercive behaviour states that domestic abuse is ‘primarily a form of violence against women and girls and is underpinned by wider societal inequality’.⁷ Similarly, the Equality and Human Rights Commission notes that:

The continuum of violence against women, in its many forms, reflects the wider structural gender inequalities that make it one of the most pervasive human rights issues in the UK: it impacts on women’s health and independence, reduces their ability to work and creates a cycle of economic dependence. Women’s inequality limits their ability to escape from abusive relationships; it can make it more difficult for them to enforce their rights.⁸

Domestic abuse is not, however, necessarily synonymous with gender-based violence in that the latter can take place in the public sphere and can be perpetrated by those outside domestic

1. Office for National Statistics, ‘Domestic Abuse in England and Wales: Year Ending March 2018’ (Office for National Statistics, 22 November 2018) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018>> accessed 05 January 2019.
2. HM Government, ‘Transforming the Response to Domestic Abuse’ (Government Consultation, 8 March 2018) 8 <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf> accessed 05 January 2019; Women’s Aid, ‘Survival and Beyond: The Domestic Abuse Report 2017’ (2017) 23 <<https://1q7dqy2unor827bjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/Survival-and-Beyond.pdf>> accessed 05 January 2019.
3. H Bows, ‘Domestic Homicide of Older People (2010–15): A Comparative Analysis of Intimate-Partner Homicide and Parricide Cases in the UK’ (2018) *The British Journal of Social Work (BJSW)* 1–20.
4. The European Institute for Gender Inequality, ‘Strategic Framework on Violence against Women 2015–2018’ (Publications Office of the European Union, Luxembourg 2015) <<https://eige.europa.eu/rdc/eige-publications/strategic-framework-violence-against-women-2015-2018>> accessed 05 January 2019.
5. The Equality and Human Rights Commission, ‘Response of the Equality and Human Rights Commission to the Consultation: Transforming the Response to Domestic Abuse’ (2018). The response can be accessed: <<https://www.equalityhumanrights.com/sites/default/files/consultation-response-transforming-response-to-domestic-abuse-may-2018.pdf>> accessed 05 January 2019.
6. Office for National Statistics, ‘Crime Statistics, Focus on Violent Crime and Sexual Offences, Year ending March 2016, Chapter 2: Homicide’ (2016).
7. Home Office ‘Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework’ (2015) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf> accessed 05 January 2019.
8. See The Equality and Human Rights Commission (n 5).

relationships.⁹ This understanding of domestic abuse informs and is reflected in the policy approach to domestic abuse in England and Wales which is state-driven, multi-agency and, increasingly, criminal justice focused.

The discourse surrounding domestic abuse in Russia contrasts starkly to the position in England and Wales. Rather than being viewed as an expression of gender inequality and a human rights infringement, the prevention of which is primarily the Government's responsibility to address, domestic abuse in Russia is viewed as a private family matter which necessitates minimal state, legal or police intervention.¹⁰ Campaigns aimed at raising awareness of tackling domestic violence have met with some success,¹¹ but perceptions of domestic violence in Russia are reported as being dominated by a 'renaissance of traditional values' which reinforce archaic gender norms around a 'woman's place' in the family unit.¹² In a 2015 review on the position in Russia, the Committee on the Elimination of Discrimination against Women noted that they were concerned about the:

persistence of patriarchal attitudes and stereotypes concerning the roles and responsibilities of women and men in the family and in society, which consider women primarily to be mothers and caregivers, discriminate against women and perpetuate their subordination within the family and society... and perpetuate their unequal status in family relations.¹³

The Committee also reported that such stereotypes are one of the root causes of violence against women and therefore it is concerning that the Russian government has not taken any steps to modify or eliminate discriminatory stereotypes and negative traditional attitudes. The Committee recommended that Russia put in place a strategy aimed at eliminating patriarchal attitudes concerning the roles and responsibilities of women and men in the family and in society.¹⁴

The scale of domestic abuse in Russia is largely unknown. This is principally because, unlike the UK government, Russia has not sought to implement a statutory definition of 'domestic abuse', which creates difficulty in clarifying the parameters of behaviour that will fall within its remit. In addition, because domestic abuse is not seen as a government concern, let alone a priority, the Russian government does not collect centralised statistics on domestic abuse. In any event, the lack of legal recognition of domestic abuse as a criminal matter makes collecting data in Russia a futile task. Russia is one of only three countries in Europe and Central Asia which does not recognise domestic violence as a discrete offence.¹⁵ There is currently no legal recognition of coercive and controlling behaviour, economic

9. Law Commission 'Reform of Offences against the Person: A Scoping Consultation Paper' CP 217 (2014), para 150 <http://www.lawcom.gov.uk/app/uploads/2015/06/cp217_offences_against_the_person.pdf> accessed 05 January 2019.

10. JE Johnson, 'Privatizing Pain: The Problem of Woman Battery in Russia' (2001) 13(2) *National Women's Studies Association Journal (NWSA Journal)* 153–68.

11. The Russian Orthodox Church, for example, has promoted a zero-tolerance attitude towards familial violence through working in conjunction with domestic abuse organisations to develop an effective response to incidents of violence, including providing training for priests and establishing religious support services for women. Collectives such as 'Papa-groups' have also attempted to promote gender equality and encourage men to assume a joint approach to parental responsibility with the children's mother. This has been reported in ANNA—Centre for the Prevention of Violence 'Domestic Violence against Women in the Russian Federation: An Alternative Report to the United Nations Committee on the Elimination of Discrimination against Women' (62nd Session, October 2015). Examination of the eighth periodic report submitted by the Russian Federation <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/RUS/INT_CEDAW_NGO_RUS_21870_E.pdf> accessed 05 January 2019.

12. *Ibid.*

13. CEDAW, 'Concluding Observations on the Eighth Periodic Report of the Russian Federation' (UN Doc CEWAD/CO/RUS/8) (20 November 2015) <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnINnqKYBbHCTOaqVs8CBP2%2fEJgS2uWhk7nuL22CY5Q6EygEUW%2bboviXGrJ6B4KEJr4JalKJZyYib0P1wYeg13mjbxpuvbBQIHs8SaZvXdjX>> accessed 05 January 2019.

14. *Ibid.*

15. Bianca Chamusco, 'If he Beats you, It Means He Loves You' (2017) University of Chicago Law School, Chicago Unbound: Student Papers.

abuse, emotional abuse, honour violence and stalking or harassment. Victims of these offences therefore have no legal recourse under the criminal justice system against their perpetrators. As such, any representation of the scale of the Russia's domestic abuse problem would be grossly distorted.

Nonetheless, family violence is reported to be an endemic and gendered social problem in Russia. Johnson's 2001 study found that intimate partner violence in Russia takes many forms including emotional and psychological torture, beating, sexual violence and murder.¹⁶ Johnson's findings are supported by the Russian Ministry of Internal Affairs which report that 40 per cent of violent crimes take place within the family,¹⁷ 74 per cent of victims of abuse are women and in 91 per cent of cases, violence was perpetrated by a husband.¹⁸ On a conservative estimate, it is believed that 30–40 per cent of murders take place in the family.¹⁹ This mirrors statistics from the World Health Organisation which estimate that approximately 38 per cent of all murders of women worldwide are committed by intimate partners.²⁰ In Russia, this equates to approximately 14,000 women and 2,000 children being murdered annually as a result of family violence.²¹ These figures will be a gross underestimation, because regressive attitudes towards domestic abuse mean that reporting family violence is discouraged as undermining family honour. Those victims who do report abuse often find 'extreme difficulty' in securing help from the police or state organisations as their calls are ignored or cases are not investigated.²² It has been reported that police frequently tell victims that domestic abuse does not fall within their jurisdiction²³ and that victims should 'come and see us after he's killed you'.²⁴ This reflects an archaic English adage in which incidents were dismissed as 'just a domestic', indicating that they could be resolved within the family without the intervention of the criminal justice system. As this article will go on to consider, in contrast to the position in England and Wales, the Russian response to domestic abuse is arguably characterised by a lack of government accountability to resolve the issues, minimal criminal and civil protection and fledgling investment into much-needed support services.²⁵

This article will compare the seemingly opposite approaches to domestic abuse adopted by England and Wales and Russia. The first part of the article will set out the legal and policy frameworks for responding to domestic abuse in England and Wales and the Russian Federation. The second part of the article will examine the effectiveness of both approaches in deterring domestic violence, providing adequate support for victims and meeting state obligations under international law. Throughout the article, suggestions will be made as to the ways in which victims of domestic abuse could be better supported.

The Domestic Abuse Framework in England and Wales

This section will consider the criminal, civil and family justice response to domestic abuse in England and Wales. The analysis reveals that a key feature of the English response is the sheer number of options available to protect victims or punish perpetrators. However, as this article will go on to explore, the volume of protective methods does not necessarily result in the most effective protection for victims.

16. See Johnson (n 10).

17. The Law Library of Congress, 'Russia: Decriminalisation of Domestic Violence' (2017) <<https://www.loc.gov/law/help/domestic-violence/russia-decriminalization-domestic-violence.pdf>> accessed 05 January 2019.

18. See ANNA—Centre for the Prevention of Violence (n 11).

19. See Johnson (n 10).

20. World Health Organisation, 'Violence against women: Factsheet' (2017) <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>> accessed 05 January 2019.

21. C Mahserjian, 'We're All in this Together: A Global Comparison on Domestic Violence and the Means Necessary to Combat It' (2016) 79(1) *Alb L Rev* 297–324.

22. See B Chamusco (n 15).

23. See ANNA—Centre for the Prevention of Violence (n 11).

24. See B Chamusco (n 15).

25. See ANNA—Centre for the Prevention of Violence (n 11); B Chamusco (n 15).

This is partly because of funding cuts which have resulted in reduced support services to underpin the legal and policy framework. In addition, as a result of the complexity of the English approach, the extent to which these options are fully understood and implemented by practitioners working in the area of domestic abuse is questionable.

The Family Law Response

In England and Wales, victims of domestic abuse can apply for protection in both the civil courts and the family courts. Victims can apply to the civil courts for an injunction under the Protection from Harassment Act 1997 (PHA 1997), however they will more commonly apply to the family courts for an injunctive order. This is because of the wider range of orders available and also because the issues surrounding an abusive relationship can rarely simply be dealt with by way of an injunctive order alone and other interrelated family proceedings may be required. For example, there may be property issues to resolve, arrangements to be made for children or, if the victim and the perpetrator are married, divorce proceedings to be considered. The different types of protective orders available through the family courts include an application under s 8 of the Children Act 1989 to regulate contact between the perpetrator and any relevant children; a non-molestation order to prohibit the perpetrator from contacting or harassing the victim; an occupation order²⁶ to regulate the occupation of the family home; a forced marriage protection order²⁷; and a female genital mutilation protection order.²⁸ There may be a number of reasons why victims seek to pursue family law proceedings over criminal prosecutions. These include the potential availability of legal aid to fund a legal representative, the lower standard of proof as civil cases only need to be proved on the 'balance of probabilities' rather than the criminal standard which is 'beyond reasonable doubt' and the fact that family law proceedings are heard in private judges' chambers rather than open court, thereby securing the parties' privacy.

The Civil Law Response

Victims can also seek compensation under the civil law through a personal injury claim for trespass to the person (assault/battery), a claim under the PHA 1997 and/or the Criminal Injuries Compensation Authority. The purpose of a civil claim is to compensate victims for the physical or psychological injuries they have suffered as a result of the offence. There are strict time limits to pursue claims and victims will require evidence (such as medical evidence and police reports) to support their claim. This can be difficult to obtain, particularly for victims who have never sought assistance. Victims will incur costs in pursuing a civil complaint. These expenses may include the cost of legal advice (legal aid is not available), fees to obtain evidence such as medical reports or police disclosure, and the court fee to issue and hear the claim. Many perpetrators do not have sufficient financial means to pay compensation awarded against them. Victims may therefore be successful in a civil case but never receive the compensation due to difficulties in enforcing the judgment.

The Criminal Justice Response

There are also criminal sanctions in place for individuals who perpetrate domestic abuse. Until recently, these criminal sanctions were largely limited to cases involving actual violence and where an offence was committed under the Offences against the Person Act 1861 (OAPA 1861). The non-fatal offences listed under the OAPA 1861 did capture some non-violent and otherwise abusive behaviour but this was very limited. For example, in *R v Ireland*, repeated silent telephone calls were deemed to constitute an

26. See pt IV of the Family Law Act 1996.

27. See s 63 of the Family Law Act 1996 as amended by the Forced Marriage (Civil Protection) Act 2007.

28. See the Female Genital Mutilation Act 2003 as amended by the Serious Crime Act 2015.

assault but only if it caused the victim to ‘apprehend immediate and unlawful violence’.²⁹ Some fear of violence therefore still needed to be present and the behaviour alone was insufficient to constitute an offence under this Act. The approach under the OAPA 1861 also focuses on single incidents rather than a course of conduct which is more commonly associated with an abusive intimate relationship.

The PHA 1997 offers slightly more scope for criminal sanction, where the conduct is non-violent and involves a ‘course of conduct’ rather than a single incident. For example, s 4A provides that:

A person (‘A’) whose course of conduct—

(a) amounts to stalking, and

(b) either—

(i) causes another (‘B’) to fear, on at least two occasions, that violence will be used against B, or

(ii) causes B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities,

is guilty of an offence if A knows or ought to know that A’s course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.

This potentially brings into scope domestic abuse cases where the victim has not suffered physical violence but has suffered psychological/emotional harm. There has been a reluctance on the part of the judiciary to interpret this section in a way that would include coercive and controlling behaviour in an intimate relationship, thereby limiting the scope of this section. For example, in *R v Widdows*, Pill LJ stated:

[Section 4A] is not normally appropriate for use as a means of criminalising conduct, not charged as violence, during incidents in a long and predominantly affectionate relationship in which both parties persisted and wanted to continue.³⁰

Writers such as Stark³¹ and Douglas³² suggested that abusive relationships often involve ‘periods of violence interspersed with periods of non-violence’³³ and that the latter can form part of the controlling behaviour. At a Justice for Women event in 2018 on the subject of coercive control,³⁴ Walmsley-Johnson³⁵ explained that, in her own abusive relationship, the periods of violence were interspersed with periods of grand generosity which were designed to make her feel grateful for the relationship and encourage her to remain, despite the violence that was certain to happen again. The *Widdows* case therefore highlights a lack of understanding on the part of the judiciary of the nature of domestic abuse and the psychological impact that the behaviour can have on a victim. Unfortunately, concerns about lack of understanding extend beyond the judiciary and this is an issue that will be explored later in this article.

Since 2007, it is also now a criminal offence to breach a non-molestation order.³⁶ Prior to 2007, a power of arrest would need to be attached to an order and the onus would be on the victim to pursue contempt of court proceedings in the event of a breach. It could be argued that this relatively small

29. *R v Ireland* [1997] All ER 225 HL.

30. *R v Widdows (David Roger)* [2011] EWCA Crim 1500 at [29].

31. E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (New York, OUP 2007).

32. H Douglas, ‘Do We Need a Specific Domestic Violence Offence?’ (2015) 39(2) *Melb Univ Law Rev* 434, 440.

33. *Ibid.*

34. Justice for Women Conference, ‘Coercive Control: Punishment and Resistance’ (November 2018) (unreported).

35. H Walmsley-Johnson, *Look What You Made Me Do: A Powerful Memoir of Coercive Control* (London, MacMillan Publishers 2018).

36. Family Law Act 1996, s 42A (as amended by the Domestic Violence Crime and Victims Act 2004, s 1)

change significantly increased the powers of the police to intervene in non-physical domestic abuse cases. To pursue criminal sanctions, the victim has to wait for the perpetrator to conduct themselves in a way that breaches the order. In the year ending December 2017, 3,154 individuals were convicted of breaching a non-molestation order.³⁷ It is difficult to compare this figure to the number of non-molestation orders actually being made because the data are gathered at different times in the year. For illustration purposes, in the year ending March 2018, 26,332 non-molestation orders had been granted.³⁸

In the same year that breaches of non-molestation orders were criminalised, the Family Law Act 1996 was also amended to introduce civil protection orders against forced marriage.³⁹ This was an acknowledgement by the government that forced marriage is a form of domestic abuse. Due to concerns at the time that criminalisation would mean that ‘victims would be reluctant to seek help and forced marriage would be driven underground’,⁴⁰ forced marriage was not made a criminal offence in its own right until 2014.⁴¹

The police approach to domestic abuse was strengthened in 2014 with the introduction of the Domestic Violence Disclosure Scheme (DVDS), Domestic Violence Protection Orders (DVPO) and Domestic Violence Protection Notices (DVPN). The DVDS allows a person to ask to the police for information about whether their partner has a previous history of domestic violence and violent acts. The DVDS is not currently set out in legislation, although there are plans to change this under the draft Domestic Abuse Bill.⁴² It involves the police using their common law power of disclosure. When deciding to make a disclosure, however, the police must ensure they are complying with relevant legislation such as the Data Protection Act 2018, the General Data Protection Regulation and the Rehabilitation of Offenders Act 1974.

In contrast, the powers given to the police through DVPOs and DVPNs are set out in the Crime and Security Act 2010 (CSA 2010) and allow them to provide immediate protection to a victim where they are asked to intervene in a domestic violence incident. A DVPN is very similar to a non-molestation order, in that it contains provisions preventing the perpetrator from molesting the individual it is designed to protect, contacting the individual and/or returning to the family home. As with a non-molestation order, it can only be used where the victim and perpetrator are ‘associated persons’. Unlike non-molestation orders, there must be actual violence or a threat of violence.⁴³ One advantage of the DVPN scheme over a non-molestation order is that it can be issued by the police immediately, without the need for the victim taking any action themselves to commence court proceedings. A person in alleged breach of a DVPN can be arrested by the police without warrant but must be brought before the magistrates’ court within 24 hours.⁴⁴

Where the police issue a DVPN, they are obliged under s 27 of the CSA 2010 to make an application to the magistrates’ court for a DVPO within 48 hours. The justification for this time limit is because a DVPN restricts the alleged perpetrator’s freedom without any determinations being made about the alleged behaviour. It is comparable to a non-molestation order made on an *ex parte* basis with the requirement of a return hearing in the near future to give the respondent opportunity to contest the order. The timescales are therefore in place to ensure compliance with the Human Rights Act 1998. However, the reality of situation may be that these timescales deter the police from using this type of notice. Police

37. See Office for National Statistics (n 1).

38. *Ibid.*

39. Family Law Act 1996, s 63A (as amended by the Forced Marriage (Civil Protection) Act 2007).

40. R Gaffney-Rhys, ‘The Criminalisation of Forced Marriage in England and Wales: One Year On’ (2015) 45(11) *Fam Law* 1378–80.

41. Anti-Social Behaviour, Crime and Policing Act 2014.

42. HM Government, ‘Transforming the Response to Domestic Abuse: Consultation Response and Draft Bill’ (2019), cl 53 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf> (accessed 12 March 2019).

43. Crime and Security Act 2010, s 24(2).

44. *Ibid.*, s 26.

forces in England and Wales are often under-resourced and overworked, with statistics for the year ending March 2018 showing numbers of police officers to be at a record low.⁴⁵ They may therefore be reluctant to utilise an order that obliges them to take further steps within a short period of time. Instead, they may instead seek to rely on a more general Police Information Notice, which does not have the same subsequent obligations and importantly cannot be used as gateway evidence to allow the victim to secure legal aid in family law proceedings.

Where an application is made for a DVPO, the court can only 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.⁴⁶ The DVPO can last for no fewer than 14 days and no more than 28 days from the day it is granted.⁴⁷ It is therefore not designed to be a long-term protective order but, rather, to provide the victim with breathing space to make decisions about their next steps and seek support. As explained above, however, DVPNs and DVPOs only assist in cases where there has been actual violence or a threat of violence. This demonstrates the emphasis placed on actual violence by the criminal justice system and an ignorance of other types of domestic abuse. It should be noted that amendments have been proposed as part of the draft Domestic Abuse Bill. Part 3 of the draft Domestic Abuse Bill proposes replacing DVPNs and DVPOs with Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs). The proposed provisions widen the scope of individuals who can apply for an Order, will extend the potential duration of those orders and will make breach of an order a criminal offence. In many ways, this will make DAPOs similar in scope to non-molestation orders but with the added ability of the police being able to apply on a victim's behalf. There are no proposals in the draft Bill to repeal the provisions of the Family Law Act 1996 relating to non-molestation orders and it is therefore to be presumed that both orders will continue to exist as alternative options for victims of domestic abuse.

There was no specific domestic abuse offence covering non-physical forms of abuse until 2015 in England and Wales; the government sought to change this position by introducing a new offence of 'controlling or coercive behaviour in an intimate or family relationship',⁴⁸ under s 76 of the Serious Crime Act 2015 (SCA 2015). The offence came into force on 29 December 2015. Under s 76:

A person A commits an offence if:

- (a) A repeatedly or continuously engages in behaviour towards another person B that is controlling or coercive;
- (b) At the time of the behaviour, A and B are personally connected;
- (c) The behaviour has a serious effect on B; and
- (d) A knows or ought to know that the behaviour will have a serious effect on B.⁴⁹

If a person is convicted of the offence, they face a maximum sentence of 5 years' imprisonment if convicted on indictment or of 12 months' imprisonment if it is dealt with as a summary offence.⁵⁰ In comparison to sentences available in a case involving physical violence, this is higher than the maximum

45. Home Office, 'Police Workforce, England and Wales, 31 March 2018' (2018) Statistical Bulletin 11/18 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/726401/hosb1118-police-workforce.pdf> accessed 05 January 2019.

46. Crime and Security Act 2010, s 28.

47. *Ibid.*, s 28(10).

48. Serious Crime Act 2015, s 76.

49. *Ibid.*

50. *Ibid.*, s 76(11).

sentence for common assault but lower than the maximum sentence available for assault occasioning bodily harm.⁵¹

The introduction of the s 76 offence corresponded with the proposed expansion of the cross-governmental definition of domestic abuse:

Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. The abuse can encompass but is not limited to: psychological, physical, sexual, financial, emotional.⁵²

The cross-governmental definition also defines controlling and coercive behaviour, something that was interestingly omitted of the SCA 2015 legislation.

‘Controlling behaviour’ is defined as:

A range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.⁵³

‘Coercive behaviour’ is defined as:

An act or pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.⁵⁴

This was a clear public acknowledgement by the UK government that domestic abuse extends beyond physical violence and that all forms of domestic abuse are equally harmful to victims. It also acknowledged that controlling and coercive behaviour is often at the centre of an abusive relationship. These concepts were addressed by writers such as Stark⁵⁵ and Williamson,⁵⁶ long before the introduction of the offence.

Based on statistics available, it might be argued that the approach of the police and the Crime Prosecution Service (CPS) has significantly improved. Recent data indicate that conviction rates for domestic abuse-related offences are at their highest level since 2010, with 76 per cent of prosecutions resulting in a conviction.⁵⁷ This percentage needs to be considered in the context of the other data available. Out of the nearly 2 million adults who experienced domestic abuse within the last year, only 599,549 domestic abuse-related crimes were recorded by the police and only 225,714 arrests were made for domestic abuse-related offences.⁵⁸ Therefore, while the criminal justice approach is statistically the best it has been in eight years, more can and should still be done.

Acknowledging this issue, the UK government has demonstrated a commitment to improving the response of the criminal justice system to domestic abuse. This was demonstrated in the publication of the draft Domestic Abuse Bill⁵⁹ with many of the provisions focusing on improving the criminal justice

51. Offences Against the Person Act 1861, s 47.

52. Home Office, New Definition of Domestic Violence (November 2012) <<https://www.gov.uk/guidance/domestic-violence-and-abuse#domestic-violence-and-abuse-new-definition>> accessed 05 January 2019.

53. *Ibid.*

54. *Ibid.*

55. See E Stark (n 31).

56. E Williamson, ‘Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control Violence against Women’ (2010) 16(2) *Journal of Violence Against Women (VAW)* 1412–23.

57. See Office for National Statistics (n 1).

58. *Ibid.*

59. HM Government (n 42).

response to this issue. As explained above, the draft Bill even proposes expanding the possible criminal approach with the introduction of a new criminal order, a 'Domestic Abuse Protection Order' (DAPO).

In relation to criminal sentencing, a new domestic abuse sentencing guideline was released in February 2018.⁶⁰ The starting point in the guidelines is that the domestic nature of the offence makes the offending more serious because it 'represents a violation of the trust and security that normally exists between people in an intimate or family relationship'.⁶¹ It is also recognised that cases concerning 'serious violence', or where severe emotional harm is caused, will usually warrant a custodial sentence. The guidelines state that the victim should not be responsible for the sentence imposed as this may lead to victims being threatened by perpetrators if it is understood that they can impact the sentence awarded.

In addition to the overarching principles stated above which assess the seriousness of a domestic abuse offence generally, the guidelines provide comprehensive details of factors which may be viewed as aggravating or mitigating factors. Aggravating factors include where the victim is particularly vulnerable, where the perpetrator has attempted to prevent the victim from reporting the incident, where there is a proven history of violence or threats and where there is a direct or indirect effect on children. Either party can ask the court to consider the interests of children in sentencing. This recognises both that further violence could be harmful to children and that longer custodial sentences can disrupt the perpetrator's relationship with their children. In contrast, mitigating factors may be relied on where there is evidence of 'genuine recognition' of the need to change and evidence of obtaining help or treatment to effect that change. This article will go on to consider Domestic Violence Perpetrator Programmes which aim to achieve a behavioural change in perpetrators.

As this section has considered, on the face of it, England and Wales has adopted a comprehensive approach to regulating domestic abuse. It is an approach which increasingly draws on the criminal justice system to deter offenders, punish perpetrators and provide protection for victims. For reasons this article will go on to consider, however, it is not necessarily the case that criminalisation is the most effective route to combatting domestic abuse. This is ostensibly because criminalisation can lead to victims becoming passive bystanders in the process and because funding cuts have led to difficulties in effectively implementing legislation.

The next section will set out the framework regulating domestic abuse in Russia.

The Domestic Abuse Framework in the Russian Federation

This section will set out the legal and policy framework regulating domestic abuse in Russia. The approach taken in Russia will be contrasted with the position in England and Wales. The analysis reveals that the Russian response is characterised by institutional passivity to domestic abuse, a lack of legal provisions in relation to core domestic abuse offences and draconian provisions which make it very difficult for victims to achieve access to justice and are in urgent need of review.

Similarly to England and Wales, domestic abuse is not recognised as a discrete criminal offence but rather physical violence can be prosecuted as a crime against the person, under pt VII of the Russian Criminal Code. In contrast to England and Wales, however, there is no legislative recognition of, or protection for, victims of non-physical forms of domestic abuse. A working group comprised of non-government organisations and representatives of the State was convened in 2012 to develop legislation aimed at protecting victims of abuse. The resulting draft law 'On Prevention and Response to Domestic Violence' has not been passed to date. As the current law stands, the following offences are likely to be relevant in a case of physical abuse:

60. Sentencing Council, Domestic Abuse Sentencing Guideline (2018) <<https://www.sentencingcouncil.org.uk/publications/item/overarching-principles-domestic-abuse-definitive-guideline/>> accessed on 19 February 2019.

61. *Ibid* 3.

- Article 112 (intentional infliction of injury to health of average gravity)
- Article 115 (intentional infliction of light injury)
- Article 116 (battery and aggravated battery)
- Article 117 (torture, the causing of physical and mental suffering by means of the systematic infliction of beatings or other forcible actions)
- Article 119 (threat of murder or infliction of grave injury to health).

In contrast to England and Wales where many of the criminal offences (such as coercive and controlling behaviour) acknowledge the intimate relationship between the parties, none of the offences in Russia take into account the nature of the relationship between the victim and the perpetrator. In addition, this is unlikely to be viewed in determining the seriousness of an offence for the purposes of sentencing. It is only under Article 117 that the circumstances would be regarded as aggravating if the victim was either a minor or 'materially or otherwise dependent on the guilty person'. This will not be a feature of all intimate relationships involving domestic abuse. As this article has examined, this can be contrasted to the position in England and Wales, where the Sentencing Council has expressly stated that the domestic nature of the offence makes the offending more serious because of the relationship of trust and security between the parties.

There have been a series of threats to the legal provisions which can be applied to domestic abuse cases in recent years. This can be considered in the treatment of Article 116 of the Criminal Code (battery and aggravated battery). Prior to 2015, a perpetrator of domestic abuse could be prosecuted under Article 116(1) where their behaviour amounted to 'battery or similar violent actions, which cause physical pain but have not amounted to light injury' or aggravated assault under Article 116(2) if the battery was committed through 'ruffian-like motives'. The offence of battery was punishable as a criminal offence by a fine of up to 40,000 rubles (approximately £455), by a three-month detention or six-month period of mandatory work with reduced income at a place designated by the authorities. This could be compared with the offence of common assault in England where the maximum sentence for assault carries a maximum penalty of six months' imprisonment and/or a fine whereas assault occasioning actual bodily harm carries a maximum penalty on indictment of five years' imprisonment and/or a fine. In Russia, the more serious offence of aggravated battery was punishable by a compulsory work term of up to 360 hours, corrective labour for a term of up to one year, a restriction of liberty for a term of up to two years, compulsory labour for a term of up to two years by an arrest for a term of up to six months or by deprivation of liberty for a term of up to two years.

In contrast to England and Wales where the focus has been on creating new statutory offences to protect victims of domestic abuse, in Russia a Bill was introduced by the Supreme Court of the Russian Federation in 2015 to decriminalise non-aggravated battery. The drafters of the Bill claimed this was part of efforts to 'humanise and liberalise' Russian criminal law on the basis that imprisoning men who had just been 'mildly abusive' could leave households without breadwinners and destroy families.⁶² It was estimated that decriminalising this offence (together with the Article 119 offence of threatening murder or serious bodily harm and the Article 157 offence of maliciously evading the payment of funds for the maintenance of children or disabled parents) would lead to 200,000 fewer criminal prosecutions annually.⁶³ Initially, the amendment did not distinguish between offences committed under Article 116 by strangers or by family members. This prompted outrage by conservative forces who felt that this was discriminatory and permitted further intervention into family matters.⁶⁴ Subsequently, the Bill was amended to state that 'battery between close persons' would remain a criminal offence.

62. Decision of the Plenary Meeting of the Supreme Court of the Russian Federation No 37 of July 31, 2015 <http://www.supcourt.ru/Show_pdf.php?Id=10240> accessed 05 January 2019.

63. See The Law Library of Congress (n 17).

64. Ibid.

In January 2017, a further amendment was passed (by an overwhelming majority of 383:3) which removed battery of *close persons* that resulted in physical pain but did not inflict substantial bodily harm or other consequences under Article 116 as a criminal offence. The new law removed offences of battery against a family member which does not result in significant bodily injury and instead made it an administrative offence which attracts a 30,000 ruble (approximately £340) fine, a period of up to 15 days' administrative arrest or up to 120 hours of community service. Repeated assaults against family members, defined as more than one offence per year, and assaults which result in serious bodily harm, remain a criminal offence under Article 116. It has been reported that a spokesperson for the Russian President said that it would not be appropriate 'to identify domestic violence with some insignificant manifestations of abuse'.⁶⁵ As a result of these amendments, the potential for criminal convictions for domestic abuse offences has been considerably curtailed.

Assuming an offence falls within these restricted provisions, the next difficulty survivors experience is the lack of support from the police and the state to pursue convictions. It is reported that Russian police often rely on the right to privacy enshrined in the Russian Constitution to justify their inaction if the abuser refuses entry into the family property where the offence has been perpetrated.⁶⁶ According to statistics compiled by the ANNA Centre for the Prevention of Violence, 72 per cent of female victims who sought assistance from a helpline for survivors of abuse did not then go on to report the violence to the police.⁶⁷ Eighty per cent of those women who had reported the incident were unsatisfied with the police response.⁶⁸ The Human Rights Watch note that in a typical case, victims can report abusive behaviours for months or even years without the police speaking to an abuser, making a formal record of the complaint or initiating a case.⁶⁹ As this article will go on to consider, this can be contrasted with the position in England and Wales where police officers receive specialist training on domestic abuse offences.

It is also reported that many perpetrators successfully allege provocation or self-defence to policy in order to justify their behaviours. Johnson's research, for example, found that provocation can encompass a wide variety of behaviours including 'earning too much money, wearing the wrong clothes, being unfaithful, taunting the abuser, nagging and complaining about bad behaviour'.⁷⁰ The Human Rights Watch reported one occasion where a police officer told the victim 'it is no accident he is beating you, you must be so hard to live with'.⁷¹ As a result, many offences do not result in criminal sanctions being pursued. In contrast, in England and Wales, provocation only exists as a defence to domestic abuse offences in very limited circumstance and can rarely be argued in mitigation.

Under Article 20 of the Criminal Procedural Code, if the parties reconcile (either voluntarily or through coercion by the perpetrator or wider family/community members) the Criminal Code requires any criminal charges to be dropped.⁷² This is the position for all domestic abuse cases, with the exception of rape and cases which involve 'violent acts of sexual character'.⁷³ It has been reported that police have been known to encourage victims to reconcile with their attackers to save time and effort in conducting investigations.⁷⁴ Inevitably, at the prospect of a conviction, some perpetrators may display

65. Ibid.

66. See Johnson (n 10).

67. See ANNA—Centre for the Prevention of Violence (n 11).

68. Ibid.

69. See Johnson (n 10).

70. Ibid.

71. Editorial, 'Russia: Bill to Decriminalize Domestic Violence: Parliament Should Reject Measure that Harms Families' *Human Rights Watch* (23 January 2017) <<https://www.hrw.org/news/2017/01/23/russia-bill-decriminalize-domestic-violence>> accessed 05 January 2018.

72. See Article 20 of the Criminal Procedural Code with states that 'cases... are subject to termination in connection with... reconciliation'.

73. See Mahserjian (n 21).

74. See B Chamusco (n 15).

remorse and seek forgiveness from the victim. Women who feel guilty and believe that violence was an isolated incident which will not happen again may withdraw the complaint and agree to reconciliation. As such, this provision can be manipulated to allow perpetrators to commit further acts of emotional abuse while simultaneously creating a culture of impunity for offenders. It has been reported that some women are forced by their abusers to pay the fines awarded to them as a punishment for reporting the offence, or that unpaid fines are taken from shared bank accounts.⁷⁵ In England and Wales, while reconciliation does not automatically lead to cases being dropped, it can increase the likelihood of victims deciding not to give statements which in turn may make a prosecution more difficult to pursue, depending on the availability of other evidence.

In respect of charges under Article 115 or Article 116, prosecutions are usually dealt with as private prosecutions rather than state-directed prosecutions. The Criminal Procedural Code states that crimes under Articles 115 and 116 'are . . . cases of private prosecution, [and] are initiated only upon application from the victim or . . . his legal representative'. This means that the onus is on the victim to start the proceedings, gather the evidence and present the case without any knowledge of the legal process, evidential requirements or support from a publicly funded legal adviser as there is no legal aid available in relation to domestic abuse cases. Of course, it is open to a victim who is willing and able to do so, to incur the cost of paying for an investigator and prosecutor. This is likely to come at a considerable expense and, as this article will go on to consider, there are few legal practitioners specialising in domestic abuse cases.

The criminal justice response is particularly important in Russia because there is next to no civil response. Unlike in England and Wales, there is no injunctive protection available to victims through the family courts nor is there any public funding to support a victim in receiving advice about the options available to them to leave the relationship or to prevent the perpetrator from contacting them or returning to the family home. As such, it is commonplace for victims and perpetrators to continue living together following an incident of violence. Victims who live in state-owned accommodation who wish to see their abusers removed from the home are required to apply under housing law for an order of eviction.⁷⁶ No official court statistics exist regarding the utility of this court application, however it is understood that courts grant this remedy sparingly.⁷⁷ There is no direct provision to evict a tenant who privately rents accommodation, however Article 25 of the Constitutional provision on housing may be used in cases where a tenant has used violence against other residents.⁷⁸

Similarly to the position in England and Wales, there is scope for women to secure compensation from their partners for under Article 151 of the Civil Code. This provides that victims can request compensation where the perpetrator has inflicted 'moral harm' on the victim. In deciding what level of compensation to award, the courts will take into account 'the abuser's culpability, the extent of the harm suffered and other circumstances worthy of attention'. Of course, it also remains open to the victim to seek a divorce and apply for the division of financial assets through the family courts. In relation to housing, family and civil claims however, women are expected to navigate an unfamiliar legal process without support from a publicly funded lawyer or a judiciary which is sympathetic to their experiences.

As these access to justice barriers attest, the policy framework in relation to domestic abuse in Russia is much less interventionist and comprehensive than in England and Wales with few funded agencies or services to support an effective response to domestic abuse. The Committee on the Elimination of Discrimination against Women reported in 2015 that women face too many barriers when they seek justice, including social stigma and negative stereotypes, lack of awareness of their rights and a failure

75. See Johnson (n 10).

76. See, for example, an order for 'eviction without the granting of alternative accommodation' under Articles 53 and 98 of the Housing Code.

77. See Human Rights Watch (n 71). See also Johnson (n 10).

78. See Johnson (n 10).

on the part of law enforcement officials to strictly apply international legislation prohibiting gender-based discrimination against women.⁷⁹

Effectiveness of the Approaches to Domestic Abuse

The next section considers the effectiveness of the approaches adopted in England and Wales and Russia in ensuring compliance with international obligations, deterring violence and ensuring access to justice for the victim.

Compliance with International Obligations

This section will consider England's and Russia's compliance with key Conventions in the area of domestic abuse; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the European Convention on Human Rights (ECHR). Compliance with the Istanbul Convention is also considered although it is noted that Russia is not a signatory to this Convention. The authors argue that Russia's passive approach to domestic abuse arguably creates a condition which allows domestic crimes to continue unrelentingly. This is inconsistent with the requirements of the Conventions to which it is a signatory. In contrast, while England and Wales are prima facie compliant with their international obligations, there are steps they can take to improve their international standing in this important area. The authors argue that this will require England to implement the Istanbul Convention and improve public funding to support access to justice for victims.

Both Russia and England are signatories to a range of international instruments which seek to deter domestic abuse, provide protection for survivors and punish perpetrators. Unlike England and Wales, which requires international legislation to be formally ratified by parliament and incorporated domestically through implementing legislation in order to become binding, Article 17 of the Russian Constitution provides that all persons shall have 'all rights and freedoms in accordance with generally respected principles and norms of international law'. In cases of conflict between domestic and international provisions, international law takes precedence. In Russia, there is therefore no need for implementing legislation.

The Convention on the Elimination of All Forms of Discrimination against Women. The first instrument to which both Russia and England are signatories is the CEDAW, which together with its Optional Protocol was ratified by Russia in 1981 and the UK in 1986. CEDAW imposes affirmative obligations on signatory states, including the requirement to promote equality of men and women in legal systems; abolish all discriminatory laws and adopt appropriate laws prohibiting discrimination against women; establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and ensure elimination of all acts of discrimination against women by persons, organisations or enterprises.⁸⁰ Compliance with these requirements is achieved through the 'due diligence' standard, which requires governments to take positive action and ensures they can be held account for tacitly condoning violence where they make little or no effort to prevent it. The due diligence requirement emerged from the case of *Velasquez Rodriguez v Honduras*⁸¹ which found that an illegal act 'which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it'.⁸²

79. See CEDAW (n 13).

80. See the full text of the Convention <<http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>> accessed 05 January 2019.

81. *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No 4 (1988).

82. *Ibid* at [172].

Violence against women is not directly referred to in the text of the original Convention, General Recommendation No 19 which was adopted in 1992, states that the definition of discrimination in Article I includes 'violence directed against a woman because she is a woman or that affects women disproportionately'.⁸³ As the statistics examined above demonstrated, in both England and Russia, domestic abuse is disproportionately perpetrated against women by men and would therefore fall under the scope of CEDAW.

There is some recognition of the need for equality and freedom from discrimination within Russian domestic law. This is contained in the Constitution of the Russian Federation which guarantees equal protection for the sexes under the law. Article 19 of the Constitution states that 'man and woman shall enjoy rights and freedoms and have equal possibilities to exercise them'. As has been considered above, however, the reality is that this provision is often frustrated by the criminal justice response to domestic abuse which is fraught with difficulties, making convictions hard to secure and access to justice for victims a near impossibility.

The failure to implement effective enforcement responses, adequate measures of protection and to prosecute perpetrators in Russia arguably allows domestic abuse to continue unabated. A specific example of failure to carry out due diligence is in relation to training law enforcement officers regarding domestic abuse cases and ensuring they actively investigate cases. To comply with their obligations, the police should respond to every request for assistance, assign equal protection to calls concerning abuse by family members as to calls regarding abuse perpetrated by strangers, provide protection to victims of violence and arrange for the perpetrator to be removed from the home if the threat of further violence remains.⁸⁴ The evidence considered in this article so far suggests that the law enforcement response in Russia falls short at every stage. In contrast, in England and Wales, many police constabularies have specialist domestic abuse officers and there is clear police guidance in place setting out the approach that officers should take in domestic abuse cases.⁸⁵ Further, in England and Wales, multiple options are available to secure the immediate protection of the victim including DVPOs/DVPNs and Police Information Notices. Although, as addressed above, their inclination to exercise any of these options may be impacted by workload and resources issues.

The difficulties that domestic abuse victims face in securing access to justice in Russia have been recognised by the CEDAW Committee in their 2015 review. The review acknowledged the high prevalence of domestic and sexual violence against women and criticised the absence of legislation to prevent and address violence against women, including domestic abuse and the state services to provide assistance to victims.⁸⁶ The Committee recognised that there was insufficient knowledge within the judiciary and the general public about the rights conferred under CEDAW and the concept of substantive equality of women and men. The Committee made a series of recommendations to the Russian government, including:

- (a) Efforts should be made to ensure that the Convention, the Optional Protocol and the Committee's general recommendations are understood and applied by the government, including the judiciary, as a framework for laws, court decisions and policies on gender equality and the advancement of women;
- (b) Enhance women's awareness of their rights and the remedies available to them under the Convention and national legislation;

83. CEDAW, General Recommendation No 19 (11th Session, 1992) <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>> accessed 06 January 2019.

84. L. Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence and International Legal Minimums of Protection' (2010) 8(2) *Northwestern Journal of International Human Rights (JHR)*, Article 3.

85. Authorised Professional Practice (APP) on Domestic Abuse <<https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/>> accessed 05 January 2019.

86. See CEDAW (n 13).

- (c) Ensure the strict application by law enforcement officials of legislation prohibiting gender-based discrimination, including through systematic training of judges, prosecutors and lawyers;
- (d) Collect statistics in relation to gender and abuse which are disaggregated by age, nationality and relationship between the victim and the perpetrator;
- (e) Adopt comprehensive legislation to prevent and address violence against women, including domestic violence and ensure that women and girls who are victims of violence have access to immediate means of redress and protection and that perpetrators are prosecuted and adequately punished; and
- (f) Provide adequate assistance and protection to women who are victims of violence, by establishing shelters in both urban and rural areas and enhancing cooperation with non-governmental organisations providing assistance to victims.⁸⁷

As Mahserjjan notes, the United Nations Universal Human Rights Index have made repeated recommendations to the Russian government to provide a statutory definition of domestic violence and more consistently prosecute abusers.⁸⁸ However, as the analysis of the current position in Russia attests, there is no evidence that Russia have acknowledged any of these recommendations and to date, there have been no proposals to implement a definition of domestic violence or recognise it as a discrete offence. In contrast, the amendments to Article 116 mean that victims have fewer legal remedies than ever before. The Secretary General of the Council of Europe acknowledged that reducing battery within the family from a criminal to an administrative offence, with weaker sanctions for offenders, would be a 'clear sign of regression' and would 'strike a blow to global efforts to eradicate domestic violence'.⁸⁹ Similarly, the Human Rights Watch described the amendment as 'dangerous and incompatible with Russia's international human rights obligations'.⁹⁰ Russia's unwillingness to implement any recommendations may result from the fact that to date there have been no legal consequences for their failure to comply with the recommendations or their overall violations of CEDAW. Instead, violating CEDAW merely opens up Russia to liability for individuals or other States to report them.⁹¹

The UK is not exempt from criticism in relation to compliance with its obligations under CEDAW regarding its approach to domestic abuse. In 2013, the CEDAW Committee expressed concern that the introduction of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO),⁹² and in particular the requirement to provide gateway evidence to demonstrate that the applicant has been a victim of domestic violence, would 'unduly restrict' women's access to family legal aid. There was a concern that this could push women towards informal arbitration systems, including faith-based tribunals, which do not comply with CEDAW requirements.⁹³ The Committee therefore recommended that the UK take steps to ensure survivors of violence could access courts and tribunals effectively. The UK

87. Ibid.

88. See Mahserjjan (n 21).

89. As reported in Human Rights Watch, Rebecca Hendin, "I could kill you and no one would stop me": Weak State Response to Domestic Violence in Russia' *Human Rights Watch* (25 October 2018) <<https://www.hrw.org/report/2018/10/25/i-could-kill-you-and-no-one-would-stop-me/weak-state-response-domestic-violence>> accessed 05 January 2019.

90. Editorial, 'Russia: Bill to Decriminalize Domestic Violence: Parliament Should Reject Measure that Harms Families' *Human Rights Watch* (23 January 2017) <<https://www.hrw.org/news/2017/01/23/russia-bill-decriminalize-domestic-violence>> accessed 05 January 2018.

91. See Mahserjjan (n 21).

92. For an overview of LASPO 2012 and its effect on family matters, see 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) JSWFL (in press).

93. Equality and Human Rights Commission, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: understanding what governments need to do to advance women's rights in Great Britain' (2014) <https://www.equalityhumanrights.com/sites/default/files/cedaw_concluding_observations_251114_1.pdf> accessed 05 January 2019.

have since taken steps to broaden the scope of acceptable gateway evidence, however it is arguable that such changes were not affected directly as a result of the Committee recommendations. Rather this was the result of Rights of Women bringing a successful claim against The Lord Chancellor and the Secretary of State for Justice on the basis that the prescribed forms of evidence did not cater for victims of financial abuse. In that case, it was also determined that the requirement for some forms of evidence to be dated within the 24-month period before any application for legal aid was invalid.⁹⁴

Victims of domestic abuse are still in theory eligible for legal aid if they are able to secure the necessary gateway evidence. In practice however, the financial position of many victims means that they do not satisfy the strict means test but are still unable to afford to pay a solicitor privately. This leaves victims vulnerable to representing themselves in court proceedings and potentially being cross-examined by an abuser. Although steps have been taken to ensure this cannot take place in criminal courts, there is currently no provision preventing this in the family courts and this can act as a further opportunity for perpetrators to exercise control over their victims.

The case of *JY v RY* demonstrates the difficulties this can cause.⁹⁵ The case concerned a father's (JY) application for contact with his 11 year-old daughter. It was heard at the Family Court at Middlesbrough before District Judge Simon Read. Ten serious allegations had been raised by the child's mother (RY) as to why contact should be restricted, including allegations of physical, verbal and sexual assault. Some of the allegations were proved following a fact-find hearing, however RY felt unable to be cross-examined in relation to the sexual abuse. As such, she asked the judge to form his judgment based on the evidence he had heard so far. At the end of the fact-find hearing, the judge made a series of critical observations about the difficulties caused by the parties appearing in person. These are set out in full at paragraph 35 of the judgment, however some of the more poignant observations for the purposes of this article are listed below:

- a) Neither parent could afford a lawyer and neither was eligible for Legal Aid. I found this surprising in the mother's case in particular, given that I was told that she was dependent entirely on state benefits and yet failed the means test, despite the nature of the case.
- b) Having professional representation and advice will tend to support and help an alleged victim of domestic abuse in a moral and practical way that goes far beyond what a voluntary support agency can or should offer. It can fortify a witness before questions are asked, be a reassuring presence during that process, and debrief them afterwards. It can reassure them as to outcomes, and act as a safeguard during what may be a hugely bewildering and scary experience. Its presence is the mark of a civilised society and a mature and balanced legal system . . . No English or Welsh criminal court would proceed as this court had to, in the absence of representation for parties dealing with such grave allegations.
- c) As is his right, the father was not prepared to make any admissions. Yet upon hearing the evidence I later found him manifestly to be lying on the first 2 allegations . . . In this case, pre-trial negotiation between advocates might have obviated the need for a fact-finding evidential hearing entirely, had sufficient admissions been made upon legal advice.
- d) I therefore think there is a very strong likelihood that the outcome of the fact finding would have been different, and most probably a truer reflection of what really happened, had the parents been represented. It would surely have concluded sooner, more fairly, and at far less expense to the public purse than ultimately was the case, with two wasted days at Court. It may also have been less painful for the participants.

Despite amendments to the acceptable gateway evidence, the position remains that many survivors of abuse in England experience discrimination based on the fact that they are unable to secure legal

94. *R (Rights of Women) v The Lord Chancellor and the Secretary of State for Justice* [2016] EWCA Civ 91.

95. [2018] EWFC B16.

representation in domestic abuse proceedings. Whilst this is an improvement on the position in Russia, where legal aid is not available for domestic abuse cases at all, it is still a significant access to justice barrier. Following concerns about this being raised during the 2018 Legal Aid Review, the Legal Aid Agency have now pledged to review the legal aid means test by the summer of 2020.⁹⁶ The authors recommend that the stringent legal aid means test must be urgently revised to make it fit for purpose.⁹⁷

A resolution to the issue of direct cross-examination in England and Wales has been recommended under cl 50 of the draft Domestic Abuse Bill, which proposes that a new pt 4B be inserted into the Matrimonial and Family Proceedings Act 1984. Those draft provisions, if implemented, will prohibit direct cross-examination by a party to proceedings who has been convicted, given a caution for or charged with an offence perpetrated against the other party to the proceedings. It will also prohibit direct cross-examination where there is an on notice injunction in place protecting one party to proceedings against the other. In all other cases, the court retains discretion to make a direction prohibiting cross-examination. Both parties' Article 6 rights are protected under the proposals through cl 31 V. This clause directs that:

- (5) The court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party.
- (6) If the court decides that it is, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the party.

Provisions about the payment of costs for that 'qualified legal representative' will need to be dealt with by statutory instrument and the funding position therefore remains uncertain.

The Committee were also concerned about the prevalence of violence against black and minority ethnic women, including honour violence and FGM.⁹⁸ The report noted that FGM is practised in communities in the UK but there have still been no convictions under Female Genital Mutilation Act 2003 (FGMA 2003). The Committee recommended that the UK government take steps to ensure existing laws against FGM are put into practice and provide the CPS with the necessary support to prosecute perpetrators of FGM. Following the recommendations, there have been considerable legislative developments in relation to FGM. These include introducing FGM protection orders to provide civil injunctive protection to potential victims.⁹⁹ Since FGM protection orders came into force in July 2015, there have been 256 applications and 248 orders granted.¹⁰⁰ The SCA 2015 has attempted to increase the prospects of a conviction by broadening the scope of the offences and providing support in place to increase the likelihood of disclosures. Under the 2003 Act, it is an offence for any person in England, Wales or Northern Ireland (regardless of their nationality or residence status) to perform FGM, or to assist a girl to carry out FGM on herself. It is also an offence to assist (from England, Wales or Northern Ireland) a non-UK national or resident to carry out FGM outside the UK on a UK national or permanent UK resident. Section 4 extends ss 1 to 3 to extra-territorial acts.¹⁰¹ To support potential prosecutions,

96. Ministry of Justice, 'Legal Support: The Way Ahead' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf> (accessed 12 March 2019).

97. See Richardson and Speed (n 92).

98. See Equality and Human Rights Commission (n 93) paras 35 and 37.

99. See sch 2 of the Female Genital Mutilation Act 2003.

100. Ministry of Justice and National Statistics, 'Family Court Statistics Quarterly, England and Wales, April to June 2018' (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752737/FCSQ_April_to_June_2018_-_FINAL.pdf> accessed 06 January 2019.

101. See ss 1–4 of the Female Genital Mutilation Act 2003. In addition, s 72 of the 2015 Act inserts new s 3A into the 2003 Act; this creates a new offence of failing to protect a girl from FGM. This will mean that if an offence of FGM is committed against a girl under the age of 16, each person who is responsible for the girl at the time of FGM occurred will be liable under this new offence.

victims of FGM offences are also granted lifelong anonymity.¹⁰² A new mandatory reporting duty has also been implemented requiring specified regulated professionals in England and Wales to make a report to the police. The duty applies where, in the course of their professional duties, a professional discovers that FGM appears to have been carried out on a girl aged under 18.¹⁰³ Despite these efforts, however, there has only been one successful criminal prosecution for an FGM offence.

In relation to other forms of honour violence, the CEDAW Committee recommended that the UK government criminalise forced marriage and take steps to ratify the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (more commonly referred to as the Istanbul Convention), which the UK signed in June 2012.¹⁰⁴ The steps that the UK have taken to prevent forced marriage and implement the first recommendation of the CEDAW committee were outlined earlier in this article. These include criminalisation and the introduction of protective orders. These provisions have been met with some success in tackling violence against women. Over the last year, 247 forced marriage protection orders have been granted (in all cases the applicants were women)¹⁰⁵ and two convictions for forced marriage have taken place.¹⁰⁶ The delays in ratifying the Istanbul Convention are examined further below.

The Istanbul Convention. The delays to ratifying the Istanbul Convention appear to be largely caused by a failure of the devolved administrations to take the required steps to enable ratification. In February 2015, the Joint Committee on Human Rights published a report on the UK's progress towards ratification of the Convention. The report called on the government 'to prioritise ratification of the Istanbul Convention by putting the final legislative changes required before this Parliament'.¹⁰⁷ The report stated:

We are concerned that the delay in ratifying the Istanbul Convention could harm the UK's international reputation as a world leader in combating violence against women and girls. We acknowledge that, if the devolved administrations need to take further legislative steps, there may be a delay in ratifying the Istanbul Convention. We recommend, however, that the Government bring forward the necessary primary legislation regarding jurisdiction before the end of this Parliament, and that the devolved administrations also bring forward any legislative measures that they consider to be necessary, so that the goal of ratifying the Istanbul Convention can be given the priority it deserves.

102. See s 71 of the Serious Crime Act 2015 inserts a new s 71 into the Female Genital Mutilation Act 2003. This prohibits the publication of any information that would be likely to lead to the identification of a person against whom an FGM offence is alleged to have been committed.

103. Section 74 inserts new s 74B into the 2003 Act.

104. The Convention can be accessed in full <<https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e>>. The three key themes of the Convention are prevention, protection and prosecution. In relation to protection, signatories are obliged to ensure victims are able to access clear and accessible information about support available to them. Member States are also obliged to ensure free of charge 24/7 helplines to offer immediate expert advice and specialised support services. Regarding prevention, signatories must promote awareness through awareness raising campaigns and education at all levels to ensure that the general public are informed of the various forms of violence that women experience on a regular basis as well as of the different manifestations of domestic violence. Finally, states must ensure systems are in place to ensure perpetrators are prosecuted for crimes committed. This requires states to give power to the police, ensure effective and timely prosecutions and immediate protection for victims.

105. Ministry of Justice and National Statistics, 'Family Court Statistics Quarterly: Annual 2017 including October to December 2017' (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695363/family-court-stats-oct-dec-2017.pdf> accessed 06 January 2019.

106. Editorial, 'Second forced marriage conviction within a week' *Family Law Week* (29 May 2018) <<http://www.familylawweek.co.uk/site.aspx?i=ed190141>> accessed 06 January 2018.

107. House of Commons' Briefing Paper Number 7829, 'UK Policy on Ratifying the Istanbul Convention on Preventing Violence against Women' (House of Commons Library 21 February 2017) <<http://researchbriefings.files.parliament.uk/documents/CBP-7829/CBP-7829.pdf>> accessed 06 January 2019.

In its March 2015 response, the then Government said it was ‘committed to ratifying’ the Convention.¹⁰⁸ Subsequently, the Government has proposed the Domestic Abuse Bill, which together with the Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017 should ratify the Istanbul Convention into domestic law. At present, however, the preoccupation with Brexit means that it is not clear when the Domestic Abuse Bill will become law.

Notwithstanding this delay, the Government has taken steps to ensure its compliance with the Convention. As outlined above, at a domestic level, there has been growing recognition of the different forms that domestic abuse takes. This is evidenced through the introduction of the Modern Slavery Act 2015 which seeks to protect victims of human trafficking and the SCA 2015 which criminalised coercive and controlling behaviour¹⁰⁹. In order to ensure that domestic abuse is properly understood, there have also been proposals for a statutory definition of domestic abuse, in line with the requirements of the Convention, as explored above.¹¹⁰

The overarching message is therefore that, while the UK appear amenable to making recommendations to comply with its international obligations, Russia have to date ignored requests to do the same. It is also noteworthy that Russia is among 4 out of 47 Member States who has not signed the Istanbul Convention, arguably because they are not willing to undergo the legislative reform or financial investment that would be required to adhere to the Convention.

European Convention on Human Rights. Russia and the UK are also parties to the ECHR. The ECHR guarantees the right to life,¹¹¹ the right not to be subject to torture or cruel, inhumane or degrading treatment¹¹² and the right to be free from discrimination.¹¹³ Domestic abuse threatens each of these fundamental freedoms. Similar to CEDAW, as well as giving negative rights to individuals (ie the rights that governments must refrain from interfering with), the ECHR imposes positive obligations on States to ensure compliance with the rights protected in the ECHR through a due diligence requirement.¹¹⁴

In *Osman v United Kingdom*, the European Court of Human Rights acknowledged that a state’s obligation

108. The response stated: ‘The UK has some of the most robust laws in the world against violence towards women and girls and as the Committee has acknowledged, we already comply with the vast majority of the articles in the Convention. The Government takes its international commitments very seriously and will only commit to such ratification when we are absolutely satisfied that we comply with all articles. As the Committee has recognised, the Convention applies to the whole of the UK and the devolved administrations are responsible for implementing the positive obligations of the Convention in their territories. The Government has liaised with the devolved administrations about ratification of the Istanbul Convention, including the further legislative steps necessary on extraterritorial jurisdiction, and will continue to do so through consultation and the Inter-Ministerial Group, of which the devolved administrations are members’.

109. S Edwards ‘Coercion and Compulsion—Re-Imagining Crimes and Defences’ (2016) 12 Crim LR 876–99.

110. See HM Government (n 2): The consultation defines domestic violence as ‘any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexual orientation. The abuse can encompass, but is not limited to: psychological, physical, sexual, economic, emotional, controlling behaviour (controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour) or coercive behaviour (coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim)’.

111. European Convention of Human Rights (1950), Article 2 provides that ‘everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law’.

112. Ibid. Article 3 states that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’.

113. Ibid. Article 14 provides that ‘the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.

114. See Hasselbacher (n 84).

extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.¹¹⁵

The court noted that for there to be a violation of the obligation to protect life, it must be shown that the authorities knew, or ought to have known at the time, of the existence of a ‘real and immediate risk’ and that they failed to ‘take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk’.¹¹⁶ This includes the provision of public education, treatment and assistance for victims, intervention for the perpetrators and interim measures to prohibit the perpetrator from ‘contacting, communicating with or approaching the victim [or] residing in or entering certain defined areas’.¹¹⁷

The issue of how this works in practice has been considered by the European Court of Human Rights. The case of *Bevacqua and S. v Bulgaria* concerned a man who physically assaulted his ex-wife.¹¹⁸ She argued firstly that Bulgarian government officials had violated her right to respect for private and family life (secured by Article 8) by failing to provide an adequate legal framework that would protect her and her son from abuse from her ex-husband. Secondly, she argued that it was a breach of her ECHR rights that Bulgarian domestic legislation specified that when ‘medium bodily harm’ or ‘light bodily harm’ was inflicted by a family member, criminal proceedings had to be initiated by the victim as a private prosecution rather than by a public prosecutor. However, where the same harm had been caused by a stranger, the public prosecutor could initiate proceedings. In upholding the applicant’s first claim, the court found that the minimum for compliance with the due diligence standard would require a state to allow for emergency protection measures such as an order to remove the abuser from the home and prohibiting contact.

In relation to the requirement for victims to pursue private prosecutions, the European Court stated that:

Member states should ensure that all victims of violence are able to institute proceedings, make provisions to ensure that criminal proceedings can be initiated by the public prosecutors, encourage prosecutors to regard violence against women as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest, ensure where necessary that measures are taken to protect victims effectively against threats and possible acts of revenge and take specific measures to ensure that children’s rights are protected during proceedings.¹¹⁹

The European Court disagreed that the requirement for a victim to act as private prosecutor was a violation of ECHR rights under Article 8 and held that states have a ‘margin of appreciation’ in meeting the ECHR requirements using domestic policies. The court stated that ‘the choice of a means to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities’ margin of appreciation’.¹²⁰ The court therefore refused to accept that the applicant’s ECHR rights could be secured only through a public prosecution and that such a prosecution was required in all cases of domestic violence.¹²¹ A relevant factor in this

115. *Osman v UK* ECHR 1998–VIII 3124 at [115].

116. *Ibid.*

117. Council of Europe Comm. of Ministers, Recommendation Rec (2002) 5 on the Protection of Women against Violence, 794th Sess. (30 April 2002). <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612> accessed 06 January 2019.

118. *Bevacqua and S. v Bulgaria* App no 71127/01 (ECtHR, 12 June 2008). The judgment can be accessed at. <<http://hrlibrary.umn.edu/research/bulgaria/BEVACQUA.pdf>> accessed 06 January 2019.

119. *Ibid.*, para 50.

120. *Ibid.*, para 82.

121. See Hasselbacher (n 84).

case, however, was that Bulgarian law permitted state prosecutions in ‘exceptional’ circumstances and therefore it was not a blanket refusal to bring a public prosecution.

In contrast, the case of *Opuz v Turkey* concerned a daughter (Nahide) and her mother who had experienced decades of abuse from Nahide’s husband, who eventually killed her mother. Despite repeated complaints to the police, little action had been taken to ensure Nahide and her mother’s security. Nahide subsequently brought a case that the Turkish authorities had violated her mother’s right to life under Article 2 and her own right to be free from torture and ill-treatment under Article 3. She also argued that the inadequate response by law enforcement was a result of gender-based discrimination and therefore a violation of Article 14. At the time, Turkish legislation required official complaints by victims to pursue criminal investigations when criminal acts did not result in sickness or unfitness for work for 10 days. In this case, Nahide and her mother repeatedly withdrew their claims out of fear and therefore criminal prosecutions were not pursued. The Turkish government argued that interfering with their wishes not to prosecute would have been a violation of the victim’s rights under Article 8. However, the Court found that the legislation ‘fell short of the requirements inherent in the State’s positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims’.¹²² The Court noted that the more serious the offence or the greater the risk of future offending, the more likely it is that the prosecution should continue by the State, notwithstanding that the victim has withdrawn their complaint. In light of their failure to do so, Turkish authorities ‘could not be considered to have displayed due diligence’.¹²³ Accordingly, breaches of Articles 2, 3 and 14 were established.

When these cases are applied to the present situation in Russia, it paints a bleak picture of the country’s compliance with the ECHR. Firstly, as has been examined, statistics indicate that domestic abuse is prevalent in Russia and that it is a gendered offence. As such, the general passivity caused by the government’s failure to implement a comprehensive criminal and civil framework to protect victims may mean that Russia would struggle to defend claims based on the right to life, under Osman. This is particularly relevant following the decision to decriminalise assault and Russia’s unwillingness to introduce protection orders, despite recommendations from the CEDAW Committee who have identified weaknesses with the current approach. Following *Bevacqua*, Russia’s lack of civil protective measures akin to non-molestation or occupation orders would be a failure to meet the minimum due diligence standard. Finally, the requirement for private prosecutions in respect of offences under Article 115 and 116 of the Russian Criminal Code may, depending on the situation, also be considered a failure to provide adequate protection for victims. The Russian government have attempted to justify using private prosecutions on the basis that, given the personal nature of the offence, it is appropriate for victims to decide whether a prosecution is in their best interests. This is similar to the argument that was raised by the Turkish authorities in *Opuz*. Following the Judgments above, a blanket ban on public prosecutions is unlikely to fall within a state’s ‘margin of appreciation’ and suggests that Russia must in appropriate cases pursue state prosecutions where the victim feels unable to do so themselves. At present, there is no evidence this is taking place.

Detering Domestic Abuse

This section considers the extent to which the law surrounding domestic abuse in England and Russia is a force for regulating people’s behaviour. Preventing unwanted behaviours is an often-cited measure of

122. *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009) at [145]. The judgment can be accessed at <<http://www.bailii.org/eu/cases/ECHR/2009/870.html>> accessed 07 January 2019.

123. *Ibid* at [149].

policy success¹²⁴. The authors argue that one of the most effective methods of deterring domestic abuse and socialising the wider public regarding different forms of abusive behaviours is through education. The authors highlight different programmes which have been adopted in England and Russia, with varying levels of success.

In relation to domestic abuse, the law in the UK has been relied on both to control the behaviour of perpetrators and to underpin and establish values that domestic abuse in all forms is unacceptable. Education is one means by which the UK attempts to secure compliance with its international obligations, while also aiming to deter future violence. Article 12 of the Istanbul Convention, for example, obliges states to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and other practices which are based on the inferiority of women. It is expected this will be achieved through Article 13 which requires signatories to

promote or conduct on a regular basis awareness raising campaigns or programmes . . . to increase awareness and understanding among the general public of the different manifestations of all forms of violence covered by the Convention, their consequences on children and the need to prevent such violence.

As Russia is not a signatory to the Istanbul Convention, it is not under any such obligations to promote education.

In England, deterrence through education has been a key feature of the government consultation ‘transforming the response to domestic abuse’, where one of the four themes was ‘promoting public and professional awareness’ of domestic abuse.¹²⁵ Efforts have included proposing a statutory definition of domestic abuse as part of the draft Domestic Abuse Bill¹²⁶ to ensure the range of offences are properly understood and providing funding for all schools to deliver Relationships Education, Relationships and Sex Education and Personal, Social, Health and Economic Education so that young adults leave school with an understanding of domestic abuse.¹²⁷ The need for such education recognises that while legal reform can challenge socio-cultural perspectives which view women as subordinate to men, laws by themselves cannot create equality.¹²⁸

Similarly, in the consultation that preceded the introduction of the coercive control offence, the Law Commission for England and Wales placed an emphasis on the educative value of the offence.¹²⁹ The hope was that educating the public about the nature of non-violent domestic abuse and the potential consequences of this behaviour would highlight behaviour that may not previously have been recognised as problematic. This societal acceptance of certain types of abusive behaviour has been emphasised by media reports, such as those surrounding the murder of Richard Challen by his wife Sally Challen, in which witnesses described the controlling relationship she experienced as ‘old-fashioned’.¹³⁰ The aim was that the introduction of a new domestic abuse offence would change this view of a controlling relationship simply being old-fashioned or traditional to an acknowledgment that this behaviour is abusive and psychologically damaging. This was recognised in the Judgment in which permission was

124. S Graca, ‘Domestic Violence Policy and Legislation in the UK: A Discussion of Immigrant Women’s Vulnerabilities’ (2017) 23(1) *European Journal of Current Legal Issues (EJoCLI)* <<http://webjcli.org/article/view/531/715>> accessed 06 January 2019.

125. See HM Government (n 2).

126. See HM Government (n 42).

127. *Ibid.*

128. A Gill and S Anitha, ‘The Illusion of Protection: An analysis of Forced Marriage Legislation and Policy in the UK’ (2009) 31(3) *JSWFL* 257–69.

129. See Law Commission (n 9).

130 Anna Moore, “‘I miss him so much’: why did a devoted wife kill the man she loved?” *The Guardian* (29 September 2018) <<https://www.theguardian.com/uk-news/2018/sep/29/devoted-wife-who-killed-husband-with-hammer-sally-challen>> accessed 06 January 2019.

granted for Sally Challen to appeal her conviction on the basis that the new offence of coercive and controlling behaviour amounted to fresh evidence. Lady Justice Rafferty stated:

It should be plainly understood that the application made today is but one step in what, it is hoped by counsel, those who instruct her and many others concerned in this case, will be a full detailed exploration of the position, based on scholarship, learning and clinical expertise, which should prevail now . . . A jury, it is argued, should, with the benefit of that learning, be enabled to reach a clear settled conclusion on the basis of an understanding which, it is said, was not available to the jury in 2011.¹³¹

Sally Challen has now won her appeal against her conviction and a retrial has been directed.¹³² However, she has arguably only been able to challenge her conviction because of advancements in understanding controlling and coercive behaviour and the impact that this behaviour can have on a victim, that have been gained through the introduction of the new offence. Arguments raised before the Court of Appeal at the permission hearing drew parallels with other societal advancements such as DNA testing, which can result in the safety of a conviction being challenged.¹³³ Bettinson notes that the impact of the new offence is therefore significant in that it may lead to a new partial defence to murder convictions where a coerced and controlled victim kills their abuser.¹³⁴

By educating the public in this way, perpetrators may acknowledge their own behaviour as wrong and seek to make changes. Alternatively, there is more scope for those close to a victim to recognise the behaviour and encourage them to seek support. Public campaigns by Women's Aid and alternative forms of education such as the Rattle Snake theatre production (commissioned by Durham PCC) have been designed to assist with this public education aim.

This process of public education is more difficult in countries like Russia where traditional views tend to dominate. However, some collectives have achieved success in educating members of the public. The Russian Orthodox Church, for example, has promoted a 'zero-tolerance' attitude towards familial violence through working with domestic abuse organisations to develop training for priests and establishing religious support services for women.¹³⁵ Similarly, 'Papa-groups' have attempted to promote gender equality and encourage men to take on a more egalitarian approach to parental roles.¹³⁶ Unlike in England, however, there is no formal education regarding domestic violence or preventing violence against women.

This poses the question: Is the purpose of domestic abuse offences, or criminalisation more broadly, to send out a message and educate the public about different types of abusive behaviour or is it to act as a deterrent against future offending? Ideally, they can achieve both. Ashworth, for example, considers that educational policies may have a greater preventative effect than simply criminalising behaviours, despite the fact that prevention is a legitimate aim in criminalisation.¹³⁷ Similarly, Crofts and others note that criminal law plays an important role in preventing unwanted behaviours 'not just through the specific and general deterrent effect . . . but also through its educative, moralising and habituating functions'.¹³⁸

Inevitably, it is not possible to capture the number of offences that may have taken place but for the introduction of criminal offences in relation to domestic abuse. However, when we look at the statistics set out above about the number of non-molestation orders being granted in England and Wales, compared to the number of convictions for breaches, it could be argued that the prospect of a criminal

131. Cited in V Bettinson, 'Aligning Partial Defences to Murder with the Offence of Coercive and Controlling Behaviour' (2019) 83(1) JCL 71–86

132. *R v Challen* [2018] EWCA Crim 471.

133. Cited in V Bettinson (n 131).

134. *Ibid.*

135. See ANNA—Centre for the Prevention of Violence (n 11).

136. *Ibid.*

137. A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225, 226.

138. T Crofts and T Kichengast 'A Ladder Approach to Criminalising Revenge Pornography' (2019) 83(1) JCL 87–103.

conviction is a sufficient deterrent for perpetrators of domestic abuse. This argument relies on the proposition that the only reason for the smaller number of convictions is that orders are not breached. However, this may be a simplistic view that ignores the fact that many breaches will go unreported by victims who, notwithstanding the abuse they have suffered, may not wish to see their ex-partner face a prison sentence. It also ignores the difference in the standard of proof in the civil/family courts, compared to the criminal courts. The standard of proof in the civil and family courts is 'on the balance of probabilities'. This means that non-molestation orders will often be granted based on the written and oral evidence of the applicant alone. In the criminal court, the standard of proof is much higher, 'beyond reasonable doubt'. It is therefore entirely conceivable that an individual may obtain a non-molestation order but then have insufficient evidence of any breaches to prove to a criminal standard that the breach has actually occurred. This can lead to the CPS refusing to take a case forward. In turn, this reduces not only the effectiveness of the protection for the victim but the deterrent effect it may have on the perpetrator.

There are difficulties with the position in England. However, the failure of the Russian government to recognise or criminalise many forms of domestic abuse provides a culture of impunity for perpetrators and perpetuates beliefs such as 'I could kill you and no one would stop me'.¹³⁹ This, combined with the requirement for private prosecutions and for a criminal case to be dropped if the parties reconcile, a general unwillingness of the police to investigate domestic violence offences and of the judiciary to properly understand domestic abuse as a criminal matter, means that there are very few deterrents to perpetrating abuse in Russia. It is recognised that prisons in Russia are notoriously tough places compared to prisons in England, but in all but the most severe cases, a custodial sentence is unlikely to be imposed.¹⁴⁰

Protecting Victims of Domestic Abuse and Promoting Access to Justice

This section will consider the ways in which domestic abuse laws in England and Russia can empower or disempower victims. The analysis will focus on victim autonomy and participation in proceedings, the role of private and public prosecutions and the availability of support services. The analysis reveals that once again there are stark differences between the two jurisdictions. While England favours a multi-agency approach to supporting victims which often takes control of the process away from victim, in Russia there are limited organisations willing or able to support victims. This leads to victims assuming responsibility for the process.

It is arguable that victims of domestic abuse in England and Wales have many more opportunities to obtain protection from domestic abuse because of the wide range of actions available to them both through civil remedies and through the different criminal sanctions. Giving the victim the option of applying for protection under civil/family law or supporting the police in a criminal prosecution is potentially a very powerful tool and puts the control back in the hands of the victim. It enables victims to make applications to ensure that the perpetrator is not able to return to the home or contact them, thereby giving them breathing room to consider their next steps. Victims may find this choice empowering. It could therefore be suggested that providing victims with as many options as possible is a positive move.

The notion of empowering victims with choices ignores the fact that control is quite often out of the victim's hands when it comes to criminal prosecution. It is not the victim's choice at all whether to pursue a conviction, rather it is the decision of the CPS. Hitchings and others have argued against prosecutions being pursued without victim's support, stating that this could remove the power from

139. See Human Rights Watch (n 89).

140. This has been recognised in a Storyville documentary: 'Russia's Toughest Prison: The Condemned' which is available on BBC iPlayer.

them once more and lead to increased trauma.¹⁴¹ Hirschel and others agreed with this and went as far as to say that the victim is best placed to assess their own situation and whether a prosecution is the appropriate way forward.¹⁴² To do this, they would need an understanding of the different processes available and, as explained above, legal advice may not be easily accessible due to the cuts in legal aid. Instead, many victims rely on charitable organisations such as Victims First to support them through the process. Even where victims are in a position to afford legal advice, solicitors tend to specialise in only one area (family, criminal or civil) and are therefore unlikely to be in a position to provide survivors of domestic abuse with holistic advice about which process or combination of processes would best suit their needs.

This issue is compounded by the range of options available, some of which were set out earlier in this article. In addition to the specific offence, the Home Office statutory guidance on controlling and coercive behaviour sets out 64 other criminal offences that may apply in a domestic abuse case.¹⁴³ Providing such a wide range of options risks confusing not only victims but also professionals involved in this area. The police will need to consider which offence to bring a charge under, if any, and legal practitioners will need to advise their clients as to whether they should simply be relying on the CPS to pursue a criminal action or whether they should be seeking their own private action through the civil and family courts. Each action will have its own disadvantages and advantages, cost implications and timescales.

This was acknowledged by the UK government in their 2018 consultation and yet they are still proposing the introduction of another type of order. As addressed earlier in this article, the newly proposed DAPO will share similarities with non-molestation orders, causing the authors to question why such an order is required. The only obvious difference will be that DAPO will be pursued by the police rather than by the victim themselves. This has an advantage in cases where a victim is ineligible for legal aid to pursue a family court order but has the disadvantage of relying on police resources and a willingness on the part of the police to take a case forward.

The argument that we should empower victims to make a choice also ignores the coercive and controlling nature of domestic abuse. Criminalisation (with or without victim support) is potentially helpful in control and coercion cases where the perpetrator may continue to try and exert control over the victim to persuade them not to seek protection under the civil law/drop their applications. As explained above, this is something that campaigners were particularly concerned about with the criminalisation of forced marriage.

Indeed, some victims may not even self-identify as being in an abusive or controlling relationship. For example, in ‘gaslighting’ cases, a victim may be convinced because of the psychological abuse that they have suffered, that they are to blame for the perpetrator’s actions. This particular type of psychological abuse is something that Prime Minister Theresa May has indicated she is committed to tackling as part of the draft Domestic Abuse Bill.¹⁴⁴ In those cases, and following the ruling in *Opuz*, taking the responsibility for progressing an action away from the victim may be a positive step. Implementing the ruling in *Opuz* in the domestic framework in England and Wales relies on the CPS being able to successfully pursue a case without the victim’s involvement. The idea was that this would be possible under the coercive control legislation and that evidence such as 999 tapes and police bodycams could assist with

141. E Hinchings, ‘A Consequence of Blurring the Boundaries Less Choice for the Victims of Domestic Violence?’ (2006) 5(1) *Social Policy and Society* 91–101; J Herman, *Trauma and Recovery: From Domestic Abuse to Political Terror* (Basic Books, New York 1992).

142. 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.

143. See Home Office (n 7) at 17.

144. A Mikhailova, ‘Theresa May Pledges to Tighten the Law on “Gaslighting” abuse’ *The Telegraph* (23 May 2018) <<https://www.telegraph.co.uk/politics/2018/05/23/theresa-may-pledges-tighten-law-gaslighting-abuse/>> accessed 06 January 2019.

this.¹⁴⁵ Video evidence is only useful if the correct questions are asked when the police attend an incident to speak to the victim. Further police training may therefore be required if prosecutions are to be progressed without victim support. The Home Office guidance on the use of body worn devices also indicates that cameras should not be used where any allegations of serious sexual offences are made, unless the victim gives their explicit consent.¹⁴⁶ Given that 45 per cent of female victims of rape or assault by penetration reported the offender to be a partner or ex-partner, this somewhat restricts their use.¹⁴⁷

The reality is that the majority of domestic abuse incidents will take place in the privacy of a victim's home and there may not be any witnesses or outside involvement at all. Even with the 2015 offence, to pursue a conviction the CPS will need to be able to demonstrate what effect the behaviour had on a victim. This is very difficult without a direct statement. Williamson gives the example of specific gestures or phrases that may cause a victim fear harm but may not be understood by a police officer attending an incident.¹⁴⁸ Certainly, the most recent statistics (ending March 2018) indicate that, despite the admissibility of hearsay evidence in the form of body cam footage, CCTV evidence or 999 calls, nearly half (48.8 per cent) of domestic abuse-related offences are still not progressed due to evidential difficulties arising from the victim not supporting further action.¹⁴⁹

Bishop and others summarise the literature in this area and the most common factors affecting the victim's decision not to support a conviction as 'fear of retaliation by the defendant or their relatives, a desire to continue with the relationship, and dissatisfaction with, or fear over, the court process'.¹⁵⁰ Dissatisfaction with the court process could be a major issue for victims disengaging with criminal cases and, with a court system which is bulging at the seams, this does not look to be an issue that will be improved any time soon. Cases are taking longer to be listed, too many cases are listed in a day leading to adjournments, and other cases need to be adjourned because of evidential problems that should have been resolved pre-trial. Bishop and others argue that the way to combat this is to increase confidence in the criminal justice system and point out that this is necessary because 'a victim-centred approach is at the heart of the National Strategy to End Violence Against Women and Girls'.¹⁵¹ Bishop and others also indicate that there is a need for 'increased training for legal professionals' more generally on the effect of trauma on witness evidence.¹⁵² At a Justice for Women event in November 2018,¹⁵³ when discussing the approach of lawyers to coercive and controlling behaviour cases, Wistrich¹⁵⁴ suggested that lawyers acting in domestic abuse cases should have to participate in training and obtain accreditation in the same way that Children Panel solicitors do in care proceeding cases. In an already stretched system where the number of legal aid solicitors are already lacking, additional burdens to instructing a solicitor are unlikely to be welcomed. However, as stated above, lawyers practising in this area need to, as a minimum, develop an understanding of the different options available to victims in the civil, family

145. See Home Office (n 7).

146. Home Office, 'Guidance for the Police use of Body-worn Video Devices' (2007) <<http://library.college.police.uk/docs/homeoffice/guidance-body-worn-devices.pdf>> accessed 06 January 2019.

147. Office for National Statistics, 'Sexual offences in England and Wales: Year Ending March 2017' (2018) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffencesinenglandandwales/yearendingmarch2017/previous/v1>> accessed 06 January 2019.

148. See Williamson (n 56).

149. See Office for National Statistics (n 1).

150. C Bishop and V Bettinson, 'Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offence of 'Controlling or Coercive Behaviour' (2018) 22(1) E&P 3, 6. See also V Bettinson, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?' (2016) 66(2) *Northern Ireland Legal Quarterly (NILQ)* 179–97; S Hilder and V Bettinson, *Domestic Violence: Interdisciplinary Perspectives on Protection, Prevention and Intervention* (Palgrave Macmillan, Basingstoke 2016).

151. *Ibid.*

152. *Ibid* 3–29.

153. See Justice for Women conference (n 34).

154. Solicitor and co-founder of Justice for Women.

and criminal courts. If the government continue with their plans to introduce more legislation on this subject, a knowledge of one of those practice areas alone will no longer suffice and victims will require increasingly holistic advice about all their available options.

The limitations of victim participation in criminal proceedings can be seen in the case of Russia where, under Articles 115 and 116, prosecutions are usually dealt with privately. This means that unlike in England, the onus is on the victim to start the proceedings, gather the evidence and present the case. Victims are expected to do so without any knowledge of the legal process, the evidential requirements to secure a successful prosecution or support from a publicly funded legal adviser (unless, of course, they are willing and able to incur the costs in paying for an investigator and prosecutor). The victim is expected to take this action at a time when she is likely to be emotionally and physically vulnerable and may be facing further abuse from the perpetrator. They could potentially even still be living with him, because there are no available family law injunctions which would be available to remove the perpetrator from the home, prohibit him from contacting her and provide the victim with important breathing space.

As explained above, the Russian government have justified using private prosecutions on the basis that, given the 'personal nature' of the offence, it is appropriate for the victim to decide whether a prosecution is in their best interests. This may seem admirable in theory, however the reality is that many victims may not be aware of what is in their best interests and this is exaggerated further when no public funding or support services are available to advise a victim about their options. It also reinforces the message that domestic abuse is a private matter which does not require state involvement. Even when a victim pursues a prosecution, they are left with virtually no state protection to support them in the conduct of proceedings. There are concerns that when victims do pay privately for representation, lawyers have not received the necessary training to effectively advocate for domestic abuse survivors.¹⁵⁵ Likewise, a lack of training in the judiciary often leads judges to readily accept provocation as a defence and take such conduct into account in determining sentencing. Judges can and do consider the 'the conduct of the victim that led to the crime'.¹⁵⁶ Research by Danilenko and others also suggests that the judiciary mitigate defendants' punishments if they try to get 'help' for the victim, they are in a 'difficult situation' or if they show 'compassion for the victim'.¹⁵⁷

Arguably, a more effective compromise may be similar to the approach taken in Germany where complainants in criminal proceedings play a more active role as a 'subsidiary prosecutor', rather than either a prosecution witness or the prosecutor themselves. Doak describes that under this system the victim is entitled to participatory rights, including:

The right to be present at all stages of the process; to put additional questions to witnesses; to provide additional evidence / make a statement; or to present a claim for compensation . . . the procedure thereby recognises the status of the complainant as the alleged victim of the criminal offence, whilst acknowledging at the same time the normative role of the state in prosecuting crime.¹⁵⁸

Importantly, however, the public prosecutor is ultimately responsible for preparing and presenting the prosecution and therefore the victim does not bear this burden. Such an approach would have clear benefits for victims in both England and Russia.

It is not just about focusing on changes to the legal process, it is about ensuring that the services are available for survivors to access those processes and support them throughout. This has been recognised by academics who have argued that '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

155. See Johnson (n 10).

156. Criminal Code of the Russian Federation Article 16[2]h.

157. See Johnson (n 10).

158. J Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *J Law & Soc* 294–316.

credited with solving the problem'.¹⁵⁹ The impact of the cuts to legal aid and the lack of legal advice in England and Wales have already been addressed. However, there have also been cuts to other support services as well. For example, while it is undeniable that there are more refuges available in England and Wales than there are in Russia, this is still not sufficient for the demand. Women's Aid reported that in 2016/17 60 per cent of referrals to their refuges were refused simply because of lack of bed spaces.¹⁶⁰ The nature of coercive and controlling behaviour means that many survivors will have been isolated from friends and families. Therefore, without a refuge space available, they may feel no choice but to return to their abusive relationships. There may be additional complicating factors, which may mean that they are unable to find a refuge space. Some refuges have restrictions on survivors bringing pets or male teenage children with them which may leave a survivor with the choice of leaving them behind with the perpetrator or staying themselves.

Similar difficulties exist in Russia, where there is a lack of funding dedicated to establishing support services for survivors. It is understood that there are approximately 42 refuges in Russia (a country which is approximately 70 times bigger than England).¹⁶¹ Many refuges impose residency requirements, meaning that if a victim does not live in the region where the refuge is based, they are unable to access support, while others exist to support particularly marginalised or vulnerable groups only such as teenage mothers. This is particularly difficult for women who live outside the large cities of St. Petersburg and Moscow.¹⁶² The majority of refuges receive nominal government funding and therefore rely on financial sponsorship from private companies and non-government organisations. Obtaining funding can be difficult because of the societal perceptions of domestic abuse as a private matter. Likewise, there is a scarcity of organisations dedicated to victim rehabilitation and the burden for providing support falls on women's charities.¹⁶³ It has been reported that psychologists and social workers employed by the state to work with survivors often perpetuate the same perceptions of domestic abuse as the criminal justice system, including a focus on reconciliation at all costs and a belief that victims provoke battery and therefore require counselling to ensure that when they return to their abusers they do not repeat their mistakes.¹⁶⁴ There have, however, been a number of women's rights movements which have sought to advocate change through lobbying for legislative change.¹⁶⁵ In turn, many of these organisations have become domestic abuse specialists, able to provide practical support to women navigating unfamiliar court process.

A final key difference in the approaches adopted by the two jurisdictions which affects the ability of victims to secure access to justice is in the agencies which engage in the provision of support. The position in England is underpinned by the recognition that victims' needs are complex and that domestic abuse creates a range of problems that are unlikely to be effectively addressed by a single agency.¹⁶⁶ As such, England favours a multi-agency approach. This is evidenced through the introduction of Specialist Domestic Violence Courts, Multi-Agency Risk Assessment Conferences (where information is shared on the highest risk domestic abuse cases between representatives of local police, health, child protection, housing practitioners and specialists from the statutory and voluntary sectors) and Independent Domestic Violence Advisors (whose role it is to address the safety of victims at high risk of harm from family members and secure their safety). An example of a multi-agency project is the Home Office funded

159. E Stanko, *Intimate Intrusions (Routledge Revivals): Women's Experience of Male Violence* (London, Routledge 2013) 165.

160. Women's Aid, 'Refuges Send Out SOS in Response to Government's Proposed Supported Housing Funding Plans' (2017) <<https://www.womensaid.org.uk/refuges-send-sos-response-governments-proposed-supported-housing-funding-plans/>> accessed 27 November 2018.

161. See ANNA—Centre for the Prevention of Violence (n 11).

162. See Mahserjian (n 21).

163. See Johnson (n 10).

164. *Ibid.*

165. See, for example, ANNA—Centre for the Prevention of Violence.

166. See Graca (n 124).

project entitled 'The Whole System Approach'¹⁶⁷ which is seeking to integrate support services into both the criminal justice response and the family court process. The project has introduced domestic abuse cars in West Yorkshire, which will follow the frontline officers to a domestic abuse incident.¹⁶⁸ A police officer and a specialist IDVA will be present in the second car to provide support to the victim once a perpetrator has been removed from the property. In her research into the role of IDVAs, Taylor-Dunn found that victims supported by an IDVA were 'more likely to continue with the criminal justice process'.¹⁶⁹ Therefore, the involvement of IDVAs at this very early stage could be a positive step towards better victim engagement.

Acknowledging that there will still be many victims who do not want to engage with the criminal justice process, but who do want to seek protection through the family courts, the project has also introduced Family Court Liaison Workers (FCLWs).¹⁷⁰ The FCLWs are present in courts in the Northumbria, Cleveland and Durham areas of England and provide support and assistance to unrepresented victims of domestic abuse throughout the family court process. IDVAs and FCLWs cannot provide legal advice or representation, but they can provide much-needed support for victims who, because of the nature of the abuse they have suffered, may have become isolated from the rest of society.

Graca highlights that while a multi-agency approach is favoured by the Istanbul Convention, it is not without difficulties.¹⁷¹ The key concerns are that multi-agency initiatives work as a 'mere forum for discussion with few practical results', or as a 'smokescreen' for local government to draw attention away from ineffective practices, and a way to show good will and engagement in finding solutions for domestic violence'.¹⁷² It is recognised that they can also be a way for the police and local authorities to 'divert accountability for their actions' to other organisations.¹⁷³ Despite these difficulties, however, the presence of multi-agency working suggests that there are many organisations with an ostensible interest in supporting victims. The same does not appear to be true of Russia where no government department or state-funded organisation seem willing or competent in assuming accountability for securing access to justice for victims.

Conclusion

It is acknowledged that although there is no single model that will lead to the eradication of domestic violence in all societies, it is recognised by the authors that there are several key elements which any effective policy will incorporate to ensure access to justice for victims, the punishment of offenders and compliance with international obligations. These include efficient responses from law enforcement and judicial officers who investigate, prosecute and punish perpetrators; the empowerment of women through education and legal literacy; appropriate legislative frameworks, policing systems and judicial procedures to provide adequate protection; and support services such as shelters and public funding.¹⁷⁴

As has been considered throughout this article, while domestic abuse has been at the forefront of legal policy changes in both Russia and England in recent years, their approaches have contrasted greatly. At a very basic level, the two jurisdictions have different theoretical understandings of domestic abuse. This has impacted on the types of protections that are made available to victims (or the lack thereof) and the countries' willingness to invest in support services and give effect to international instruments. On the

167. <<http://dawsa.org.uk>> accessed 06 January 2019.

168. <https://www.westyorkshire-pcc.gov.uk/media/135339/amber_rudd_221217.pdf> accessed 06 January 2019.

169. H Taylor-Dunn, 'The Impact of Victim Advocacy on the Prosecution of Domestic Violence Offences: Lessons from a Realistic Evaluation' (2016) 16(12) *Criminology and Criminal Justice (CRJ)* 21–7.

170. <<http://dawsa.org.uk/partnership-work-with-civil-and-family-courts/>> accessed 06 January 2019.

171. See Graca (n 124).

172. Ibid.

173. Ibid.

174. See Hasselbacher (n 84).

one hand, in England there are an ever-expanding range of options available to victims under the criminal, civil and family law justice systems. However, the quantity of opportunities can lead to a confusing system for both victims, the police and practitioners. These difficulties are compounded by a lack of public funding and specialists who have a holistic understanding of the options. In contrast, in Russia there is a lack of statutory protection under the criminal law and these options have reduced in recent years. There are next to no civil remedies available to victims. There has been little, if any, investment in infrastructure to change attitudes towards domestic abuse or provide training for law enforcement or the judiciary.

There are a number of steps that could improve the approach to domestic abuse in Russia. Firstly, the authors would suggest establishing a statutory definition of domestic abuse which recognises the broad range of behaviours that can fall within its remit, similar to that proposed under the draft Domestic Abuse Bill in England and Wales. A statutory definition would assist in improving public understanding of domestic abuse as a gendered offence and a human rights infringement. In conjunction with this, the government should begin collecting statistics on domestic abuse, so they are able to effectively allocate resources to domestic abuse prevention/perpetration programmes similar to those operating in England and Wales. Such programmes have met with some success in encouraging perpetrators to think about their abusive behaviour, consider the impact this had on their partners and children and provide them with tools and techniques to tackle abusive behaviours.¹⁷⁵ This could also fit within a broader policy regarding the prevention of violence against women to send a clear message about the State's disapproval of domestic abuse and which would address many of the CEDAW Committees' concerns.

The authors would also suggest that crimes committed by family members should be excluded from the category of private prosecution and should be pursued publicly, with the assistance of the state. This would ensure that the sole responsibility for bringing a prosecution would not be left with the victim who is likely to have no knowledge of the legal process or evidential requirements. In turn, this may increase the number of successful prosecutions.

Finally, returning to the theme of education, there would be benefits of including formal training about gender and domestic abuse at all stages of education and particularly for those employed by the state, including social services, police, judges, prosecutors and public administrations.¹⁷⁶ Of course, all of this would require a commitment to ending domestic violence and heavy financial investment, which seems at odds with the Russian government's current passivity towards these issues.

Clearly, both jurisdictions must take action to ensure that their policies are better equipped to prevent domestic violence, protect victims and prosecute perpetrators. A possible solution for both countries to meet these objectives would be a streamlined system where both victim-led civil and state-led criminal options are facilitated in expanded specialist domestic abuse courts, with funded IDVAs present and special measures facilities established.

It is acknowledged that specialist domestic abuse courts (SDACs) have previously been piloted in England and Wales. However, these were criminal courts and therefore only dealt with one aspect of a victim's case. As addressed earlier in this article, domestic abuse cases can rarely be dealt with by one set of proceedings and often there will be interrelated issues to be considered such as child arrangements and divorce/judicial separation. The previous format of the SDAC ignored this and meant that victims would also need to commence separate sets of proceedings in non-specialist family courts, with limited special measures facilities and a lack of court based IDVAs. The authors suggest that a similar approach could be taken to that adopted in the Family Drug and Alcohol Courts (FDACs). In the FDACs, a holistic approach is taken to cases, with a specialist team from a range of professions (including medical

175. E Williamson and M Hester, 'Evaluation of the South Tyneside Domestic Abuse Perpetrator Programme (STDAPP) 2006–2008' (2009) University of Bristol School for Policy Studies <<http://www.bristol.ac.uk/media-library/sites/sps/migrated/documents/finalreport1.pdf>> accessed 06 January 2019. See also N Stanley, N Graham-Kevan, R Borthwick, 'Fathers and Domestic Violence: Building Motivation through Perpetrator Programmes' (2012) 21(4) *Child Abuse Review (AoCPP)* 264–74.

176. See ANNA—Centre for the Prevention of Violence (n 11).

professionals, child and family social workers, substance misuse teams and domestic abuse specialists) supporting the Judge in the process. The specialist team draw up an intervention plan and encourages parties to engage with specialist services. In a domestic abuse case, this could be encouraging a victim to engage with an IDVA or specialist support service and for the perpetrator it could be encouraging them to participate in a perpetrator programme.

The use of specialist court facilities, designed with special measures in mind and with allocated IDVAs, could potentially allow victims to take a more active role in proceedings. This could be in a similar way to ‘subsidiary prosecutors’ in Germany, should they so wish, but in a supportive environment, where their safety is prioritised. The inclusion of non-lawyer specialists may also mean that there is scope to work with perpetrators during the proceedings to address their behaviour and prevent the same offences being committed in their future relationships.

Arguably, society has moved on since the initial SDAC pilot and the understanding of domestic abuse has now developed, as demonstrated by the Sally Challen case. With the renewed Government commitment to tackling domestic abuse and in particular the financial commitments set out in Annex C of the consultation response¹⁷⁷, perhaps now is the time to reconsider the potential benefits of rolling out specialist courts across England and Wales?

These recommendations would all require significant financial investment by both countries but would likewise ensure that international obligations are met and, more importantly, victims are supported in accessing justice at a time when they are most vulnerable.

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177. See HM Government (n 42), Annex C.

A CASE STUDY APPROACH:

LEGAL OUTREACH CLINICS AT NORTHUMBRIA UNIVERSITY

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INTRODUCTION

Over the last decade there have been significant threats to access to justice, including the reduction in the availability of legal aid implemented by the Legal Aid Sentencing and Punishment of Offenders Act 2012¹ and cuts to charitable organisations and law clinics which have resulted in a reduction or loss of legal services². These measures have impacted disproportionately on people living in disadvantaged and minority communities both because they are likely to be unable to afford to pay for legal advice and representation when they require it and because they are more likely to face legal problems in those areas which have now been removed from the scope of public funding, such as welfare benefits, debt and immigration³. Structural barriers aside, there

¹ In 2010 the Government announced that it would implement a series of reforms to the legal aid regime. The reforms included removing large areas of law from the scope of legal aid; tightening the financial eligibility criteria; cutting fees paid to providers by 10%; and providing more legal advice over the telephone. Financially, the reforms aimed to reduce the legal aid budget by 23%. This equated to cuts of £350 million in 2013 and annual cuts of approximately £268 million until 2018. The reforms were implemented through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which can be accessed at: <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>.

² See, for example, Siddiqui, H (2018) 'Counting the Cost: BME women and gender-based violence in the UK' IPPR Progressive Review.

³ The Council of Europe Commissioner for Human Rights has stated that "vulnerable and marginalised groups of people have been hit disproportionately hard, compounding pre-existing patterns of discrimination in the political, economic and social spheres". This has been reported in "Safeguarding human rights in times of economic crisis", November 2013; Report of the Special Rapporteur on Extreme Poverty and Human Rights, 9 August 2012, UN Doc A/67/278.

is evidence that people who are disadvantaged by reason of financial hardship, unresolved mental health difficulties or immigration status may also be less aware of their legal rights and how to secure the assistance they need⁴. In addition, they may be less likely to seek advice because of a distrust of legal advisers or intimidation by the legal process⁵.

Clinical legal education (CLE) has often been called on to 'fill the gap' created by the above measures⁶. Whilst this is not plausible due to the sheer volume of cases, the complexity and urgency of many legal disputes, and the demands that this places both on students, clinical supervisors and the institutions which fund them, it is recognised that law school clinics nonetheless play a valuable role in promoting access to justice for the communities they serve. This is evidenced by the fact that 40% of the 225 clinics within the LawWorks Clinics Network in England and Wales were operated by law schools⁷. Together, they dealt with 32% (over 18,000) of enquiries between April 2016

⁴ Amnesty International (2016) 'Cuts that Hurt: The Impact of Legal Aid Cuts in England and Wales on Access to Justice'. London: Amnesty International. Retrieved from: <https://www.amnesty.org/en/documents/eur45/4936/2016/en/>.

⁵ See, for example, Siddiqui, H (2018) 'Counting the Cost: BME women and gender-based violence in the UK' IPPR Progressive Review; Legal Services Commission (2009) 'Report on Black, Asian and Minority Ethnic (BAME) Women, Domestic Abuse and Access to Legal Aid'; Schetzer, L, Mullins, J and Buonamano, R (2002) 'Access to Justice and Legal Needs: a project to identify legal needs, pathways and barriers for disadvantaged people in New South Wales' Background Paper – available at [http://www.lawfoundation.net.au/ljf/site/articleIDs/012E910236879BAECA257060007D13E0/\\$file/bkgr1.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/012E910236879BAECA257060007D13E0/$file/bkgr1.pdf) and Forell, S and Gray, A (2009) 'Outreach legal services to people with complex needs: what works?' Law and Justice Foundation Justice Issues Paper 12.

⁶ See Campbell, E (2014) 'Pro bono is great education for law students but they shouldn't fill the gap left by legal aid cuts' published in The Conversation – available at <https://theconversation.com/pro-bono-is-great-education-for-law-students-but-they-shouldnt-fill-gap-left-by-legal-aid-cuts-34323>.

⁷ LawWorks Clinics Network Report April 2016-2017: analysis of pro bono legal advice work being done across the LawWorks clinics network between April 2016 and March 2017 – accessed at <https://www.lawworks.org.uk/sites/default/files/LawWorks%20Clinics%20Report%202016-17.pdf> (last accessed on 26 September 2018).

and March 2017⁸. In addition to the provision of advice, law school clinics also account for 50% of clients receiving general information, signposting and referrals⁹. In the North-East of England, where the authors are based, there are 8 clinics within the LawWorks Clinics Network. Between April 2016 and March 2017, they dealt with 1,295 enquiries: 544 of these enquiries were on an 'advice' basis, whereas 588 related to general information, signposting and referrals¹⁰.

The emphasis on promoting access to justice is reflected in the educational aims of CLE.

This has been summarised by Wizner as follows:

“What do students learn from representing clients in the law school clinic that they would not learn from their regular academic courses? First, they learn that many social problems, like poverty, can be seen and acted upon as legal problems. Second, they learn that legal representation is as necessary to the resolution of complex legal problems of the poor as it is to those of the affluent. Third, they learn to develop and apply legal theory through the actual representation of clients. Fourth, they learn to use the legal system to seek social change. And finally, they learn the limits of law in solving individual and social problems... These are all important intellectual and ethical lessons for law students to learn¹¹”.

CLE is therefore socio-legal in its pedagogical approach as it “invites students to see the wider context and everyday realities of accessing an imperfect legal system, enabling

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Wizner, S (2002) 'The Law School Clinic: Legal Education in the Interests of Justice' Fordham Law Review Volume 70 Issue 5 Article 29.

them to integrate their learning of substantive law with the justice implications of its practical operation”¹². Social justice aside, the broader value of student participation in CLE is well-documented and includes community engagement,¹³ general skills improvement and preparation for the workplace¹⁴.

Through a case study approach, this paper discusses two projects which have been established by clinical supervisors at Northumbria University to support access to justice and promote the development of students’ professional skills and identities through CLE within disadvantaged or minority communities in the North East of England. The projects adopt the model of ‘legal outreach services’ because they operate within distinct communities to provide advice to target groups¹⁵. The paper will first discuss the different models of CLE; simulation, drop in clinics, letters of advice and full representation. The second part of the paper will go on to discuss legal outreach models and set out the key features of the legal outreach approach. The third part of the article will set out the considerations underpinning the two outreach projects operated by Northumbria Law School: Legal Advice Byker (LAB) and Empower 4 Justice (E4J). The fourth part of the paper will set out in detail the operation of LAB and E4J. The

¹²Evans, A. Cody, A. Copeland, A. Jeff, G. Joy, P. Noone, M and Rice, S (2017) Australian clinical legal education: models and definitions in *Australian Clinical Legal Education* published by ANU Press. p.41.

¹³ Russell, J (2013) ‘Running drop-in advice services in a university setting’ *International Journal of Clinical Legal Education* Volume 19.

¹⁴ Cantatore, F (2018) ‘The Impact of Pro Bono Law Clinics on Employability and Work Readiness in Law Students’ *International Journal of Clinical Legal Education*, Vol 25, No 1.

¹⁵ Forell, S and Gray, A (2009) ‘Outreach legal services to people with complex needs: what works?’ *Law and Justice Foundation Justice Issues Paper 12*.

final part of the article will discuss the benefits and limitations of this approach to CLE from a student and community perspective.

MODELS OF CLINICAL LEGAL EDUCATION

The term CLE has different meanings to academics, legal professionals and students¹⁶. This is largely because there is no generally accepted definition of CLE¹⁷. It is, however, widely recognised that CLE is an increasingly prevalent feature of legal education in England¹⁸. CLE fits within the wider pedagogical remit of experiential learning, in which students seek to develop their professional skills through exposure to 'real' experiences¹⁹. However, there are many different approaches and models which can be encompassed within CLE, each with differing financial and staffing resource requirements, forms of supervision and levels of advice provided to the client. This reflects the fact that clinics have varying staff and student numbers and institutional support²⁰. In addition, institutions' decisions about which model of CLE to adopt may depend on their view as to whether its main aim is the education of students or the

¹⁶ Evans, A. Cody, A. Copeland, A. Jeff, G. Joy, P. Noone, M and Rice, S (2017) Australian clinical legal education: models and definitions in Australian Clinical Legal Education published by ANU Press.

¹⁷ Ibid.

¹⁸ See, for example, Bleasdale-Hill, L and Wragg, P (2013) 'Models of Clinic and Their Values to Students, Universities and the Community in the post-2012 Fees Era. International Journal of Clinical Legal Education Issue 19, pp. 257-270.

¹⁹ Evans, A. Cody, A. Copeland, A. Jeff, G. Joy, P. Noone, M and Rice, S (2017) Australian clinical legal education: models and definitions in Australian Clinical Legal Education published by ANU Press, p. 41.

²⁰ Kemp, V. Munk, T and Gower, S (2016) Clinical Legal Education and Experiential Learning: Looking to the Future. University of Manchester. Accessed at: <http://eprints.nottingham.ac.uk/40920/1/Final%20Report%2022.09.2016..pdf>.

advancement of social justice (or indeed both). The main clinical models are identified further below:

(a) Simulation

Institutions may offer their students simulated client experiences in which they advise hired actors in relation to mock problem-based learning scenarios or conduct mock hearings²¹. This simple model of CLE can be integrated within existing modules and does not require qualified practitioners or significant financial resourcing, although some costs may be incurred if the actors are acting in a professional capacity and seek payment. However, this model also lacks community benefit, does not expose students to real people with complex needs and is likely to do little to instil a social justice ethic into students which they may take forward into a future career.

(b) Drop in clinics

Russell identifies that the drop-in model is characterised by clients being provided with on-the-spot one-off generalist information, advice or signposting by students who interview and assess clients and research the enquiry while the client waits²². Unlike the 'letters of advice' model (outlined below), no prior filtering or triage takes place before the appointment. This means that students are "presented with people who do not necessarily have a readily identifiable legal problem and learn to assist clients in

²¹ See Milstein, E (2001) 'Clinical Legal Education in the United States: In-House Clinics, Externships and Simulations' 51 J Legal Educ. 375.

²² Russell, J (2013) 'Running drop-in advice services in a university setting' International Journal of Clinical Legal Education Volume 19.

translating their concerns into legally recognisable categories”²³. Kemp et al note that drop-in clinics are a relatively recent trend in CLE²⁴. They prioritise community engagement over educational development and endeavour to address the unmet legal need which has arisen following the series of threats to access to justice. As such, drop in clinics typically operate in areas which have seen significant legal aid cuts such as family, housing, immigration and welfare law.

The key benefits of drop-in clinics are that they expose students to people from all walks of life, including disadvantaged and vulnerable communities. Russell notes that students who participate in drop-in clinics develop their interviewing skills, practical legal knowledge and understanding of client care²⁵. However, drop-in clinics inevitably have limitations. For example, instead of students conducting detailed legal research to identify a solution to a clients’ enquiry, they may instead search for pre-formulated advice on an existing practitioner website such as Citizens Advice’s ‘advisernet’²⁶. Alternatively, they may simply just provide the client with an information leaflet²⁷. In turn, this means that the level of advice provided to clients can be very basic. Cases with any complexity are unlikely to be appropriate for advice without significant supervisor

²³ Ibid.

²⁴ Kemp, V. Munk, T and Gower, S (2016) *Clinical Legal Education and Experiential Learning: Looking to the Future*. University of Manchester. Accessed at: <http://eprints.nottingham.ac.uk/40920/1/Final%20Report%2022.09.2016..pdf>.

²⁵ Russell, J (2013) ‘Running drop-in advice services in a university setting’ *International Journal of Clinical Legal Education* Volume 19.

²⁶ Advisernet is an online resource tool for advisers and volunteers at Citizens Advice which covers areas such as welfare law, employment, benefits, housing and debt. The website can be accessed by subscription at: <https://www.citizensadvice.org.uk/>.

²⁷ Russell, J (2013) ‘Running drop-in advice services in a university setting’ *International Journal of Clinical Legal Education* Volume 19.

input because the student does not have sufficient time to get to grips with the issue. In turn, this reduces the students' engagement with the case and their role may be reduced to note taking. As no advice is provided in writing, the students do not develop their legal writing or drafting skills and clients do not receive a comprehensive document containing the advice which they can refer to at a later date. Further, strict drop in models can have practical difficulties. Without pre-arranged appointments, it is difficult to predict the number of clients who will attend the clinic and therefore the amount of student volunteers and supervising solicitors in the requisite practice area needed to service the clients.

(c) Letters of advice

Russell describes the letters of advice model as characterised by clients receiving a one-off letter of advice (but no face-to-face advice) after a lengthy process in which the enquiry is filtered by an administration team and supervising solicitor, an information gathering interview has taken place (at which no advice is provided), and students have spent a period of time conducting research²⁸. This scenario seems to balance the needs of clients with the educational needs of students. Clients are provided with tailored and comprehensive legal advice in relation to their enquiry, however the trade-off is the inevitable delay it takes students to complete the necessary stages (i.e. fact-finding interview, research, preparing the letter of advice).

(d) Full representation clinic

²⁸ Ibid.

Practice Report: Clinic the University and Society

Some clinics more closely resemble a full-service law firm in which students do not only provide advice but also represent clients in court and tribunal proceedings. Bleasdale-Hill et al note that this can include students being supervised by external practitioners who assume ultimate responsibility for the quality of the advice; advice provided under the practicing certificate of a qualified pro bono director; or by students under the supervision of qualified academic members of staff²⁹.

An example of a full-representation model is the SLO at Northumbria University. All students enrolled on the four-year M Law Exempting law degree (a programme which combines the undergraduate law degree with the requirements of the Legal Practice Course (LPC) or Bar Practitioner Training Course (BPTC)) undertake a year-long assessed clinical module in the SLO in their final year. This option is also available to students on the LPC and BPTC as an elective module in the second semester. Students provide pro bono advice and potentially representation to members of the public under the supervision of qualified solicitors, barristers or caseworkers. Around 200 students work in the clinic each academic year³⁰. Students specialise in their supervisor's area of expertise, such as civil litigation, crime, welfare benefits, housing law, employment and family law. Inevitably, this is a more labour-intensive model of CLE both for staff and

²⁹ Bleasdale-Hill, L and Wragg, P (2013) 'Models of Clinic and Their Values to Students, Universities and the Community in the post-2012 Fees Era. *International Journal of Clinical Legal Education* Issue 19, pp. 257-270.

³⁰ Information about the Student Law Office can be accessed at: <https://www.northumbria.ac.uk/about-us/academic-departments/northumbria-law-school/study/student-law-office/>.

students but in principle this model has the potential for great rewards in terms of client satisfaction, community engagement and student development.

Law school clinics can also be categorised as ‘individual’, ‘specialist’ or ‘community based’³¹. The individual service model concentrates on the students’ ability to engage with core issues of legal practice that come from the experience of working with a client on any legal case. As such, they do not focus on the legal needs of a particular community or area of law³². In contrast, the specialist model is defined by a particular area of legal need or a broader national concern. In the United Kingdom an example of a specialist clinic would be the Dementia Law Clinic at Manchester University. Established in 2015, this clinic enables students to provide advice under supervision to clients on a range of dementia issues. Cases are referred by Dementia UK and the Alzheimer’s Society, and students provide advice to carers and, where appropriate, clients with dementia³³.

The key feature of the community-based model is that students work with particular communities or geographic areas with the aim of empowering the people they serve. Some projects will focus on a variety of different practice areas, thereby exposing their students to a diverse caseload. In contrast, other projects will focus on niche areas which

³¹ Winkler, E (2013) ‘Clinical legal education: a report on the concept of law clinics’, accessed at https://law.handels.gu.se/digitalAssets/1500/1500268_law-clinic-rapport.pdf.

³² Ibid.

³³ Further information about the Dementia Clinic at Manchester University can be accessed at <https://www.law.manchester.ac.uk/about/stories/dementia-law-clinic-2/>.

are determined by, and according to the needs of, community members³⁴. Further, as their role may also require the students to deliver training, they become law teachers as well as legal advisers. Street Law is a good example of a community-based programme which develops students' skills and empowers communities³⁵.

LEGAL OUTREACH MODELS

Legal outreach has been defined as “face-to-face legal assistance and advice services delivered away from the primary service/office, in places accessible to the target group”³⁶. Such services tend to focus on people who are marginalised or socially excluded as a result of issues such as homelessness, disability, mental health issues, vulnerable immigration statuses, financial hardship, unemployment or remote location³⁷. As such, individuals may have multiple, complex and interrelated needs which are relevant to their legal problems. Legal outreach clinics therefore share some common features with drop-in clinics and community-based projects, discussed earlier in this article.

³⁴ Winkler, E (2013) ‘Clinical legal education: a report on the concept of law clinics’, accessed at https://law.handels.gu.se/digitalAssets/1500/1500268_law-clinic-rapport.pdf.

³⁵ Street Law’s website states its aims as ‘advancing justice through classroom and community education programs that empower people with the legal and civil knowledge, skills and confidence to bring about positive change for themselves and others. More information can be obtained at <https://www.streetlaw.org/>.

³⁶ Forell, S and Gray, A (2009) ‘Outreach legal services to people with complex needs: what works?’ Law and Justice Foundation Justice Issues Paper 12.

³⁷ Ibid.

Forrell et al's study of 16 legal outreach projects in New South Wales identified that quality outreach advice services are effective in reaching target clients who have not previously sought advice from mainstream legal service providers, or who otherwise would not have received legal assistance. Further, there is evidence that legal assistance through outreach services can provide positive legal outcomes, improve clients' circumstances and prevent problems escalating³⁸. In order to achieve positive outcomes, outreach services must be appropriately located and connected with target groups and their support agencies. In addition, they must fill a gap in the existing advice provision to the target group. The service must operate from a location which is physically (and financially) accessible to users and which has private spaces or clients and advisers to discuss confidential cases.

Forrell's review of existing outreach projects indicated that the legal advisers working in outreach services required particular skills. These included having a 'generalist' knowledge across varied practice areas as many clients have intersecting legal problems, having an awareness of other organisations and support services which clients could be referred to and being skilled in communicating and working with the target group³⁹. To this, the authors would add that advisors must also be compassionate and able to empathise with how clients' difficulties can impact their engagement with legal services. For example, clients with complex needs may not always attend appointments, may

³⁸ Ibid.

³⁹ Ibid.

give contradictory accounts, may not provide the relevant documentation and may struggle to remain engaged in the process. It is valuable for students to gain an appreciation of how legal needs impact individuals' abilities to engage in the legal process.

The projects discussed within this article, LAB and E4J, can be regarded as legal outreach services as they both focus on working with targeted communities in order to address unmet legal need⁴⁰. The advice is provided by students within the communities and therefore in places which are frequented and trusted by the target groups. Partnerships have been formed with local agencies and/or law firms in order to carry out appropriate legal needs and service gap analyses, develop appropriate systems of referrals and ensure legitimacy within the target communities. In relation to the targeted communities, LAB operates within the community of Byker in the east-end of Newcastle upon Tyne to provide initial advice to its residents. Byker has a score of 2 on the index of multiple deprivation⁴¹. Of the families living in the community, 48% live in local authority accommodation⁴², 53% of the children are regarded as living in low-income families⁴³ and over 25% describe themselves as living with a long-term health problem

⁴⁰ Ibid.

⁴¹ Information about the socio-economic demographics of Byker can be accessed at: <http://www.knownewcastle.org.uk/DrillDownProfile.aspx?pid=44&rt=11&rid=59029&cookieCheck=true>

⁴² Ibid.

⁴³ Ibid.

which affects their day-to-day activities⁴⁴. LAB is delivered in partnership between the University and a regional legal aid law firm situated in Byker.

In contrast, E4J operates in the ward of Wingrove which is situated in the west-end of Newcastle. Whilst Wingrove has a lower score of 13 on the index of multiple deprivation, many of its female residents experience other barriers to securing legal advice. Wingrove has a high black and minority ethnic (BAME) population; over 50% of its residents identify as 'non-white' and 21% of households have no people for whom English is their first language⁴⁵. E4J was established with the principle aim of empowering BAME women through the provision of initial legal advice. Students work in association with a regional legal aid firm and a specialist BAME women-only organisation to provide initial legal advice to BAME women who are unable to secure legal aid or pay privately for advice. In addition to structural barriers, in many of the cultures served by the project, there are sociocultural practices that can permit male dominance and a culture of shame if BAME women dishonour their families by taking private issues into the public domain⁴⁶. Many BAME women with insecure immigration statuses, or which are dependent on a UK national spouses may also fear engaging with formal justice systems (i.e. lawyers, judges and the court system) because of fear they

⁴⁴ Ibid.

⁴⁵ Information about the socio-economic demographics of Wingrove can be accessed at: <http://www.knownewcastle.org.uk/DrillDownProfile.aspx?rt=11&rid=58981&pid=44&cookieCheck=true&Script=1>.

⁴⁶ Siddiqui, H (2018) 'Counting the Cost: BME women and gender-based violence in the UK' IPPR Progressive Review.

will 'say the wrong thing' and compromise their security⁴⁷. BAME women who have been brought to England upon marriage to a UK national may not speak English, lack cultural networks outside their immediate community and therefore lack awareness of their rights⁴⁸.

The Legal Aid Agency (formerly the Legal Services Commission) have identified that many BAME women distrust the legal system because of 'referral fatigue' (telling their story to numerous professionals who are unable to assist) whilst others fear engaging with a solicitor and are intimidated by a formal legal environment⁴⁹. For some BAME women, there are practical difficulties seeking advice because they are chaperoned to appointments by family members and therefore are unable to report or seek help. It has also been reported that BAME women who are able to secure access to a solicitor, find that professionals may be unable to understand the cultural issues in their case sufficiently to represent them⁵⁰. Other BAME women felt that solicitors were too 'process driven' and that legal aid clients were treated poorly in comparison to private paying clients⁵¹. The advice provided by solicitors can also be perceived as inflexible. An example of this is divorce being presented as the only option available on separation, despite the high status conferred on marriage in many cultures. This may lead to BAME women being deterred from seeking support in the future. Despite the fact that some

⁴⁷ Ibid.

⁴⁸ Legal Services Commission (2009) 'Report on Black, Asian and Minority Ethnic (BAME) Women, Domestic Abuse and Access to Legal Aid'.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

women might not wish to leave the relationship or take legal action in respect of their relationship, they still need information and support about their options. These barriers are concerning because BAME women are disproportionately affected by domestic abuse and therefore are more likely to require legal support and advice services⁵². BAME communities have higher levels of domestic homicide, 'honour' killings and abuse driven suicide⁵³. Women are also at risk of culturally specific forms of abuse such as forced marriage, female genital mutilation and dowry related abuse⁵⁴.

Considerations underpinning the projects

LAB and E4J are underpinned by the following community and pedagogical considerations:

1. The aims of the project are twofold. Firstly, the authors wish to reach the targeted communities in areas of legal practice where there is limited or no existing advice provision. As such, it was vital that the authors were not simply duplicating existing legal services or providing advice in cases where preferential funding opportunities may exist. The focus of the services is empowering communities through legal advice and education. Impact can be demonstrated in a variety of ways including that (a) the project has prevented a legal problem from escalating (b) the project has

⁵² Siddiqui, H (2018) 'Counting the Cost: BME women and gender-based violence in the UK' IPPR Progressive Review.

⁵³ Patel, P. and Siddiqui, H. (2010) 'Shrinking secular spaces: Asian women at the intersect of race, religion and gender', in Thiara, R.K. and Gill, A.K. (eds) *Violence against Women in South Asian Communities: Issues for Policy and Practice*, London: Jessica Kingsley Publishers.

⁵⁴ See Paragraph 73 of The Home Affairs report published on 22 October 2018, which can be accessed at: https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1015/101503.htm#_idTextAnchor000.

improved the client's circumstances and/or (c) the project has given the client confidence, self-esteem and capacity to take the case forward. In addition, the educational aims of the projects were to develop the students' professional skills and preparedness for practice whilst also developing their competency in working with communities with complex needs. It was also considered important that students had the opportunity to provide advice off-campus and within the targeted communities.

2. It was felt that face-to-face advice was vital in order to build trust and a relationship between the students and the client. As such, the project could not be limited to the 'letters of advice' model discussed above. Due to capacity and resourcing issues, it was not feasible to offer a full representation model. As such, it was felt that advice would be limited to one-off initial advice. In relation to E4J, it was also felt that the students could draw on the clients' experiences to engage in advocacy and law reform to improve the ways in which law affects people within the community.
3. It was considered that a strict drop-in would not be feasible given that both projects would be supervised by a small number of solicitors with limited specialisms. Further, the space available at the appointment venues (a regional legal aid firm for LAB and a women's centre for E4J) would not allow high numbers of clients at each sessions. The authors were also mindful of the pedagogical limitations of drop-in clinics, which are addressed above. In particular, it was felt that students working

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with vulnerable individuals for the first time (and indeed the clients they were serving) would benefit from their having sufficient time to conduct research and prepare for the appointments. Prior to beginning work with LAB or E4J, the authors organise induction sessions for the students in which they are able to work through simulated scenarios which mirror those they are likely to incur within the sessions. Arranging the appointments in advance also reduces the likelihood of clients disclosing legal issues which are beyond the scope and/or expertise of the service as full details of the enquiry are taken at the enquiry stage.

4. By increasing the students' understanding of the context in which advice is provided, it was hoped that this would reduce the likelihood of the students becoming distressed by the issues they are exposed to. To reduce the possibility of vicarious trauma, the supervisors ensure that they are approachable for students to discuss any concerns with. Further, the university runs a number of sessions focussed on wellbeing which students are encouraged to attend. Students are also encouraged to reflect with their supervisors and peers about their cases in regular weekly meetings.

The next part of this article will discuss LAB and E4J in detail.

Case Study 1: Legal Advice Byker

LAB is a legal outreach clinic whereby students go into the community in order to provide the advice. LAB began in January 2012 with the objective of providing members of the public with access to legal advice in circumstances in which they may not

otherwise be able to obtain such advice⁵⁵. This may be due to either the cost involved in paying a solicitor or otherwise to the nature of the enquiry where the solicitor may not assist. Students work in partnership with a regional legal aid firm in the community of Byker, Newcastle upon Tyne in order to provide initial advice to its residents.

The project runs from January to May each year. During the course of the project, the students conduct three separate, one-off initial advice sessions. LAB is run by student advisors who study on the post-graduate LPC course at Northumbria University. The students chose whether to take LAB as one of their elective subjects after attending an introductory lecture on what is involved and what is expected of them⁵⁶. The students therefore undertake this project alongside several other classroom based, elective subjects. Students generally have limited practical experience advising clients when they begin this elective, although many have had a period of work experience in law firms.

All appointments are arranged in advance with the clients and brief details of the case are taken by the LAB administrators within the SLO. This is necessary as cases with urgent deadlines, cases that are particularly complex and cases where there is no solicitor with expertise in the applicable area of law are unlikely to be offered an appointment. Areas of law which have been covered include family law, housing,

⁵⁵ This is highlighted in the Northumbria University course manual 'Legal Practice Course Student Manual 2018-19'.

⁵⁶ In contrast to the final year law students undertaking the four year M Law (Exempting) Degree at Northumbria University where the Student Law Office module is a compulsory year-long module.

employment, civil litigation and welfare benefits. However, the areas of practice do change each year depending on what area of law the available solicitors specialise in. The students gain the opportunity to deliver three advice sessions throughout LAB. Therefore they could potentially conduct client interviews in three different areas of law and provides students with the experience of working under the supervision of three different solicitors.

If the enquiry is considered suitable by the solicitor supervisor the enquiry is allocated to a pair of students and they undertake responsibility for the client. They have up to a week to open a client file, undertake and prepare the practical legal research and draft the interview plan. This work is completed under a tight timescale, so that they are prepared to advise on the day of their first appointment with the client. The solicitor supervisor checks both the practical legal research report and interview plan and returns each document to the students with their amendments as formative feedback⁵⁷.

Two advice appointments take place at the offices of the regional law firm and one appointment takes place within the SLO at Northumbria University. On the day of the advice session at the local law firm, the students gather in the boardroom in advance of the appointment time. Here they meet the external solicitor supervisor and discuss the enquiry, the amended research report and the interview plan. Each student pair then conducts the client interview. They provide compliance information, confirm their

⁵⁷ Boothby, C (2016) 'Pigs are not fattened by being weighed' so why assess clinic and can we defend our methods?' *International Journal of Clinical Legal Education* Volume 23.

instructions and obtains any missing factfind information. After around 30 minutes the interview is paused for 15 minutes and the client waits while the students return to the board room to further discuss the case with their supervisor. A discussion takes place as to whether any further research is required before advice can be given or whether the advice remains appropriate and can therefore be given there and then. Where advice can be given, it is formulated by the students drawing on their existing research and agreed by the supervisor. The students return to the interview room and deliver the appropriate advice. Where possible, should the client require further assistance referrals are made to appropriate law firms. The interview process is usually complete within one hour. The speed at which the advice is provided more closely resembles life in practice where a client can expect to receive some initial advice during their first appointment. For the advice appointment which takes place in the SLO, the same procedure is followed, except the enquiry is supervised solely by the designated solicitor within the University.

Following the advice appointment, the students draft an attendance note of the meeting which sets out the client's instructions and the advice that was given. The students then confirm the advice in writing to the client within three weeks of the date of the appointment. The solicitor supervisor approves the letter of advice and provides the students with feedback. Where the case has been supervised by a solicitor at the local law firm, the advice letter is approved and signed by the solicitor and sent out on the firms' letterhead paper. Attached to the letter is a questionnaire, which asks the client to

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provide feedback about their experience. Once the letter is sent to the client, the file is closed. At this stage, the external solicitor completes a pro-forma feedback form and sends this to the designated SLO supervisor who will ultimately assess that student at the end of the programme. The pro-forma allows the supervisor to comment on all aspects of the students work, including the research report, interview and letter writing.

As each pair of students have the opportunity to conduct three advice appointments, 18 clients can benefit from legal advice under this model. During the academic year 2016-2017, 12 students participated in this project and advice was provided to 12 clients. The discrepancy in the numbers is because not all clients attended an appointment and whilst the authors do not know the exact reasons why, this may support the authors' view that clients with complex needs may struggle to engage in the legal advice process more so than those who do not.

Case study 2: Empower 4 Justice (E4J)

As considered earlier in this article, E4J is another example of a legal outreach clinic operating within a vulnerable community and lead by staff who work within the SLO. E4J was set up in September 2017 with the principle aim of empowering BAME women through the provision of initial legal advice. Students work in association with a regional legal aid firm and a specialist BAME women-only organisation to provide initial legal advice to BAME women who are unable to secure legal aid or pay privately for advice. Many of the clients are vulnerable by reason of being survivors of domestic abuse including forced marriage, FGM, sexual abuse and exploitation, domestic slavery and

coercive control. In addition to legal concerns, some of the women also experience related problems such as homelessness, poverty and insecure immigration statuses.

E4J was established to address some of the structural and cultural access difficulties that many BAME women found in securing advice in the North-East of England, which are explored above. There is national concern about a reduction in support for specialist BAME services and ongoing support for their existence. This was summarised in the recent Home Affairs Committee report following the government consultation 'Transforming the Response to Domestic Abuse':

We are particularly concerned about the reported decrease in specialist services for BAME victims of abuse. Some BAME women are more vulnerable to culturally specific types of abuse and can find it particularly difficult to seek help because of close-knit family and communities, and because of language difficulties. Witnesses provided evidence about a range of specific problems for some BAME women, including financial difficulties for those with No Recourse to Public Funds, transnational marriage abandonment, honour-based violence and extra-territorial jurisdiction for victims who are removed from the UK in order to be harmed. We believe that specialist 'by and for' BAME domestic abuse services are necessary to win the confidence of BAME

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*victims of abuse, to understand the issues they face and to have the skills and experience to provide the necessary support*⁵⁸.

The project runs one afternoon each month between October and April, in line with the academic calendar. Within each session, four appointments are available ranging in length between one hour and one and a half hours. Every year there is therefore capacity to deal with 28 enquiries. Unlike LAB, which is an LPC elective, E4J is run by student advisors on the final year of the M Law degree programme who are undertaking the clinical SLO module. As such, participation in this project supplements their existing casework in the SLO. Typically, these students have limited practical experience working with clients as their undergraduate legal education has thus far focussed on black letter law.

Similarly to LAB, E4J is not a strict drop-in clinic in the sense that appointments are arranged in advance with the clients. It was felt that a drop-in clinic would lack merit for both the students and the clients, as the students would not be familiar with the areas of law and could not therefore provide any meaningful advice (without significant supervisor input). Further, the sheer demand for the service would be problematic as there are a limited number of supervisors at each session with limited specialisms.

⁵⁸ Paragraph 73 of The Home Affairs report published on 22 October 2018, which can be accessed at: https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1015/101503.htm#_idTextAnchor000.

The women's organisation is responsible for identifying suitable referrals from their existing client base and providing enquiries to the SLO at least one week in advance of the appointment. This initial triage is helpful because it reduces the prospect of us receiving an enquiry which would not be suitable for the supervisor or students. Further, as the enquiry is prepared by someone with an existing relationship with the client (usually a support worker or domestic violence advocate), the referrals contain considerable levels of detail which in turn, supports the students' ability to conduct effective research. Of course, a limitation of the project is that women who have not sought initial support at the women's organisation are not able to receive advice through the project and therefore will likely continue to go without advice and support.

Suitable enquiries tend to be those which are neither urgent nor overly complex as the students have a limited amount of time to conduct research. In addition, where it is clear that clients are likely to be eligible for legal aid, it would always be preferable for a referral to be made to the partner legal aid firm at outset. The main areas of unmet legal need following LASPO are housing, family law and welfare benefits⁵⁹ and this is reflected in demand and therefore the areas of law that are covered by the project. There is also a demand for immigration advice however unfortunately there are no solicitors specialising in this area. Family law cases which are suitable for initial advice tend to include information about divorce and judicial separation proceedings, contact

⁵⁹Amnesty International (2016) 'Cuts that Hurt: legal aid cuts in England on access to justice' [accessed at <https://www.amnesty.org/download/Documents/EUR4549362016ENGLISH.PDF>].

arrangements for children and cohabitation disputes. Housing enquiries often focus on public sector issues (where legal aid is not available) such as homelessness, allocation policies and procedures and local government housing responsibilities more generally. By virtue of the fact that many of the clients have cultural, financial and familial links to other jurisdictions, the cases often have an international element. This provides students an opportunity to learn about different religious, cultural and political perspectives and approaches to the law⁶⁰. An example of this can be seen in relation to the recognition of Islamic marriages. There have been a handful of cases where students have been required to advise women about the legal validity (or lack thereof) of a Nikah contract. Many Muslim women are unaware that an Islamic Nikah ceremony performed in England (without an accompanying civil ceremony) is unlikely to create a legally recognised marriage with the couple still classed as cohabitants in the eyes of English law⁶¹. Therefore, should the marriage break down, the financially weaker party (usually the 'wife') is vulnerable as there are limited financial claims she can make against her husband. The need for legal reform in this area has been the focus of scholars, practitioners and campaigners⁶². It is valuable for students to engage in discussions about whether this lack of protection is discriminatory and debate the options for law reform in this area.

⁶⁰ Reynolds, W (1995) 'Why Teach International Family Law in Conflicts' 28 *Vanderbilt Journal of Transnational Law*.

⁶¹ See, for example, O'Sullivan, K & Jackson, J (2017) 'Muslim Marriage (Non Recognition): Implications and Possible Solutions' *Journal of Social Welfare and Family Law*, 39:1, pp. 22-41.

⁶² *Ibid*.

Similarly to LAB, after receiving the enquiry form, two student advisors are allocated to the case and they must carry out initial research based on the information available to them. The research report should identify any further information required about the client's case and make a preliminary assessment about any action the client can take and the merits of proposed action. Importantly, as the client will be taking any further steps without the assistance of a legal representative, any practical action must be clearly identified. The research report is approved by the students' supervisor who will be a specialist solicitor, barrister or caseworker in the relevant area of law. As with LAB, the research report forms the basis of the interview plans which the students rely on in the appointment.

Despite being a women's only service, both male and female students participate in E4J. There is, however, space on the enquiry form for the advocate to specify whether the client requires female-only advisers. This may be justified, for example, where the client may experience trauma or re-victimisation due to their previous experiences. The availability of female-only advisers is arguably an essential part of acting in the best interests of each client and providing a proper standard of service to each client⁶³. Whilst this option exists, to date there have been no requests for female-only advisers.

The appointments take place at the women's organisation in order to provide an accessible environment with which the women are already familiar. Unlike a formal legal environment, appointments are carried out on sofas in a room which resembles a

⁶³ As required by principles 4 and 5 of the Solicitors Regulation Authority Code of Conduct.

living room. With their consent, clients are accompanied by a support worker or independent domestic violence advocate (IDVA) with whom they already work closely. This ensures that a 'holistic' approach to supporting the client is adopted where both their legal and emotional needs are considered. Further, from a practical perspective, it means that the IDVA is aware what advice has been provided and can provide ongoing support to the client if they need to take further steps to resolve their legal case. It also allows the advocate to act as an independent translator for clients with limited English. To assist with the informality, students are encouraged to wear office appropriate clothing however this does not necessarily have to be a suit, which may be intimidating to some clients.

The students are supported in the appointment by their supervisor. In a similar manner to LAB, during the first part of the appointment the students will provide compliance information (i.e. in order to comply with GDPR and Solicitors Regulation Authority requirements) and ask fact find questions to ensure they have all relevant information. Following this, the students have a discussion with their supervisor about whether the advice remains appropriate in light of any further information that has been provided. Assuming this is the case, the students then return to the appointment to deliver the advice. Alternatively, if the advice has changed (typically because the factual background to the case is different to anticipated), the students may not be able to provide immediate advice as it may be necessary to carry out further research. After the appointment, the students complete a one-page pro-forma with a bullet pointed list of

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the advice provided to the client and any immediate action they need to take. This is followed by a comprehensive advice letter which is sent to the client within 21 days of the appointment. At this point, the client's file is closed reflecting that the retainer has come to an end. Where possible, referrals will be made to appropriate law firms for the case to be taken on under a legal aid contract or a fee agreement. At this stage, the clients are also asked to provide feedback about their experience through a questionnaire in order to assess client satisfaction and contribute to the ongoing development of the project.

In its initial year, over 28 students participated in the project and advice was provided to 14 women. In addition to this, a training session was delivered to the IDVAs and support staff at the women's organisation about the availability of civil claims under the Criminal Injuries Compensation Authority for victims of domestic abuse.

ANALYSIS OF THE NORTHUMBRIA UNIVERSITY CASE STUDIES

Community benefits

The advantage of a legal clinic in offering a valuable service to the local community is well established in the literature⁶⁴. However, the projects outlined in this article have taken this one-step further. With both projects, the students are required to leave the

⁶⁴ Frank Dignan (2011) 'Bridging the Academic/Vocational Divide: The Creation of a Law Clinic in an Academic Law School' 16 *International Journal of Clinical Legal Education* Volume 75.

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university campus and actively go out into the targeted community in order to provide their legal advice. The legal advice is provided within communities where there is limited or no existing pro bono advice provision available. In LAB, the students go to a regional law firm situated in an area of high social deprivation to provide the advice. By providing a pro bono legal advice clinic alongside this law firm, the partnership raises the profile of the service within the local community and supports unmet legal need. Likewise, in E4J, students work within a women's organisation alongside IDVAs and support workers. In turn, the students target a specific community to ensure they receive the appropriate advice and assistance.

There is arguably a direct access to justice advantage that arises from extending the legal services offered by a law clinic to those areas of law in which external solicitors can supervise⁶⁵. In LAB, 12 clients benefitted from legal advice under this model during the academic year 2016-2017 and there was an equal spread of advice given in the areas of general civil litigation, housing, family and employment law. With regards to E4J, 14 women benefitted from legal advice last year. The majority of advice (61%) was in the area of family law, whilst 30% of cases related to housing law and the remainder concerned welfare benefits. As explained above, whether the enquiry is suitable to advise on does depend on the area of specialism of the available supervisors in each

⁶⁵ Castles, M (2016) 'Marriage of convenience or a match made in heaven? Collaboration between a law school clinic and a commercial law firm' *International Journal of Clinical Legal Education*, volume 23, pp. 7-47.

project; however, these were also the areas in which there was the most demand for service.

From the authors' experience, the one-off advice appointment is usually either sufficient to resolve the client's issue (in that they have no need to seek further legal advice) or the project gives the client the confidence, self-esteem and capacity to take the case forward themselves. In some cases this has been reported by the clients' support worker (in the case of E4J) or was reported in the client feedback questionnaire. In the authors' view this beneficial impact is a result of the advice being comprehensive, tailored to the particular case and practically focussed so clients have a clear idea about how to progress the matter. Where further legal assistance has been required, the client's circumstances were also improved through an appropriate referral system which directed them either to the SLO (to students on another programme at the university), to the partner law firm as a client because legal aid or a conditional or contingent fee agreement could be offered or to another local law firm or pro bono organisation specialising in the relevant area of law. This supports previous research, which highlights that a legal outreach service can provide effective legal outcomes, improve clients' circumstances and prevent problems escalating⁶⁶.

The projects have received positive feedback from clients within the questionnaires that are completed at the end of their experience with the clinic or from the clients' support

⁶⁶ Forell, S and Gray, A (2009) 'Outreach legal services to people with complex needs: what works?' Law and Justice Foundation Justice Issues Paper 12

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workers. E4J has also been recognised at the annual Law Works & Attorney General Student Pro-Bono Awards, where it was awarded “Best New Pro Bono Activity”⁶⁷. The award nomination included the E4J project together with the wider work that the students do to assist victims of domestic abuse in the local community through the SLO. As such, these projects have led to reputational benefits for the university.

Pedagogical benefits

The outreach model used in both LAB and E4J enables the students to intensively develop their employability skills and preparedness for practice. Unlike the SLO model, there is no initial fact find interview, which gives the students a significant amount of time to digest the information and undertake their legal research. In LAB, the students swiftly conduct their research based upon the initial enquiry information and thereafter prepare for their advice interview. However, unlike a drop-in model, the students have sufficient time to prepare for the interview and get to grips with the issues. In the authors’ view, the right balance is struck between giving the students the appropriate time to research but also ensuring they meet the challenges of working under pressure and under a tight timescale. The result is that arguably the students intensively develop their professional skills and are better equipped and prepared to handle the demands of the legal profession. Simultaneously the advice is comprehensive and tailored to the client’s case rather than the more superficial

⁶⁷<https://www.lawworks.org.uk/solicitors-and-volunteers/get-involved/lawworks-and-attorney-generals-student-pro-bono-awards-2018>.

approach of a drop-in. As the advice is confirmed in writing, the students also develop their written communication skills.

In LAB, the partnership between the university and the local law firm enriches the students' experience. The students work with and learn from at least two solicitor supervisors; one of whom is an experienced practitioner within the target community, thereby allowing students to develop a holistic approach to providing the advice. Bleasdale-Hill highlights that the internal supervision model (where the academic members of staff supervise the student) provides for more contact with the supervisor than an external model (which involves external practitioners)⁶⁸. She considers that this in turn enhances the skills students gain from the clinic. Under the LAB model, the students gain the benefit of both the internal and external supervision model. They work under their internal supervisor throughout the project and this provides them with an opportunity to gain frequent and regular feedback. They attend their weekly firm meeting with their internal supervisor and the rest of their firm members. They also have the benefit of an appraisal where they are invited to reflect upon their skills and their experience to date. They also work under the external supervisor, which brings the opportunity for the student to engage with different practice styles⁶⁹. Students learn whether they should adjust their style and how they can do so, thereby

⁶⁸ Bleasdale-Hill, L and Wragg, P (2013) 'Models of Clinics and Their Value to Students, Universities and the Community in the post 2012 Fees Era' *International Journal of Clinical Legal Education*, volume 19, pp.257-270.

⁶⁹ Plerhoples, A and Spratley, A (2014) 'Engaging Outside Counsel in Transactional Law Clinics' *Clinical Law Review* Volume 20, pp 379, 393.

developing their professional identity. Likewise, in E4J, students work alongside IDVAs and support workers which gives them an understanding of how legal advice interacts with other services (for example counselling) and an awareness of the different roles that professionals play in supporting survivors.

The involvement of different supervisors also expands the breadth of work the students can engage in and thereby affords those students with experience in different areas of law. However where students advise on the same area of law in all of their advice sessions this is equally beneficial as they are exposed to 'the same legal problem but from new or different perspectives'⁷⁰. In turn, this enables students to develop a deeper perspective about the complexities and nuances of particular legal problems.

The students also gain an insight into the social and personal issues affecting their local communities, are exposed to clients they otherwise may not be in contact with. As students are required to leave the university campus and go out into the community, they are able to meet people from different walks of life and develop new perspectives. By advising within disadvantaged, targeted communities the students develop their competency in working with those who have complex needs. In addition the students must also be compassionate and learn the importance of empathy when meeting their clients. As mentioned earlier in this article, clients' difficulties can impact their engagement with legal services and students gain an appreciation of this. For example,

⁷⁰ Winkler, E (2013) 'Clinical legal education: a report on the concept of law clinics', accessed at https://law.handels.gu.se/digitalAssets/1500/1500268_law-clinic-rapport.pdf.

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clients with complex needs may not always attend appointments, may give contradictory accounts and may not provide the relevant documentation. The students involved have valued the opportunity to promote access to justice at difficult times in their lives. This is reflected in the comments made by students, shown below.

“Working in this project has helped me learn and grow and I think become a more well-rounded individual never mind practitioner.”

“Working in communities and with women where they seemingly have no other access to legal advice made it more satisfying that I was able to be a part of it.”

“You just felt so sorry for the women that you were helping, just it really made me feel like I was doing something worthwhile.”

“It made me more interested in working within the area of family law.... I was able to gain a deeper insight into something that normally happens behind closed doors. I want to help people that are in similar situations”.

Limitations

The authors accept that the model adopted in LAB and E4J has limitations from a client, student and supervision viewpoint. The students provide one-off initial advice, they do not undertake to represent the client at court or provide any further assistance beyond the appointment. However, as highlighted above this model does benefit more clients as a greater number receive initial advice than in a model, which involves further legal assistance and representation. From a student perspective, through initial advice they

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see a snapshot of their client's case. They do not gain the experience that full case representation brings, such as liaising with an opponent and drafting court documents. It also remains a challenge for the students to balance their workload however this is not unique to LAB and E4J. However, the students are informed at an early stage what is expected of them and the authors consider that this ultimately improves their time management skills.

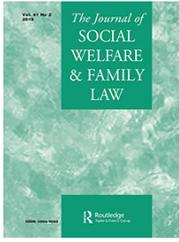
Finally, from a supervision viewpoint, it is recognised that there must be sufficient feedback from the external solicitor to both the student and the internal solicitor. This is imperative for both the student who must learn how they can improve a particular skill or piece of work and for the internal supervisor who must be in a position to effectively assess the students on their practical work at the end of the project. To overcome this challenge a framework was put in place for the students to receive not just feedback on their work and during the face-to-face meeting, but also to receive a completed feedback form on their performance.

CONCLUSION

Undoubtedly CLE plays a valuable role both to the community in promoting access to justice and to the participating students in developing their professional skills and preparedness for practice. This article has outlined two outreach projects operated by Northumbria University through CLE and has sought to demonstrate the pedagogical benefits to the participating students and the access to justice advantages they bring to the communities they serve. From a student perspective, the value of the model lies not

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only in the intense development of skills competencies but also in gaining an insight into the social and personal issues affecting a local community through working with those who have complex needs. The students gain an appreciation of the value of clinical work within disadvantaged communities and the access to justice challenges faced by their clients. From a community perspective, effective partnerships have been formed which have targeted vulnerable communities whilst simultaneously addressing unmet legal need. Taking into account the positive student and client feedback from these projects (and therefore the associated reputational benefit), the authors would encourage other clinical supervisors to form partnerships with external agencies and utilise the legal outreach model.



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?

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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?

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ABSTRACT

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) resulted in significant cuts to the availability and scope of legal aid in family law proceedings. Some four years after the cuts were implemented, there has been a great deal of research about their devastating impact on vulnerable groups and individuals. This paper considers the other victim of the cuts, the family court itself. It is currently bulging under pressure from both an increase in applicants who have been forced to represent themselves in family proceedings and also from a rise in applications for injunctions linked to domestic violence. This paper will draw on case law to demonstrate that the reforms implemented through LASPO have seemingly only succeeded in passing the burden from one publicly funded agency, the Legal Aid Agency, to another, HM Courts and Tribunals Service. The family court system is currently at breaking point and further government review is urgently needed if people are going to be able to continue to use the system effectively.

KEYWORDS

LASPO; legal aid; access to justice; family courts

Introduction

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) resulted in significant cuts to the availability and scope of legal aid in family law proceedings. In the four years that have passed since the introduction of LASPO, the effect of the cuts on individuals and practitioners has been well documented. Women, ethnic minorities and people with disabilities have been disproportionately affected (Mostyn 2015). The cuts have led to the creation of ‘advice deserts’ and a two-tier system where some of the poorest and most vulnerable members of society are denied access to justice (Amnesty International 2016). Legal aid firms have felt their profit margins shrink as a result of reduced fees and areas being removed entirely from the scope of legal aid. Many firms have had to diversify their offering to include areas that still attract public funding. However, not all firms have survived and the figures demonstrate that the number of legal aid firms has fallen by 20% in the past five years, from 2,991 in March 2012 to 2,393 in March 2017 and by 5% in 2017 alone (Gyimah 2017).

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However, there has been another victim of these cuts: the family court system itself. This article will consider the ways in which LASPO has increased the burden on the family court system including the rise in self-representing litigants, a reduction in cases being disposed of through mediation and an increase in applications for injunctions linked to domestic violence. A particular emphasis will be placed on the case law which has arisen post-LASPO which has recognised the increasing strain on the family courts.

This article will conclude that the reforms implemented through LASPO have seemingly only succeeded in passing the burden from one publicly funded agency, the Legal Aid Agency, to another, HM Courts and Tribunals Service. The article will also conclude that the family court system is currently at breaking point. Whilst efforts have been made by law firms, University clinics and law centres to increase their pro bono offering, they are unable to fill the gap left by the cuts and ease the burden on the family courts. We lastly conclude that further government review is urgently needed if people are to be able to continue to use the system effectively.

The history of legal aid

The roots of the legal aid system in England and Wales' family law sit firmly in the general public's need for advice and assistance with matrimonial matters. Until the Second World War, there was no formal legal aid system so advice primarily existed, for those who could not afford it, on a philanthropic ad hoc basis, with qualified lawyers (commonly referred to as the poor man's lawyer) volunteering their time to provide advice on divorce and custody disputes on a pro bono basis. An exception to this was the Poor Persons Procedure, which was established by the Law Society in 1914. Under the Poor Persons Procedure, lawyers on local panels were expected to provide free assistance to those who satisfied a strict means test. Applicants were required to have capital savings of less than £50 and an income of less than £2 per week or £4 in exceptional circumstances (Cretney 2005).

Although the work of the Poor Person's Department was not limited to matrimonial matters, approximately 90% of the cases were divorces (Gibson 1993). The Poor Persons Procedure could not be sustained during the Second World War, however, when the number of marriages breaking down rose significantly. According to the Office of National Statistics, in 1938 (the year before the Second World War began) there were 6,250 divorces, compared to 15,654 divorces in 1945 (the year the War ended) (Office for National Statistics 2014, section, p. 3). Two years later, whilst men and women were still dealing with the aftermath of the War, numbers reached 60,254 (ibid). To meet the rising demand, the Law Society established a temporary salaried divorce department which carried out pro bono divorce work for servicemen.

Following the end of the war, the coalition government set up the Rushcliffe Committee (chaired by the former Conservative backbench MP Lord Rushcliffe) to advise on the establishment of a comprehensive legal aid system. The Committee's recommendations included that legal aid should be available in all courts to a wide income group and at a scale of contributions for those who could pay something towards costs but free for those who could not. The cost of the scheme would be borne by the state; however, the scheme should be administered by the legal profession who would receive adequate remuneration for their services (Report of the Committee

on Legal Aid and Legal Advice in England and Wales, 1946). The Rushcliffe recommendations were given effect through the Legal Advice and Assistance Act 1949 and the legal aid regime came into force in 1950. In its first year, 37,700 certificates were granted (Abel, 1998). This was an increase of 31,100 applications from those granted under the Poor Person's Procedure in 1949 (ibid).

The initial scope of legal aid was wide-reaching. All routine family law proceedings including divorce, financial relief and children disputes were covered. Applicants were subject to a means and merit test; however, this was generous and over 80% of the country were eligible for assistance (ibid). In the years that followed, family law continued to attract considerable legal aid applications. A survey of legal aid certificates granted in Birmingham in 1969 revealed that 86% of certificates were granted for family matters, 9% for personal injury and 5% for other areas (Legal Action Group, 1992). The entitlement to claim legal aid in family law proceedings was preserved in the subsequent Legal Aid Act 1988 and the Access to Justice Act 1999.

The importance of legal aid in ensuring meaningful access to the courts and full participation in the litigation process has been recognised by academics, legal practitioners and the judiciary. It is often regarded as the fourth pillar of the welfare state, alongside health, education and social security. Prior to the creation of the legal aid system, in his paper *Legal Aid for the Poor: A Study of Comparative Law and Legal Reform*, Cohn argued that legal aid is a fundamental right of citizens. He wrote that:

Legal aid is a service which the modern state owes to its citizens as a matter of principle. . . just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc, so it should protect them when legal difficulties arise. Indeed the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law (Cohn 1943, p. 250).

More recently, Steyn LJ mirrored these comments in the case of *R v Secretary of State for the Home Department, ex parte Leech*, noting that 'the principle of our law that every citizen has a right of unimpeded access to a court. . . even in our unwritten constitution. . . must rank as a constitutional right. Such rights are a fundamental part of our legal system, providing access to justice and the right to a fair trial'.

The civil legal aid budget increased 14 times between 1966 and 1983 whilst over the same period the criminal budget rose from £550,000 to over £62 million (Abel 1998). By 1998 the budget had reached £1.6 billion (Brooke 2017) and between 2005 and 2010, the average annual budget was £2.1 billion (ibid). The legal aid budget was the largest rising item of Government expenditure (Mostyn 2015). At the same time, however, fewer people were qualifying for assistance as a result of the Government's failure to increase the means test to take into account inflation. Whilst 80% of the population were financially eligible for assistance in 1950, this declined to 40 per cent by the mid-1970s and only 20% per cent of families with children qualified. In 2007, only 27% of the population were financially eligible (Mostyn 2015).

In 2010, as part of wider cuts taking place within the public sector and necessitated by the economic crisis, the Government announced that it would implement a series of reforms to the legal aid regime. The reforms included removing large areas of law from the scope of legal aid; tightening the financial eligibility criteria; cutting fees paid to providers by 10%; and

providing more legal advice over the telephone (Implementing Reforms to Civil Legal Aid, Public Accounts Committee, 2015). The reforms would be implemented through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The reforms had four objectives: to make significant savings to the legal aid budget; to discourage litigation at public expense; to target legal aid to those who need it most; and to deliver better overall value for money (Implementing Reforms to Civil Legal Aid, Public Accounts Committee, 2015). Financially, the reforms aimed to reduce the legal aid budget by 23%. This equated to cuts of £350 million in 2013 and annual cuts of approximately £268 million until 2018 (Ministry of Justice, Legal Aid Agency 2014). Culturally, the Government sought to discourage people from engaging in what was regarded as ‘unnecessary and adversarial litigation at the public expense and to encourage people to take greater personal responsibility for their problems by utilising ‘alternative sources of help, advice or routes to resolution’ (Ministry of Justice 2010).

However, despite widespread objections from the legal profession, LASPO came into effect on 1 April 2013 and removed from the scope of legal aid private family law cases except where strict criteria were met regarding domestic violence (including female genital mutilation), child abduction and child abuse, or for children if they were made a party to private law proceedings (LASPO, 2012, Schedule 1 Part 1 Paragraphs 12 and 13). Even in cases where individuals are able to provide evidence of domestic abuse and are seeking protection from the family court, they may still not be entitled to legal aid due to the strict means test that is applied. For example, an individual may be seeking a non-molestation order and may be living in a refuge with little to no income. However, they may still be prevented from accessing legal aid due to the equity in the family home they have fled from. This is an issue which will be discussed in more detail later in this article.

The Government justified the decision to restrict legal aid on the basis that ‘legal aid is not routinely justified for ancillary relief proceedings, private law family and children proceedings’ (Ministry of Justice 2010). In relation to private law children cases, they argued that ‘the provision of legal aid in this area is creating unnecessary litigation and encouraging long, drawn-out and acrimonious cases which can have a significant impact on the long-term well-being of any children involved’ (ibid).

Increase in litigants in person

The most foreseeable impact of the restrictions in legal aid has been the increase in self-representing litigants (i.e. parties with no legal representation) in the family courts. Statistics demonstrate that between April and June 2017, the proportion of disposals where neither the applicant nor respondent had legal representation was 36%, an increase of 19 percentage points since the same period in 2013 (Ministry of Justice and the Legal Aid Agency 2017b). Correspondingly, the proportion of cases where both parties had legal representation dropped by 17 percentage points to 18% over the same period (ibid). The President of the Family Division, Sir James Munby acknowledged this in the case of *Q v Q; Re B (A Child), Re C (A Child)* [2014] EWFC 31. He said ‘there has been a drastic reduction in the number of represented litigants in private law cases. The number of cases where both parties are represented has fallen very significantly, the number of cases where one party is represented has also fallen significantly

and, correspondingly, the number of cases where neither party is represented has risen very significantly' (para 11).

The benefits of legal representation for the client and the family court cannot be overstated. Without a professional advocate, clients often lack the experience and skill required to identify the key issues in dispute and put forward their strongest legal arguments. In turn, their ability to fully participate in the proceedings can be compromised. This was exemplified in *Q v Q* where *Q*'s public funding was withdrawn leaving him unable to obtain funding to instruct an expert to challenge the expert report which was already before the court.

This case raises the question whether someone can really defend themselves against accusations if they do not have access to legal advice or representation? Although subject to means testing, legal aid is available for those individuals who raise allegations of domestic abuse or child abuse but no legal aid is available for those individuals who are accused. As Sir James Munby P. raised in the *Q v Q* judgment, this creates challenges for judges who preside over these types of proceedings and need to make determinations as to the truth of the allegations before them. It could therefore be suggested that, where allegations are made of domestic abuse or child abuse in proceedings, both parties should have equal access to legal aid. This would enable the proceedings to be determined fairly and would enable both parties to access funding for experts to either prove or disprove the case before the court.

Even in those family cases where no such allegations are before the court, the act of simply presenting one's own case can be distressing and prevent full participation in the process. In the public law case of *Re JC (Discharge of Care Order: Legal Aid)* [2015] EWFC B39 HHJ Hammerton recognised the challenges in conducting a case where the subject matter is 'grave and emotive' (para 92). Referring to the conduct of an unrepresented father throughout proceedings, he said:

The absence of representation is particularly inappropriate and unfair. The advantage of legal representation is not confined to the presentation of the case. In family proceedings, there is an additional advantage that the advocate can protect the client from himself. Timely advice will prevent the party from behaving in a way that he might regret. In this case, the father has not had the benefit of such advice. His behaviour in court before me has, at times, been unrestrained. He has frequently demonstrated the worst aspects of his personality and his propensity to act with aggression (para 92 – 93).

Poor conduct was also addressed in *Re A: Letter to a Young Person* [2017] EWCF 48. The case concerned a teenage boy (*A*) who applied for an order to move with his father to Scandinavia. The application was eventually taken over by *A*'s father, who represented himself in the proceedings. The application was opposed by the child's mother and step-father, with whom *A* lived. *A* received public funding and was the only party represented by a solicitor. Instead of giving a traditional judgment, Peter Jackson J wrote a letter to *A* explaining his decision to refuse the relocation order. The letter is littered with comments about the father's poor conduct throughout the proceedings, including that the judge had seen the 'self-centred way that he behaves' (para 5) and that he 'makes sure everybody knows how little respect he has for anybody who disagrees with him' (ibid). 'Even as a judge', Peter Jackson J wrote, 'I found it hard work stopping him from insulting the other witnesses' (ibid). Whilst such behaviour

could be indicative of a party's parenting abilities which should form part of the decision-making process, it may simply be evidence of a party's frustration with the process. Equally it may be that they are finding it difficult to express themselves appropriately in such an emotionally charged arena. Parties with representation are generally protected from the damaging effects of their own behaviour because they have a reduced involvement in the proceedings. Undoubtedly, represented parties are able to capitalise on such behaviour (whether intentionally or not). It is also difficult to envisage a situation where such behaviour does not have any impact on the outcome of proceedings.

A further issue that has been raised by the judiciary is the length of time that it takes to dispose of proceedings where one or more of the parties does not have representation. Mostyn J spoke of this at the National Access to Justice and Pro Bono Conference in 2015 when he said, 'lists of 12 cases which used to be completed in a day are now a far gone memory' (para 42). Lord Neuberger also spoke of this during his welcome address to Australian Bar Association Biennial Conference on 3 July 2017. He said:

The substantial increase in litigants in person represents a serious problem for judges, for court staff and for other litigants and their lawyers. A trial or any other hearing involving a litigant in person is likely to last far longer and involve far more work for, and pressure on, the judge than a trial with legal representatives on both sides, and an inevitable result of longer hearings is delays to other cases. The effect on an undermanned and demoralised court staff of having to deal with more litigants in person can only be imagined (para 11).

This is having a visible effect on local family courts, where it can now take months to have a first hearing listed in a family case. For a parent who is being prevented from seeing their child this can be an unacceptable delay and could arguably heighten the animosity between the parties by the time they reach court. The Family Court statistics demonstrate that between April and June 2017 private law cases took an average of 24 weeks to reach final resolution (Ministry of Justice 2017c). This is an increase from 14.7 weeks over the same period in 2015 (Ministry of Justice 2015). Delays are often caused by judges spending time to ensure that unrepresented parties fully understand the process and any agreement reached. The role of the judiciary post LASPO therefore appears to extend beyond decision making, into providing limited legal advice to unrepresented parties, albeit in as neutral a manner as possible.

Guidance from the Law Society (June 2015) indicates that delays are also being caused because judges are more willing to grant extensions or adjournments to unrepresented parties. This was exemplified in the case of *Kinderis v Kineriene* [2013] EWGC 4139 (Fam), which concerned the summary return of a ten year old child under the Hague Convention on the Civil Aspects of International Child Abduction. The child had been removed to England by her mother, who asked the court not to return the child because to do so would be against the wishes and feelings of the child and would cause her psychological harm. There was evidence that the Applicant father had been abusive towards the Respondent mother and the child. As the Applicant, the father benefitted from non-means and non-merits tested public funding. The mother's application, however, was subject to both means and merits testing. Her application was refused on its merits because, at the time, there was insufficient evidence to support her case. By the time of the final hearing (and despite, by this stage, there being a Cafcass

report supporting her case) she had not had the opportunity to appeal the Legal Aid Agency's refusal. Holman J felt he had no choice but to adjourn the hearing. He said 'I wish to make absolutely clear that I understand and appreciate the need to be prudent with legal aid expenditure, which is also funded by the taxpayer. The merits test in screening legal aid applications is, in general terms, a necessary and appropriate one' (Para 21). However, he recognised that 'it is impossible for this mother, as it is for almost any self-representing respondent parent, to engage in such negotiations without an experienced lawyer who knows and understands the conventional framework and scope of such measures and arrangements, and who has the skill to negotiate' (Para 19).

In the writers' experience, delays are also caused by unrepresented litigants preferring all communication to take place within the courtroom on the court record. Understandably, litigants are untrusting about communicating with the opponent's representative or engaging in out of court settlement negotiations for fear they act to their detriment. Similarly, representatives communicating with litigants in person may also prefer this communication to take place on the court record so that they cannot later be accused of taking advantage of an unrepresented opponent. Previously, parties would be encouraged to use meeting rooms around the court to try to reach agreements between themselves, and in the meantime the judge/lay bench would hear other cases which needed determination. This enabled the court to list many cases in one day. This is unfortunately no longer possible with the increase in unrepresented litigants.

Of course, the impact of the court's decisions in family cases can be far reaching. Notably, there is evidence that children are being impacted by the increase in self-representing litigants, directly as parties to the proceedings and indirectly as dependents of the parties in private law cases where their best interests are being decided. This was recognised in the case of *Q v Q* where Sir James Munby P stated '[I]t seems to me that these are matters which required to be investigated in justice not merely to the father but I emphasise equally importantly to the son, as well as in the wider public interest of other litigants in a similar situation to that of the father here' (para 19). Despite stating prior to the introduction of LASPO, that as far as possible, legal aid would still be available in cases involving children the Government rejected calls to ensure that children and vulnerable young persons received an automatic entitlement to free legal aid (The Law Society of England and Wales 2017). It is estimated that 75,000 children and young people have lost entitlement to legal aid year on year since the introduction of LASPO (ibid).

Such unfairness may be contrary to Article 3 (1) of the UN Convention on the Rights of the Child which requires the best interests of children to be the primary consideration in all decisions affecting them and Articles 6 and 8 of the European Convention on Human Rights (ECHR) which ensure children have the right to a fair trial and family and private life. Exceptional case funding is available in cases where a failure to provide legal services would be in breach of an individual's ECHR rights (section 10, LASPO 2012). However, this 'safety net' has proved vastly ineffective, not least because solicitors are often unwilling to complete the application forms. This is because it takes an average of ten hours to complete the application with no guarantee it will be approved and the firm reimbursed for its time. The number of applications for exceptional case funding is approximately 1,200 per year (Ministry of Justice and Legal Aid Agency, Legal Aid Statistics, September 2013 – December 2015). This is substantially lower than the Ministry of Justice's predictions that there would be between 5,000 and 7,000

applications per annum (National Audit Office, 2014, page 7). The Law Society has recommended that the Government should update the guidance for exceptional case funding to reflect that without legal advice, the rights of children and young people under the European Convention on Human Rights are likely to be breached (The Law Society of England and Wales 2017).

A further difficulty for family courts is the complexity of disputes. Despite claims by the Government that private law cases ‘will not be routinely legally complex’, there is clear evidence of cases coming before the court where unrepresented parties are being expected to present legally complex issues. For example, the case of *Lindner v Rawlins* [2015] EWCA Civ 61 concerned a husband’s appeal to the Court of Appeal against a decision to refuse him an order for police disclosure. The court referred to the appeal as ‘technical and unusual’ and noted that the husband ‘could not be expected to have mastered this area of the law in order to be able to present his appeal in a way that assisted the court’ (para 34). The husband approached the appeal on a mistaken legal basis. The judges had to spend a considerable amount of time locating and identifying the relevant documents and researching the law. Aikens LJ stated:

Yet again, the court was without any legal assistance and had to spend time researching the law for itself then attempting to apply it to the relevant facts in order to arrive at the correct legal answer. To do the latter exercise meant that the court itself had to trawl through a large amount of documents in the file. All this involves an expensive use of judicial time, which is in short supply as it is. Money may have been saved from the legal aid funds, but an equal amount of expense, if not more, has been incurred in terms of the costs of judges’ and court time. The result is that there is, in fact, no economy at all. Worse, this way of dealing with cases runs the risk that a correct result will not be reached because the court does not have the legal assistance of counsel that it should have and the court has no other legal assistance available to it (para 34).

Again, this is yet more evidence of the judiciary now being expected to perform the role of legal advisors and legal researchers, rather than simply decision-makers. In a system where many judges preside over areas of law in which they have no particular practice specialism, this is an onerous burden to place upon them. The time spent on these tasks, which previously would have been undertaken by the lawyers presenting the case, removes the time that they have to carry out the role they were originally appointed to undertake.

The issue of complexity and human rights becomes more prominent in cases where one or more of the parties have a disability. The case of *Re D (A Child)* [2014] EWFC 39 concerned an unrepresented father who lacked capacity and applied to revoke a care order in respect of his son. The Legal Aid Agency only agreed to award legal aid following considerable pressure from Sir James Munby P. In his first judgment the President stated: ‘thus far the State has simply washed its hands of the problem, leaving the solution to the problem which the State itself has created – for the State has brought the proceedings but declined all responsibility for ensuring that the parents are able to participate effectively in the proceedings it has brought – to the goodwill, the charity, of the legal profession. This is, it might be thought, both unprincipled and unconscionable’ (para 31(vi)). Similar comments have been made by the President of the Supreme Court, Lord Neuberger who said, ‘many people [are faced] with the unedifying choice of being driven from the courts or having to represent themselves...[it] verges on the

hypocritical for governments to bestow rights on citizens while doing very little to ensure those rights are enforceable' (Lord Neuberger 2017, para 8, pp 4–5).

Reduction in parties attending mediation

Since 22 April 2014, all parties wishing to issue financial relief proceedings or Children Act applications must first attend a Mediation Information and Assessment Meeting (MIAM), unless they fall within one of the stated exemptions (Family Procedure Rules (2010), Rule 3.6). Exemptions include cases featuring domestic violence or child protection concerns, where proceedings must be initiated urgently or where a party simply wishes to file a consent order (Family Procedure Rules (2010), Rule 3.8).

MIAMs were not borne out of LASPO as since April 2011 clients have been encouraged as part of Pre-Application Protocol to attend a MIAM to learn about mediation as a potential alternative to court proceedings (Hamlyn *et al.* 2015). However, MIAMs did not receive statutory footing until the Children and Families Act 2014.

The party considering court proceedings will be required to pay for the MIAM unless they satisfy the legal aid means test, in which case it is free of charge. Individual mediators set their own fees but according to the National Family Mediation website the cost of a privately funded MIAM can vary from £30 per person to £120 per person, with the average charge being around £65 per person. The policy rationale behind MIAMs was to divert appropriate cases away from court thereby alleviating the burden on the family courts and allowing parties to reach a speedy and potentially more cost-effective resolution (Block *et al.* 2014).

Arguably, MIAMs have failed to achieve the effect of diverting cases from the court. The number of parties attending the assessments since the introduction of LASPO has been lower than anticipated. The Ministry of Justice estimated that removing funding for civil legal aid for private family law matters, but retaining funding for mediation, would lead to an additional 9,000 mediation assessments and 10,000 mediation cases per year (Block *et al.* 2014). In contrast, however, there were 17,246 fewer mediation assessments in 2013–2014, a 56% decrease from 2012–2013 (the National Audit Office, Ministry of Justice and the Legal Aid Agency, 2014).

Following a Freedom of Information request to the Ministry of Justice, National Family Mediation established that in 2014/15, out of 112,000 private family law applications, only one in twenty had been preceded by a MIAM (National Family Mediation, 2016). Accordingly, a significant number of exemptions are being claimed. It is doubtful that all of these exemptions are valid. Rather, it is possible that over-worked court staff are not effectively checking applications to ensure that parties have attended a MIAM or an exemption has been validly claimed. Alternatively, it is arguable that self-representing litigants are unaware of the requirement to attend a MIAM and may therefore be referred by a family court judge after the first hearing (or not at all).

Research conducted by the Ministry of Justice and the Legal Aid Agency and published in 2017 indicates that LASPO has reduced the contact that members of the public have with solicitors, who are most likely to inform clients about the requirement to attend a MIAM and the benefits of mediation. Prior to LASPO over 80% of referrals to publicly funded MIAMs were made by solicitors holding a legal aid contract. Following LASPO, however, this dropped to less than 10% (Ministry of Justice and

the Legal Aid Agency 2017a). It was acknowledged in the Ministry of Justice report that whilst other sources of referrals have increased (for example, from third sector organisations or court referrals) this is not enough to compensate for the loss in legal aid solicitor referrals.

Mediators have also acknowledged what they perceive as the loss of an incentive for solicitors to refer publicly funded clients to MIAMs, given they no longer (except in a small proportion of cases) receive legal aid for representing them in court proceedings. Mediators believe these 'clients are being turned away from solicitors' firms without being able to speak with a solicitor and without being informed about publicly funded mediation as an alternative option to litigation' (Block *et al.* 2014). Cynics may also query whether solicitors have become adept at drafting applications in such a way as to make an exemption apply, in cases where it should strictly not.

In any event, there does not appear to be a significant correlation between those who have attended a MIAM going on to further mediation sessions. In 2013–2014, the number of mediation cases starting after an assessment fell by 5,177 cases or 38% from 2012–2013 (Report for the National Audit Office, Ministry of Justice and the Legal Aid Agency 2014). In the period 2015–2016, the amount of starts stabilised but they remained at around 60% of pre-LASPO levels (Ministry of Justice and the Legal Aid Agency 2016). There were 1,600 mediation starts between April and June 2017, which is the lowest number since the LASPO Act was introduced (Ministry of Justice and the Legal Aid Agency, 2017). This suggests that MIAMs are simply viewed as an inconvenient administrative hurdle to comply with before proceedings can be started rather than as a serious alternative to court proceedings.

The key to why mediation is underutilised may lie in the joint claim by the Ministry of Justice and the Legal Aid Agency that mediation 'is cheaper and quicker than using the courts and it also allows for a more flexible approach' (Ministry of Justice and the Legal Aid Agency 2016, p. 25). For self-representing litigants, the idea that mediation is cheaper than pursuing court proceedings can be a misnomer. In such cases, parties will not incur costs instructing a legal professional and they are likely to benefit from a reduction (or complete removal) in the court fee through fee remission. They may also receive assistance with meeting the costs of disbursements that may be incurred throughout the court process. For example, in Children Act cases, CAFCASS can now be asked to meet the cost of DNA testing (Munby and Douglas 2015) and in divorce cases, an unrepresented party can ask the court for bailiff service rather than having to instruct a more expensive process server. Therefore the cost of pursuing court proceedings for self-representing litigants can be nominal. In contrast, however, if a party does not satisfy the strict means test for legal aid, they will be required to pay for an indefinite number of mediation sessions at an average cost of £110 per person for children issues mediation or £130 per person for property and finance mediation (National Family Mediation Service, n.d), with no guarantee that a resolution will be reached. In 2016, only 61% of all family law mediation outcomes involved successful agreements (Ministry of Justice and the Legal Aid Agency, 2017). Even if an agreement is reached, some mediators will charge additional fees on top for drawing up an agreement, which is not legally binding. According to the National Family Mediation website the average fee charged for drawing up a parenting agreement is £22 and the average fee for drawing up a Memorandum of Understanding for a property or financial agreement is £100.

It is therefore unsurprising that despite the requirement to attend a MIAM, the number of family law cases being issued at court has not decreased. In the immediate aftermath of LASPO, the number of private law applications being issued declined by 25% to approximately 9,130 in the quarter April to June 2014 (Ministry of Justice and the Legal Aid Agency 2014). However, applications gradually increased to 10,494 in the period April to June 2015 and by the same period in 2017 reached 13,029, which exceeds pre-LASPO levels (Ministry of Justice and the Legal Aid Agency, 2017). This suggests that the provision of legal aid in this area [private law cases] was not creating increased litigation, in contrast to the Government's assertions.

Increase in applications for injunctive protection

As explained earlier in this article, one of the few exceptions to the rule that legal aid is not available in private family law cases is where evidence of domestic abuse or violence (referred to as gateway evidence) can be produced (Civil Legal Aid (Procedure) Regulations 2012). Despite considerable legal challenges, the type of gateway evidence Legal Aid Agency will accept is still quite restricted. Examples include a relevant unspent conviction for a domestic violence offence or a relevant police caution for a domestic violence offence given within the preceding five years, a domestic violence protection notice/order or a letter from the applicant's general practitioner or domestic violence organisation confirming that the applicant is or has been a victim of domestic violence (Civil Legal Aid (Procedure) Regulations 2012).

The obvious problem is that in many cases of domestic abuse, victims are reluctant to speak out and the abuse therefore goes unreported, resulting in a lack of evidence which could be used to source legal aid. In turn this has previously meant that many victims have had no choice but to attend court without representation, and if the matter becomes contested, face the possibility of being cross-examined by a potentially abusive ex-partner. This has somewhat been alleviated by the introduction of paragraph 28 to Practice Direction 12J which prevents an unrepresented abuser cross-examining his victim; however, this does not prevent victims from having to face their perpetrators in court in the vast majority of cases.

In cases where survivors have not reported the abuse to the police, their medical practitioner or a domestic violence organisation, they are able to apply to the court for a non-molestation order against their abuser. Such injunctive protection, granted within the five-year period immediately preceding the date of the application for legal aid, is acceptable gateway evidence for the Legal Aid Agency. Provided the survivor meets the financial means criteria, they will also be able to obtain legal aid to assist them with making this application. The non-molestation order can then be used as evidence of domestic violence in other family law proceedings. For example, if a woman has been a victim of domestic abuse by her ex-partner but has no other evidence because it has never been reported, she could apply to court for a non-molestation order to protect her against further abuse. Once she has obtained this order she could then use this as evidence of domestic abuse to obtain legal aid for children proceedings to set out the arrangements as to who the children will live with and how they will spend time with the other parent.

Concerns could therefore be raised that since LASPO protective injunctions have been used for a purpose beyond that which they were originally introduced for (i.e. to evidence domestic abuse for legal aid purposes as opposed to simply provide a protective remedy). It has been reported that protective injunctions continue to be the most frequently used evidence of domestic violence (Ministry of Justice and the Legal Aid Agency, 2017). There were 6,827 domestic violence orders granted in April to June 2017, 91% were non-molestation orders compared to 9% which were occupation orders (Ministry of Justice and the Legal Aid Agency, 2017). This is compared to 5,405 orders granted in the same period of 2012 (Ministry of Justice 2012). Court statistics also record an increase in domestic violence remedy order case starts and applications. Whilst of course this could partly be due to an increased societal awareness of domestic abuse and the protection available, it is also possible that since the introduction of LASPO, solicitors consider it is worth trying their luck at applying for a non-molestation order in order to secure funding.

The process for obtaining a non-molestation order or occupation order in England and Wales is relatively simple. The Applicant will often apply *ex parte* (without notice) to the Respondent and the only evidence before the court will be the Applicant's witness statement, which will outline the incidents of abuse relied on. In the writers' experience, judges are likely to err on the side of caution and grant an interim order. A return hearing will then be listed so that the Respondent can put forward their case. If the Respondent has access to legal advice then they will often be persuaded to give an undertaking that they will not molest the Applicant (which is also acceptable gateway evidence for the Legal Aid Agency) or to accept that the order will continue but prefacing it with a note that the Respondent disagrees with the allegations and no findings of fact are made about the truth of the allegations. Concerns could therefore be raised that the evidence in these cases are not being appropriately tested and this is therefore leaving the process open to manipulation from individuals who are wishing to source gateway evidence for other proceedings.

However, there are concerns about the testing of the evidence even if applications do not settle at the return hearing and become fully contested. It used to be that this rarely happened. However, because legal aid is very rarely available for a Respondent to an application under the Family Law Act, quite often the Respondent will not get advice at the return hearing regarding the benefits of not contesting the application. The Applicant may also not have access to legal aid if they have not passed the means test. As raised earlier in this article, this does not necessarily mean that they will have funds available to pay privately for legal advice. They may simply not have passed the means test because there is equity in the family home from which they have fled. This usually means that the court must list an application for a fully contested hearing with two litigants in person, one of whom is potentially very vulnerable. When listing the case for a contested hearing the court will give directions for evidence, which quite often in domestic abuse cases could include evidence from the police or from medical professionals. Unfortunately, this evidence is not available without payment of a fee and if neither party is eligible for legal aid they will be responsible for paying for that evidence themselves. If they are unable to afford this then it could be argued that they are being prevented from fully putting forward their case. With regards to the final hearing itself, it is hoped that paragraph 28 of Practice Direction 12J will assist with the much controversial issue of both parties cross-examining each other without the help of

representatives. However, whilst this provides additional protection to the parties themselves, it is likely that this will involve an increased role from the judge in the case, who may have no choice but to take responsibility for asking the questions to each party. Again, this demonstrates a significant stretching of the judicial role to compensate for the lack of legal aid.

The burden for the family court system is twofold: they are having to deal with this increase in contested applications, but since LASPO the court fees for protective injunctions have been removed meaning the courts do not receive a contribution to their costs for hearing those applications.

The financial burden

There has also been a considerable financial impact as a result of the reforms. This cost has been estimated by the Ministry of Justice as being £3.4 million in 2013 and 2014 alone (Grimwood 2016). This figure includes approximately £370,000 spent by the Ministry on various types of support for litigants in person (*ibid*). One such project to support litigants in person is the Litigant in Person Support Strategy, which was launched in October 2014 in response to the acknowledged increase in litigants in person. The Strategy is funded by the Ministry of Justice and supports a range of projects including Law for Life, LawWorks, Personal Support Unit, RCJ Advice, Bar Pro Bono Unit and the Access to Justice Foundation. These projects help vulnerable people seek access to justice by providing online and self-help resources, providing practical and emotional support and where possible, providing pro bono advice. It is estimated that a further £2 million will be spent in further support in 2017 and 2018 (*ibid*).

The courts have also had to address the issue of who should pay for expert reports and other such disbursements when the client cannot and the Legal Aid Agency refuses to do so. In *Q v Q* [2014] EWFC 31 Sir James Munby considered that as a ‘last resort’ HM Courts and Tribunal Service could be ordered to pay the cost of legal representation, experts’ fees and for interpreters and translators where the client was not eligible for public funding and Exceptional Case Funding was not awarded (para 90). He argued that this would be necessary where the parties’ rights to a fair trial under article 6, and private and family life under article 8 would be jeopardised. Sir James issued a stark warning that ‘the Ministry of Justice, the LAA and HMCTS may wish to consider the implications’ (para 92). This judgment subsequently overruled by the Court of Appeal who stated that ‘there is no legal basis on which such an order can be made’ (*Re K and H (Children)* [2015] EWCA Civ 543).

The issue of whether the court could assume such a financial burden was reconsidered by the courts in the private law case of *Re K and H (Children: Unrepresented father: Cross-examination of a Child)* [2015] EWCA Civ 543. The case concerned a self-representing father who sought contact with his child (Y) but against whom, Y had made allegations of sexual abuse. The allegations were disputed. The judge considered that the child was a competent witness who should be cross-examined. The judge stated that:

- (i) it was not appropriate for the father to cross-examine Y (in fact he did not wish to do so);
- (ii) it was not appropriate for him (the judge) to put questions to Y to test her allegation against the father; (iii) the court should arrange for a legal representative to be appointed to cross

examine Y on behalf of the father; and (iv) the costs of the legal representative should be borne by Her Majesty's Court and Tribunal Service ("HMCTS"). (para 3)

On appeal, the Court of Appeal disagreed that the judiciary had the authority to order HMCTS to provide funding. Instead, the Court placed a burden on the court to provide practical assistance, rather than funding support. The Court held:

In a simple straightforward case, questioning by the judge is likely to be the preferred option and it should present no difficulties. The judge will know what the unrepresented party's case is. It may be helpful for the judge to ask him or her to prepare written questions for the court to consider in advance. Sometimes, unexpected answers may be given to the judge. These may require the judge to ask the unrepresented party to comment on the unexpected answers and to suggest supplementary questions for the judge's consideration. In my view, in the present case, which is fairly straightforward, the judge should probably have decided to conduct the questioning himself. I am in no doubt that the nature of this case is such that there were options available to the judge which would have ensured a fair hearing and vindicated the Article 6 and 8 rights of the father and K and H (para 60 – 61).

The Court did, however, accept that in cases involving complex medical or expert cases or particularly vulnerable witnesses, it may not be appropriate for the judge to conduct the cross-examination. In such cases, it may be that the cases cannot be conducted without a breach of the Convention. It is arguable that this issue will become more prevalent in the coming months, following the introduction of the new paragraph 28 of Practice Direction 12J, which provides that in cases where domestic violence is in issue, the judge 'should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focussing on the key issues in the case'. In addition, the increase in cases with an international element in recent years means that questions about who pays for interpreting and translation will surely be encountered more frequently.

Conclusion

It is widely accepted that the current system of legal aid is unsustainable for the family courts. This year marks four years since the cuts were implemented and the Government has committed to reviewing the reforms. Many charities and organisations have already published case studies about the effects of the cuts on vulnerable litigants and made recommendations for improvements (The Law Society of England and Wales 2017, Amnesty International 2016). It is considered unlikely, however, that the Government will renege on the budget cuts in any meaningful way.

The Ministry of Justice has been required to part-fund voluntary programmes to provide support to litigants in person. The Litigant in Person Support Strategy was set up as a collaborative project involving Law for Life, LawWorks, Personal Support Unit, RCJ Advice, Bar Pro Bono Unit and the Access to Justice Foundation. The aim of this collaboration was to provide assistance to litigants in person within the court and tribunal process by providing online resources (mainly through the Advice Now website); practical and emotional support; and where possible access to free or affordable legal advice.

One project funded (in part) by the Litigant in Person Support Strategy is the Personal Support Unit (PSU). The PSU is a voluntary organisation which sits in many court buildings up and down the country. It is staffed by volunteers who provide free assistance, although not legal advice, to self-representing litigants in civil and family courts. In the PSU Annual Report, 2009–2010, Lord Neuberger, President of the Supreme Court of England and Wales, stated that:

PSU volunteers perform the invaluable, sometimes even miraculous, task of calming litigants, going through their paperwork, and talking through their cases. This means litigants are cooler, calmer and more collected, and are therefore better prepared to present their arguments to the court. . . Consequently, justice is much more likely to be done (page 27).

Approximately 47% of the cases that the PSU deal with are family matters, which is an increase of 19% since LASPO was introduced (Personal Support Unit 2014). Ultimately, however, the PSU does not operate in every city and litigants do not benefit from guaranteed assistance by the same volunteer at each hearing. Volunteers are also not able to provide legal advice or representation. The service provided is therefore not an effective replacement for legal aid.

Attempts by members of the legal profession have been made to fill the gap left by the cuts. Many law firms and chambers report carrying out more pro bono work than was the case before LASPO was introduced. There have been calls for all firms to commit to providing a minimum level of pro bono hours for their staff. The top 100 firms would face a financial levy if they failed to comply. However, suggestions that pro bono activities should be mandatory for all firms have largely been dismissed as defeating the intention behind pro bono. For legal aid firms, it is also demeaning to suggest that they should now carry out work free of charge, which they would previously have been paid for.

Alongside the legal aid cuts, law centres, which had traditionally offered pro bono or reduced cost services suffered significant cuts as part of wider public sector austerity measures. Many law centres also had legal aid contracts and have therefore suffered double cuts. This resulted in a large number of closures. Those organisations which survived had to restrict the number of clients they could assist and had to spend valuable time raising funds by other means. The future is looking brighter for law centres with three more law centres recently opening, including one in Manchester which had previously been identified as a legal advice desert (The Law Centres Network 2017). However, this is still not sufficient to meet the public demand for pro bono work.

The combined effect of the cuts to legal aid and law centre funding is that people are now required to seek advice in less traditional forums including MPs' offices and law school clinics. Whilst these organisations provide a valuable service they can by no means fill the gap left by legal aid because they are often unable to assist in complex or urgent matters. For example, the purpose of law school clinics is to provide a practical, educational benefit to its students, alongside providing free legal advice to the community. The cases those clinics take on therefore have to be suitable for students with little to no prior practical legal experience. Because the students will have to spend time researching the legal issues involved in a case and seeking supervision from a qualified solicitor, they are unlikely to be able to progress urgent cases at the speed they require. They are also

restricted because their lack of a practising certificate means they are unable to represent clients in court where a case is listed in front of a lay bench or a circuit judge or above.

By cutting legal aid, the government has seemingly only succeeded in passing the burden from one publicly funded agency, the Legal Aid Agency, to another, HM Courts and Tribunals Service. The family court system is currently at breaking point and further government review is urgently needed if people are going to be able to continue to use the system effectively.

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- Re JC (Discharge of a care order: legal aid) [2015] EWFC B 39
- Q v Q [2014] WLR (D) 372, Re B (A Child), Re C (A Child) [2014] EWF C 31

DOMESTIC ABUSE AND THE PROVISION OF ADVOCACY SERVICES: MAPPING SUPPORT FOR VICTIMS IN FAMILY PROCEEDINGS IN ENGLAND AND WALES

Ana Speed¹

Abstract

The role that domestic abuse services play in navigating victims through the family court process is under documented in domestic abuse literature, save for a recent enquiry conducted by SafeLives at the request of the Domestic Abuse Commissioner, which was published in June 2021. Building on that work, this article presents empirical insights from a separate study of 29 Independent Domestic Violence Advisers (IDVAs), domestic abuse support workers and legal professionals. The study evaluates the type of support that is provided by domestic abuse services to victims in family court proceedings and considers the extent to which such services are able to reduce barriers to the family courts for victims. Finally, drawing on Costello and Durfee's assertion that to improve the practice of advocacy services, it must be challenged, critiqued, and pushed forward, the limitations of support provided by victim services will be discussed. The data is cautiously optimistic that domestic abuse services can support victims to make more informed choices and navigate proceedings more competently and safely than if such support were not available, albeit there is a need for greater investment in legal training to ensure the quality of support provided and funding to protect the short to medium term future of advocacy interventions.

Key words: domestic abuse support services; advocacy; family courts

Introduction

The family court plays a central role in the provision of protective remedies for victims of domestic abuse. The issues surrounding an abusive relationship, however, can rarely be dealt with by way of protective orders (i.e., non-molestation orders and occupation orders) alone and other interrelated family proceedings are often required. There may be property issues to resolve, arrangements to be made for children or, if the victim and perpetrator are married, divorce proceedings to be considered (Richardson and Speed, 2019b). In some cases, both or neither justice system will be engaged. However, evidence consistently demonstrates that criminal proceedings play a

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secondary role to the family court in providing legal recourse to victims of domestic abuse, due to high rates of attrition at all stages from reporting to prosecution (Herman 2005). Further, studies indicate that victims are more inclined to prioritise their protection and that of any relevant children above the punishment of the perpetrator (McGlynn et al 2017). The importance of the family court is heightened by the fact that alternative dispute resolution (i.e., mediation) cannot provide a victim of domestic abuse with legally enforceable protection, nor (in the context of divorce or children proceedings) is it considered appropriate due to power imbalances which exist in relationships where domestic abuse is prevalent (Practice Direction 3A, Family Procedure Rules 2010). Accordingly, whether through choice or limited alternative options, the family court is often the only route to legal resolution for victims of domestic abuse.

The process of pursuing (or responding to an application for) a family court remedy is designed to be undertaken with the benefit of legal representation. This is not necessarily reflective of current practice however, as a series of cost-saving measures in the family justice system over the last decade have reduced the accessibility of legal aid and led to an increase in the number of litigants in person (both applicants and respondents) (Organ and Sigafos 2018; Trinder et al 2014). The most extensive reform was the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which removed legal aid from the scope of private family law proceedings unless specified evidence is produced of domestic abuse or child abuse, or the application relates to a protective injunction under the Family Law Act 1996 (schedule 1, LASPO). Where such evidence can be provided, and the victim satisfies the means and merits assessment, legal aid will be available in all family law proceedings resulting from the abusive relationship. Whilst in principle, LASPO intended to preserve legal aid for victims of domestic abuse, in practice studies indicate that as of 2018, only around 60% of victims actually satisfied the financial eligibility criteria (Hirsch 2018). Family court statistics corroborate that LASPO has led to an increase in litigants in person, with the number of unrepresented applicants in injunction proceedings increasing from 19.3% in 2013 when LASPO was introduced to 40.3% in 2019, and in private children proceedings from 38.4% in 2013 to 58.1% in 2019 (Ministry of Justice and National Statistics 2021).

The rise in litigants in person is concerning because unlike criminal proceedings, victims must initiate the family court process themselves (although, in the context of protective orders it is proposed that from 2023, third party applications will be permitted when Domestic Abuse Protection Orders (DAPOs) are introduced under the Domestic Abuse Act 2021). Research demonstrates that a litigant in person's prospects of achieving a positive outcome may be compromised by having a weak understanding of the substantive law (Moorhead and Sefton,

2005) and legal procedure (Sandefur, 2015). Studies have also shown that victim litigants in person are less likely to have their applications for protection granted than their represented counterparts (Durfee 2009). The difficulties pursuing a case without assistance are often exacerbated for victims of domestic abuse by features of the court process which can add to an individual's vulnerability and impede effective participation, including the requirement for a victim to attend a hearing in the presence of her perpetrator, to present evidence to the court about the abuse and (until the relevant provisions of the Domestic Abuse Act 2021 are implemented in Spring 2022 which will prohibit this) to potentially cross-examine or be cross-examined by her perpetrator.

Given the potentially harmful effects of being a litigant in person on a victim's wellbeing and prospects of success, it is unsurprising studies have found that LASPO has resulted in litigants attempting to seek legal advice and (where this is not available) practical and emotional assistance with their legal disputes from third sector organisations (Organ and Sigafos 2018). Providers of pro bono legal services have traditionally included law centres and Citizens Advice however wider austerity measures have reduced the capacity of such organisations, leading people to seek assistance in less traditional forums including MPs' offices, charities located at court buildings and law school clinics (Richardson and Speed 2019a; Speed 2021). Literature has considered the extent to which such services are capable of 'filling the gap' left by cuts to legal aid, with most academics concluding that pro bono organisations are unable to have an appreciable impact on reducing the rates of litigants in person because of their limited capacity to assist in urgent or complex proceedings (Richardson and Speed 2019a; Speed 2021). Others have questioned the meaningfulness of pro bono advice given that it is typically 'general in nature' and provided on a one-off basis with there being 'very little free casework' (Organ and Sigafos 2018, p.22).

Alongside services which are available to all litigants, victims of domestic abuse may also seek assistance with legal disputes through advocacy services delivered by domestic abuse organisations/victim services. The term victim services 'encompasses organisations providing a range of options that enable women [and sometimes men] to create safety, seek justice and undo the harms of violence' (Kelly 2008, p.10). Operating since the 1970s, support is typically provided by non-government organisations, although some services may be 'commissioned' and funded at least in part, by the State or local authority (Kelly 2008). Founded on the principle of empowerment (aligning many services with a feminist agenda), support services are recognised for developing essential responses to help women leave abusive relationships (Kelly 2008). Whilst victims may require multiple forms of support including refuge accommodation, resettlement services and therapeutic interventions, support for victims in family law disputes fall within 'advocacy services' which comprise 'early intervention, *support through legal*

cases, practical support, and ensuring that rights and entitlements are forthcoming' (Kelly 2008, p.13). Costello and Durfee (2020) note that advocacy support aims to improve the safety of petitioners and their families, hold perpetrators accountable, and advocate on behalf of a petitioner for a constructive experience in the justice system' (p.303). Studies have found that despite there being widespread support for advocacy services, they are underfunded compared to other types of domestic abuse support (Women's Aid 2021). Further, whilst some formal initiatives exist to ensure dedicated advocates can work with victims in family court proceedings, funding for these services is disproportionately directed at supporting victims to engage in criminal proceedings (SafeLives 2021). SafeLives (2021) identified that 'the proportion of victims receiving either only informal or no support is largest when looking at those survivors who had been through the family court', with 47% of the victims in their study receiving only informal support and 38% receiving no support - more than double than for victims who went through magistrates court (16% and 14% respectively) and crown court (both 15%).

The focus on advocacy services in criminal proceedings is also reflected in domestic abuse scholarship. In contrast, the role that domestic abuse support services play in navigating victims through the family court process is under documented in domestic abuse literature, despite research estimating that at least one in ten victims engaged in family court proceedings receive such support (SafeLives 2021). By presenting empirical insights from 29 Independent Domestic Violence Advisers (IDVAs), domestic abuse support workers and legal professionals, this article makes timely findings which address this gap in the research. Firstly, the article evaluates the type of support that is provided by domestic abuse support services to victims in family court proceedings. Secondly, it considers the merits of such services, focussing in particular on the extent to which they are able to reduce barriers to the family court for victims of domestic abuse. Finally, drawing on Costello and Durfee's (2020) assertion that 'to improve the practice of advocacy services, it must be challenged, critiqued and pushed forward' the limitations of support provided by victim services will be discussed (p.300). It is acknowledged that at the same time as the study discussed in this article was carried out, the Domestic Abuse Commissioner Nicole Jacobs asked SafeLives to map the provision of (criminal and family) court-related domestic abuse support and advocacy across England and Wales, demonstrating the value and timeliness of the present study. The remit of the SafeLives (2021) study, which was published in June 2021, bears parallels with the study discussed in this article, in that it considers 'the proportion of family courts where domestic abuse support/advocacy services are able to support victims', the availability of 'ad hoc' support for these client groups amongst services not specifically commissioned to do so' and 'the current capacity of these services and their capacity to manage any future surge

in demand' (p.9). Given that both sets of data potentially comprise some of the same respondents, a comparison of relevant findings is made throughout this article to test the validity and reliability of this study.

Literature review – mapping advice and support for victims of domestic abuse

The availability of legal aid

Given that the justice system is 'based on an adversarial, full representation model with two lawyers presenting their client's case to an impartial arbiter – the judge – who will make a decision', legal services provided by a qualified representative is invariably the most preferable option for those navigating a family case (Trinder et al 2014, p.53). However, there are various reasons why this may not be accessible to victims of domestic abuse. As indicated above, principal amongst these are the legal aid cuts imposed by LASPO which have reduced the availability of public funding, notwithstanding that cases for injunctive protection (and interrelated proceedings arising from an abusive relationship) remain within the scope of legal aid. Demonstrating the reliance that many victims have on public funding, statistics indicate that out of the 30,683 applications for non-molestation orders and occupation orders in 2020, legal aid was applied for by 20,985 applicants and granted in 20,135 cases (Ministry of Justice and National Statistics, 2021; Ministry of Justice 2021). Of course, this does not provide an indication of the number of victims initially assessed as ineligible by a legal aid solicitor where an application was not pursued. In respect of the means test, LASPO froze the income and capital thresholds which applicants must satisfy, meaning there has been a real terms reduction in the maximum income and capital an applicant may have to qualify for funding since the Act came into force. Further, LASPO removed the provision that applicants in receipt of welfare benefits were automatically eligible for public funding. Over the last year, there have, however, been two changes to the legal aid regulations which, for the first time since LASPO was introduced, may potentially improve the availability of legal aid for victims. The first of these is the decision in *R (GR) v Director of Legal Aid Casework* [2020] EWHC 3140 (Admin) where the High Court 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. Secondly, was the successful challenge by the Public Law Project to the rule that when determining the value of an individual's interest in a property, a mortgage would only be considered 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 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 (Regulation 2(4) of The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020).

Literature indicates that the other key barrier to legal aid created by LASPO has been the requirement to secure gateway evidence, which exists for all family proceedings except where the victim is seeking a protective order (Organ and Sigfaos 2018). The initial legal aid regulations contained restrictive forms of acceptable evidence (The Civil Legal Aid (Procedure) Regulations 2012), much of which needed to relate to incidents that took place within the two years prior to the date of the legal aid application. In addition, the restrictive gateway evidence did not accommodate difficult to evidence forms of domestic abuse such as financial abuse. In February 2016, the Court of Appeal found that the limited evidence requirements prevented survivors of abuse from qualifying for legal aid and were therefore unlawful (*Rights of Women v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91). In April 2016, new regulations were introduced extending the 24-month time limit to 60 months and introducing new forms of acceptable gateway evidence for financial abuse into regulation 33(2) of the Civil Legal Aid (Procedure) (Amendment) Regulations 2016. The regulations were subsequently amended again in January 2018 to remove the time limit on abuse evidence and to broaden the scope of gateway evidence to include letters from domestic violence support organisations (para 17, schedule 1 of LASPO) and IDVAs (para 14). The accessibility of gateway evidence has since been improved by section 80 of the Domestic Abuse Act 2021 which prohibits medical professionals from charging for preparing such evidence.

The cost of legal services

Studies demonstrate that many victim litigants struggle to satisfy the legal aid means test but are also unable to afford to pay privately for advice and representation, suggesting that the means test does not accurately reflect the level at which people can afford to pay for legal services and supporting the need for the ongoing Ministry of Justice review into its fitness for purpose (Hirsch 2018; Speed and Richardson 2022). Trinder et al (2014) found that the largest category of litigants in person in their study were those representing themselves because they could not afford a lawyer, supporting that 'a major reason for self-representation is an inability to afford the cost of legal representation' (p.13). This is compounded by litigants facing other costs including court fees and disbursements, which are steadily rising. Whilst some victims will utilise an unbundled service (i.e., paying for legal services for some discrete aspects of their case) to ensure that they receive at least some specialised advice, this option will not be available to those who cannot afford to pay *anything* towards their legal costs. Further, scholars have questioned

the value of discrete advice given that many litigants in person then become ‘unstuck’ when they come to carry out other tasks without legal support (Trinder et al 2014, p.117).

Independent Domestic Violence Advisers (IDVAs) and court IDVAs

Regardless of whether a victim of domestic abuse is able to secure the services of a legal representative, support for victims during the family court process can be provided by an IDVA who is either located within court buildings (court IDVA) or within a community domestic abuse service. The IDVA model of intervention, introduced in 2005, is designed to be delivered from the point of crisis over a relatively short period of time and is focussed on working with statutory agencies to provide wraparound support, ‘addressing immediate risks to safety and barriers to service utilisation’ (Howarth and Robinson 2016, p.44). IDVAs working within community domestic abuse services will undertake some accredited training to support victims through legal proceedings and thereafter will assist victims engaged in legal disputes as and when their contract permits, however they will also provide support in other areas (i.e., housing) and at Multi-Agency Risk Assessment Conferences (MARACs). In contrast, a court IDVA will have an ‘advanced knowledge and experience of the justice process’, dedicating a greater proportion of their time to ensuring victims ‘have the right support needed to proceed through the justice process, advocating on their behalf where possible’ (SafeLives 2021, p.5). Court IDVAs were also intended to provide more extensive levels of support throughout legal disputes, including ‘attending solicitor appointments (where applicable), supporting applications for legal aid, signposting and making referrals, feeding into expert assessments, facilitating pre-hearing visits, ensuring special measures are put in place, keeping victims up to date with proceedings and attending hearings’ (SafeLives 2021, p.5). IDVAs may work within both criminal and family courts, and in family cases, can support victims across a range of proceedings including applications for injunctive protection and public and private children cases.

Whilst limited empirical enquiry has been carried out to assess the effectiveness of IDVAs, SafeLives recognise that they provide a ‘clear pathway through the system which sits at the heart of what works to achieve better outcomes’ (2021, p.6), with over a third of their victim respondents agreeing that their experience was improved by having a court IDVA. In contrast, without an IDVA, victims reported feeling traumatised by the court process, because of ‘a lack of understanding from judges and other court officials; fearing for their safety and that of their children; poor interactions with CAFCASS and the courts allowing perpetrators to use the system for coercive control’ (p.6). This mirrors assessments of IDVAs in the criminal courts, where studies have found that they are

able to secure improved outcomes for victims as those who receive support are more likely to report abuse to the police, file a statement, have their case investigated, and secure access to risk assessments and protective remedies (Campbell 2006; Coy and Kelly 2011). Nonetheless, there are limitations to IDVA services. Principally, IDVAs are only able to work with victims for a restricted amount of time (on average 14 weeks), resulting in some clients being left ‘without advocate support in the midst of the court process’ (SafeLives 2021, p.11). Further, as funding for IDVAs is provided by the Ministry of Justice (and allocated across Police and Crime Commissioners) and demand is high, IDVAs are often restricted to working with victims assessed as ‘high risk’, meaning those assessed as low and medium risk who nonetheless require access to family court remedies are left without formal support. Research also shows that there are ‘very few family court IDVAs’ in England and Wales, with over 70% of victims in the SafeLives’ study receiving no court support from an IDVA and only 14% receiving any other dedicated court support (2021, p.10). This was lower than the corresponding support available in criminal courts. The respondents to the SafeLives’ study identified that the paucity of court IDVAs had been exacerbated by an approach which favours ‘standard support as part of a wider domestic abuse support package’ leading to the withdrawal of court IDVAs in some areas/courts (2021, p.22) and a reluctance within some courts to accept IDVAs supporting victims or failing to take on board their recommendations. Whilst the Home Office (2021) has announced funding totalling £43 million to recruit 1,100 more Independent Sexual Violence Advisers (ISVAs) and IDVAs (comprising initial funding of £16 million and a subsequent pot of £27 million) there is currently no indication whether this will fund more IDVAs to support victims in family court proceedings.

Advocacy services by domestic abuse support services

As a result of there being ‘very few dedicated court support services’ for victims of domestic abuse (SafeLives 2021, p.17) most advocacy support is provided by community domestic abuse services, albeit not necessarily by qualified IDVAs. Instead, research indicates that such assistance may additionally or alternatively be provided by support workers or volunteers, who have undergone varying levels of legal training (Kelly 2008). SafeLives’ (2021) estimate that this is at a ratio of 15% (dedicated family court support) to 72% (community domestic abuse services), which is slightly lower than in the criminal courts. Whilst it is promising that the vast majority of domestic abuse services provide some form of advocacy support for victims in the family court, in contrast to court IDVAs, studies indicate that this accounts for only a small proportion of their work, with 85% spending less than 40% of their time supporting the court process (SafeLives 2021).

Advocacy support provided by non-legally qualified workers at a domestic abuse service are akin to 'lay legal advocates' in the USA, in that services are provided for free and alongside the provision of other domestic abuse support (Costello and Durfee, 2020). Moreover, while lay legal advocates may receive some receive training about legal processes and victim rights, they are not licensed to practice law (p.300). Costello and Durfee identify that advocates within these settings often support victims according to the principles of 'survivor-defined advocacy', by which 'advocates work to advance feminist goals, including the removal of the traditional patriarchal hierarchical relationship between advocate and survivor, which privileges the advocate as having greater knowledge, authority, and decision-making capabilities' (p.300). Instead, a survivor-defined approach 'prioritises victims' needs, emphasises survivor decision-making, and uses flexibility in response to the 'one-size-fits-all' approach' (p.300). Costello and Durfee identified four ways in which advocates in their study provided services consistent with survivor-defined advocacy, including by accompanying victims to court; safety planning; meeting victims' extra-legal needs and prioritising the survivor as the decision-maker (p.299). They concluded that survivor defined approaches are associated with 'more positive outcomes for victims, including increased safety and higher service satisfaction' (p.300).

As Costello and Durfee (2020) recognise, however, 'lay legal advocacy is not without problems' (p.313). McDermott and Garofalo (2004) for example, recognise that some advocates disempower victims by 'presuming to know better than a victim what is in her own best interests, providing unwanted intrusion into her life, shaping and retelling the story of her experience, acting against her wishes, and stripping her of the right to choose to participate in justice processes' (p.1251), although arguably many of these criticisms could also be levied at qualified legal practitioners. Concerns have also been raised about the quality of support provided by some domestic abuse services. Respondents in Speed and Richardson's (2022) study described the quality of advice provided by support services as not always to the same standard provided by a legal representative, either in its scope or accuracy. Advice was described as 'mixed' and it was noted, 'they might tell you some things but not other things'. In one case, a victim felt that if they had received more specific advice about the risks that came with applying for a protective order, she 'probably wouldn't have done it'. Similarly, SafeLives (2021) found that amongst victims who received domestic abuse support in the family court, 67% had not had the process explained to them beforehand. Victims' understanding of the court process was generally poor, with 36% reporting that they did not understand the process at all, and only 4% saying they fully understood – figures which were higher than in respect of the criminal courts. Whilst 37% of victims in the SafeLives (2021) study reported that domestic abuse support had a positive impact on their experience of the courts, almost half of those who had received

support were either 'somewhat dissatisfied' or 'very dissatisfied' with the support received. Only a third of those whose cases were heard at a family court were either 'somewhat' or 'very' satisfied.

Recognising inconsistencies in the standard of service provision, Kelly (2008) proposed minimum standards that all services should aim to implement with regard to advocacy services. She argued, 'amongst other areas, advocates should have sufficient knowledge to provide information, advice and referrals on legal rights and remedies (including child protection)' and should be able to 'explain criminal and civil justice processes... and the service user's rights' (p.43). It was proposed that minimum standards should be supplemented by aspirational standards, including maintaining an up-to-date list of local lawyers (including pro bono) who work with victims of abuse, accompanying victims to meetings with other professionals and having a working knowledge of the local law court rules and the local justice response. Whilst it does not appear that these standards were ever implemented, the literature discussed in this section indicate that there would be value in minimum standards to ensure advice is accurate and reflective of local legal practice. Alongside additional training, there is a recognition within the literature that more resources are required to improve the scope and quality of advocacy services. A recent Women's Aid (2021) audit of support services identified that advocacy services were the second least funded service after prevention and education work, and that nearly 43% of providers were, at the time of the audit, delivering advocacy services without any dedicated funding. The audit also found that 69% of providers were using reserves to cover these costs. Nearly 20% agreed that funding difficulties for advocacy work meant they were unable to plan for the future and this impacted the service delivered. These findings are supported by SafeLives (2021), where over a third of respondents acknowledged having no specific funding in place, with 10% noting that funding would run out in less than a year. Only 10% responded that services had secured funding for three or more years.

Methodology

The paper draws on data obtained from a mixed methods research project undertaken between March and September 2020. The study received ethical approval from Northumbria University. An online questionnaire was designed to obtain a comprehensive picture of the scope of assistance provided by domestic abuse support services to victims in family court proceedings. A request to participate was sent to all 331 support services listed in the Women's Aid and Mankind directories that had an email address recorded. Automated responses were received by 31 organisations, indicating that the request could not be delivered, or the email address was otherwise not in

operation. In total, 27 completed questionnaire responses were received, meaning the questionnaire had a response rate of 9%. The low response rate is likely to be attributable to the timing of the study. Significant time and resource pressures have been placed on support services since the outbreak of Covid-19 (Speed et al 2020). It is the author's position that although the response rate is not representative of the sample, the data nonetheless provide meaningful insights into the area of study as responses were received from all regions of England (and Wales) and from diverse organisations including national commissioned services, small rural services, refuges, specialised LGBT services and services supporting migrant and black and minority ethnic (BAME) victims. Only one of the responding organisations acknowledged having a family court IDVA located within their service, with advocacy support being provided in the remaining cases by general IDVAs, support worker advocates and volunteers. As domestic abuse legislation and policy is not consistent across the UK, during the process of cleaning the data, five responses from organisations located outside England and Wales were removed, meaning the findings presented in this article concern the position of the 22 responding organisations in England and Wales only. A descriptive statistical analysis was used to examine the prevalence of different types of services available to victims.

A limitation of the study is that the questionnaire was designed prior to Covid-19 and therefore did not directly address the extent to which the pandemic has affected service provision. Nonetheless, as the questionnaire was available for completion between April 2020 and September 2020, it was unclear whether the respondents had completed the survey based on their pre Covid-19 service provision or the provision as at the time the survey was completed, which as other studies have highlighted may have been substantially different (Speed et al 2020). The findings should therefore be interpreted as the minimum level of support provided, given that those organisations who reduced service provision during Covid-19 are likely to have done so on a temporary basis.

Semi-structured in-depth interviews were also carried out to gain an understanding of the lived experience of those supporting victims in family court proceedings. It is recognised that 'in gender-based violence research, qualitative methods can expose nuances in knowledge, attitudes and practice, as well as help develop an understanding of the effectiveness and challenges faced by support services' (Cancoro de Matos and McFeely 2019, p.341). The interview data therefore provides important qualitative understandings to some of the issues raised in the questionnaire. Follow up interviews were conducted with three respondents who indicated in the questionnaire that they would be willing to discuss their views and experiences further. An additional three interviews were conducted with support workers who had not completed the questionnaire but who were known

to the author in a professional capacity through her position as a family law solicitor, and four legal professionals who were recruited through a general email invitation sent to legal practitioners identified through a web-based search as specialising in domestic abuse. Interviews were therefore conducted with three solicitors; one barrister; two court based IDVAs/ISVAs (attached to national support services, operating in both the criminal and family courts); one Violence against Women and Girls advocacy manager; two children and young person's workers and two support workers. The data presented in this article therefore reflects the views of 29 professionals.

The interview data was coded using NVivo, which is recognised for providing a more rigorous method of coding than manual or other digital processes (Hoover and Koerber 2011). In vivo coding, where the initial codes refer to 'a word or short phrase from the actual language found in the qualitative data record' was utilised to reduce the risk of the researcher imposing their own biases on the data and 'honour the participant's voices' (Strauss 1987, p.33; Saldana 2016, p.106). With the exception of one of the interviews which was conducted prior to the Covid-19 outbreak, the remaining interviews were carried out remotely. This decision was one of 'methodological necessity' owing to the lockdown regulations (Johnson et al, 2019, p.3). Johnson et al (2019) recognise that whilst interviews conducted remotely 'do not significantly differ in interview length, subjective interviewer ratings and substantive coding, they likely do often come at a cost to the richness of information produced' (p.1). This is largely because in-person interviews 'provide the most natural conversational setting, the strongest foundation for building rapport, and the best opportunity to observe visual and emotional cues' whereas remote interviews can be 'difficult to manage, more likely to result in misunderstandings and limited in their ability to generate meaningful conversations' (pp.2-3). It is the author's position that the risk of remote interviewing affecting the quality of the data was mitigated to some extent by virtue of the author being a family law solicitor who is experienced in both conducting fact-finding exercises and discussing cases with other professionals. As a result, the interviews were overwhelmingly conversational and detailed interactions. Utilising video conferencing facilities for most of the interviews also ensured that at least some non-verbal and emotional cues could be identified. Conducting interviews remotely also allowed the author to gain access to participants in geographical regions which would otherwise be unrepresented in the data.

Findings and discussion

Type of assistance provided – advocacy services as distinct from other models of support

In common with the SafeLives study (2021), where nearly three quarters of community domestic abuse services reported providing support to service users engaged in family court proceedings, all of the questionnaire respondents provided some form of family court support to victims. Table 1 provides a summary of the services offered. Unlike many third sector organisations who are limited to providing one-off generalised information (Organ and Sigafoos 2018), the data indicate that domestic abuse services provide individualised tailored support and assist victims at all stage of the court process, regardless of whether they have a court IDVA attached to their service. Further, the data suggest that advocacy support has a broader scope than assistance offered by non-domestic abuse related third sector organisations, comprising advising victims about rights and processes, offering emotional support, and providing practical assistance with progressing a case. Broadly, the data support Costello and Durfee’s (2020) findings that ‘legal advocates provide petitioners with information, make referrals, accompany the petitioner to court proceedings, and assist with paperwork to increase the likelihood that applications will be issued’ (p.303). As table 2 demonstrates, whilst the respondents to this study offered broadly comparable services to those identified by SafeLives (2021), the respondents to this study provided such services at a slightly lower rate, albeit the reasons for this discrepancy were not clear from the data.

Table 1: Support provided in family court proceedings by questionnaire respondents

Types of services	Number and percentage of support services offering services
Help service users identify their legal needs	17 (77.3%)
Encourage service users to address their legal needs through engagement with the family justice system	17 (77.3%)
Make service users aware of the availability of legal aid	15 (68.2%)
Identify legal remedies available to address service users’ needs	15 (68.2%)
Refer service users to law firms	15 (68.2%)
Attend court hearings with service users	13 (59.1%)
Help service users to complete court forms	12 (54.5%)
Provide service users gateway evidence to enable them to secure legal aid	11 (50%)
Advocate on behalf of service users with the opponents in a dispute	10 (45.5%)
Help service users to comply with court directions	10 (45.5%)
Engage in national advocacy to raise awareness of service user’s legal needs	9 (40.9%)
Provide evidence (such as witness statements) on behalf of service users	8 (36.4%)
Offer drop-in appointments with qualified legal practitioners	8 (36.4%)
Liaise with legal representatives throughout legal case	6 (27.3%)
Engage in research or policy work to raise awareness of service users legal needs	6 (27.3%)
Provide community legal education (i.e., presentations about legal issues)	6 (27.3%)
Assist service users preparing letters to negotiate a resolution to disputes	5 (22.7%)
Act as McKenzie Friend in court proceedings	5 (22.7%)
Help service users avoid court by offering counselling to service users and family members in relation to their legal dispute	1 (4.5%)
Help service users avoid court by assisting them to negotiate a settlement or resolution to their case	1 (4.5%)
Provide service users financial support to pursue their legal case	1 (4.5%)

Do not offer any of these services	(0%)
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Table 2: Comparison with community-based family court support identified in SafeLives' study

Types of services	% of support services offering services (SafeLives)	% of support services offering services (this study)
Supporting clients to access legal aid	85%	68.2% / 50% (see table 1)
Support completing documents	82%	54.5%
Attend court with clients	79%	59.1%
Support to access legal support	79%	68.2%

(a) Supporting service users to secure legal aid

In common with SafeLives' findings, most of the questionnaire respondents reported making service users aware of the potential availability of legal aid in family proceedings. The role that support services play in facilitating victims to access legal aid is also documented in Syposz's research which found that after 'direct contact' and 'word of mouth', the next most common routes to engaging with a legal aid provider were either through a 'referral from a support organisation' or a 'specialist domestic violence organisation' (2017, p.21). Whilst all of the questionnaire respondents claimed to be aware that domestic abuse organisations and IDVAs are now able to provide gateway evidence for victims, only half reported actually doing so. One explanation is that there is an unwillingness within some organisations to provide gateway evidence and there was some support for this in the data. Two of the legal practitioners, for example, commented:

'Some domestic abuse services get nervous about these things... I just say, 'look just ask them to fill in the blanks and they should be fine'. But even then, some of them hesitate because they're like 'we don't know if we can say this' ... with legal proceedings, they think they're signing up to a lot.'

'We are able to work with the IDVAs to provide letters... but IDVAs initially were and still are quite cautious'.

The data therefore suggest that support services/IDVAs would benefit from training to support them to feel more confident providing evidence. Additionally, organisations may perceive that service users are able to secure gateway evidence from other organisations, meaning there is limited need for them to offer this service. This was supported by the fact that only 22.7% of the questionnaire respondents felt that securing gateway

evidence was a barrier to their service users accessing the family courts. One respondent noted that *'99% [of victims] are able to secure some form of evidence'*. Nonetheless, there continue to be benefits of IDVA/support services providing evidence, not least that victims are more likely to have regular engagement with a support worker compared to other professionals who can provide evidence (Syposz 2017). Further, not all victims make a 'revelation of the abuse to a public official' (Choudhry and Herring 2017, p.161). In such circumstances, retrospective evidence could not be sought from a GP or the police, however an IDVA/support service would be able to provide evidence after the fact. The finding that half of the IDVAs/support services in the study do not routinely provide evidence is also concerning because at the time the data was collected, section 80 of the Domestic Abuse Act 2021 was not yet in force meaning that medical professionals could (and often did) charge fees of up to £120 for providing evidence, which was prohibitive for those on a low income (Syposz 2017). Given that gateway evidence can be the difference between a victim receiving representation or acting as a litigant in person, it is critical that services provide evidence when they can do so, to ensure they themselves are not a barrier to support.

(b) Developing victims' understanding of the law and legal process

Most of the questionnaire respondents reported helping service users to identify their legal needs and potential remedies to address these needs. Respondents described this as a core component of advocacy support because, supporting SafeLives' (2021) findings, service users were thought to typically have a poor understanding of their legal rights, with an IDVA interviewee commenting, *'women don't understand the options available to them until we work with them'*. Research also suggests that Covid-19 has created new challenges for litigants to understand the operation of the Remote Access Family Court given that most guidance documents are aimed at legal professionals (Richardson et al 2021), indicating that the need for initial advice is likely to have increased recently.

Respondents reported that empowering victims with knowledge was an essential part of advocacy work, with one commenting, *'the point is to inform and advise so clients can make informed choices with all potential outcomes explored'*. This aligns with the values underpinning survivor defined advocacy, described by Costello and Durfee (2020), where advocates 'provide information about options and resources and help survivors to think through which options are best for them' (p.303). Further, it indicates a recognition amongst the respondents that 'whilst perpetrators and the courts constrain victims' power to make choices for themselves, advocates are able to stress the importance of ultimate decision-making powers resting with

the petitioner' (p.310). The concept of knowledge being a route to empowerment has been recognised in other studies. McKeever (2020) for example, identified that litigants in person face 'intellectual barriers' to accessing the justice system, which may affect their understanding that they have a legal case. Similarly, Trinder et al (2014) noted that 'without some informed guidance at the initial stages, litigants face great difficulties in attempting to understand and act upon the substantive law' (p.37). They note that services which provide face-to-face explanations, such as those in this study, can protect against victims needing to resort to unofficial sources of information. Further, they argue that litigants support needs may not be met by 'relying upon written or online material or passive information' as this requires a 'baseline level of legal knowledge and understanding' which not all litigants in person possess (p.106). Accordingly, the data suggest that, to the extent services are able to provide quality support (an issue considered later in the article) advocacy support may improve both initial access to the family courts and victims' understanding of their case and the legal process from an early stage.

Challenging Costello and Durfee (2020) however, the data also suggested that the relationship between an advocate and victim can impede, rather than promote, the exercise of a victim's autonomy. One of the respondents noted, '*sometimes you have clients that won't agree to anything the solicitor says unless they can have a conversation with an advocate*'. Although this respondent noted trying to deter such behaviour '*because we want the women we support to feel empowered in decisions without feeling that they need the go-ahead from the advocate*', it nonetheless suggests that some clients are heavily influenced by their advocates' views, which is concerning given that not all have legal training. Another respondent recognised that '*none of [our service users] have been open to attending court or accessing the justice system without the support of an advocate*'. Again, this is problematic where support is unreliable because of funding difficulties. Further, whilst it is suggested that support services can reduce rates of attrition (SafeLives 2021), assistance may not be available for the full duration of the proceedings, leading victims to withdraw if they feel unable to continue without the support of an advocate.

(c) *Facilitating referrals for legal services*

Questionnaire respondents reported attempting to secure legal advice for service users by referring them to law firms. Studies indicate that victims of domestic abuse engage with lawyers at a lower rate than support services. In Syposz's (2017) study, for example, the average number of victims seeking legal advice or representation from a legal aid provider each year was 81 whereas this figure was estimated at 270 by

domestic abuse services. This is potentially due to perceptions about the limitations on legal aid and the general unaffordability of legal services for many victims. Additionally, it may be reflective of the intellectual and practical barriers victims experience to knowing where to access help (McKeever 2020). Referrals to law firms on their own are likely to be of limited assistance to service users. Many of the respondents in Trinder et al's (2014) study, for example, were advised to 'seek legal advice' or were signposted to law firms, however the issue remained that they could not actually afford legal services. Combined with the fact that there is very little free legal advice available, referrals can therefore become a source of frustration for some litigants. This was also acknowledged by a small number of the questionnaire respondents in this study who perceived that their service users experience 'referral fatigue' - the process of being referred to multiple organisations who are unable to assist. A potentially more effective strategy was reported by over a third of the organisations, who offered drop-in appointments with qualified legal practitioners. Multi-agency partnerships such as this provide a means for clients to receive some tailored initial advice about their case and be triaged for legal aid eligibility, which may improve their prospects of securing longer term representation.

(d) Casework support

Many respondents reported providing ongoing practical assistance to service users throughout a case, including helping them complete court forms to start proceedings and complying with court directions. Some services also played a role in evidence gathering. Less than a quarter of the questionnaire respondents reported acting as McKenzie Friends. The Courts and Tribunals Judiciary (2010) Practice Guidance states that McKenzie Friends may 'i) provide moral support, ii) take notes, iii) help with case papers, iv) quietly give advice on any aspect of the conduct of the case' (p.1). Accordingly, based on the services described above, it is possible that some services were acting in this capacity without recognising it as such.

Providing casework distinguishes domestic abuse services from the more limited support available from pro bono and third sector organisations. Casework is important, however, because it fills a need for practical support identified by Trinder et al (2014) for 'help with paperwork... help with advocacy in court... and help with evidence-gathering' (p.112). Casework support is also likely to have a positive impact on the smooth running of a case because 'much of the work in a family case is conducted before and between hearings rather than in the courtroom itself' and because 'errors and omissions in the preparatory work done by litigants in person impact on court staff workloads and on the conduct of the hearing itself' (Trinder et al 2014, p.35). In relation to whether the respondents were likely to have been able to improve case outcomes the research is

cautiously optimistic. Sandefur (2015) found that lay experts may be as effective as legal professionals at influencing the outcomes of hearings as long as they have a competent understanding of court procedure and litigation conduct. Writing specifically in the context of protective injunctions, Durfee (2009) found that victims who were supported by a legal professional were more likely to secure a protective order than those who were supported by a domestic abuse advocate, although those supported by a domestic abuse advocate (but who did not have a legal representative) were 'slightly more' likely to secure a protective injunction than those who appeared without any support because they were able to structure clearer and more comprehensive narratives within the application documents. Accordingly, the literature suggests that offering casework could, at the very least, result in a minor improvement in the number of litigants securing successful outcomes in proceedings, particularly amongst those services who have a higher number of IDVAs/support workers with legal training and who offer support to victims in preparing their applications.

(e) *Attending court hearings and requesting special measures*

The majority of the questionnaire respondents reported attending court hearings with service users and described how this allowed them to provide emotional support to victims and create a 'welcoming less-threatening environment' (Costello and Durfee 2020, p.312).

'I'm just smiling, nodding my head encouraging and every so often an 'are you okay?' I'm not going to say anything that's inappropriate, it's just that reassuring face'.

'My practice is always to go in to check the room is okay and set out properly'.

Alongside supporting victims to prepare applications, physically accompanying victims to hearings emerged as a particularly valuable form of support in reducing barriers to the family court. because advocates can 'counteract the effects of victims' fears and increase feelings of safety, thereby improving the prospect a petitioner will be able to complete the process' (Costello and Durfee 2020, p.306). In addition, attending hearings with victims provided advocates an opportunity to challenge approaches which could disadvantage victims or compromise their ability to safely and effectively participate in proceedings.

'I'm fierce when it comes to protecting my women and if I have to [I will] stand to a judge and say, 'I'm sorry sir, she's not going to be able to do that, it's not acceptable'.

'We have to challenge sometimes... we've got to bend over backwards to make sure we're accommodating her safety'.

Challenging perceived unfair practices was particularly evident in the context of special measures...

'I think the family court have tried to fob it off and say, 'we can't accommodate that' and I'm saying, 'no, that's not acceptable'.'

Support for the idea that domestic abuse services can help establish a safer process and promote effective engagement in proceedings through challenging outdated or insensitive attitudes/approaches can also be seen in SafeLives' (2021) study where 45% of the victim respondents noted that their negative experience was attributable to professionals' attitudes and understanding of domestic abuse and 18% attributed it to poor safeguarding, special measures or other safety concerns. It is well documented that special measures in the family courts are not always available or fit for purpose but that those who participate without special measures find the process traumatising (Birchall and Choudhry 2018; Coy et al 2015). Attempts have recently been made to address this issue through provisions in the Domestic Abuse Act 2021, which create a statutory presumption that special measures should be granted to victims of domestic abuse because 'the quality of [a victim's] evidence and participation in proceedings is likely to be diminished by reason of vulnerability' (section 63). The Act will also prohibit perpetrators directly cross-examining their victims, albeit this provision will not be implemented until Spring 2022 (section 65). It is likely to remain the case, however, that without the support of a legal representative or an IDVA/support service, victims lack an awareness of the availability of special measures and the process required to request them (Speed and Richardson 2022).

Advocacy services are typically provided to women but not always by women

All of the questionnaire respondents supported female victims of abuse. The need for support for female victims will largely be reflective of domestic abuse demographics, as women are disproportionately victims of abuse and men are overwhelmingly the main perpetrators (Women's Aid 2012). The fact that over three quarters of the questionnaire respondents also assisted male victims was potentially surprising given that many organisations are

underpinned by a feminist approach to supporting victims (Kelly 2008). Nonetheless, this is a promising indicator that advocacy support is available for all victims. None of the advocacy services were offered by exclusively male support workers, however over a third were offered by exclusively females. Half of the respondents noted that advocacy support was provided by men or women, depending on availability, the need of the service user or the qualification of the service provider. For most respondents, a blanket policy that services should be provided by women was not therefore adopted. Whilst the value of women-only services is well documented (Women's Aid 2012), the need for gendered assistance with navigating legal disputes is potentially less important than services relating to therapeutic support given that victims may also receive legal advice and/or representation from a legal practitioner of the opposite sex (The Women's Resource Centre 2007). Other practitioners, however, have challenged this idea on the basis that domestic abuse as a gendered issue 'needs to be considered throughout each stage of service provision offered' (Women's Aid 2012 p.1). Women's Aid (2012) argue that 'coercive control which creates a gender power imbalance comes into play whenever a victim is in an intimate relationship with any male whether this is a future partner or a support worker client relationship... the presence of male staff can hinder recovery and empowerment' (p.1). The lower levels of women-only services within the sample may also be attributed to funding cuts and austerity measures which have made it more difficult for women-only services to thrive. Hirst and Rinne (2012) argue that as women-only services are non-statutory, local authorities consider that they have no obligation to provide them. Further, in commissioning processes, women-only services have reported that their limited capacity has meant they often lose out to larger more generic service providers. As a result, such services are nearly 16% less likely to survive than other service providers (Hirst and Rinne 2012). Both ideological and practical factors are therefore likely to drive who advocacy support is provided by.

Advocacy support is usually provided as an alternative, rather than in addition to, legal services

Supporting earlier literature, the data indicate that victims seek advocacy support from domestic abuse services when they have exhausted more traditional avenues to securing legal advice and representation (Speed and Richardson 2022). Combined with the finding that support services perform tasks that would ordinarily be carried out by a legal representative (i.e., preparing court paperwork), it would appear that in many cases advocates are an alternative to a legal representative. Further, the data indicate that support services are not necessarily a victims' first choice of support. In line with Trinder et al (2014) and Organ and Sigafos (2018), the most common reasons provided by the respondents for victims utilising their service were difficulties securing legal aid, the cost of pursuing a legal case (including court fees, disbursements, and legal services), and a lack of organisations offering

pro bono advice or support. Nearly half of the questionnaire respondents noted that their service users experience difficulty satisfying the legal aid means test, albeit at the time the data was collected the changes brought about by *R (GR) v Director of Legal Aid Casework* [2020] EWHC 3140 (Admin) and The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020 had not yet been implemented, which may have improved this position somewhat. Nearly three quarters of the questionnaire respondents identified that most of their service users could not afford to pay for initial legal advice in the event they did not qualify for legal aid whilst over 90% reported the same in relation to legal representation, supporting that most victims could not even make use of an unbundled service.

In common with previous studies, the questionnaire respondents highlighted that LASPO had resulted in an increase in their service users acting as litigants in person (16 out of 22) or not pursuing a legal case where they may have done so previously (12 out of 22) (Speed and Richardson 2022). In light of the findings that support services can potentially assist victim safety throughout proceedings, reduce rates of attrition and minimise practical, emotional, and intellectual barriers to the family court, the wider implications are that there needs to be greater investment in court IDVAs and funding advocacy services. Further, supporting Trinder et al (2014), where a litigant is unrepresented there should be a presumption in favour of them having an informal supporter in court hearings. For the foreseeable future whilst hearings are being dealt with remotely, this issue has been addressed by the Family Justice Council guidance (2020), which provides that courts should ordinarily allow either party to be accompanied in any hearing by a supporter (whether or not the party is legally represented) or a McKenzie Friend (if the party is not legally represented), subject to the judge's power to exclude any supporter who disrupts the hearing (section 4). The guidance states that 'ideally supporters should not be directly involved in proceedings (e.g., a domestic abuse support worker or friend)'. This guidance was implemented following findings by the Nuffield Family Justice Observatory (2020a, 2020b) that some judges have questioned the necessity of support workers being present during remote hearings or otherwise made it difficult for them to engage by listing or rescheduling hearings at the last minute.

Limitations of advocacy services

(a) Restrictions on service provision

In common with SafeLives' findings (2021), concerns related to the length of time with which services could work with victims, affecting both IDVAs and advocacy support more generally. Several of the respondents

were 'commissioned' by the state, leading to restrictions on how funding was spent. In addition to limits on time spent with victims, some organisations were believed to have quotas regarding the number of victims they were expected to support within a given timeframe. In line with previous studies, time frames quoted for supporting victims were often much shorter than the typical length of court proceedings, particularly during the pandemic where the average time taken to dispose of cases has increased (Ministry of Justice and National Statistics 2020). Supporting McDermott and Garofalo (2004) there was also evidence that funding restrictions resulted in some services excluding particularly vulnerable victims. In particular, limitations were placed on some commissioned services to provide support for victims with no recourse to public funds:

'We had a woman call the other day who was told [by a commissioned service] 'no sorry we can't help because you have no recourse for public funds'... I've seen this multiple times.'

'Women that have no recourse to public funds come to us and say 'I've called all of these helpline numbers'. When you think these women have gone their entire lives being taught they are worthless... so then to actually build up the bravery to pursue a protective injunction [but] domestic violence agencies are saying 'no sorry because of your visa status we can't help you'. All that is doing is reconfirming what they've been taught by the perpetrator'.

This contradicts the annual audit of domestic abuse services conducted by Women's Aid (2021) which found that no victims were refused support because a service was 'unable to meet support needs around no recourse to public funds' (p.47). Styles (2014) found that attempting to escape a violent relationship was a particularly difficult time for women with no recourse to public funds, and that without 'adequate and timely support', many women will return to an abusive situation. She argues, 'the support that is available to women will impact their decision-making processes and their ability to safely flee violent relationships' (p.26). A higher level of support may also be required for women with no recourse, who may have fewer social networks. It is therefore concerning that this study indicates vulnerable women are being turned away for support. In cases where a service is unable to assist, it is vital that referrals are made to appropriate services and victims are not expected to identify and approach services themselves, as in the examples provided above.

(b) *Quality of support*

Overall, the legal representatives interviewed were positive about their encounters with domestic abuse services. However, they also noted that although IDVAs/support workers claimed their assistance was not ‘legal’ in nature, deciding what remedies may be available to a victim and supporting them to complete court paperwork invariably involved some assessment of the client’s legal position. In common with Speed and Richardson’s findings (2022) there was a perception that some support workers lacked a sufficient working understanding of the law, compromising the quality of information provided to service users and their ability to offer the ‘legal reality-check’ that is required by many litigants at the early stages of their case (Trinder et al 2014, p.36).

‘This is no disrespect as they’re not legally trained, and yet despite working in this sector, some of them still don’t quite understand the law. For example, with what is needed to get a non-molestation order ex-parte, they continue saying, ‘right, this happened three months ago, this woman needs a non-mol’, and there isn’t merit for it. The client in their head is adamant they now want a non-mol. Then you say, ‘I can’t do that’. It makes us look like the bad guy because we can’t get them the support they need, as we’re restricted by the law’.

Examples were also provided of this having a detrimental impact on victims’ expectations:

If they are asked by the judge ‘why have you stopped contact’... [they will say] ‘because my support worker told me to’. It’s not for a support worker to say, ‘you should be stopping contact’, they should say ‘there’s some safeguarding issues that need exploring but you need to get legal advice around this to know the repercussions’. Because then you [the legal representative] are this bad person who says, ‘I hear what you say, I see what’s happened, but just to let you know when we go to court, he’s going to get contact’. Which happens quite regularly’.

Similar concerns were raised by The Transparency Project (2018) who noted that ‘parents are often given (well meaning) advice by support agencies (*domestic abuse services...* etc) that may include a mixture of what those services *think* the law *is* or *should* be, but which isn’t really what is likely to happen at all’ (pp.9-10). Whilst the legal professionals therefore recognised that part of their role was providing more robust advice, it is concerning that in many cases, legal professionals will not be instructed and victims may attend court with a poor or unrealistic understanding of the process and likely outcome. Issues around ‘understanding’ are likely to relate, at least in

part, to an absence of standards in training non-IDVA advocates and the low level at which advocacy services are funded, meaning that training cannot be prioritised. Whilst 16 out of the 22 questionnaire respondents reported that at least one of their staff or volunteer team had received some 'legal training' (albeit this was usually an IDVA), it was concerning that nearly a third of the respondents reported that no one in their organisation had received any legal training. In this context, it is unsurprising that some deficiencies were identified in advocates knowledge and suggests there is a need for a more detailed review into the need for training and the quality of support provided, particularly by those who do not possess an IDVA level qualification.

Conclusion

Academics have recognised that the identification of the Home Office as the lead government department for domestic abuse has 'resulted in a cultural and legal shift', with domestic abuse now being 'located within a criminal justice and disorder framework as opposed to embedded within a feminist/women's movement discourse' (Clever et al 2019, p.141). Whilst this may have resulted in the 'displacement of feminist theory and a reduction of its political power as a dominant mode for interpreting and analysing issues' it is nonetheless clear that IDVAs and domestic abuse services continue to play a valuable role in supporting victims to navigate the family court process, particularly in the wake of LASPO, and that feminist ideologies, aligning with the survivor defined advocacy described by Costello and Durfee (2020), underpin much of the support that is available (Clever et al 2019, p.141). The findings of this study indicate that although there is a paucity of IDVAs within England and Wales, particularly court IDVAs, advocacy support is also provided by community domestic abuse services, with such support being more extensive in its scope than that which is available from other third sector organisations. The data is cautiously optimistic that domestic abuse services can minimise intellectual, emotional, and practical barriers to the family justice system by ensuring victims are able to make more informed choices about pursuing (or responding to) a legal dispute and, in many cases, navigating the proceedings more competently and safely than if this support was not available. Invariably, given that such assistance is provided free of charge and often by support workers who have minimal training on legal issues, limitations on such services were identified. The findings largely support the recent study by SafeLives (2021), however, that in the aftermath of LASPO and wider austerity measures which have affected the availability of pro bono advice and representation, 'domestic abuse support and advocacy services are more vital than ever' and with the 'right resource, they can invest time in building relationships with victims as individuals, developing the trust and confidence critical for the successful

navigation of these often complex and challenging systems' (SafeLives and the Domestic Abuse Commissioner 2021, p.8).

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Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013
Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020
Civil Legal Aid (Procedure) Regulations 2012
Civil Legal Aid (Procedure) (Amendment) Regulations 2016
Council of Europe Convention on preventing and combating violence against women and domestic violence (The Istanbul Convention)
Domestic Abuse Act 2021
Family Law Act 1996
Family Procedure Rules 2010
Legal Aid, Sentencing and Punishment of Offenders Act 2012
R (oao GR) v DLAC, EWHC 3140 (Admin) (2020)
Rights of Women v The Lord Chancellor and Secretary of State for Justice, EWCA Civ 91 (2016)

Appendix 2: Ethical approval confirmations and study details

Ethical approval was granted for each of the studies by the ethics committee at Northumbria University.

1) Study 1: ethics application, consent form and participant information form

Approval granted for initial questionnaire on 4 February 2019.

Approval granted to conduct interviews on 28 October 2019.

Approval granted to expand recruitment for questionnaires on 14 April 2020.

Approval granted to conduct interviews with domestic abuse specialists on 21 May 2020.

Approval granted to conduct interviews with legal professionals on 26 May 2020.

(Pages 352 to 406 of this document)

2) Study 2: ethics application, consent form and participant information form

Approval granted on 9 November 2020.

(Pages 407 to 423 of this document)

3) Study 3: ethics application, consent form and participant information form

Approval granted on 2 April 2020.

(Pages 424 to 439 of this document)

4) Study 4: ethics application, consent form and participant information form

Approval granted on 21 July 2020.

(Pages 440 to 454 of this document)

My Documents

Amendments						
Refresh						
SUBMISSION ID	CREATED DATE TIME	CREATED BY	STATUS	DESCRIPTION	UPDATED DATE TIME	COORDIN...
13813	24/10/2019 08:23	Ana Speed	Amendment Approved	I would now like t...	28/10/2019	Tony Ward
13813	11/04/2020 09:27	Ana Speed	Amendment Approved	The original ethics...	14/04/2020	Tony Ward

Submission

Submission Ref: 13813
 Status: Approved
 Submission Coordinator: Tony Ward tony.ward@northumbria.ac.uk

Name: Ana Speed

Email: ana.speed@northumbria.ac.uk

Faculty: Business and Law

Department: Law

Submitting As: Staff

Externally Approved: Note: ONLY tick this box if your project has already received full ethical approval from an external organisation

Module Level Approval: Tick this box if staff and this submission refers to an entire module.
**** Only to be used for low or medium risk projects as categorised by the diagnostic risk question set ****

Module Code:

Module Tutor:

Titl...
 De...
 Em...

Research Supervisor:

Titl...

De...

Em...

Ethical Risk Level

Medium

[Click here to answer the ethical risk questions](#)

Risk Level Conditions:

Your ethical risk is **medium**. Your research should only consist of one or more of the following:

- Non-vulnerable adults
- Non-sensitive personal data referring to a living individual
- Secondary data not in the public domain
- Environmental issues
- Commercially sensitive information

Your project proposal has some ethical implications and will be reviewed by one independent reviewer appointed by your Faculty Research Ethics Committee. Some factors to be considered include considering obtaining informed consent forms from organisations or people involved, permission to use data from the Data Controller, as well as confidentiality/anonymity issues.

Ethical Risk Diagnostic Questions and Responses

 Refresh

ID QUESTION

ANSWER

No items to display.

Co-investigators

 Add  Edit  Delete  Save  Refresh

NAME OF CO-INVESTIGATORS

No items to display.

G1: General Aims and Research Design (Mandatory)

Title

Title of your research project

To what extent do traditional forums of informal dispute resolution operate within community and religious organisations in Newcastle's West End in relation to family law disputes and how does this facilitate and/or prohibit access to justice for female users?javascript;

Outline General Aims and Research Objectives

State your research aims/questions (maximum 500 words). This should provide the theoretical context within which the work is placed, and should include an evidence-based background, justification for the research, clearly stated hypotheses (if appropriate) and creative enquiry.

The proposed study:

The proposed study is a web-based questionnaire. The purpose of the questionnaire will be to elicit information about organisational perceptions of access to justice in the West End of Newcastle upon Tyne. Further, the study will examine whether community and religious organisations in Newcastle's West End offer dispute resolution services in relation to family law disputes. The questionnaire will allow me to identify the demographics served by the organisations, the type of services that they may offer to community members in relation to family law disputes and why these services are offered. This will enable me to address part (a) and (b) of my doctorate research question which are:

- (a) Do traditional forums of informal dispute resolution operate within community and religious organisations in Newcastle's West End?
- (b) If so, what services do these organisations offer and what role do they play in attempting to engage with family law disputes for their community members?

If the organisations do offer such services, they will then be asked further questions which will enable me to identify good and bad practices (i.e. whether they charge for the services, whether they advise about civil and criminal remedies and the availability of legal aid). This will address parts (d) and (e) of my research question:\

- (d) Is there evidence of good practice which would support that informal justice systems facilitate access to justice for their female users?
- (e) Is there evidence of bad practice which would support that informal justice systems prohibit access to justice for their female users?

(NB: Part C of my research question involves consideration of why these services are utilised but data about this will be obtained through interviews with service users and will not form part of the study to which this application for ethical approval relates).

The questionnaire will produce both quantitative information and qualitative data, the former of which can be analysed through statistical analysis whilst the latter will be coded for themes using a software programme such as NVivo.

The context for the proposed study:

As a practitioner working with BAME women in Newcastle's west-end, I am anecdotally aware from clients, solicitors and independent domestic violence advocates that BAME women are often encouraged to engage in local dispute resolution in relation to family law disputes (children, divorce and domestic abuse) in order to keep legal disputes within the community. Such processes are seemingly run by organisations with no legal qualifications and questionable intentions. On one occasion, I turned up at court for the return hearing of a non-molestation order for a client who had been subject to domestic abuse by her partner (including that he had had unprotected sex with my client who was unaware that he was HIV positive), only to find that her partner (the defendant in the proceedings) had brought a church elder with him to attempt to mediate the dispute before the court hearing. My simple hypothesis is therefore that informal justice systems do exist in the west end.

I am also acutely aware of the structural and cultural barriers to access to justice faced by BAME women and therefore I am interested in perceptions of 'justice' and 'access to justice' and the cultural relativism of these concepts. Typically, feminists are sceptical of the idea that informal justice systems can play an important or positive role in facilitating 'access to justice' for women (Siddiqui, 2018). This is on the basis that they have interpreted 'access to justice' as meaning access to formal justice systems (i.e. lawyers, judges and civil and criminal remedies). It is possible that a broader interpretation of 'access to justice' and 'justice' may result in a more favourable understanding of informal justice systems. Even if there are difficulties with informal justice systems, ignoring these systems will not change the problematic practices, which may be present in their operations. Existence of these systems cannot therefore be overlooked and it may be necessary to propose appropriate reforms (Wojkowska, 2006). The research question has been deliberately phrased to cover how informal justice systems facilitate and/or prohibit access to justice' because I accept that they may have both a positive and negative role.

My preliminary reading has revealed that whilst informal justice systems exist within England and Wales, particularly within Asian communities, there is no empirical research in relation to the existence of informal justice systems in the North East of England. Nor do the existing studies fully consider what role these organisations play in facilitating and/or prohibiting access to justice for BAME women. As such, the perspectives of BAME women are not at the forefront of the existing research in this area.

I do not intend to exclusively focus on Asian Islamic communities however I anticipate that due to the demographics of the west end and the existing literature in this area the majority of the community and religious organisations will serve this demographic. However, by considering the west end as a whole, it is possible that this would reveal informal

G2: Research Activities (Mandatory)

Please give a detailed description of your research activities

Please provide a description of the study design, methodology (e.g. quantitative, qualitative, practice based), the sampling strategy, methods of data collection (e.g. survey, interview, experiment, observation, participatory), and analysis. Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography, extremism or radicalisation inform the research? If so have these been fully addressed?

Methodology:

The proposed research design is a web-based questionnaire. The advantage of this method is that it will allow me to elicit information from a wide range of respondents in order to develop a broad picture of perceptions of access to justice in the West End and whether informal dispute resolution operate within community and religious organisations in Newcastle's West End. An online questionnaire will be relatively easy and free to design (albeit the University will pay a subscription for the use of web-based services). In addition to providing design tools, web-based platforms assist with data collection and analysis, such as providing email response notifications and the ability to export responses to statistical software packages such as SPSS. There is potential for a low response rate which I will be mindful of in designing the questionnaire and cover letter. I do not consider that there will be a low response rate from the community and religious organisations as I am of the view that community and religious organisations in the west-end will have an interest in understanding the dynamics of their communities and the services offered within them.

Sampling strategy:

The researcher has conducted a thorough online and local search for community and religious organisations in the West-end of Newcastle. This has revealed 80 such organisations. The questionnaire will be sent to all of these organisations. Where an email address is available, the cover email containing a link to the questionnaire will be sent by email. Where no email address is available, the cover letter and link to the questionnaire will be sent by post.

Methods of data analysis:

The web-based platform that I intend to use, Bristol Online, provides very primitive data analysis tools. I envisage that I will use statistical analysis (through a software system such as SPSS) in order to analyse the quantitative elements of the questionnaires. SPSS can perform data manipulation and analysis and will enable me to identify trends and draw informed conclusions. In relation to the qualitative information obtained through 'free text box' answers in the questionnaire, the data obtained will be coded according to different themes arising using a data analysis tool such as NVivo.

Sensitive issues:

This proposed questionnaire will not ask about sensitive issues as the purpose of the questions is to elicit information about the services that they provide. An exception to this may be asking about services offered (i.e. mediation) in relation to domestic abuse. However, the purpose of this will be to find out what service is offered and will not therefore relate to the experiences of the service users.

In relation to identifying 'bad' and 'good' practices, it is not anticipated that the organisations will necessarily be able to identify whether their practices would fall within good or bad practices. As such, this should not affect the disclosures made within the questionnaires. This is primarily because, as I have identified above, this depends on the definition of access to justice adopted throughout the research. I am aware that this is a culturally relative concept and what may be regarded as a 'bad practice' in existing literature may in fact be a good practice if it serves the needs of the women in the community. As such, I am not making any judgements at outset about what is a 'good or bad practice'. This is reflected in the design of the questionnaire. The different service options will therefore be presented in a neutral manner, such as asking the organisations whether they:

- (a) Refer service users to law firms to deal with family disputes
- (b) Work alongside law firms to deal with family disputes for service users
- (c) Support service users through court proceedings
- (d) Offer counselling to service users in relation to family disputes
- (e) Offer mediation or conciliation in relation to family disputes
- (f) Charge for their services for services provided
- (g) Offer free support to service users in financial difficulty
- (h) Make service users aware of the potential availability of public funding (legal aid) in disputes

etc...

Organisations will also have the opportunity to explain why they offer the services they do, in the way they do, for example:

- (a) There is a demand for our services from community members
 - (b) There is a lack of state organisations which offer culturally relevant advice or support for our service users in this area
 - (c) State services do not understand the culturally specific issues affecting our service users
- etc...

Tick if your work involves people and/or personal data?

Sample Groups

Provide details of the sample groups that will be involved in the study and include details of their location (whether recruited in the UK or from abroad) and any organisational affiliation. For most research studies, this will cover: the number of sample groups; the size of each sample group; the criteria that will be used to select the sample group(s) (e.g. gender, age, sexuality, health conditions). If the sample will include NHS staff or patients please state this clearly. If this is a pilot study and the composition of the sample has not yet been confirmed, please provide as many details as possible.

The sample are community and religious organisations in Newcastle's west-end. Please see the attached list of organisations that the questionnaire will be sent to.

Nature of data pertaining to Living Individuals

If you will be including personal data of living individuals, including still or moving images, please specify the nature of this data, and (if appropriate) include details of the relevant individuals who have provided permission to utilise this data, upload evidence of these permissions in the supporting documentation section.

Details of any Special Category Data - If you will be collecting data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, data concerning health or data concerning a natural person's sex life or sexual orientation, please specify which categories you will be using.

As can be seen from the draft questionnaire, I will be asking the organisations to provide information relating to the age, gender, sexual orientation and racial and ethnic demographics of their service users. However, they will not be required to disclose particular data relating to living individuals nor will this identify any living individuals.

Legal Basis for Processing: [Further guidance can be found here](#)

Article 6(1) e: processing is necessary for the performance of a task carried out in the public interest
Article 9(2) j: processing is necessary for scientific and historical research purposes

Recruitment

Describe the step by step process of how you will contact and recruit your research sample and name any organisations or groups that will be approached. Your recruitment strategy must be appropriate to the research study and the sensitivity of the subject area. You must have received written permission from any organisations or groups before you begin recruiting participants. Copies of draft requests for organisational consent must be included in the 'Supporting Documentary Evidence'. You must also provide copies of any recruitment emails/posters that will be used in your study.

A link to the questionnaire is being sent by email or post to a staff or volunteer contact at religious and community organisations in Newcastle's west-end.

The sample has been collected by conducting an online and local search of such organisations. The whole research population will be invited to participate in the questionnaire.

The sample are varied in terms of gender. The age and sexuality of the sample group is not known.

Please see the attached draft cover email/letter which would be sent to potential respondents

Remuneration

Details of remuneration

Will you make any payment or remuneration to participants or their carers/consultees? If yes: Please provide details/justifications. Note that your Faculty may have specific guidelines on participant payments/payment rates etc and you should consult these where appropriate.

N/A - no remuneration will be provided and this is made clear at the start of the questionnaire.

Type of Consent

Informed Consent

Type of Consent Details

Please include copies of information sheets and consent forms in the 'G6: File Attachments' section. If the study involves participants who lack capacity to consent, procedures in line with sections 30-33 of the Mental Capacity Act will need to be put in place. If you are using alternative formats to provide information and /or record consent (e.g. images, video or audio recording), provide brief details and outline the justification for this approach and the uses to which it will be put:

Please refer to the draft questionnaire, which contains an initial section on participant information and consent.

Researcher and Participant Safety Issues

If there any risks the research could cause any discomfort or distress to participants (physical, psychological or emotional) describe the measures that will be put in place to alleviate or minimise them. Please give detailsof the support that will be available for any participants who become distressed during their involvement with the research.

N/A

Data Gathering Materials Used

Provide a detailed description of what the participants will be asked to do for the research study, including details about the process of data collection (e.g. completing how many interviews / assessments, when, for how long, with whom). Add any relevant documentation to the 'Supporting Documentary Evidence' section of this form.

The respondents are being asked to complete one web-based questionnaire which should take approximately 10 minutes to complete.

Potential Ethical Issues

Please describe any potential ethical issues the project may have which are not covered above, and how you have sought to minimise these.

The organisations may not be willing to disclose information about their services and practices if they believe this is going to be criticised. However, as the respondents' responses will be anonymised and the institution should not be identifiable from any of the the other information provided, this issue should be minimised. In addition, as commented on above...

In relation to identifying 'bad' and 'good' practices, it is not anticipated that the organisations will necessarily be able to identify whether their practices would fall within good or bad practices. As such, this should not affect the disclosures made within the questionnaires. This is primarily because, as I have identified above, this depends on the definition of access to justice adopted throughout the research. I am aware that this is a culturally relative concept and what may be regarded as a 'bad practice' in existing literature may in fact be a good practice if it serves the needs of the women in the community. As such, I am not making any judgements at outset about what is a 'good or bad practice'. This is reflected in the design of the questionnaire. The different service options will therefore be presented in a neutral manner, such as asking the organisations whether they:

- (a) Refer service users to law firms to deal with family disputes
- (b) Work alongside law firms to deal with family disputes for service users
- (c) Support service users through court proceedings
- (d) Offer counselling to service users in relation to family disputes
- (e) Offer mediation or conciliation in relation to family disputes
- (f) Charge for their services for services provided
- (g) Offer free support to service users in financial difficulty
- (h) Make service users aware of the potential availability of public funding (legal aid) in disputes

etc...

Organisations will also have the opportunity to explain why they offer the services they do, in the way they do, for example:

- (a) There is a demand for our services from community members
- (b) There is a lack of state organisations which offer culturally relevant advice or support for our service users in this area

M2: DBS Clearances Required

 Add
  Edit
  Delete
  Save
  Refresh

Do not upload your DBS certificate to this system as this would be contravening General Data Protection Regulations.

Further information relating to DBS Clearance can be found in the Ethics and Governance Handbook using the link below

[Ethics and Governance Handbook](#)

NAME OF PERSON ON CERTIFICATE	TYPE OF DBS CLEARANCE	CERTIFICATE REFERENCE	ADULTS/CHILDREN	DATE OF DBS CERTIFICATE
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(Add new row)

M3: Secondary Data

Tick if you will be using secondary data NOT in the public domain?

M4: Commercial Data

Tick if your work involves commercially sensitive data?

M5: Environmental Data

Tick if your work involves the collection of environmental data?

G3: Research Data Management Plan (Mandatory)

Anonymising Data (mandatory)

Describe the arrangements for anonymising data and if not appropriate explain why this is and how it is covered in the informed consent obtained.

The online questionnaire does ask the respondents to confirm their organisation's name. This is to enable me to analyse the data according to the type of organisation (e.g. church, mosque, women's organisation, community centre, etc) to see if there are any patterns between the different type of institutions. However, none of the institutions will be referred to by name at any point in the analysis or any subsequent articles. None of the other information obtained would enable an institution to be identified.

Storage Details (mandatory)

Describe the arrangements for the secure transport and storage of data collected and used during the study. You should explain what kind of storage you intend to use, e.g. cloud-based, portable hard drive, USB stick, and the protocols in place to keep the data secure.

If you have identified the requirement to collect 'Special category data', please specify any additional security arrangements you will use to keep this data secure.

All information will initially be retained on Bristol Online, which the university subscribes to. I have a private login for this website which can only be accessed by password. The questionnaire will be open until 31 July 2019. On the date that the questionnaire closes, all of the responses will be downloaded to my secure U:Drive (which is password protected). The questionnaire will then be deleted from BristolOnline. I will then analyse the responses using SPSS. The responses will be retained for three years from the date of the questionnaire closure (this will be around the time that I should complete the DLaw). After this, the responses will be permanently deleted.

Retention and Disposal (mandatory)

I confirm that I will comply with the University's data retention schedule and guidance.

[Research Data Management link](#)

[General Data Protection Regulations including Data Protection link](#)

[Records Retention Schedule link](#)

G4: Research Project Timescale (Mandatory) ▼

Proposed Start Date 

Proposed End Date 

G5: Additional Information ▼

Externally Funded

External Funder

Please give details of your 'other' funder

Agresso Reference

Franchise Programme Organisation

Please give details of your franchise organisation

NHS Involvement

Please give details of any NHS involvement

Clinical Trial(s)

Please give details of any Clinical Trial(s)

Medicinal Products

Please give details of any Medicinal Product(s)

G6: File Attachments



Additional files can be uploaded e.g. consent documentation, participant information sheet, etc.

Please note: It is best practice to combine all documents into one PDF (This avoids the reviewer having to op...

[Go To Attachments](#)

G7: Health and Safety (Mandatory)



I confirm that I have read and understood the University's Health and Safety Policy.

I confirm that I have read and understood the University's requirements for the mandatory completion

of risk assessments in advance of any activity involving potential physical risk.

The University Health and Safety Policy can be accessed [here](#)

The University Risk Assessment Code of Practice can be accessed [here](#)

Please confirm either:

There are PHYSICAL risks associated with the research project work and I confirm that a risk assessment has been approved and attached to this ethics submission.

OR

I can confirm that there are no physical risks associated with this project and so no risk assessments are required.

Students requiring assistance with completing their risk assessment should get in touch with their supervisor or module tutor as the first point of contact. If further assistance is needed, the Faculty Technician can provide further guidance.

For more specific risk assessments (e.g. lab work), especially where the project is Medium or High risk, you are required to consult the Faculty Technical Manager; your Supervisor/Module Tutor will be able to put you in touch.

If you have any questions or concerns, please contact the University Health and Safety Team by emailing CRHealthandSafety@northumbria.ac.uk

G8: Insurance (Mandatory) ∨

I have read and understood the University Insurance guidance document (link below):

[Insurance Guidance link](#)

If you think your activity may involve a High Risk rating or are unsure how to answer the statements - contact fi.insurance@northumbria.ac.uk with a copy of your research proposal for advice.

I confirm my work is covered by University Insurance. I confirm an insurance risk level of:

If your insurance risk level is HIGH please attach details of exceptional insurance coverage:

G9: Electronic Signature (Mandatory) ∨

I confirm my supervisor has reviewed the contents of this document

I confirm I have assessed the ethical risk level of my work correctly and answered the above sections as fully and accurately as possible.

Full Name

Date 29 December 2018 18:39:00 

PDF Version ▼

Create PDF

No items to display.

Review Comments, Conditions and Outcomes

Log of any Ethical Incidents ▼

Log New Incident

INCIDENT...	CREATED DATE TIME	CREATOR NAME	COMPLAINANT DETAILS
No items to display.			

Title and Objectives (see G1) ▼

+ Add  Save

Reviewer A: Approve ▼ Reviewer B: ▼

e.g. Are the research question and/or study aims clear?

DATE	ROLE	COMMENT
04/02/2019	Reviewer A	The research addresses a very interesting question. It might be better phrased as whether informal dispute resolution INhibits, rather than PROhibits, access to justice.

Proposed Methodology and Analysis (see G2) ▼

+ Add  Save

e.g. Is the design appropriate to the research question?
Are the methods of data analysis appropriate to the research question?

DATE	ROLE	COMMENT
No items to display.		

Sample and Recruitment (see M1) ▼

+ Add  Save

e.g. Is the sampling approach appropriate to the design?
Is the sample sufficient and achievable?

Is the process of recruitment clearly explained?
 Are participants receiving payments for taking part, and if so is the payment appropriate?
 If the DBS is ticked, has the appropriate information been included?

DATE	ROLE	COMMENT
No items to display.		

Consent (see M1) ▼

 Add  Save

e.g. Is the approach to consent seeking clear?
 Is consent from parents/ carers/ guardians required?
 Are all necessary recruitment and informed consent documentation included (e.g. letters of permission, letters of invitation)
 Is the information sheet adequate to ensure informed consent?
 Are the consent form(s) appropriate?

DATE	ROLE	COMMENT
No items to display.		

Researcher and Participant Safety (see M1) ▼

 Add  Save

e.g. Is there any risk of physical harm for the researcher(s) or the participants and if so what attempts have been made to alleviate or minimise them?
 Have Risk Assessments been referred to where appropriate?

DATE	ROLE	COMMENT
No items to display.		

Research Activities (see G2-G8, M1-M5, H1-H5) ▼

 Add  Save

e.g. Are the research tasks described clearly?
 Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography or extremism/ radicalism inform the research? If so have these been fully addressed? (and we can use this to amend the information on risk levels on the form) Is there any risk that the tasks may cause psychological harm and if so what attempts have been made to alleviate or minimise them?

DATE	ROLE	COMMENT
No items to display.		

Data Management Plan (see G3) ▼

 Add  Save

Reviewer A: ▼ Reviewer B:

e.g. Have sufficient steps been taken to ensure participant anonymity/confidentiality of data?
 Are the arrangements for data storage and disposal clearly outlined?
 Are these arrangements in line with University and/or the funding body requirements?

DATE	ROLE	COMMENT
No items to display.		

No items to display.

File Attachments (see G6)

 Add  Save

Please note: where file attachments have not been added because they are not required, please select Approve.

COMMENT BY	DATE	ROLE	COMMENT
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No items to display.

General Comments (see Help)

 Add  Save

DATE	ROLE	COMMENT
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No items to display.

Ethics amendment to submission ID 13813 (amendment ID 332)

Proposed amendment: I would now like to conduct interviews with organisations who were originally asked to participate in the questionnaires.

Reason for the amendment: The letters requesting participation in the questionnaire (the focus of the original ethics application) were sent to my sample group in February 2019 with chaser letters being sent in May 2019. Responses were requested by July 2019. Unfortunately, there was a low response rate and out of the 80 organisations contacted, only 3 questionnaire responses were received. It is anticipated that this is because, for many of the organisations contacted, no key contact names were known and so the letters were addressed to 'Dear Sirs/Madam'. This may potentially mean that the request was not considered by the appropriate person. It is also possible that the contact addresses were incorrect as they were based on information available online which may be out of date. The data obtained so far has been helpful and in order to build on the data set I would now like to contact the organisations by telephone to ask if they would be willing to participate in an interview. The interview questions would be identical to those contained in the questionnaire. It is anticipated that this may attract a higher response rate, as the act of contacting the organisations by telephone will be more personal and engaging. I remain of the view that community and religious organisations in the west-end will have an interest in understanding the dynamics of their communities and the services offered within them and the data obtained from the questionnaires suggests that this is the case.

Any potential ethical issues: The organisations have previously been contacted to ask if they will participate in the questionnaires and they did not do so. As such, it could be considered inappropriate to contact them again to ask whether they will participate in an interview. I now consider that sending a blanket letter to the organisations was a methodological weakness. It is likely to be the case that a number of the addresses were incorrect/out of date (as they are based on information obtained online), that they were not opened or considered by the relevant person. It is hoped that contacting the organisations by telephone will allow me to be directed to the most appropriate person and will enable me to build a rapport with the relevant party. This may increase the likelihood of their willingness to participate in the interview. I will be polite and courteous with my request and if the organisation confirms that they do not want to participate, they will not be contacted again.

Data security: One of the interview questions will ask the respondent to confirm their organisation's name. This is to enable me to analyse the data according to the type of organisation (e.g. church, mosque, women's organisation, community centre, etc) to see if there are any patterns between the different type of institutions. However, none of the institutions will be referred to by name at any point in the analysis or any subsequent articles. None of the other information obtained would enable an institution to be identified.

The interviews will be conducted at the organisation (or if they prefer, it could be conducted at the Faculty of Law). It is anticipated the interviews will take no more than 1 hour to conduct. The questions asked will be exactly the same as the questionnaire (which has previously received ethical approval). There will be an opportunity for the organisation to provide additional comments at the end of the interview (this opportunity was also provided to the questionnaire respondents through a free text box).

The interviews will be recorded using a dictaphone. The dictaphone will be brought straight back to the university following the interview and will be kept in a locked cupboard in the researcher's locked office. The interviews will be transcribed within seven days of the date of the interview. Following this, the contents of the dictaphone will be erased. The written transcription will be kept on my secure U:Drive (which is password protected). I will then analyse the responses using SPSS and NVIVO - my accounts to both of these software sites is password protected and in any event the information being analysed will not identify any particular organisations. The transcriptions will be retained for two years from the date of the interview (this will be around the time that I should complete the DLaw). After this, the transcriptions will be permanently deleted.

Amendment request submitted on 24 October 2019 and approved on 28 October 2019

Tuesday, November 23, 2021 at 10:05:36 Greenwich Mean Time

Subject: Research Ethics: Amendment Approved
Date: Monday, 28 October 2019 at 13:24:27 Greenwich Mean Time
From: EthicsOnline@Northumbria
To: Ana Speed

Dear Ana Speed

This email is to notify you that your coordinator (Tony Ward) has approved your amendment request in respect of Research Ethics submission 13813.

Research Ethics Home: [Research Ethics Home](#)

Please do not reply to this email. This is an unmonitored mailbox. If you are a student, queries should be discussed with your Module Tutor/Supervisor. If you are a member of staff please consult your Department Ethics Lead.

Page 1 of 1

Ethics amendment to submission ID 13813 (amendment ID 516)

Proposed amendment: The original ethics application related to a survey to be carried out by community organisations in the West-End of Newcastle in relation to access to justice for their service users. Through the initial survey and subsequent interviews I have been carrying out, my research has taken a much clearer focus of access to justice for survivors of gender-based violence, rather than just women in family law disputes. In addition, I now wish to obtain data from across the UK rather than just focussed in the North East in order to gain an understanding of the national picture.

In light of this, an ethics amendment is sought to send my existing survey (which has already received ethical approval) to domestic abuse organisations nationally. The survey can be accessed here: <https://northumbria.onlinesurveys.ac.uk/access-to-justice-for-survivors-of-gender-based-violence> (using the password gbv1).

The sample has been collected through finding an online database of organisations supporting survivors of gender-based violence across the UK. There are 200 organisations on this list. I will send an email request to all of them.

The email will read:

"Good evening

I hope you are well.

You may recall that either myself or one of my colleagues (Kayliegh or Callum) contacted you a few weeks ago in relation to our research regarding support services for victims of gender-based violence in light of COVID-19. We are incredibly grateful if you chose to participate in this research. The data we have collected has provided a really important insight into the vital work of your organisations at this time.

I am contacting you with one final request. The work about access to support services during COVID-19 falls within my doctoral study which focusses on the barriers that survivors of gender-based violence experience to engaging with the justice system. As we all know, whilst COVID-19 has been an outstanding barrier to justice for many, there are more general barriers to justice for the survivors of abuse which are faced on a daily basis.

I am carrying out a study into perceptions of access to justice for victims of gender-based violence and the role that organisations, such as yours, plays in supporting their service users. It is very a similar style to the survey that you have already completed. In light of the role that your organisation plays in supporting survivors of abuse, I would be really grateful if you

would consider completing the survey. I expect this will take you between 10-15 minutes. It can be accessed at: <https://northumbria.onlinesurveys.ac.uk/access-to-justice-for-survivors-of-gender-based-violence>

Your responses will be anonymised. I appreciate your time is limited but as your responses to our COVID-19 study has demonstrated, you are best placed to ensure that victims voices are represented in research into this area.

Please be assured, you will not be contacted with any further requests from myself to participate in research, unless you indicate on the survey that you would like to participate in an interview to provide more information about access to justice for your service users.

This project has received ethical approval from Northumbria University.

Kind regards

Ana"

Reason for the amendment: Please see above - wish to expand the sample

Any potential ethical issues: As you will see from the above draft email, the organisations have already been contacted to carry out a short 10 min survey into GBV support services and COVID-19. As such, I don't want them to feel overburdened by requests to take part in research. I have tried to address this in the above draft email. The email clearly states that participation is optional and that they will not be contacted again if they choose not to participate. I have also tried to make the links between the two research projects clear. In addition, the response rate to the COVID-19 survey has been excellent (so far, over 45 organisations have participated in the survey - nearly a 25% response rate). This indicates that the organisations are keen to participate in research in this area.

Amendment request submitted on 11 April 2020 and approved on 14 April 2020

Tuesday, November 23, 2021 at 10:11:40 Greenwich Mean Time

Subject: Research Ethics: Amendment Approved
Date: Tuesday, 14 April 2020 at 08:19:11 British Summer Time
From: EthicsOnline@Northumbria
To: Ana Speed

Dear Ana Speed

This email is to notify you that your coordinator (Tony Ward) has approved your amendment request in respect of Research Ethics submission 13813.

Research Ethics Home: [Research Ethics Home](#)

Please do not reply to this email. This is an unmonitored mailbox. If you are a student, queries should be discussed with your Module Tutor/Supervisor. If you are a member of staff please consult your Department Ethics Lead.

Page 1 of 1

My Documents

Amendments

 Refresh

SUBMISSION ID	CREATED DATE TIME	CREATED BY	STATUS	DESCRIPTION	UPDATED DATE TIME	COORDIN...
No items to display.						

Submission

Submission Ref 24298
Status Approved
Submission Coordinator Tony Ward tony.ward@northumbria.ac.uk

Name  Ana Speed

Email ana.speed@northumbria.ac.uk

Faculty

Department

Submitting As

Externally Approved Note: ONLY tick this box if your project has already received full ethical approval from an external organisation

Module Level Approval Tick this box if staff and this submission refers to an entire module.

**** Only to be used for low or medium risk projects as categorised by the diagnostic risk question set ****

Module Code

Help

Module Tutor

Find

Help

Clear

Titl...

De...

Em...

Research Supervisor

Find

Help

Clear

Titl...
De...
Em...

Ethical Risk Level Medium

[Click here to answer the ethical risk questions](#)

Risk Level Conditions:

Your ethical risk is **medium**. Your research should only consist of one or more of the following:

- Non-vulnerable adults
- Non-sensitive personal data referring to a living individual
- Secondary data not in the public domain
- Environmental issues
- Commercially sensitive information

Your project proposal has some ethical implications and will be reviewed by one independent reviewer appointed by your Faculty Research Ethics Committee. Some factors to be considered include considering obtaining informed consent forms from organisations or people involved, permission to use data from the Data Controller, as well as confidentiality/anonymity issues.

Ethical Risk Diagnostic Questions and Responses

[Refresh](#)

ID	QUESTION	ANSWER
<i>No items to display.</i>		

Co-investigators

[+](#) Add [✎](#) Edit [✖](#) Delete [📄](#) Save [🔄](#) Refresh

NAME OF CO-INVESTIGATORS

No items to display.

G1: General Aims and Research Design (Mandatory)

Title
Title of your research project

Routes to justice for victims of GBV - (data collection part 2)

Outline General Aims and Research Objectives
State your research aims/questions (maximum 500 words). This should provide the theoretical context within which the work is placed, and should include an evidence-based background, justification for the research, clearly stated hypotheses (if appropriate) and creative enquiry.

This application builds on the ethical approval granted in 13813 (and the two amendments to the original application).

The original ethics applications and amendments related to a survey and interviews carried out with community organisations in the West-End of Newcastle in relation to access to justice for their service users. Through this date, my research has taken a much clearer focus of access to justice for survivors of gender-based violence, rather than just women in family law disputes.

The most recent ethical application expanded the scope of my original study to send my existing survey to domestic abuse organisations nationally. The sample was collected through finding an online database of organisations supporting survivors of gender-based violence across the UK. There are 200 organisations on this list.

This survey is still live and so far 27 responses have been received. The final question on the survey asked whether the participants would be willing to participate in an interview to discuss their experience of supporting victims of GBV in more detail. 7 respondents have indicated that they would be willing to participate in an interview.

Ethical approval is therefore sought in order to conduct interviews with these respondents.

G2: Research Activities (Mandatory)

Please give a detailed description of your research activities

Please provide a description of the study design, methodology (e.g. quantitative, qualitative, practice based), the sampling strategy, methods of data collection (e.g. survey, interview, experiment, observation, participatory), and analysis. Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography, extremism or radicalisation inform the research? If so have these been fully addressed?

The proposed research method is a semi-structured interview. The respondents have already participated in a questionnaire on the topic of access to justice for victims of GBV and have indicated that they are agreeable to participating in a one-off interview. Each of the interviews will be personalised to the respondents, based on their questionnaire responses. The aim will be to encourage them to talk around their questionnaire responses in more detail. As such, I do not propose to have a pre-set list of questions in advance of the interview. Instead, I will just have a print-out of the respondent's answers to the questionnaire. This will enable me to generate more qualitative data than the questionnaire allowed. The data will be analysed through NVivo, allowing patterns and trends in the responses to be identified. Whilst GBV is a sensitive topic, the interviews will be with professionals who work in this field and have considerable experience supporting victims of GBV. In addition, the questions will not relate to the personal experiences of the interviewees but the service users they support. The responses (i.e. organisation name and any identifying information) will be anonymised, in line with all other data collected.

M1: People and/or Personal Data

Tick if your work involves people and/or personal data?

Sample Groups

Provide details of the sample groups that will be involved in the study and include details of their location (whether recruited in the UK or from abroad) and any organisational affiliation. For most research studies, this will cover: the number of sample groups; the size of each sample group; the criteria that will be used to select the sample group(s) (e.g. gender, age, sexuality, health conditions). If the sample will include NHS staff or patients please state this clearly. If this is a pilot study and the composition of the sample has not yet been confirmed, please provide as many details as possible.

The sample are employed by or volunteer for domestic abuse support services in the UK. The sample have all volunteered to participate in an interview, following their initial participation in a questionnaire. The age, gender and sexuality of the respondents is unknown.

Nature of data pertaining to Living Individuals

If you will be including personal data of living individuals, including still or moving images, please specify the nature of this data, and (if appropriate) include details of the relevant individuals who have provided permission to utilise this data, upload evidence of these permissions in the supporting documentation section.

Details of any Special Category Data - If you will be collecting data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, data concerning health or data concerning a natural person's sex life or sexual orientation, please specify which categories you will be using.

The respondents will be asked to discuss in further detail the responses provided to the questionnaire and any questions arising out of this. The questionnaire which the respondents have already participated in can be accessed via the following link: <https://northumbria.onlinesurveys.ac.uk/access-to-justice-for-survivors-of-gender-based-violence>.

The respondents will not be required to disclose particular data relating to living individuals nor will the information provided identify any living individuals. Any identifying information will be anonymised.

Legal Basis for Processing: [Further guidance can be found here](#)

Article 6(1) e: processing is necessary for the performance of a task carried out in the public interest
Article 9(2) j: processing is necessary for scientific and historical research purposes

Recruitment

Describe the step by step process of how you will contact and recruit your research sample and name any organisations or groups that will be approached. Your recruitment strategy must be appropriate to the research study and the sensitivity of the subject area. You must have received written permission from any organisations or groups before you begin recruiting participants. Copies of draft requests for organisational consent must be included in the 'Supporting Documentary Evidence'. You must also provide copies of any recruitment emails/posters that will be used in your study.

The sample have all volunteered to participate in an interview, as outlined above.

Please see the email to the respondents arranging the interview.

Remuneration

Details of remuneration

Will you make any payment or remuneration to participants or their carers/consultees? If yes: Please provide details/justifications. Note that your Faculty may have specific guidelines on participant payments/payment rates etc and you should consult these where appropriate.

N/A - no remuneration will be provided and this is made clear at the start of the questionnaire.

Type of Consent

Informed Consent 

Type of Consent Details

Please include copies of information sheets and consent forms in the 'G6: File Attachments' section. If the study involves participants who lack capacity to consent, procedures in line with sections 30-33 of the Mental Capacity Act will need to be put in place. If you are using alternative formats to provide information and /or record consent (e.g. images, video or audio recording), provide brief details and outline the justification for this approach and the uses to which it will be put:

Please see the attached information for respondents sheet and consent form. This will be sent to the respondents with the email to arrange the interview.

Researcher and Participant Safety Issues

If there are any risks the research could cause any discomfort or distress to participants (physical, psychological or emotional) describe the measures that will be put in place to alleviate or minimise them. Please give details of the support that will be available for any participants who become distressed during their involvement with the research.

N/A - interviews will be conducted via Skype for Business, Microsoft Teams or telephone.

Data Gathering Materials Used

Provide a detailed description of what the participants will be asked to do for the research study, including details about the process of data collection (e.g. completing how many interviews / assessments, when, for how long, with whom). Add any relevant documentation to the 'Supporting Documentary Evidence' section of this form.

The respondents are being asked to complete a one-off interview which should take approximately 1 hour. The interview will be conducted via Skype for Business, Microsoft Teams or telephone.

Potential Ethical Issues

Please describe any potential ethical issues the project may have which are not covered above, and how you have sought to minimise these.

N/A

M2: DBS Clearances Required

 Add  Edit  Delete  Save  Refresh

Do not upload your DBS certificate to this system as this would be contravening General Data Protection Regulations.

Further information relating to DBS Clearance can be found in the Ethics and Governance Handbook using the link below

[Ethics and Governance Handbook](#)

NAME OF PERSON ON CERTIFICATE	TYPE OF DBS CLEARANCE	CERTIFICATE REFERENCE	ADULTS/CHILDREN	DATE OF DBS CERTIFICATE
-------------------------------	-----------------------	-----------------------	-----------------	-------------------------

(Add new row)

M3: Secondary Data

Tick if you will be using secondary data NOT in the public domain?

M4: Commercial Data

Tick if your work involves commercially sensitive data?

M5: Environmental Data



Tick if your work involves the collection of environmental data?

G3: Research Data Management Plan (Mandatory)



Anonymising Data (mandatory)

Describe the arrangements for anonymising data and if not appropriate explain why this is and how it is covered in the informed consent obtained.

Please see the attached information for participants document. Whilst the respondents are asked to provide the name of their institution, this is only to enable the researcher to identify patterns between similar/differing organisations. Details which would identify the institution or any other person will be anonymised during the analysis and will not be published.

Storage Details (mandatory)

Describe the arrangements for the secure transport and storage of data collected and used during the study. You should explain what kind of storage you intend to use, e.g. cloud-based, portable hard drive, USB stick, and the protocols in place to keep the data secure.

If you have identified the requirement to collect 'Special category data', please specify any additional security arrangements you will use to keep this data secure.

All information in this study will be collected using a dictaphone. The interviews will be transcribed within three weeks of the date of the interview either by the researcher or a research assistant. Following this, the contents of the dictaphone will be erased. The written transcription will be kept on the researcher's private work drive. The transcriptions will be retained for two years from the date of the interview following which the transcriptions will be permanently deleted.

Retention and Disposal (mandatory)

I confirm that I will comply with the University's data retention schedule and guidance.

[Research Data Management link](#)

[General Data Protection Regulations including Data Protection link](#)

[Records Retention Schedule link](#)

G4: Research Project Timescale (Mandatory)



Proposed Start Date

01/06/2020



Proposed End Date

30/11/2020



G5: Additional Information



Externally Funded

External Funder

Please give details of your 'other' funder

Agresso Reference

Franchise Programme Organisation

Please give details of your franchise organisation

NHS Involvement

Please give details of any NHS involvement

Clinical Trial(s)

Please give details of any Clinical Trial(s)

Medicinal Products

Please give details of any Medicinal Product(s)

G6: File Attachments ▼

Additional files can be uploaded e.g. consent documentation, participant information sheet, etc.

Please note: It is best practice to combine all documents into one PDF (This avoids the reviewer having to op...

[Go To Attachments](#)

G7: Health and Safety (Mandatory)



I confirm that I have read and understood the University's Health and Safety Policy.



I confirm that I have read and understood the University's requirements for the mandatory completion of risk assessments in advance of any activity involving potential physical risk.

The University Health and Safety Policy can be accessed [here](#)

The University Risk Assessment Code of Practice can be accessed [here](#)

Please confirm either:



There are PHYSICAL risks associated with the research project work and I confirm that a risk assessment has been approved and attached to this ethics submission.

OR



I can confirm that there are no physical risks associated with this project and so no risk assessments are required.

Students requiring assistance with completing their risk assessment should get in touch with their supervisor or module tutor as the first point of contact. If further assistance is needed, the Faculty Technician can provide further guidance.

For more specific risk assessments (e.g. lab work), especially where the project is Medium or High risk, you are required to consult the Faculty Technical Manager; your Supervisor/Module Tutor will be able to put you in touch.

If you have any questions or concerns, please contact the University Health and Safety Team by emailing CRHealthandSafety@northumbria.ac.uk

G8: Insurance (Mandatory)



I have read and understood the University Insurance guidance document (link below):

[Insurance Guidance link](#)

If you think your activity may involve a High Risk rating or are unsure how to answer the statements - contact fi.insurance@northumbria.ac.uk with a copy of your research proposal for advice.

I confirm my work is covered by University Insurance. I confirm an insurance risk level of:

Medium

If your insurance risk level is HIGH please attach details of exceptional insurance coverage:

Click here to attach a file

G9: Electronic Signature (Mandatory)

I confirm my supervisor has reviewed the contents of this document

I confirm I have assessed the ethical risk level of my work correctly and answered the above sections as fully and accurately as possible.

Full Name

Date 

PDF Version ▼

[Create PDF](#)

No items to display.

Review Comments, Conditions and Outcomes

Log of any Ethical Incidents ▼

[Log New Incident](#)

INCIDENT...	CREATED DATE TIME	CREATOR NAME	COMPLAINANT DETAILS
<i>No items to display.</i>			

Title and Objectives (see G1) ▼

[+ Add](#) [Save](#)

e.g. Are the research question and/or study aims clear?

DATE	ROLE	COMMENT
<i>No items to display.</i>		

Proposed Methodology and Analysis (see G2) ▼

[+ Add](#) [Save](#)

*e.g. Is the design appropriate to the research question?
Are the methods of data analysis appropriate to the research question?*

DATE	ROLE	COMMENT
<i>No items to display.</i>		

Sample and Recruitment (see M1) ▼

[+ Add](#) [Save](#)

e.g. Is the sampling approach appropriate to the design?
 Is the sample sufficient and achievable?
 Is the process of recruitment clearly explained?
 Are participants receiving payments for taking part, and if so is the payment appropriate?
 If the DBS is ticked, has the appropriate information been included?

DATE	ROLE	COMMENT
No items to display.		

Consent (see M1) ▼

 Add  Save

e.g. Is the approach to consent seeking clear?
 Is consent from parents/ carers/ guardians required?
 Are all necessary recruitment and informed consent documentation included (e.g. letters of permission, letters of invitation)
 Is the information sheet adequate to ensure informed consent?
 Are the consent form(s) appropriate?

DATE	ROLE	COMMENT
No items to display.		

Researcher and Participant Safety (see M1) ▼

 Add  Save

e.g. Is there any risk of physical harm for the researcher(s) or the participants and if so what attempts have been made to alleviate or minimise them?
 Have Risk Assessments been referred to where appropriate?

DATE	ROLE	COMMENT
No items to display.		

Research Activities (see G2-G8, M1-M5, H1-H5) ▼

 Add  Save

e.g. Are the research tasks described clearly?
 Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography or extremism/ radicalism inform the research? If so have these been fully addressed? (and we can use this to amend the information on risk levels on the form) Is there any risk that the tasks may cause psychological harm and if so what attempts have been made to alleviate or minimise them?

DATE	ROLE	COMMENT
No items to display.		

Data Management Plan (see G3) ▼

 Add  Save

Reviewer A: Reviewer B:

e.g. Have sufficient steps been taken to ensure participant anonymity/confidentiality of data?

Are the arrangements for data storage and disposal clearly outlined?
Are these arrangements in line with University and/or the funding body requirements?

DATE	ROLE	COMMENT
------	------	---------

No items to display.

File Attachments (see G6)

 Add  Save

Please note: where file attachments have not been added because they are not required, please select Approve.

COMMENT BY	DATE	ROLE	COMMENT
------------	------	------	---------

No items to display.

General Comments (see Help)

 Add  Save

DATE	ROLE	COMMENT
------	------	---------

No items to display.

Information sheet

Introduction

I would like to invite you to take part in a research study. Before you decide if you want to take part, it is important you understand why the research is being done and what it would involve for you. Please read through this information about the research and if you have any queries, please do not hesitate to contact me.

Purpose of the study

The purpose of this study is to evaluate your perceptions of access to justice for residents of the West-End of Newcastle upon Tyne and to examine the role that community and religious organisations can play in supporting their service users in family law disputes. You are being asked to provide information about the types of services you offer and what the needs of your service users are.

The questions are split into two parts. The first part asks about your perceptions of access to justice in the West-End. The second part asks about your services. It may be that you have a lot to say in relation to part one and not much to say in relation to part two of the study, or vice versa. That is completely fine.

Why have you been invited?

You have been invited to participate in this study because information published online identifies that you are a religious or community organisation who is either based in the West-End of Newcastle or who works closely with residents of the West-End of Newcastle upon Tyne.

Do you have to take part?

It is up to you to decide if wish to participate in the research. You are free to withdraw at any time. You do not need to provide a reason and the researcher will delete your response.

If you do not wish to receive any further correspondence about participating in this research project, please let the researcher know. Alternatively, the researcher can be contacted by email at ana.speed@northumbria.ac.uk.

What will happen if you decide to participate?

You are being asked to participate in an interview. It should not take you longer than one hour. Participation in this study means that you provide the researcher with permission to use the data collected in a publication. Your responses will be anonymised and combined with those of other participants.

As I have highlighted above, the questions are split into two parts. The first part of the interview asks about your perceptions of access to justice in the West-End. The second part asks about your services. It may be that you have a lot to say in relation to part one and not much to say in relation to part two of the study, or vice versa. That is completely fine.

Expenses and Payments

You will not receive any expenses or payments for your participation in this study. The researcher is grateful in anticipation for your participation.

Risk / benefits

The researcher does not envisage any risk to you in participating in this study. If you do not receive a direct benefit from your participation in this study, others may ultimately benefit from the knowledge obtained. It is anticipated that the findings will contribute to an understanding of access to justice in the West End of Newcastle. Finally, the research will highlight the advice and access needs of people in the West-End experiencing family law disputes and therefore could assist governments and charities in deciding how funding and services could be most effectively directed.

Confidentiality

All information in this study will be collected using a dictaphone. Whilst you are asked to provide the name of your institution, this is only to enable the researcher to identify patterns between similar/differing organisations. Details which would identify your institution will be anonymised during the analysis and will not be published.

The interviews will be transcribed within seven days of the date of the interview. Following this, the contents of the dictaphone will be erased. The written transcription will be kept on the researcher's private work drive. The transcriptions will be retained for two years from the date of the interview following which the transcriptions will be permanently deleted.

What will happen to the results of this study?

The information gathered during the interview will be analysed and the findings will be used in academic articles and conference papers. The data will also feature in the researcher's professional doctorate thesis.

Who is organising and funding the research?

The research is being organised by Northumbria University. No external organisations or funders are involved.

Who has reviewed the study?

The research proposal has been reviewed and approved in accordance with the ethics procedures of Northumbria University.

Further information and contact details

If you would like any further information regarding this study, or if you are unhappy with any aspect of this study, please contact the researcher:

Ana Speed
Tel: 0191 243 7958
email: ana.speed@northumbria.ac.uk

Consent form

- I have read and understood the information about the research and I have had an opportunity to contact the researcher if I require any further information regarding the study.
- I understand that participation is voluntary and I can withdraw at any time without the need to give reasons.
- I consent to the researcher using my anonymised views in research publication(s)
- I agree to participate in this study.

Signed:

Date:

< Return PREVIEW Access to justice for survivors Skip: Next > 1 / 8 

of gender-based violence

Access to justice for survivors of gender-based violence

0% complete

Page 1: Research information

Introduction

I would like to invite you to take part in a research study. Before you decide if you want to take part, it is important you understand why the research is being done and what it would involve for you. Please read through this information about the research and if you have any queries, please do not hesitate to contact me.

Purpose of the study

The purpose of this study is to evaluate your perceptions of access to justice for survivors of gender-based violence and to examine the role that organisations can play in supporting their service users in legal disputes. You are being asked to provide information about the types of services you offer and what the needs of your service users are.

The questions are split into two parts. The first part asks about your perceptions of access to justice. The second part asks about your services. It may be that you have a lot to say in relation to part one and not much to say in relation to part two of the study, or vice versa. That is completely fine.

Why have you been invited?

You have been invited to participate in this study because information published online identifies that you are an organisation who works with victims of gender-based violence.

Do you have to take part?

It is up to you to decide if wish to participate in the research. You are free to withdraw at any time. You do not need to provide a reason and the researcher will delete your response.

What will happen if you decide to participate?

If you decide to participate, you will be asked to complete a questionnaire. It should not take you longer than 10 minutes. Participation in this study means that you provide the researcher with permission to use the data collected in a publication. Your responses will be anonymised and combined with those of other participants.

As I have highlighted above, the questions are split into two parts. The first part asks about your perceptions of access to justice. The second part asks about your services. It may be that you have a lot to say in relation to part one and not much to say in relation to part two of the study, or vice versa. That is completely fine.

Expenses and Payments

You will not receive any expenses or payments for your participation in this study. The researcher is grateful in anticipation for your participation.

Risk / benefits

The researcher does not envisage any risk to you in participating in this study. If you do not receive a direct benefit from your participation in this study, others may ultimately benefit from the knowledge obtained. It is anticipated that the findings will contribute to an understanding of access to justice for survivors of gender-based violence. Finally, the research will highlight the advice and access needs for survivors of abuse and therefore could assist governments and charities in deciding how funding and services could be most effectively directed.

Confidentiality

All information in this study will be collected using an on-line survey. Whilst you are asked to provide the name of your organisation, this is only to enable the researcher to identify patterns between similar/differing organisations. Details which would identify your institution will be anonymised during the analysis and will not be published. At the end of the questionnaire, you will be given an opportunity to state whether you would like to be involved in further research relating to this study.

All information will initially be retained on Bristol Online. The researcher has a private login for this website which can only be accessed by password. The questionnaire will be open until **31 August 2020**. On the date that the questionnaire closes, all of the responses will be downloaded to the researcher's private drive on her work computer.

The questionnaire will then be deleted from Bristol Online. The responses will be retained for three years from the date of the questionnaire closure. After this, the responses will be permanently deleted.

What will happen to the results of this study?

The information gathered during the focus group will be analysed and the findings will be used in academic articles and conference papers. The data will also feature in the researcher's professional doctorate thesis.

Who is organising and funding the research?

The research is being organised by Northumbria University. No external organisations or funders are involved.

Who has reviewed the study?

The research proposal has been reviewed and approved in accordance with the ethics procedures of Northumbria University.

Further information and contact details

If you would like any further information regarding this study, or if you are unhappy with any aspect of this study, please contact the researcher:

Ana Speed

Tel: 0191 243 7958

email: ana.speed@northumbria.ac.uk

Access to justice for survivors of gender-

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survivors of gender-based violence

14% complete

Page 2: Consent to participate

1. Please tick all of the boxes below to indicate your consent to participate. *

Required

Please select at least 4 answer(s).

- I have read and understood the information about the research and I have had an opportunity to contact the researcher if I require any further information regarding the study.
- I understand that participation is voluntary and I can withdraw at any time without the need to give reasons.
- I consent to the researcher using my anonymised views in research publication(s)
- I agree to participate in this study.

Information sheet

Introduction

You have recently taken part in a questionnaire regarding access to justice for victims of gender-based violence and the role that organisations can play in supporting their service users.

You indicated on the questionnaire that you would be agreeable to participating in an interview with me to discuss your responses further. Before you decide if you want to take part, it is important you understand why the research is being done and what it would involve for you. Please read through this information about the research and if you have any queries, please do not hesitate to contact me.

Purpose of the study

The purpose of this study is to evaluate your perceptions of access to justice for survivors of gender-based violence and to examine the role that organisations can play in supporting their service users. You are being asked to discuss your questionnaire answers in more detail. This will provide the researcher with a fuller understanding of the issues that your service users face and how you are able to support them.

Why have you been invited?

You have been invited to participate in this study because you have indicated on your questionnaire response that you would be agreeable to taking part in a one-off interview.

Do you have to take part?

It is up to you to decide if wish to participate in the research. You are free to withdraw at any time. You do not need to provide a reason and the researcher will delete your response.

If you do not wish to receive any further correspondence about participating in this research project, please let the researcher know. The researcher can be contacted by email at ana.speed@northumbria.ac.uk.

What will happen if you decide to participate?

You are being asked to participate in an interview. The interview can be conducted by Skype for Business, Microsoft Teams or telephone. It should not take you longer than one hour. Participation in this study means that you provide the researcher with permission to use the data collected in research publication(s). Your responses will be anonymised and combined with those of other participants.

As I have highlighted above, you are being asked to discuss your questionnaire answers in more detail. This will provide the researcher with a fuller understanding of the issues that your service users face and how you are able to support them.

Expenses and Payments

You will not receive any expenses or payments for your participation in this study. The researcher is grateful in anticipation for your participation.

Risk / benefits

The researcher does not envisage any risk to you in participating in this study. If you do not receive a direct benefit from your participation in this study, others may ultimately benefit from the knowledge obtained. It is anticipated that the findings will contribute to an understanding of access to justice for survivors of gender-based violence.

Confidentiality and data management

All information in this study will be collected using a dictaphone. Whilst you are asked to provide the name of your institution, this is only to enable the researcher to identify patterns between similar/differing organisations. Details which would identify your institution will be anonymised during the analysis and will not be published.

The interviews will be transcribed within three weeks of the date of the interview either by the researcher or a research assistant. Following this, the contents of the dictaphone will be erased. The written transcription will be kept on the researcher's private work drive. The transcriptions will be retained for two years from the date of the interview following which the transcriptions will be permanently deleted.

What will happen to the results of this study?

The information gathered during the interview will be analysed and the findings will be used in academic articles and conference papers. The data will also feature in the researcher's professional doctorate thesis.

Who is organising and funding the research?

The research is being organised by Northumbria University. No external organisations or funders are involved.

Who has reviewed the study?

The research proposal has been reviewed and approved in accordance with the ethics procedures of Northumbria University.

Further information and contact details

If you would like any further information regarding this study, or if you are unhappy with any aspect of this study, please contact the researcher:

Ana Speed

Tel: 0191 243 7958

email: ana.speed@northumbria.ac.uk

Consent form

- I have read and understood the information about the research and I have had an opportunity to contact the researcher if I require any further information regarding the study.
- I understand that participation is voluntary and I can withdraw at any time without the need to give reasons.
- I consent to the researcher using my anonymised views in research publication(s)
- I agree to participate in this study.

Signed:

Date:

My Documents

Amendments						
SUBMISSION ID	CREATED DATE TIME	CREATED BY	STATUS	DESCRIPTION	UPDATED DATE TIME	COORDINATOR
23001	25/05/2020 03:30	Ana Speed	Amendment Approved	The substantive et...	26/05/2020	Tony Ward

Submission

Submission Ref: 23001
 Status: Approved
 Submission Coordinator: Tony Ward tony.ward@northumbria.ac.uk

Name: Ana Speed

Email: ana.speed@northumbria.ac.uk

Faculty:

Department:

Submitting As:

Externally Approved: Note: ONLY tick this box if your project has already received full ethical approval from an external organisation

Module Level Approval: Tick this box if staff and this submission refers to an entire module.
 ** Only to be used for low or medium risk projects as categorised by the diagnostic risk question set **

Module Code:

Module Tutor:

Titl...
 De...
 Em...

Research Supervisor:

Titl... Professor
De... Northumbria School of Law
Em... elaine.hall@northumbria.ac.uk

Ethical Risk Level

Medium

[Click here to answer the ethical risk questions](#)

Risk Level Conditions:

Your ethical risk is **medium**. Your research should only consist of one or more of the following:

- Non-vulnerable adults
- Non-sensitive personal data referring to a living individual
- Secondary data not in the public domain
- Environmental issues
- Commercially sensitive information

Your project proposal has some ethical implications and will be reviewed by one independent reviewer appointed by your Faculty Research Ethics Committee. Some factors to be considered include considering obtaining informed consent forms from organisations or people involved, permission to use data from the Data Controller, as well as confidentiality/anonymity issues.

Ethical Risk Diagnostic Questions and Responses

 Refresh

ID QUESTION

ANSWER

No items to display.

Co-investigators

 Add  Edit  Delete  Save  Refresh

NAME OF CO-INVESTIGATORS

No items to display.

G1: General Aims and Research Design (Mandatory)

Title

Title of your research project

Routes to justice for survivors of gender-based violence (with a particular focus on Newcastle upon Tyne)

Outline General Aims and Research Objectives

State your research aims/questions (maximum 500 words). This should provide the theoretical context within which the work is placed, and should include an evidence-based background, justification for the research, clearly stated hypotheses (if appropriate) and creative enquiry.

The proposed study builds on the research conducted in ethics application 13813 (and amendment ID 332) in which I conducted questionnaires and interviews with community organisations regarding their perceptions of access to justice. The data obtained largely focusses on access to justice for victims of gender-based violence (domestic abuse, FGM, forced marriage, honour violence, sexual abuse). In order to develop this research, and obtain new perspectives, I now wish to conduct interviews with legal professionals who specialise in gender-based violence regarding the following issues:

- a) their perceptions of access to justice for survivors of gender-based violence
- b) barriers to the formal legal system experienced by their clients who are survivors of gender-based violence
- c) the existence and role of informal justice systems in gender-based violence cases in Newcastle upon Tyne.

The research will form part of my DLaw which considers routes to justice for survivors of gender-based violence.

The interviews will produce both quantitative information and qualitative data, the former of which can be analysed through statistical analysis whilst the latter will be coded for themes using a software programme such as NVivo.

In light of Covid 19, it is proposed that the interviews will take place by Skype.

G2: Research Activities (Mandatory) ▼

Please give a detailed description of your research activities

Please provide a description of the study design, methodology (e.g. quantitative, qualitative, practice based), the sampling strategy, methods of data collection (e.g. survey, interview, experiment, observation, participatory), and analysis. Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography, extremism or radicalisation inform the research? If so have these been fully addressed?

Methodology:

The proposed research is a one-off semi-structured interview with legal professionals who support victims of gender-based violence. The advantage of this method is that it will allow me to elicit rich and detailed information about the practitioners perceptions of access to justice for survivors of gender-based violence, barriers to the formal legal system experienced by their clients who are survivors of gender-based violence and the existence and role of informal justice systems in gender-based violence cases. The research will produce both qualitative and quantitative data. The quantitative data will allow me to carry out a statistical analysis of the responses to pre-set questions and make comparisons. The qualitative data will allow rich and detailed responses to be provided. Gender-based violence is an emotive and potentially distressing topic. Whilst the practitioners will be experienced with dealing with these issues (and therefore may be more emotionally resilient to them) I am mindful that discussing these topics may also be distressing for the practitioners. I have raised this as a potential issue that the respondents should consider as part of the 'Information for Respondents' document that will be discussed with the respondents before the interviews start. As such, the practitioners will be live to the issue and will have the opportunity whether they do not wish to participate. The respondents will be made aware that they can bring the interview to an end at any point and they can choose not to answer any questions. The purpose of the questions will be to elicit information about their clients' experiences and will not therefore relate to the experiences of the legal professionals.

In light of Covid 19, it is proposed that the interviews will take place by Skype.

Sampling strategy:

A snowball sample will be adopted. As a practitioner in the area of domestic abuse and family law, I am familiar with other practitioners working in this field. As such, I intend to contact these practitioners to ask if they are agreeable to participating in the study. It is anticipated my initial sample size will be 10 practitioners. I will also ask them to forward the request to any other practitioners who works in this area.

Data analysis:

I envisage that I will use statistical analysis (through a software system such as SPSS) in order to analyse the quantitative elements of the interviews. SPSS can perform data manipulation and analysis and will enable me to identify trends and draw informed conclusions. In relation to the qualitative information obtained, the data obtained will be coded according to different themes arising using a data analysis tool such as NVivo.

M1: People and/or Personal Data ▼

Tick if your work involves people and/or personal data?

Sample Groups

Provide details of the sample groups that will be involved in the study and include details of their location (whether recruited in the UK or from abroad) and any organisational affiliation. For most research studies, this will cover: the number of sample groups; the size of each

sample group; the criteria that will be used to select the sample group(s) (e.g. gender, age, sexuality, health conditions). If the sample will include NHS staff or patients please state this clearly. If this is a pilot study and the composition of the sample has not yet been confirmed, please provide as many details as possible.

A snowball sample will be adopted. As a practitioner in the area of domestic abuse and family law, I am familiar with other practitioners working in this field. As such, I intend to contact these practitioners by email to provide information about the study and ask if they are agreeable to participating in the study. It is anticipated my initial sample size will be 10 practitioners. All of these practitioners work in law firms in the Newcastle area. I will also ask them to forward the request to any other practitioners who work in this area of law and geographic location. The two criteria for respondents are that they are (a) a legal professional and (b) they are based in the Newcastle area. This is because my research is concerned with the routes to justice for survivors of GBV in this geographical area. For the purposes of my research, a legal professional may include a solicitor, barrister, legal executive or paralegal.

In light of Covid 19, it is proposed that the interviews will take place by Skype.

Nature of data pertaining to Living Individuals

If you will be including personal data of living individuals, including still or moving images, please specify the nature of this data, and (if appropriate) include details of the relevant individuals who have provided permission to utilise this data, upload evidence of these permissions in the supporting documentation section.

Details of any Special Category Data - If you will be collecting data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, data concerning health or data concerning a natural person's sex life or sexual orientation, please specify which categories you will be using.

As can be seen from the draft list of questions, I will be asking legal professionals to provide some demographic information (i.e. about what type of law firm they work in). In addition, whilst the professionals will be encouraged to discuss experiences relating to the research questions, they will not be required to discuss any identifying information relating to their cases in order to protect client confidentiality. The respondents will not be asked to disclose particular data relating to living individuals nor will this identify any living individuals.

Legal Basis for Processing: [Further guidance can be found here](#)

If you require further information, please contact the Data Protection Officer by emailing

dp.officer@northumbria.ac.uk

Article 6(1) e: processing is necessary for the performance of a task carried out in the public interest
Article 9(2) j: processing is necessary for scientific and historical research purposes

Recruitment

Describe the step by step process of how you will contact and recruit your research sample and name any organisations or groups that will be approached. Your recruitment strategy must be appropriate to the research study and the sensitivity of the subject area. You must have received written permission from any organisations or groups before you begin recruiting participants. Copies of draft requests for organisational consent must be included in the 'Supporting Documentary Evidence'. You must also provide copies of any recruitment emails/posters that will be used in your study.

The initial sample will be contacted by email (see the draft cover email). As can be seen from the cover email, the respondents will be asked to forward the request to any other practitioners who they believe may be interested in participating in the study. Thereafter, I expect that practitioners will contact me if they wish to be involved in the study. The sample is varied in terms of gender. The age and sexuality of the sample group is also varied (and in some cases, unknown).

Please see the attached draft cover email which would be sent to potential respondents.

Once the respondents have been recruited, I will send them the Information for Participants document and a consent form.

Remuneration

Details of remuneration

Will you make any payment or remuneration to participants or their carers/consultees? If yes: Please provide details/justifications. Note that your Faculty may have specific guidelines on participant payments/payment rates etc and you should consult these where appropriate.

N/A - no remuneration will be provided and this is made clear in the 'Information for Participants' document.

Type of Consent

Informed Consent ▼

Type of Consent Details

Please include copies of information sheets and consent forms in the 'G6: File Attachments' section. If the study involves participants who lack capacity to consent, procedures in line with sections 30-33 of the Mental Capacity Act will need to be put in place. If you are using alternative formats to provide information and /or record consent (e.g. images, video or audio recording), provide brief details and outline the justification for this approach and the uses to which it will be put:

Please refer to the attached draft Information for Participants document and the attached consent form. I intend to send the information for participants and consent form document to the respondents prior to the skype interview.

Researcher and Participant Safety Issues

If there any risks the research could cause any discomfort or distress to participants (physical, psychological or emotional) describe the measures that will be put in place to alleviate or minimise them. Please give detailsof the support that will be available for any participants who become distressed during their involvement with the research.

Please see the above comments in relation to the professionals potentially being distressed by their experiences of discussing representing survivors of gender-based violence. To address this and minimise the risk I have included a section about this in the attached 'Information for Respondents' document. The respondents can terminate their interview and end their involvement in the study at any point during the interview and can choose not to answer particular questions.

Data Gathering Materials Used

Provide a detailed description of what the participants will be asked to do for the research study, including details about the process of data collection (e.g. completing how many interviews / assessments, when, for how long, with whom). Add any relevant documentation to the 'Supporting Documentary Evidence' section of this form.

The respondents are being asked to participate in a skype interview which should take approximately one hour. The list of proposed questions are attached to this request, however as the interview will be semi-structured, I anticipate that I will also ask questions which are not on the list around the relevant topic. The interview will take place by Skype.

Potential Ethical Issues

Please describe any potential ethical issues the project may have which are not covered above, and how you have sought to minimise these.

Any potential ethical issues discussed above.

M2: DBS Clearances Required

+ Add ✎ Edit ✕ Delete 💾 Save ↻ Refresh

Do not upload your DBS certificate to this system as this would be contravening General Data Protection Regulations.

Further information relating to DBS Clearance can be found in the Ethics and Governance Handbook using the link below

[Ethics and Governance Handbook](#)

******* All fields below relating to DBS certificates must be completed *******

NAME OF PERSON ON CERTIFICATE	TYPE OF DBS CLEARANCE	CERTIFICATE REFERENCE	ADULTS/CHILDREN	DATE OF DBS CERTIFICATE
-------------------------------	-----------------------	-----------------------	-----------------	-------------------------

(Add new row)

M3: Secondary Data

Tick if you will be using secondary data NOT in the public domain?

M4: Commercial Data

Tick if your work involves commercially sensitive data?

M5: Environmental Data

Tick if your work involves the collection of environmental data?

G3: Research Data Management Plan (Mandatory)

Anonymising Data (mandatory)

Describe the arrangements for anonymising data and if not appropriate explain why this is and how it is covered in the informed consent obtained.

I will not obtain the name of the law firm or any other identifying information about the firm, the clients, the respondent or the cases at the start of the interview. The only information obtained will be the case study examples to evidence the points made. As identified above, this will not include any identifying information.

Storage Details (mandatory)

Describe the arrangements for the secure transport and storage of data collected and used during the study. You should explain what kind of storage you intend to use, e.g. cloud-based, portable hard drive, USB stick, and the protocols in place to keep the data secure.

If you have identified the requirement to collect 'Special category data', please specify any additional security arrangements you will use to keep this data secure.

The interviews will be recorded using a dictaphone. The dictaphone will be retained in my home and will be kept in a locked cupboard in my home office. The interviews will be transcribed within seven days of the date of the interview. Following this, the contents of the dictaphone will be erased. The written transcription will be kept on my secure U:Drive (which is password protected). I will then analyse the responses using SPSS and NVIVO - my accounts to both of these software sites is password protected. The transcriptions will be retained for two years from the date of the interview (this will be around the time that I should complete the DLaw). After this, the transcriptions will be permanently deleted.

Retention and Disposal (mandatory)

I confirm that I will comply with the University's data retention schedule and guidance.

[Research Data Management link](#)

[General Data Protection Regulations including Data Protection link](#)

[Records Retention Schedule link](#)

G4: Research Project Timescale (Mandatory) ▼

Proposed Start Date 

Proposed End Date 

G5: Additional Information ▼

Externally Funded

External Funder

Please give details of your 'other' funder

Agresso Reference

Franchise Programme Organisation

Please give details of your franchise organisation

NHS Involvement

Please give details of any NHS involvement

Type a value

Clinical Trial(s)

Please give details of any Clinical Trial(s)

Type a value

Medicinal Products

Please give details of any Medicinal Product(s)

G6: File Attachments



Additional files can be uploaded e.g. consent documentation, participant information sheet, etc.

Please note: It is best practice to combine all documents into one PDF (This avoids the reviewer having to op...

[Go To Attachments](#)

G7: Health and Safety (Mandatory)



I confirm that I have read and understood the University's Health and Safety Policy.

I confirm that I have read and understood the University's requirements for the mandatory completion of risk assessments in advance of any activity involving potential physical risk.

The University Health and Safety Policy can be accessed [here](#)

The University Risk Assessment Code of Practice can be accessed [here](#)

Please confirm either:

There are PHYSICAL risks associated with the research project work and I confirm that a risk assessment has been approved and attached to this ethics submission.

OR

I can confirm that there are no physical risks associated with this project and so no risk assessments are required.

Students requiring assistance with completing their risk assessment should get in touch with their supervisor

or module tutor as the first point of contact. If further assistance is needed, the Faculty Technician can provide further guidance.

For more specific risk assessments (e.g. lab work), especially where the project is Medium or High risk, you are required to consult the Faculty Technical Manager; your Supervisor/Module Tutor will be able to put you in touch.

If you have any questions or concerns, please contact the University Health and Safety Team by emailing CRHealthandSafety@northumbria.ac.uk

G8: Insurance (Mandatory) ▼

I have read and understood the University Insurance guidance document (link below):

[Insurance Guidance link](#)

If you think your activity may involve a High Risk rating or are unsure how to answer the statements - contact fi.insurance@northumbria.ac.uk with a copy of your research proposal for advice.

I confirm my work is covered by University Insurance. I confirm an insurance risk level of:

Medium ▼

If your insurance risk level is HIGH please attach details of exceptional insurance coverage:

[Click here to attach a file](#)

G9: Electronic Signature (Mandatory) ▼

I confirm my supervisor has reviewed the contents of this document

I confirm I have assessed the ethical risk level of my work correctly and answered the above sections as fully and accurately as possible.

Full Name

Ana Speed

Date

18 March 2020 16:03:19



PDF Version ▼

Create PDF

No items to display.

Review Comments, Conditions and Outcomes

Log of any Ethical Incidents

Log New Incident

INCIDENT...	CREATED DATE TIME	CREATOR NAME	COMPLAINANT DETAILS
No items to display.			

Title and Objectives (see G1)

+ Add **Save**

Reviewer A: Reviewer B:

e.g. Are the research question and/or study aims clear?

DATE	ROLE	COMMENT
25/03/2020	Reviewer A	On a literal interpretation this project could be said to involve research into criminal activity and therefore to fall into the high risk category, but I interpret this meaning criminal activity by the research subjects, which is not an issue here,

Proposed Methodology and Analysis (see G2)

+ Add **Save**

Reviewer A: Reviewer B:

e.g. Is the design appropriate to the research question?
Are the methods of data analysis appropriate to the research question?

DATE	ROLE	COMMENT
No items to display.		

Sample and Recruitment (see M1)

+ Add **Save**

Reviewer A: Reviewer B:

e.g. Is the sampling approach appropriate to the design?
Is the sample sufficient and achievable?
Is the process of recruitment clearly explained?
Are participants receiving payments for taking part, and if so is the payment appropriate?
If the DBS is ticked, has the appropriate information been included?

DATE	ROLE	COMMENT
No items to display.		

Consent (see M1)

+ Add **Save**

Reviewer A: Reviewer B:

e.g. Is the approach to consent seeking clear?
Is consent from parents/ carers/ guardians required?
Are all necessary recruitment and informed consent documentation included (e.g. letters of permission, letters of invitation)
Is the information sheet adequate to ensure informed consent?
Are the consent form(s) appropriate?

DATE	ROLE	COMMENT
------	------	---------

No items to display.

Researcher and Participant Safety (see M1)

+ Add Save

Reviewer A:

Reviewer B:

e.g. Is there any risk of physical harm for the researcher(s) or the participants and if so what attempts have been made to alleviate or minimise them?
Have Risk Assessments been referred to where appropriate?

DATE	ROLE	COMMENT
------	------	---------

No items to display.

Research Activities (see G2-G8, M1-M5, H1-H5)

+ Add Save

Reviewer A:

Reviewer B:

e.g. Are the research tasks described clearly?
Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography or extremism/ radicalism inform the research? If so have these been fully addressed? (and we can use this to amend the information on risk levels on the form) Is there any risk that the tasks may cause psychological harm and if so what attempts have been made to alleviate or minimise them?

DATE	ROLE	COMMENT
------	------	---------

No items to display.

Data Management Plan (see G3)

+ Add Save

Reviewer A:

Reviewer B:

e.g. Have sufficient steps been taken to ensure participant anonymity/confidentiality of data?
Are the arrangements for data storage and disposal clearly outlined?
Are these arrangements in line with University and/or the funding body requirements?

DATE	ROLE	COMMENT
------	------	---------

No items to display.

File Attachments (see G6)

+ Add Save

Reviewer A:

Reviewer B:

Please note: where file attachments have not been added because they are not required, please select Approve.

COMMENT BY	DATE	ROLE	COMMENT
	25/03/2020	Reviewer A	All these documents appear wll thought-out and carefully drafted.
General Comments (see Help)			∨
 Add  Save 			
DATE	ROLE	COMMENT	
25/03/2020	Reviewer A	These are simple Skype interviews with professionals which should not raise any ethical problems.	



**Northumbria
University**
NEWCASTLE

Information sheet

Introduction

I would like to invite you to take part in a research study. Before you decide if you want to take part, it is important you understand why the research is being done and what it would involve for you. Please read through this information about the research and if you have any queries, please do not hesitate to contact me.

Purpose of the study

The purpose of this study is to evaluate legal professionals' perceptions of access to justice for survivors of gender-based violence. Gender-based violence can include many different forms of domestic and sexual abuse, forced marriage, or 'honour'-based crimes. You are being asked to provide information about your experiences of representing survivors of gender-based violence and whether you consider that victims are able to achieve justice under the formal legal system.

Why have you been invited?

You have been invited to participate in this study either because the researcher has identified that you are a legal professional who has experience of representing survivors of gender-based violence or you have identified yourself as falling within this category.

Do you have to take part?

It is up to you to decide if wish to participate in the research. You can withdraw before, during or up to four weeks' after the interview. You do not need to provide a reason and the researcher will delete your response.

What will happen if you decide to participate?

You are being asked to participate in an interview conducted through Skype, Teams or telephone. It should not take you longer than one hour. Participation in this study means that you provide the researcher with permission to use the data collected in research publications. Your responses will be anonymised and combined with those of other participants.

Expenses and Payments

You will not receive any expenses or payments for your participation in this study. The researcher is grateful in anticipation for your participation.

Risk / benefits

The research will ask you to discuss your experience of representing survivors of gender-based violence. There is a possibility that you may find this distressing. If so, you can bring the interview to an end at any point. You do not have to answer all of the questions asked.

If you do not receive a direct benefit from your participation in this study, others may ultimately benefit from the knowledge obtained. It is anticipated that the findings will contribute to an understanding of access to justice for survivors of gender-based violence.

Confidentiality

All the information will be confidential to the researcher and any research assistants employed to assist with the project. In order to preserve client confidentiality, you will not be asked to disclose any information that would identify a particular client. When the researcher writes the report, she may include what you have said but she will make sure that if you have provided identifying information, this is removed so no-one can be recognised.

The researcher would like to record the interview because this enables ideas to be documented accurately. The researcher or a research assistant will type up the recording in to a 'transcript' and then check again to remove any identifying details (e.g. place names or names of people). The audio files will be deleted within seven days of the interview and the transcripts will be deleted within two years of the interview. The written transcription will be kept on the researcher's private and confidential work drive. The researcher will only record the interview if you are happy doing this.

What will happen to the results of this study?

The information gathered during the interview will be analysed and the findings will be used in academic articles and conference papers. The data will also feature in the researcher's professional doctorate thesis.

Who is organising and funding the research?

The research is being organised by Northumbria University. No external organisations or funders are involved.

Who has reviewed the study?

The research proposal has been reviewed and approved in accordance with the ethics procedures of Northumbria University.

Further information and contact details

If you would like any further information regarding this study, or if you are unhappy with any aspect of this study, please contact the researcher:

Ana Speed
Tel: 0191 243 7958
email: ana.speed@northumbria.ac.uk



**Northumbria
University**
NEWCASTLE

CONSENT FORM FOR INTERVIEW

The information sheet explains my research and that it is up to you if you wish to take part in this research interview. If you want to take part then please read the following information carefully and sign below. If you wish, you can withdraw at any time before or during the interview, and up to four weeks after the interview has taken place, by contacting me.

I have understood the details in the participants' information leaflet and agree to take part in this interview.

I understand that I can withdraw at any time before or during the interview, and up to 4 weeks after, and that I can choose whether or not to answer specific questions.

I agree the researcher can record my interview.

I understand that the researcher will keep all information safe and secure, and will not hold personal information about me after the end of the project. The information that I give will be confidential to the researcher and/or any research assistants employed to assist with the research.

Name _____

Date _____

State your research aims/questions (maximum 500 words). This should provide the theoretical context within which the work is placed, and should include an evidence-based background, justification for the research, clearly stated hypotheses (if appropriate) and creative enquiry.

Dated 21.10.20

The purpose of this study is to examine the accessibility and effectiveness of occupation orders by the family courts. The project will be undertaken by 20 Student Law Office (SLO) students, supervised by Ana Speed, Kayliegh Richardson and Callum Thomson, and the project will be undertaken for the Surviving Economic Abuse Forum. The project has been borne out of discussions with Surviving Economic Abuse, who support victims of economic abuse. They have noted that there has been a declining trend in the number of occupation orders granted by the family courts over the last decade. They would like the students to examine the reasons for this and identify barriers to securing orders. A secondary aim of the project is to examine whether the orders that are granted are effective in meeting their aim. It is envisaged that the students will prepare a comprehensive literature review to address the use of occupation orders by the family courts. This will include a secondary analysis of court statistics to identify whether there has been a decrease in the number of occupation orders granted in recent years. Thereafter, we will design and disseminate a questionnaire to legal professionals and support services. The aim of the questionnaire is to examine these stakeholders' experiences of applying for occupation orders – specifically, what barriers exist to applying for/being granted occupation orders, whether orders are granted as requested, whether orders are fit for purpose and the impact of orders being refused. The questionnaire will include both open and closed questions to enable themes/patterns to be identified and attitudes/opinions to be given. The questionnaire will be circulated through a range of organisations including our own professional contacts who are legal professionals, SEA, FLOWS, Resolution Family Lawyers, The Domestic Abuse Housing Alliance, Support through Court and The Litigant in Person Network. The resulting data will be coded and analysed so that research findings can be made. The findings will be presented in a research report which will outline the findings and make practical recommendations. It is hoped that there will also be a remote or face-to-face presentation of the research findings, where key stakeholders will be invited to attend. All of the students will be supervised by one of the staff team and the students will be fully briefed about the confidentiality/data protection requirements. The names of the students cannot yet be stated because they have not been allocated to the SLO module/supervisors at this time. It is anticipated there may be 20 SLO students working on this project.

Please give a detailed description of your research activities

Please provide a description of the study design, methodology (e.g. quantitative, qualitative, practice based), the sampling strategy, methods of data collection (e.g. survey, interview, experiment, observation, participatory), and analysis. Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography, extremism or radicalisation inform the research? If so have these been fully addressed?

Methodology: The proposed research methodologies are threefold. Firstly, we will prepare a comprehensive literature review drawing on existing research to address the use of occupation orders by the family courts. This

will include an examination of court statistics (which are already in the public domain) to identify whether there has been a decrease in the number of occupation orders granted in recent years. Secondly, we will design a questionnaire which will be completed by legal practitioners and support services. The aim of the questionnaire is to examine these stakeholders' experiences of applying for occupation orders. The questionnaire will be circulated through a range of organisations including our own professional contacts who are legal professionals, SEA, FLOWS, Resolution Family Lawyers, The Domestic Abuse Housing Alliance, Support through Court and The Litigant in Person Network. The resulting data will be coded (using NVivo) and analysed so that research findings can be made. The findings will be presented in a research report which will outline the findings and make practical recommendations. The questionnaire will be hosted by Online Surveys (formerly Bristol Online) which the university subscribes to. The third element of the project will involve in-depth interviews with litigants who have applied for occupation orders in the family courts to obtain a richer understanding of their experiences. The interviews will be conducted remotely (either through Skype, Microsoft Teams or telephone) by the supervisors Ana Speed and Kayleigh Richardson. The students will not be involved in this aspect of the data collection. The attached poster has been designed and will be sent to the Surviving Economic Abuse forum. SEA have agreed to forward this on to their service users who have applied for occupation orders. SEA believe that they have approximately 10 litigants who would like to be interviewed as part of this project. The data obtained from the interviews will be coded separately by the three supervisors.

Sampling strategy: As highlighted above, a link to the questionnaire will be circulated through a range of organisations including our own professional contacts who are legal professionals, SEA, FLOWS, Resolution Family Lawyers, The Domestic Abuse Housing Alliance, Support through Court and The Litigant in Person Network. It is anticipated that these organisations will then further circulate the email/link to the questionnaire with their own service users, thereby utilising a snowball sample. See draft email.

Methods of data analysis: To analyse the qualitative data obtained and the interview data, the researchers will use a data analysis tool such as NVivo to code the results, to facilitate thematic analysis. The quantitative data obtained will undergo statistical analysis using a combination of SPSS and the data analysis tools on Online Surveys.

Sensitive information: The topic of the research is occupation orders, which are granted primarily for victims of domestic abuse. This is invariably a sensitive topic. The questions will primarily deal with the experiences of making the applications, the family court process, any barriers to making the applications and the effectiveness of any orders granted. The questionnaires will be completed by legal professionals and support services. These organisations are professionals and as the applications do not relate to their own experiences will mean that they are unlikely to have any negative effect on their wellbeing. In respect of the interviews, questions could prove distressing to litigants and this has influenced our choice of methodology. The risks of distress are mitigated by the fact that the litigants are volunteering to participate in the project, having reviewed the poster and the participant information sheet. Research demonstrates that victims are keen to provide their views on research relating to domestic abuse in order to inform and develop practice in this area. As such, it is possible that participating in the interviews will be empowering for some litigants. In contrast, it is possible that litigants will

find completing the interview distressing. In this case, litigants will have the option to stop the interview immediately. This information is clearly explained in the participant information form (see link to the draft participant information form and the consent form). We have included a list of support services in the participant information form which litigants can call if they feel distressed. At the start of the interview, the interviewer will remind the interviewee about options for support if they become distressed and thereafter at appropriate intervals throughout. Sensitive questions will be introduced carefully. Interviews will be conducted by a qualified family law solicitor with experience supporting victims of domestic abuse. As agreed with the ethics committee, students will not conduct the interviews or be present during them.

Sample Groups

Provide details of the sample groups that will be involved in the study and include details of their location (whether recruited in the UK or from abroad) and any organisational affiliation. For most research studies, this will cover: the number of sample groups; the size of each sample group; the criteria that will be used to select the sample group(s) (e.g. gender, age, sexuality, health conditions). If the sample will include NHS staff or patients please state this clearly. If this is a pilot study and the composition of the sample has not yet been confirmed, please provide as many details as possible.

The sample will comprise workers and volunteers from organisations who provide support services to survivors of domestic abuse, legal practitioners and litigants themselves. In relation to the questionnaires, no identifying information will be obtained from the participants. Any identifying information that is inadvertently provided will be anonymised prior to the coding process and will not be used in the report or any articles, conference papers or other materials produced from this resultant data. Likewise, with the interviews, any identifying information will be kept to a minimum (i.e. name of applicant and court applied to) but this will be anonymised at the point that the interviews are transcribed. There will be no Special Category data obtained. The responsibility of ensuring that all identifying information is included will rest with the academic staff supervising the project. All identifying information will be anonymised.

Information about data security is contained in the information for participants document at the start of the questionnaire. In respect of the questionnaires, all information will initially be retained on Online Surveys, which the university subscribes to. Ana Speed has a private login for this website which can only be accessed by password. The questionnaire will be open until 10 January 2020. On the date that the questionnaire closes, all of the responses will be downloaded to the academic staff teams' researchers' private work drives (the U drive) on their private laptops to ensure that they are anonymous and anonymise if necessary. The questionnaire will then be deleted from Online Surveys. The downloaded responses will be retained for two years from the date of the questionnaire closure (around the time that two of the researchers, Ana and Kayliegh) will complete their doctorates. After this, the responses will be permanently deleted. The anonymous questionnaire responses may be sent to the students by email and also stored on their private U drives to enable them to carry out work on the project. In relation to the interviews, the interviews will be recorded using a dictaphone / voice recorder and retained on the individual laptops of the interviewers (Ana, Callum and Kayliegh). The recordings will then be deleted from the dictaphone/voice recorder. The interviews will be anonymised during the transcription process.

The anonymised transcripts will be retained for two years. It is possible that research assistants will be employed to transcribe the interviews. This is clearly stated in the participant information form. If this is the case, the RAs will be employed by the university and will be fully briefed on confidentiality. The supervisors will still retain full responsibility for ensuring the transcripts have been fully anonymised. Any data that is uploaded to a software analysis programme (i.e. SPSS or Nvivo) will be anonymised before uploading, therefore it would not be possible to identify particular respondents' responses from this information. Access to these packages is password protected. Any information uploaded to SPSS and Nvivo would also be kept for two years.

Legal Basis for Processing: Research Ethics and Governance Handbook

Article 6(1) e: processing is necessary for the performance of a task carried out in the public interest

Article 9(2) j: processing is necessary for scientific and historical research purposes

Recruitment

Describe the step by step process of how you will contact and recruit your research sample and name any organisations or groups that will be approached. Your recruitment strategy must be appropriate to the research study and the sensitivity of the subject area. You must have received written permission from any organisations or groups before you begin recruiting participants. Copies of draft requests for organisational consent must be included in the 'Supporting Documentary Evidence'. You must also provide copies of any recruitment emails/posters that will be used in your study.

In relation to the interviews, the attached poster will be sent to SEA who will then forward this to their service users. Any service users who wish to participate can then contact Kayliegh Richardson who will provide them with a copy of the participant information form and schedule the appointment. As highlighted above, a link to the questionnaire will be circulated through a range of organisations including our own professional contacts who are legal professionals, SEA, FLOWS, Resolution Family Lawyers, The Domestic Abuse Housing Alliance, Support through Court and The Litigant in Person Network.

The email for the questionnaire will read:

“Dear Sirs

We are a team of academics and students at Northumbria University. We are conducting research in relation to the use and effectiveness of occupation orders by the family courts. In particular, we are interested in understanding your experiences of applying for occupation orders, whether any barriers exist to applying for/being granted occupation orders, whether orders are granted as requested, whether orders are fit for purpose and the impact of orders being refused. As a legal professional or support service working in the area of domestic abuse, we would be grateful if you could please consider completing the questionnaire. The link to the questionnaire can be found below {insert link}. The questionnaire will take approximately 10 minutes to complete and you will not be asked to provide any identifying information.

We are grateful to you for considering this request.

Kind regards

Ana Speed, Kayleigh Richardson, Callum Thomson and family law students within the Student Law Office”

It is anticipated the questionnaire will go live in November 2020 and it will remain open for six weeks (i.e. until 10 January 2021). The agreed timescales for completion of the project have been agreed with the Surviving Economic Abuse Forum, as outlined below:

Activity	Completion date
Literature review and analysis of court statistics	Mid-November 2020
Questionnaire/interviews	January 2021
Coding and analysis	February 2021
Report	March 2021
Presentation	April 2021

Anonymising Data (mandatory)

Describe the arrangements for anonymising data and if not appropriate explain why this is and how it is covered in the informed consent obtained.

Please see the attached information for participants document. Any identifying information inadvertently provided will be anonymised prior to the coding. The responsibility of ensuring that all identifying information is included will rest with the academic staff supervising the project.

Storage Details (mandatory)

Describe the arrangements for the secure transport and storage of data collected and used during the study. You should explain what kind of storage you intend to use, e.g. cloud-based, portable hard drive, USB stick, and the protocols in place to keep the data secure. If you have identified the requirement to collect 'Special category data', please specify any additional security arrangements you will use to keep this data secure.

Information about data security is contained in the information for participants document at the start of the questionnaire/which will be given to the interviewees prior to interview. In respect of the questionnaires, all information will initially be retained on Online Surveys, which the university subscribes to. Ana Speed has a private login for this website which can only be accessed by password. The questionnaire will be open until 10 January 2020. On the date that the questionnaire closes, all of the responses will be downloaded to the academic staff teams' researchers' private work drives (the U drive) on their private laptops to ensure that they are anonymous and anonymise if necessary. The questionnaire will then be deleted from Online Surveys. The downloaded responses will be retained for two years from the date of the questionnaire closure (around the time

that two of the researchers, Ana and Kayliegh) will complete their doctorates. After this, the responses will be permanently deleted. The anonymous questionnaire responses may be sent to the students by email and also stored on their private U drives to enable them to carry out work on the project. In relation to the interviews, the interviews will be recorded using a dictaphone / voice recorder and retained on the individual laptops of the interviewers (Ana and Kayliegh). The recordings will then be deleted from the dictaphone/voice recorder. The interviews will be anonymised during the transcription process. The anonymised transcripts will be retained for two years. It is possible that research assistants will be employed to transcribe the interviews. This is clearly stated in the participant information form. If this is the case, the RAs will be employed by the university and will be fully briefed on confidentiality. The supervisors will still retain full responsibility for ensuring the transcripts have been fully anonymised.

Any data that is uploaded to a software analysis programme (i.e. SPSS or Nvivo) will be anonymised before uploading, therefore it would not be possible to identify particular respondents' responses from this information. Access to these packages is password protected. Any information uploaded to SPSS and Nvivo would also be kept for two years. Project timescales are outlined above.

REVIEWER COMMENTS, CONDITIONS AND OUTCOMES

NOTE FOR REVIEWERS: Please do not download this workbook; complete the submitted document 'live' in **Version Control** and stop duplicate copies being held on individual OneDrive folders

Low and **Medium** risk projects will be reviewed by one Reviewer

High risk projects will be reviewed by two Reviewers in a 4 week period. Each Review shouldn't take more than 1 week

Reviewers should complete all blue fields and ensure they thoroughly check responses in Sheet 4 - Medium

NOTE THAT REVIEWER(S) IDENTITY WILL BE VISIBLE TO THE APPLICANT

	Reviewer A Decisions	Comments
Title and Objectives of the project <i>eg Check the research question and/or study aims clear</i>		
Proposed Methodology and Analysis <i>e.g. Check the design appropriate to the research question</i>		
Are the methods of data analysis appropriate to the research question?		
Sample and Recruitment <i>eg Check the sampling approach appropriate to the design</i>	Approve	
Is the sample sufficient and achievable?	Yes	
Is the process of recruitment clearly explained?	Yes	
If the DBS is ticked, has the appropriate information been included?	Not applicable	
Are participants receiving payments for taking part, and if so is the payment appropriate?	No	
Consent <i>e.g. Check the approach to consent seeking</i>	Yes	
Is consent from parents/ carers/ guardians required?	No	
Are all necessary recruitment and informed consent documentation included (e.g. letters of permission, letters of invite)	Yes	One detail - it's unclear how signatures will be obtained. A typed "signature" attached to an email from a private or work address should suffice.
Is the information sheet adequate to ensure informed consent?	Yes	
Are the consent form(s) appropriate?	Yes	

<p>Researcher and Participant Safety <i>Check if there any risk of physical harm for the researcher(s) or the participants and if so what attempts have been made to alleviate or minimise them</i></p>		
<p>Have Risk Assessments been referred to where appropriate?</p>	Not applicable	
<p>Research Activities <i>Check research tasks have been described clearly. Check whether sensitive topics such as trauma, bereavement, drug use, child abuse, pornography or extremism/ radicalism inform the research. If so check these these been fully addressed (and we can use this to amend the information on risk levels on the form).</i></p>		
<p>Is there any risk that the tasks may cause psychological harm and if so what attempts have been made to alleviate or minimise them?</p>	<p>There is a risk that some interview questions could cause distress. Participants are advised that if they do feel distressed they should stop the interview immediately and seek support, and details of a helpline are provided. Presumably interviewers will give the same advice if they notice any signs of distress. Decision: Approve</p>	
<p>Data Management Plan <i>e.g. Check that sufficient steps been taken to ensure participant anonymity/confidentiality of data</i></p>		
<p>Are the arrangements for data storage and disposal clearly outlined?</p>	Yes	
<p>Are these arrangements in line with University and/or the funding body requirements?</p>	Yes	
<p>Documentation <i>eg Check all appropriate documents been supplied with this workbook</i></p>	Yes	

General comments

Approve

This is important and valuable research. Ana and the team have taken account of comments made by both reviewers on a previous application. By using a survey

Introduction

We would like to invite you to take part in a research study. Before you decide if you want to take part, it is important you understand why the research is being done and what it would involve for you. Please read through this information about the research and if you have any queries, please do not hesitate to contact the research team.

Purpose of the study

The purpose of this study is to examine your experience of applying for an occupation order in the family courts. The research is being conducted by an academic staff team at Northumbria University. The research is being conducted in partnership with the Surviving Economic Abuse Forum who are seeking to better understand the effectiveness of the law in this area.

Why have you been invited?

You are invited to participate in this study if you have applied for an occupation order in the family courts in England and Wales.

Do you have to take part?

It is up to you to decide if you wish to participate in the research. You are free to withdraw at any time. You do not need to provide a reason and your response will be deleted.

What will happen if you decide to participate?

If you decide to participate, you will be invited to participate in an interview which is likely to take between 1-2 hours. The interview will take place remotely, using either Skype, Microsoft Teams or telephone. Participation in this study means that you provide the researchers with permission to use the data collected in research publications. Any information that potentially identifies you will be anonymised and combined with those of other participants.

Expenses and Payments

You will not receive any expenses or payments for your participation in this study. The researchers are grateful in anticipation for your participation.

Risk / benefits

If you are a survivor of domestic abuse, it is possible that you may be distressed by answering questions on this topic. If you experience any distress, you should stop the interview immediately and seek support. This may be from a friend, family member or a support service who you have previously engaged with. Alternatively, you can call the National Domestic Abuse Helpline on 0808 2000 247, or find local support at <https://www.womensaid.org.uk/domestic-abuse-directory/>.

Alternatively, it is possible that you will feel empowered by participating in the study, knowing that you are contributing to an understanding of the use and effectiveness of occupation orders and potentially improving the experience of other court users.

Confidentiality

All information in this study will be collected through an interview. In order to assist the research team, we would like to record your interview using a dictaphone/voice recorder. You might be asked to provide some identifying information such as your first name and the court which you made your application in, however if your response contains any identifying information this will be anonymised when your interview is transcribed and will not be published.

The interviews will be transcribed within three weeks of the date of the interview either by the researcher or a research assistant. Following this, the contents of the dictaphone will be erased. The written transcription will be kept on the researchers' private work drive. The anonymised transcriptions will be retained for two years from the date of the interview following which the transcriptions will be permanently deleted.

What will happen to the results of this study?

The information gathered will be analysed and the findings will be used in a report for the Surviving Economic Abuse Forum, who are seeking to better understand practice in this area. In addition, the findings may be used in academic articles and conference papers.

Who is organising and funding the research?

The research is being organised by Northumbria University. The project has been commissioned by the Surviving Economic Abuse Forum. Northumbria University will not receive any payment for carrying out the project.

Who has reviewed the study?

The research proposal has been reviewed and approved in accordance with the ethics procedures of Northumbria University.

Further information and contact details

If you would like any further information regarding this study, or if you are unhappy with any aspect of this study, please contact:

Ana Speed

Tel: 07787 364 868

email: ana.speed@northumbria.ac.uk



**Northumbria
University**
NEWCASTLE

CONSENT FORM FOR INTERVIEW

The information sheet explains the research and that it is up to you if you wish to take part in this research interview. If you want to take part then please read the following information carefully and sign below. If you wish, you can withdraw at any time before or during the interview, and up to four weeks after the interview has taken place, by contacting a member of the research team.

I have understood the details in the participants' information leaflet and agree to take part in this interview.

I understand that I can withdraw at any time before or during the interview, and up to 4 weeks after, and that I can choose whether or not to answer specific questions.

I agree the researchers can record my interview.

I understand that the researchers will keep all information safe and secure, and will not hold personal information about me after the end of the project. The information that I give will be confidential to the researchers and/or any research assistants or students who assist with the research.

Name _____

Date _____

< Return PREVIEW Occupation orders and the family courts Skip: 1 / 12 ⚙

courts



Occupation orders and the family courts

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Information for Participants

Introduction

We would like to invite you to take part in a research study. Before you decide if you want to take part, it is important you understand why the research is being conducted and what it would involve for you. Please read through this information about the research and if you have any queries, please do not hesitate to contact the research team.

Purpose of the study

The purpose of this study is to examine legal professionals and organisations' experiences of supporting people to apply for occupation orders in the family courts. You will be asked questions about what barriers exist to applying for/being granted occupation orders, whether orders are granted as requested, whether orders are fit for purpose and the impact of orders being refused.

The research is being conducted by an academic staff team at Northumbria University. Alongside the staff team,

family law students studying in the Student Law Office at Northumbria University will also contribute to the research project. The students will be supervised by the staff team. The research is being conducted in partnership with the Surviving Economic Abuse Forum who are seeking to better understand the effectiveness of the law in this area.

Why have you been invited?

You are invited to participate in this study if you are a legal professional/support service who has assisted litigants with applying for occupation orders in the family courts.

Do you have to take part?

It is up to you to decide if you wish to participate in the research. You are free to withdraw at any time up to the point of submitting your response. You do not need to provide a reason. As your responses are anonymous, it will not be possible to withdraw once you have submitted your response.

What will happen if you decide to participate?

If you decide to participate, you will be asked to complete a questionnaire. It should not take you longer than 10 minutes. Participation in this study means that you provide the researchers with permission to use the data collected in research publications. Your responses will be anonymous and combined with those of other participants. If you inadvertently provide any information that could identify you or your organisation, this will be anonymised.

Expenses and Payments

You will not receive any expenses or payments for your participation in this study. The researchers are grateful in anticipation for your participation.

Risk / benefits

We do not envisage any risk to you in participating in this study. If you do not receive a direct benefit from your participation in this study, others may ultimately benefit from the knowledge obtained. It is anticipated that the findings will contribute to an understanding of the use and effectiveness of occupation orders.

Confidentiality

All information in this study will be collected using an on-line questionnaire. You are not asked to provide any identifying information, however if your response contains any identifying information this will be anonymised during the analysis and will not be published.

All information will initially be retained on Online Surveys. The questionnaire will be open until **18 January 2021**. On the date that the questionnaire closes, all of the responses will be downloaded to the researchers' private work drives on their private laptops. The questionnaire will then be deleted from Online Surveys. The downloaded responses will be retained for two years from the date of the questionnaire closure. After this, the responses will be permanently deleted.

What will happen to the results of this study?

The information gathered will be analysed and the findings will be used in a report for the Surviving Economic Abuse Forum, who are seeking to better understand practice in this area. In addition, the findings may be used in academic articles and conference papers.

Who is organising and funding the research?

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Who has reviewed the study?

The research proposal has been reviewed and approved in accordance with the ethics procedures of Northumbria University.

Further information and contact details

If you would like any further information regarding this study, or if you are unhappy with any aspect of this study, please contact:

Ana Speed

email: ana.speed@northumbria.ac.uk



< Return PREVIEW Occupation orders and the family courts Skip: < Previous Next > 2 / 12 ⚙

9% complete

Consent form

Please provide your consent to participate in the study * Required

Please select exactly 4 answer(s).

- I have read and understood the information about the research and I have had an opportunity to contact the researchers if I require any further information regarding the study.
- I understand that participation is voluntary and I can withdraw at any time up to the point of submitting my response without the need to give reasons
- I consent to the researchers using my anonymised views in research publication(s)
- I agree to participate in this study.

My Documents

Amendments

 Refresh

SUBMISSION ID	CREATED DATE TIME	CREATED BY	STATUS	DESCRIPTION	UPDATED DATE TIME	COORDIN...
No items to display.						

Submission

Submission Ref 23413
Status Approved
Submission Coordinator Tony Ward tony.ward@northumbria.ac.uk

Name  Ana Speed

Email ana.speed@northumbria.ac.uk

Faculty

Department

Submitting As

Externally Approved Note: ONLY tick this box if your project has already received full ethical approval from an external organisation

Module Level Approval Tick this box if staff and this submission refers to an entire module.

**** Only to be used for low or medium risk projects as categorised by the diagnostic risk question set ****

Module Code

Help

Module Tutor

Find

Help

Clear

Titl...

De...

Em...

Research Supervisor

Find

Help

Clear

Titl...
De...
Em...

Ethical Risk Level Medium

[Click here to answer the ethical risk questions](#)

Risk Level Conditions:

Your ethical risk is **medium**. Your research should only consist of one or more of the following:

- Non-vulnerable adults
- Non-sensitive personal data referring to a living individual
- Secondary data not in the public domain
- Environmental issues
- Commercially sensitive information

Your project proposal has some ethical implications and will be reviewed by one independent reviewer appointed by your Faculty Research Ethics Committee. Some factors to be considered include considering obtaining informed consent forms from organisations or people involved, permission to use data from the Data Controller, as well as confidentiality/anonymity issues.

Ethical Risk Diagnostic Questions and Responses

[Refresh](#)

ID	QUESTION	ANSWER
<i>No items to display.</i>		

Co-investigators

[+](#) Add [✎](#) Edit [✖](#) Delete [📄](#) Save [🔄](#) Refresh

NAME OF CO-INVESTIGATORS

Kayliegh Richardson (Staff)

Callum Thomson (Staff)

G1: General Aims and Research Design (Mandatory)

Title

Title of your research project

Gender-based violence support services and the response to Covid-19

Outline General Aims and Research Objectives

State your research aims/questions (maximum 500 words). This should provide the theoretical context within which the work is placed, and should include an evidence-based background, justification for the research, clearly stated hypotheses (if appropriate) and creative enquiry.

The purpose of this study is to evaluate the services that are being provided to support survivors of gender-based violence in light of COVID-19. We wish to ask organisations who provide support services about the types of services they offer and whether their service provision has changed following the outbreak of the pandemic. This, combined with a black letter analysis of the response provided by the family law and criminal courts and the Legal Aid Agency will enable us to examine the access to justice response for victims of gender-based violence at this uncertain time. Gender-based violence is interpreted broadly as violence which disproportionately impacts women and girls. This may include intimate partner violence (physical, emotional, economic, coercive and controlling behaviour), forced marriage, female genital mutilation, honour-based abuse or sexual abuse.

This research project fits within the overall doctoral studies of Kayliegh Richardson and Ana Speed. In addition, Callum Thomson has a research interest in this area as a family law practitioner.

G2: Research Activities (Mandatory)

Please give a detailed description of your research activities

Please provide a description of the study design, methodology (e.g. quantitative, qualitative, practice based), the sampling strategy, methods of data collection (e.g. survey, interview, experiment, observation, participatory), and analysis. Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography, extremism or radicalisation inform the research? If so have these been fully addressed?

Methodology:

The proposed research design is a web-based questionnaire. The advantage of this method is that it will allow the researchers to elicit information from a wide range of respondents in order to develop a picture of the access to justice response for survivors of gender-based violence following the outbreak of Covid-19. An online questionnaire is relatively easy and cheap to design (the University will pay a subscription for the use of web-based services). In addition to providing design tools, web-based platforms assist with data collection and analysis, such as providing email response notifications and the ability to export responses to statistical software packages such as SPSS.

Due to the topical nature of the enquiry, the survey has already been designed and we endeavour to send the survey to organisations as soon as ethical approval has been granted. There is a password on the survey to ensure that no-one can view or complete it until ethical approval has been granted.

Sampling strategy:

As all of the researchers are family law solicitors, we have links with organisations providing GBV support services. Many of these links are online (i.e. through being connected on Twitter and other forms of social media). As such, we plan to send a twitter call out, inviting people to participate. This will simply explain that we are looking for organisations providing support services to victims of GBV to participate in an online survey and will include a link to the survey. The first page of the survey is an 'information for participants' page which provides full details about the study.

Methods of data analysis:

The web-based platform that we have selected, Bristol Online, provides very primitive data analysis tools. We envisage that we will use statistical analysis (through a software system such as SPSS) in order to analyse the quantitative elements of the questionnaires. SPSS can perform data manipulation and analysis and will enable me to identify trends and draw informed conclusions. In relation to the qualitative information obtained through 'free text box' answers in the questionnaire, the data obtained will be coded according to different themes arising using a data analysis tool such as NVivo.

Sensitive information:

Whilst the research relates to gender-based violence which is a sensitive topic, no questions are asked in relation to the substantive issue of GBV. Instead, the questions are focussed around access to justice and service provision so they are less sensitive in nature.

The draft survey can be accessed at: <https://northumbria.onlinesurveys.ac.uk/gender-based-violence-support-services-covid-19>. As this project has not yet received ethical approval, we have added a password so that no one can review and complete the survey (although the researchers have run a test themselves to ensure the functionality of the survey works correctly). The password is gbv (not capitalised). A list of the questions has also been attached to this 

M1: People and/or Personal Data

Tick if your work involves people and/or personal data?

Sample Groups

Provide details of the sample groups that will be involved in the study and include details of their location (whether recruited in the UK or from abroad) and any organisational affiliation. For most research studies, this will cover: the number of sample groups; the size of each sample group; the criteria that will be used to select the sample group(s) (e.g. gender, age, sexuality, health conditions). If the sample will include NHS staff or patients please state this clearly. If this is a pilot study and the composition of the sample has not yet been confirmed, please provide as many details as possible.

The sample will comprise workers and volunteers from organisations who provide support services to survivors of gender-based violence. The gender, age and sexuality etc of the participant will be unknown. In relation to organisational details, the online questionnaire does ask the respondents to confirm their organisation's name. This is to enable us to analyse the data according to the type of organisation (i.e. women's organisation, rape crisis etc) and will also enable us to ensure that no one organisation has provided multiple responses and that the organisation is based in the United Kingdom. However, none of the institutions will be referred to by name at any point in the analysis or any subsequent articles. None of the other information obtained would enable an institution to be identified.

As the request for participants is being sent through a public twitter belonging to two of the researchers (Kayliegh Richardson and Callum Thomson) it is hoped that other organisations will forward on and 're-tweet' the call. This will enable a snowball sample to be utilised. We are hoping to receive at least 15 responses. Kayliegh and Callum's twitter accounts are personal accounts however it is stated on their accounts that they work for the university. Both Kayliegh and Callum use twitter for professional rather than social purposes and this is reflected in their contacts and the content they publish.

Nature of data pertaining to Living Individuals

If you will be including personal data of living individuals, including still or moving images, please specify the nature of this data, and (if appropriate) include details of the relevant individuals who have provided permission to utilise this data, upload evidence of these permissions in the supporting documentation section.

Details of any Special Category Data - If you will be collecting data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, data concerning health or data concerning a natural person's sex life or sexual orientation, please specify which categories you will be using.

As can be seen from the draft questionnaire, we will be asking the organisations to provide some demographic information about their service users. However, they will not be required to disclose particular data relating to living individuals nor will this identify any living individuals.

Legal Basis for Processing: [Further guidance can be found here](#)

Article 6(1) e: processing is necessary for the performance of a task carried out in the public interest
Article 9(2) j: processing is necessary for scientific and historical research purposes

Recruitment

Describe the step by step process of how you will contact and recruit your research sample and name any organisations or groups that will be approached. Your recruitment strategy must be appropriate to the research study and the sensitivity of the subject area. You must have received written permission from any organisations or groups before you begin recruiting participants. Copies of draft requests for organisational consent must be included in the 'Supporting Documentary Evidence'. You must also provide copies of any recruitment emails/posters that will be used in your study.

As outlined above, the request for participation will be sent through a tweet.

The tweet will say:

"We are researching support for survivors gender-based violence in light of the Covid-19 outbreak. If you support victims of abuse, please consider taking part in a 10 minute survey, available at: <https://northumbria.onlinesurveys.ac.uk/gender-based-violence-support-services-covid-19>"

The first page of the survey includes full information for participants and if at that stage they do not want to participate, they can just close the webpage.

Remuneration

Details of remuneration

Will you make any payment or remuneration to participants or their carers/consultees? If yes: Please provide details/justifications. Note that your Faculty may have specific guidelines on participant payments/payment rates etc and you should consult these where appropriate.

N/A - no remuneration will be provided and this is made clear at the start of the questionnaire.

Type of Consent

Informed Consent

Type of Consent Details

Please include copies of information sheets and consent forms in the 'G6: File Attachments' section. If the study involves participants who lack capacity to consent, procedures in line with sections 30-33 of the Mental Capacity Act will need to be put in place. If you are using alternative formats to provide information and /or record consent (e.g. images, video or audio recording), provide brief details and outline the justification for this approach and the uses to which it will be put:

Please see the draft information for participants document and consent form on the draft survey:
<https://northumbria.onlinesurveys.ac.uk/gender-based-violence-support-services-covid-19>

Researcher and Participant Safety Issues

If there any risks the research could cause any discomfort or distress to participants (physical, psychological or emotional) describe the measures that will be put in place to alleviate or minimise them. Please give detailsof the support that will be available for any participants who become distressed during their involvement with the research.

None envisaged.

Data Gathering Materials Used

Provide a detailed description of what the participants will be asked to do for the research study, including details about the process of data collection (e.g. completing how many interviews / assessments, when, for how long, with whom). Add any relevant documentation to the 'Supporting Documentary Evidence' section of this form.

The participants are asked to participate in a 10 minute online survey through Bristol Online. The draft survey can be accessed at: <https://northumbria.onlinesurveys.ac.uk/gender-based-violence-support-services-covid-19>

Potential Ethical Issues

Please describe any potential ethical issues the project may have which are not covered above, and how you have sought to minimise these.

None envisaged.

M2: DBS Clearances Required ▼

+ Add ✎ Edit ✕ Delete 📄 Save 🔄 Refresh

Do not upload your DBS certificate to this system as this would be contravening General Data Protection Regulations.

Further information relating to DBS Clearance can be found in the Ethics and Governance Handbook using the link below

[Ethics and Governance Handbook](#)

NAME OF PERSON ON CERTIFICATE	TYPE OF DBS CLEARANCE	CERTIFICATE REFERENCE	ADULTS/CHILDREN	DATE OF DBS CERTIFICATE
(Add new row)				

M3: Secondary Data ▼

Tick if you will be using secondary data NOT in the public domain?

M4: Commercial Data ▼

Tick if your work involves commercially sensitive data?

M5: Environmental Data ▼

Tick if your work involves the collection of environmental data?

G3: Research Data Management Plan (Mandatory) ▼

Anonymising Data (mandatory)

Describe the arrangements for anonymising data and if not appropriate explain why this is and how it is covered in the informed consent obtained.

Please see the information for participants document.

Whilst the participants are asked to provide the name of their organisation, this is only to enable the researchers to identify patterns between similar/differing organisations, to ensure that multiple individuals from the same organisation do not complete the survey and to ensure that the organisation is based in the UK. As such, this information would be anonymised during the data analysis and would not included in any research publications. It is not anticipated that any of the other information obtained would allow an organisation to be identified, however if it did, this would also be anonymised at the data analysis stage and not included in any research publications.

Storage Details (mandatory)

Describe the arrangements for the secure transport and storage of data collected and used during the study. You should explain what kind of storage you intend to use, e.g. cloud-based, portable hard drive, USB stick, and the protocols in place to keep the data secure.

If you have identified the requirement to collect 'Special category data', please specify any additional security arrangements you will use to keep this data secure.

Information about data security is contained in the information for participants document at the start of the survey.

All information will initially be retained on Bristol Online, which the university subscribes to. Ana Speed has a private login for this website which can only be accessed by password. The questionnaire will be open until 22 April 2020. On the date that the questionnaire closes, all of the responses will be downloaded to the researchers' private work drives (the U drive) on their private laptops. The questionnaire will then be deleted from Bristol Online. The downloaded responses will be retained for two years from the date of the questionnaire closure (around the time that two of the researchers, Ana and Kayliegh) will complete their doctorates. After this, the responses will be permanently deleted.

Any data that is uploaded to a software analysis programme (i.e. SPSS or Nvivo) will be anonymised before uploading, therefore it would not be possible to identify particular organisations' responses from this information. Access to these packages is password protected. Any information uploaded to SPSS and Nvivo would also be kept for two years.

In relation to the research project timescale, it is anticipated that we will send out the tweet requesting participants as soon as we receive ethical approval. We will collect data for two weeks and then begin the data analysis. It is hoped that the research article will be completed and submitted to the Journal of Criminal Law by 1 June 2020, given how topical this issue is.

Retention and Disposal (mandatory)

I confirm that I will comply with the University's data retention schedule and guidance.

[Research Data Management link](#)

[General Data Protection Regulations including Data Protection link](#)

[Records Retention Schedule link](#)

G4: Research Project Timescale (Mandatory) ▼

Proposed Start Date

08/04/2020



Proposed End Date

01/06/2020



G5: Additional Information ▼

Externally Funded

External Funder

Please give details of your 'other' funder

Agresso Reference

Franchise Programme Organisation

Please give details of your franchise organisation

Type a value

NHS Involvement

Please give details of any NHS involvement

Type a value

Clinical Trial(s)

Please give details of any Clinical Trial(s)

Type a value

Medicinal Products

Please give details of any Medicinal Product(s)

G6: File Attachments



Additional files can be uploaded e.g. consent documentation, participant information sheet, etc.

Please note: It is best practice to combine all documents into one PDF (This avoids the reviewer having to op...

[Go To Attachments](#)

G7: Health and Safety (Mandatory)



I confirm that I have read and understood the University's Health and Safety Policy.

I confirm that I have read and understood the University's requirements for the mandatory completion of risk assessments in advance of any activity involving potential physical risk.

The University Health and Safety Policy can be accessed [here](#)

The University Risk Assessment Code of Practice can be accessed [here](#)

Please confirm either:

There are PHYSICAL risks associated with the research project work and I confirm that a risk assessment has been approved and attached to this ethics submission.

OR

I can confirm that there are no physical risks associated with this project and so no risk assessments are required.

Students requiring assistance with completing their risk assessment should get in touch with their supervisor or module tutor as the first point of contact. If further assistance is needed, the Faculty Technician can provide further guidance.

For more specific risk assessments (e.g. lab work), especially where the project is Medium or High risk, you are required to consult the Faculty Technical Manager; your Supervisor/Module Tutor will be able to put you in touch.

If you have any questions or concerns, please contact the University Health and Safety Team by emailing CRHealthandSafety@northumbria.ac.uk

G8: Insurance (Mandatory) ▼

I have read and understood the University Insurance guidance document (link below):

[Insurance Guidance link](#)

If you think your activity may involve a High Risk rating or are unsure how to answer the statements - contact fi.insurance@northumbria.ac.uk with a copy of your research proposal for advice.

I confirm my work is covered by University Insurance. I confirm an insurance risk level of:

Medium ▼

If your insurance risk level is HIGH please attach details of exceptional insurance coverage:

[Click here to attach a file](#)

G9: Electronic Signature (Mandatory) ▼

I confirm my supervisor has reviewed the contents of this document

I confirm I have assessed the ethical risk level of my work correctly and answered the above sections as fully and accurately as possible.

Full Name

Ana Speed

Date

01 April 2020 12:41:45



PDF Version ▼

Create PDF

No items to display.

Review Comments, Conditions and Outcomes

Log of any Ethical Incidents ▼

Log New Incident

INCIDENT...	CREATED DATE TIME	CREATOR NAME	COMPLAINANT DETAILS
No items to display.			

Title and Objectives (see G1) ▼

+ Add Save

Reviewer A:

Reviewer B:

e.g. Are the research question and/or study aims clear?

DATE	ROLE	COMMENT
02/04/2020	Reviewer A	This obviously fits with the Covid 19 Experts Database, see Rebecca's email of 2/4/20.

Proposed Methodology and Analysis (see G2) ▼

+ Add Save

Reviewer A:

Reviewer B:

e.g. Is the design appropriate to the research question?
Are the methods of data analysis appropriate to the research question?

DATE	ROLE	COMMENT
No items to display.		

Sample and Recruitment (see M1) ▼

+ Add Save

Reviewer A:

Reviewer B:

e.g. Is the sampling approach appropriate to the design?
Is the sample sufficient and achievable?
Is the process of recruitment clearly explained?
Are participants receiving payments for taking part, and if so is the payment appropriate?
If the DBS is ticked, has the appropriate information been included?

DATE	ROLE	COMMENT
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No items to display.

Consent (see M1) ▼

 Add  Save

Reviewer A:

Reviewer B:

*e.g. Is the approach to consent seeking clear?
Is consent from parents/ carers/ guardians required?
Are all necessary recruitment and informed consent documentation included (e.g. letters of permission, letters of invitation)
Is the information sheet adequate to ensure informed consent?
Are the consent form(s) appropriate?*

DATE	ROLE	COMMENT
------	------	---------

No items to display.

Researcher and Participant Safety (see M1) ▼

 Add  Save

Reviewer A:

Reviewer B:

*e.g. Is there any risk of physical harm for the researcher(s) or the participants and if so what attempts have been made to alleviate or minimise them?
Have Risk Assessments been referred to where appropriate?*

DATE	ROLE	COMMENT
------	------	---------

No items to display.

Research Activities (see G2-G8, M1-M5, H1-H5) ▼

 Add  Save

*e.g. Are the research tasks described clearly?
Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography or extremism/ radicalism inform the research? If so have these been fully addressed? (and we can use this to amend the information on risk levels on the form) Is there any risk that the tasks may cause psychological harm and if so what attempts have been made to alleviate or minimise them?*

DATE	ROLE	COMMENT
------	------	---------

No items to display.

Data Management Plan (see G3) ▼

 Add  Save

Reviewer A:

Reviewer B:

*e.g. Have sufficient steps been taken to ensure participant anonymity/confidentiality of data?
Are the arrangements for data storage and disposal clearly outlined?
Are these arrangements in line with University and/or the funding body requirements?*

DATE	ROLE	COMMENT
------	------	---------

No items to display.

File Attachments (see G6) ▼

 Add  Save

Please note: where file attachments have not been added because they are not required, please select Approve.

COMMENT BY	DATE	ROLE	COMMENT
<i>No items to display.</i>			

General Comments (see Help) 

 Add  Save

DATE	ROLE	COMMENT
<i>No items to display.</i>		



Gender-based violence support services & COVID-19

Page 1

Introduction

We would like to invite you to take part in a research study. Before you decide if you want to take part, it is important you understand why the research is being done and what it would involve for you. Please read through this information about the research and if you have any queries, please do not hesitate to contact me.

Purpose of the study

The purpose of this study is to evaluate the services that are being provided to support survivors of gender-based violence in light of COVID-19. You are being asked to provide information about the types of services you offer and whether your response has changed following the outbreak of the pandemic.

Why have you been invited?

You are invited to participate in this study if you work or volunteer for an organisation which supports survivors of gender-based violence. Gender-based violence is interpreted broadly as violence which disproportionately impacts women and girls. This may include intimate partner violence (physical, emotional, economic, coercive and controlling behaviour), forced marriage, female genital mutilation, honour-based abuse or sexual abuse.

Do you have to take part?

It is up to you to decide if wish to participate in the research. You are free to withdraw at any time. You do not need to provide a reason and the researcher will delete your response.

What will happen if you decide to participate?

If you decide to participate, you will be asked to complete a questionnaire. It should not take you longer than 10 minutes. Participation in this study means that you provide the researchers with permission to use the data collected in research publications. Your responses will be anonymised and combined with those of other participants.

Expenses and Payments

You will not receive any expenses or payments for your participation in this study. The researchers are grateful in anticipation for your participation.

Risk / benefits

The researchers do not envisage any risk to you in participating in this study. If you do not receive a direct benefit from your participation in this study, others may ultimately benefit from the knowledge obtained. It is anticipated that the findings will contribute to an understanding of access to justice for survivors of gender-based violence at this time.

Confidentiality

All information in this study will be collected using an on-line survey. Whilst you are asked to provide the name of your organisation, this is only to enable the researcher to identify patterns between similar/differing organisations. Details which would identify your organisation will be anonymised during the analysis and will not be published.

All information will initially be retained on Bristol Online. The questionnaire will be open until **22 April 2020**. On the date that the questionnaire closes, all of the responses will be downloaded to the researchers' private work drives on their private laptops. The questionnaire will then be deleted from Bristol Online. The downloaded responses will be retained for two years from the date of the questionnaire closure. After this, the responses will be permanently deleted.

What will happen to the results of this study?

The information gathered during the focus group will be analysed and the findings will be used in academic articles and conference papers.

Who is organising and funding the research?

The research is being organised by Northumbria University. No external organisations or funders are involved.

Who has reviewed the study?

The research proposal has been reviewed and approved in accordance with the ethics procedures of Northumbria University.

Further information and contact details

If you would like any further information regarding this study, or if you are unhappy with any aspect of this study, please contact:

Ana Speed

Tel: 07787 364 868

email: ana.speed@northumbria.ac.uk

Consent form

Please provide your consent to participate in the study. * *Required*

Please select exactly 4 answer(s).

- I have read and understood the information about the research and I have had an opportunity to contact the researchers if I require any further information regarding the study.
- I understand that participation is voluntary and I can withdraw at any time without the need to give reasons.
- I consent to the researchers using my anonymised views in research publication(s)
- I agree to participate in this study.

My Documents

Amendments

 Refresh

SUBMISSION ID	CREATED DATE TIME	CREATED BY	STATUS	DESCRIPTION	UPDATED DATE TIME	COORDIN...
No items to display.						

Submission

Submission Ref 26042
Status Approved
Submission Coordinator Tony Ward tony.ward@northumbria.ac.uk

Name  Callum Thomson

Email callum2.thomson@northumbria.ac.uk

Faculty

Department

Submitting As

Externally Approved Note: ONLY tick this box if your project has already received full ethical approval from an external organisation

Module Level Approval Tick this box if staff and this submission refers to an entire module.

**** Only to be used for low or medium risk projects as categorised by the diagnostic risk question set ****

Module Code

Module Tutor

Titl...

De...

Em...

Research Supervisor

Titl...
De...
Em...

Ethical Risk Level Medium

[Click here to answer the ethical risk questions](#)

Risk Level Conditions:

Your ethical risk is **medium**. Your research should only consist of one or more of the following:

- Non-vulnerable adults
- Non-sensitive personal data referring to a living individual
- Secondary data not in the public domain
- Environmental issues
- Commercially sensitive information

Your project proposal has some ethical implications and will be reviewed by one independent reviewer appointed by your Faculty Research Ethics Committee. Some factors to be considered include considering obtaining informed consent forms from organisations or people involved, permission to use data from the Data Controller, as well as confidentiality/anonymity issues.

Ethical Risk Diagnostic Questions and Responses

Refresh

ID	QUESTION	ANSWER
No items to display.		

Co-investigators

+ Add Edit X Delete Save Refresh

NAME OF CO-INVESTIGATORS

Ana Speed (Staff)

Kayliegh Richardson (Staff)

G1: General Aims and Research Design (Mandatory)

Title

Title of your research project

Gender-based violence support services and the response to Covid-19.

Outline General Aims and Research Objectives

State your research aims/questions (maximum 500 words). This should provide the theoretical context within which the work is placed, and should include an evidence-based background, justification for the research, clearly stated hypotheses (if appropriate) and creative enquiry.

The purpose of this study is to expand upon the results of the researchers' original study, which founded their article in the Journal of Criminal Law: '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' and their written evidence to the Home Affairs Committee. The researchers wish to further investigate and evaluate the services that are being provided to support victims of gender-based violence and their children in light of Covid-19, as well as the response to court priorities and remote hearings. They wish to ask individuals within the legal profession, and within other professional services that provide GBV support services, whether their service provision has changed following the outbreak of the pandemic and in light of the changes made to cope with the effects of the pandemic. This, combined with a black letter analysis of the response provided by the family law and criminal courts will enable the researchers to examine the access to justice response for victims of gender-based violence and their children at this uncertain time. Gender based violence is interpreted broadly as violence which disproportionately impacts women and girls. This may include intimate partner violence (physical, emotional, economic, coercive and controlling behaviour), forced marriage, female genital mutilation, honour-based abuse or sexual abuse. This research project fits within the overall doctoral studies of Kayliegh Richardson and Ana Speed. In addition, Callum Thomson has a research interest in this area as a family law practitioner and prospective doctoral student. This work also aligns with the impact case study for REF purposes.

As part of the SLO module, it is anticipated that Northumbria University students will assist with the research project. Whilst the interviews will be conducted by the staff team (Ana, Kayliegh, Callum) the students may become involved in transcribing the interviews, carrying out the analysis and contributing to a final report/article in relation to the data as part of a 'policy' approach to clinical legal education. This will enable the students to understand the current legal climate and contribute to the development of local practice. All of the students will be supervised by one of the staff team and the students will be fully briefed about the confidentiality/data protection requirements. The names of the students cannot yet be stated because they have not been allocated to the SLO module/supervisors at this time. It is anticipated there may be 32 SLO students working on this project.

G2: Research Activities (Mandatory)

Please give a detailed description of your research activities

Please provide a description of the study design, methodology (e.g. quantitative, qualitative, practice based), the sampling strategy, methods of data collection (e.g. survey, interview, experiment, observation, participatory), and analysis. Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography, extremism or radicalisation inform the research? If so have these been fully addressed?

Methodology:

The proposed research design is a semi-structured interview process with volunteers from the legal profession and support services of gender-based violence. The advantage of this method is that it will allow the researchers to elicit rich qualitative data, to expand upon the researchers' original study. It will develop a holistic view of the access to justice response for survivors of gender-based violence following the outbreak of Covid-19. The use of semi-structured interviews is relatively easy and cost-effective; the University will pay a subscription for the use of NVivo to code the interview results. Due to the topical nature of the enquiry, the questions have already been drafted and the researchers will send invitations to potential participants as soon as ethical approval has been granted. The interviews will not be scheduled until ethical approval has been received. All of the interviews will be conducted remotely (using Northumbria approved software such as telephone, Teams or Skype for Business). The interviews will be carried out by Ana Speed, Kayliegh Richardson or Callum Thomson (it is anticipated that the researchers will divide the participants between them).

Sampling strategy:

As all of the researchers are family law solicitors, they have links with organisations providing GBV support services. Many of these links are online (i.e. through being connected on Twitter and other forms of social media). As such, they plan to send a twitter call out, inviting people to participate. This will simply explain that the researchers are looking for individuals working within the legal professional, or those providing support services to victims of GBV and their children, to participate in a semi-structured interview.

Methods of data analysis:

To analyse the qualitative data obtained, the researchers will use a data analysis tool such as NVivo to code the results, to facilitate thematic and coded analysis.

Sensitive information:

Whilst the research relates to gender-based violence, which is a sensitive topic, no questions will be asked in relation to the substantive issue of GBV. Instead, the questions are focussed on access to justice and service provision, so they are less sensitive in nature. The draft questions are submitted with this application. As this project has not yet received ethical approval, there will be no interviews scheduled.

M1: People and/or Personal Data

Tick if your work involves people and/or personal data?

Sample Groups

Provide details of the sample groups that will be involved in the study and include details of their location (whether recruited in the UK or from abroad) and any organisational affiliation. For most research studies, this will cover: the number of sample groups; the size of each sample group; the criteria that will be used to select the sample group(s) (e.g. gender, age, sexuality, health conditions). If the sample will include NHS staff or patients please state this clearly. If this is a pilot study and the composition of the sample has not yet been confirmed, please provide as many details as possible.

The sample will comprise of workers and volunteers from organisations who provide support services to survivors of gender-based violence and their children, as well as CAFCASS, social workers, legal professionals and those within the justice system. Any data that could identify the participants will only be known to the research team, including those noted in the Information Sheet, included with this ethics application. This is to enable the researchers to analyse the data according to the individual and their employment or volunteering position (i.e: lawyer conducting remote hearings, social worker conducting home visits) and it will also enable them to ensure that the individual is based within the north east of England. However, none of the individuals will be referred to by name at any point in the analysis or any subsequent publications. As the request for participants is being sent through a public twitter belonging to two of the researchers (Kayliegh Richardson and Callum Thomson), it is hoped that other organisations will forward on and 're-tweet' the call. This will enable a snowball sample to be utilised. The researchers are hoping to receive at least 15 responses. Kayliegh and Callum's twitter accounts are personal accounts, however it is stated on their accounts that they work for the university. Both Kayliegh and Callum use twitter for professional rather than social purposes and this is reflected in their contacts and the content they publish. The researchers will contact other colleagues and contacts through email.

Nature of data pertaining to Living Individuals

If you will be including personal data of living individuals, including still or moving images, please specify the nature of this data, and (if appropriate) include details of the relevant individuals who have provided permission to utilise this data, upload evidence of these permissions in the supporting documentation section.

Details of any Special Category Data - If you will be collecting data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, data concerning health or data concerning a natural person's sex life or sexual orientation, please specify which categories you will be using.

As can be seen from the draft questions and the Consent Form enclosed with this application, the researchers will be asking the individuals for their name, and their occupation will be clear from their answers to the questions. Any identifying information will be anonymised during the transcription stage. The interview recordings will be deleted seven days following the completed transcriptions of all interviews and the identifying data pertaining to the participants will be anonymised and will not be used in any following articles, conference papers or other materials produced from this resultant data. The completed transcriptions will be held in accordance with the Information Sheet enclosed with this application. There will be no Special Category data obtained. If it is inadvertently obtained by the very nature of the semi-structured interview, it will be incidental to the main data and would be held securely in the same manner as all other data aforesaid and will not be made identifiable in any resultant publications.

Legal Basis for Processing: [Further guidance can be found here](#)

If you require further information, please contact the Data Protection Officer by emailing dp.officer@northumbria.ac.uk

Article 6(1) e: processing is necessary for the performance of a task carried out in the public interest
Article 9(2) j: processing is necessary for scientific and historical research purposes

Recruitment

Describe the step by step process of how you will contact and recruit your research sample and name any organisations or groups that will be approached. Your recruitment strategy must be appropriate to the research study and the sensitivity of the subject area. You must have received written permission from any organisations or groups before you begin recruiting participants. Copies of draft requests for organisational consent must be included in the 'Supporting Documentary Evidence'. You must also provide copies of any recruitment emails/posters that will be used in your study.

As outlined above, the request for participation will be sent through a tweet and through email. The Information Sheet and Consent Form, which will be provided to the participants, are enclosed with this application. A number of the participants have already volunteered to participate in the project following a seminar held by the researchers with the Local Family Justice Board.

The tweet will say:

“Gender-based Violence and the Family/Criminal Courts: we are keen to speak to people about their experiences both during and after lockdown; in particular their views on the remote court process to aid future planning. Could anyone who is interested in being interviewed by our researchers, please contact callum2.thomson@northumbria.ac.uk
All views will be kept anonymous.
#genderbasedviolence #domesticabuse #covid19”

The email will say:

“Dear Sirs,
Re: Covid-19, Gender-based-Violence and access to justice
We hope that you are well during these difficult times. We are keen to speak to people about their experiences both during and after lockdown; in particular their views on the remote court process to aid future planning.
If you are / Could anyone who is [delete as appropriate] interested in being interviewed by our researchers, please contact callum2.thomson@northumbria.ac.uk
All views will be kept anonymous.
Best wishes
Ana Speed, Callum Thomson and Kayliegh Richardson
Solicitors and Lecturers, Northumbria University”

Any views provided will of course be kept anonymous and they will provide individuals with full information about the research process before speaking to them.

Remuneration

Details of remuneration

Will you make any payment or remuneration to participants or their carers/consultees? If yes: Please provide details/justifications. Note that your Faculty may have specific guidelines on participant payments/payment rates etc and you should consult these where appropriate.

N/A - no remuneration will be provided and this is made clear in the documents to be provided prior to the interview and enclosed with this application.

Type of Consent

Informed Consent

Type of Consent Details

Please include copies of information sheets and consent forms in the 'G6: File Attachments' section. If the study involves participants who lack capacity to consent, procedures in line with sections 30-33 of the Mental Capacity Act will need to be put in place. If you are using alternative formats to provide information and /or record consent (e.g. images, video or audio recording), provide brief details and outline the justification for this approach and the uses to which it will be put:

Please see the attached Consent Form and Information Sheet.

Researcher and Participant Safety Issues

If there any risks the research could cause any discomfort or distress to participants (physical, psychological or emotional) describe the measures that will be put in place to alleviate or minimise them. Please give detailsof the support that will be available for any participants who become distressed during their involvement with the research.

No risks envisaged.

Data Gathering Materials Used

Provide a detailed description of what the participants will be asked to do for the research study, including details about the process of data collection (e.g. completing how many interviews / assessments, when, for how long, with whom). Add any relevant documentation to the 'Supporting Documentary Evidence' section of this form.

The participants are asked to participate in an interview with one or more of the researchers: Ana Speed, Callum Thomson and Kayleigh Richardson. The questions for the semi-structured interview are enclosed with this application. There will be one interview for each participant. Each interview is estimated to take around 2 hours. The researchers intend for the interviews to take place before the end of 2020.

Potential Ethical Issues

Please describe any potential ethical issues the project may have which are not covered above, and how you have sought to minimise these.

None envisaged.

M2: DBS Clearances Required

 Add  Edit  Delete  Save  Refresh

Do not upload your DBS certificate to this system as this would be contravening General Data Protection Regulations.

Further information relating to DBS Clearance can be found in the Ethics and Governance Handbook using the link below

[Ethics and Governance Handbook](#)

******* All fields below relating to DBS certificates must be completed *******

NAME OF PERSON ON CERTIFICATE	TYPE OF DBS CLEARANCE	CERTIFICATE REFERENCE	ADULTS/CHILDREN	DATE OF DBS CERTIFICATE
<input type="button" value="(Add new row)"/>				

M3: Secondary Data

Tick if you will be using secondary data NOT in the public domain?

M4: Commercial Data

Tick if your work involves commercially sensitive data?

M5: Environmental Data

Tick if your work involves the collection of environmental data?

G3: Research Data Management Plan (Mandatory)

Anonymising Data (mandatory)

Describe the arrangements for anonymising data and if not appropriate explain why this is and how it is covered in the informed consent obtained.

Whilst the participants are asked to provide their name, and their occupation will be clearly identifiable to the researchers, this is only to enable the researchers to identify patterns between similar/differing individuals and to ensure that the individual/organisation is based in the North East of England. As such, this information would be anonymised during the transcription of the interviews and would not be included in the analysis or any research publications. The same approach will be taken for any identifying information.

Storage Details (mandatory)

Describe the arrangements for the secure transport and storage of data collected and used during the study. You should explain what kind of storage you intend to use, e.g. cloud-based, portable hard drive, USB stick, and the protocols in place to keep the data secure.

If you have identified the requirement to collect 'Special category data', please specify any additional security arrangements you will use to keep this data secure.

Information about data security is contained in the Information Sheet to be provided to the participants before the interview takes place. The interviews will be recorded and stored on the university U-Drives for those working on the project, as detailed on the Information Sheet on private laptops and Personal Computers. This may include the researchers and/or SLO students who may participate in the project. All research assistants and SLO students would be from Northumbria and would be fully briefed about the importance of maintaining confidentiality. The recordings will be transcribed by Ana, Kayliegh, Callum and/or potentially SLO students who will be participating in the analysis stage of the research). If this is an issue, Ana, Kayliegh and Callum can transcribe the interviews and the anonymous transcripts can be provided to the students who will assist them with the data analysis. The anonymised transcripts will be held securely on the secure U:Drives of the staff researchers and students who participate in the project. The responses will be retained for two years from the date of the interviews (around the time that two of the researchers, Ana and Kayliegh) will complete their doctorates. After this, the transcripts will be permanently deleted. Any data that is uploaded to a software analysis programme (i.e. Nvivo) will already be anonymised (as this will be completed at the transcription stage), therefore it would not be possible to identify particular individuals' responses from this information. Access to these packages is password protected. Any information uploaded to SPSS and Nvivo would also be kept for two years. In relation to the research project timescale, it is anticipated that the researchers will send out the tweet and emails requesting participants as soon as they receive ethical approval. They will then conduct the interviews and intend to begin the data analysis before the end of 2020. It is hoped that the research article will be completed and submitted to the Journal by 1 June 2021.

Retention and Disposal (mandatory)

I confirm that I will comply with the University's data retention schedule and guidance.

[Research Data Management link](#)

[General Data Protection Regulations including Data Protection link](#)

[Records Retention Schedule link](#)

G4: Research Project Timescale (Mandatory)

Proposed Start Date

23/07/2020



Proposed End Date

01/06/2021



G5: Additional Information



Externally Funded

External Funder

Please give details of your 'other' funder

Agresso Reference

Franchise Programme Organisation

Please give details of your franchise organisation

NHS Involvement

Please give details of any NHS involvement

Clinical Trial(s)

Please give details of any Clinical Trial(s)

Medicinal Products

Please give details of any Medicinal Product(s)

G6: File Attachments



Additional files can be uploaded e.g. consent documentation, participant information sheet, etc.

Please note: It is best practice to combine all documents into one PDF (This avoids the reviewer having to op...

Go To Attachments

G7: Health and Safety (Mandatory)



- I confirm that I have read and understood the University's Health and Safety Policy.
- I confirm that I have read and understood the University's requirements for the mandatory completion of risk assessments in advance of any activity involving potential physical risk.
The University Health and Safety Policy can be accessed [here](#)
The University Risk Assessment Code of Practice can be accessed [here](#)

Please confirm either:

- There are PHYSICAL risks associated with the research project work and I confirm that a risk assessment has been approved and attached to this ethics submission.

OR

- I can confirm that there are no physical risks associated with this project and so no risk assessments are required.

Students requiring assistance with completing their risk assessment should get in touch with their supervisor or module tutor as the first point of contact. If further assistance is needed, the Faculty Technician can provide further guidance.

For more specific risk assessments (e.g. lab work), especially where the project is Medium or High risk, you are required to consult the Faculty Technical Manager; your Supervisor/Module Tutor will be able to put you in touch.

If you have any questions or concerns, please contact the University Health and Safety Team by emailing CRHealthandSafety@northumbria.ac.uk

G8: Insurance (Mandatory)



- I have read and understood the University Insurance guidance document (link below):

[Insurance Guidance link](#)

If you think your activity may involve a High Risk rating or are unsure how to answer the statements - contact fi.insurance@northumbria.ac.uk with a copy of your research proposal for advice.

I confirm my work is covered by University Insurance. I confirm an insurance risk level of:

If your insurance risk level is HIGH please attach details of exceptional insurance coverage:

Click here to attach a file

G9: Electronic Signature (Mandatory) ▼

I confirm my supervisor has reviewed the contents of this document

I confirm I have assessed the ethical risk level of my work correctly and answered the above sections as fully and accurately as possible.

Full Name

Date

PDF Version ▼

Create PDF

No items to display.

Review Comments, Conditions and Outcomes

Log of any Ethical Incidents ▼

Log New Incident

INCIDENT...	CREATED DATE TIME	CREATOR NAME	COMPLAINANT DETAILS
No items to display.			

Title and Objectives (see G1) ▼

+ Add Save

Reviewer A: Reviewer B:

e.g. Are the research question and/or study aims clear?

DATE	ROLE	COMMENT
No items to display.		

Proposed Methodology and Analysis (see G2) ▼

+ Add Save

e.g. Is the design appropriate to the research question?
Are the methods of data analysis appropriate to the research question?

449

DATE	ROLE	COMMENT
No items to display.		
Sample and Recruitment (see M1) ▼		
 Add  Save		
<p><i>e.g. Is the sampling approach appropriate to the design?</i> <i>Is the sample sufficient and achievable?</i> <i>Is the process of recruitment clearly explained?</i> <i>Are participants receiving payments for taking part, and if so is the payment appropriate?</i> <i>If the DBS is ticked, has the appropriate information been included?</i></p>		
DATE	ROLE	COMMENT
No items to display.		
Consent (see M1) ▼		
 Add  Save		
<p><i>e.g. Is the approach to consent seeking clear?</i> <i>Is consent from parents/ carers/ guardians required?</i> <i>Are all necessary recruitment and informed consent documentation included (e.g. letters of permission, letters of invitation)?</i> <i>Is the information sheet adequate to ensure informed consent?</i> <i>Are the consent form(s) appropriate?</i></p>		
DATE	ROLE	COMMENT
No items to display.		
Researcher and Participant Safety (see M1) ▼		
 Add  Save		
<p><i>e.g. Is there any risk of physical harm for the researcher(s) or the participants and if so what attempts have been made to alleviate or minimise them?</i> <i>Have Risk Assessments been referred to where appropriate?</i></p>		
DATE	ROLE	COMMENT
No items to display.		
Research Activities (see G2-G8, M1-M5, H1-H5) ▼		
 Add  Save		
<p><i>e.g. Are the research tasks described clearly?</i> <i>Do sensitive topics such as trauma, bereavement, drug use, child abuse, pornography or extremism/ radicalism inform the research? If so have these been fully addressed? (and we can use this to amend the information on risk levels on the form) Is there any risk that the tasks may cause psychological harm and if so what attempts have been made to alleviate or minimise them?</i></p>		
DATE	ROLE	COMMENT
No items to display.		

Data Management Plan (see G3) ▼

 Add  Save

Reviewer A: Reviewer B:

*e.g. Have sufficient steps been taken to ensure participant anonymity/confidentiality of data?
Are the arrangements for data storage and disposal clearly outlined?
Are these arrangements in line with University and/or the funding body requirements?*

DATE	ROLE	COMMENT
<i>No items to display.</i>		

File Attachments (see G6) ▼

 Add  Save

Please note: where file attachments have not been added because they are not required, please select Approve.

COMMENT BY	DATE	ROLE	COMMENT
<i>No items to display.</i>			

General Comments (see Help) ▼

 Add  Save

DATE	ROLE	COMMENT
<i>No items to display.</i>		



**Northumbria
University**
NEWCASTLE

CONSENT FORM FOR INTERVIEW

The information sheet explains the research and that it is up to you if you wish to take part in this research interview. If you want to take part then please read the following information carefully and sign below. If you wish, you can withdraw at any time before or during the interview, and up to four weeks after the interview has taken place, by contacting a member of the research team.

I have understood the details in the participants' information leaflet and agree to take part in this interview.

I understand that I can withdraw at any time before or during the interview, and up to 4 weeks after, and that I can choose whether or not to answer specific questions.

I agree the researchers can record my interview.

I understand that the researchers will keep all information safe and secure, and will not hold personal information about me after the end of the project. The information that I give will be confidential to the researchers and/or any research assistants or students who assist with the research.

Name _____

Date _____



**Northumbria
University**
NEWCASTLE

Information sheet

Introduction

We would like to invite you to take part in a research study. Before you decide if you want to take part, it is important you understand why the research is being carried out and what it would involve for you. Please read through this information about the research and if you have any queries, please do not hesitate to contact any of the research team.

Purpose of the study

The purpose of this study is to evaluate the local impact of Covid-19 on the operation of the family courts and organisations who work with the family courts, in the North East. You are being asked to provide information about your experiences of engaging with the family courts and/or supporting court users throughout this time. Whilst the overall responsibility for the research will rest with Ana Speed, Kayliegh Richardson and Callum Thomson, it is hoped that students working in Northumbria University's pro bono clinic, the Student Law Office will also contribute to this project through transcribing the interviews, analysing the data and preparing a final report/journal articles. The students will be supervised by Ana, Kayliegh or Callum throughout their time working on the project. It is hoped that this will allow the students to contribute to the development of local practice.

Why have you been invited?

You have been invited to participate in this study because you have indicated to the research team that you would be willing to discuss your experiences of working with the family courts during this time.

Do you have to take part?

It is up to you to decide if you wish to participate in the research. You can withdraw before, during or up to four weeks after the interview. You do not need to provide a reason and the researchers will delete your response.

What will happen if you decide to participate?

You are being asked to participate in an interview conducted through Skype, Microsoft Teams or telephone. It should not take you longer than one hour. Participation in this study means that you provide the researchers with permission to use the data collected in research publications. Your responses will be anonymised and combined with those of other participants.

Expenses and Payments

You will not receive any expenses or payments for your participation in this study. The researchers are grateful in anticipation for your participation.

Risk / benefits

The researchers do not envisage any risk to you in participating in this study. If you do not receive a direct benefit from your participation in this study, others may ultimately benefit from the knowledge obtained. It is anticipated that the findings will contribute to an understanding of access to justice in light of Covid-19.

Confidentiality

All the information will be confidential to the researchers, research assistants and/or Northumbria University students who assist with the project. In order to preserve client confidentiality, you will not be asked to disclose any information that would identify a particular client. When the researchers write the report, they may include what you have said but they will make sure that if you have provided identifying information, this is removed so no-one can be recognised.

The researchers would like to record the interview because this enables ideas to be documented accurately. The researchers, research assistants and/or Northumbria University students will type up the recording in to a 'transcript' and then check again to remove any identifying details (e.g. place names or names of people). The audio files will be deleted within seven days of the interview and the transcripts will be deleted within two years of the interview. The written transcription will be kept on the researchers' private and confidential work drive. The researchers will only record the interview if you are happy doing this.

What will happen to the results of this study?

The information gathered during the interview will be analysed and the findings will be used in research reports, academic articles and conference papers.

Who is organising and funding the research?

The research is being organised by Northumbria University. No external organisations or funders are involved.

Who has reviewed the study?

The research proposal has been reviewed and approved in accordance with the ethics procedures of Northumbria University.

Further information and contact details

If you would like any further information regarding this study, or if you are unhappy with any aspect of this study, please contact a member of the researcher team:

Callum Thomson

Email: callum2.thomson@northumbria.ac.uk

Kayleigh Richardson

Email: kayleigh2.richardson@northumbria.ac.uk

Ana Speed

email: ana.speed@northumbria.ac.uk

Appendix 3: Co-author declaration forms

1) Kayliegh Richardson

‘Should I Stay or Should I Go Now? If I Go There Will be Trouble and if I Stay There Will be Double’: An Examination into the Present and Future of Orders Regulating the Family Home in England and Wales (2022) *Journal of Criminal Law*.

2) Kayliegh Richardson

‘Covid-19 and the Family Courts: Key Practitioner Findings in Applications for Domestic Violence Remedy Orders’ (2021) 33:3 *Child and Family Law Quarterly*, 215-236.

3) Callum Thomson

‘Covid-19 and the Family Courts: Key Practitioner Findings in Applications for Domestic Violence Remedy Orders’ (2021) 33:3 *Child and Family Law Quarterly*, 215-236.

4) Laura Coapes

‘Covid-19 and the Family Courts: Key Practitioner Findings in Applications for Domestic Violence Remedy Orders’ (2021) 33:3 *Child and Family Law Quarterly*, 215-236.

5) Kayliegh Richardson

‘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.

6) Callum 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.

7) Kayliegh Richardson

‘Two worlds apart: A Comparative Analysis of the Contrasting Approaches to Responding to Domestic Abuse Adopted by England and Wales and the Russian Federation’ (2019) 85:5 *The Journal of Criminal Law*, 320-351.

8) Lyndsey Bengtsson

‘A Case Study Approach: Legal Outreach Clinics at Northumbria University’ (2019) 26:1 *International Journal of Clinical Legal Education*, 179-215.

9) Kayliegh Richardson

‘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*, 135-152.

10) Kayliegh Richardson

‘Covid-19 and the Family Courts: Key Practitioner Findings in Children Cases’ (2021) *Journal of Social Welfare and Family Law*, 1-25.

11) Laura Coapes

‘Covid-19 and the Family Courts: Key Practitioner Findings in Children Cases’ (2021) *Journal of Social Welfare and Family Law*, 1-25.

12) Callum Thomson

‘Covid-19 and the Family Courts: Key Practitioner Findings in Children Cases’ (2021) *Journal of Social Welfare and Family Law*, 1-25.

13) Kayliegh Richardson

‘Promoting Gender Justice within the Clinical Curriculum: Evaluating Student Participation in the 16 Days of Activism against Gender-Based Violence Campaign’ (2019) 21:1 *International Journal of Clinical Legal Education*, 87-131.

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A

Name of candidate: Ana Speed

Name of co-author: Kayliegh Richardson

Email address of co-author: kayliegh2.richardson@northumbria.ac.uk

Full bibliographical details of the publication *(including authors):*

A. Speed & Richardson. K 'Should I Stay or Should I Go Now? If I Go There Will be Trouble and if I Stay There Will Be Double: An Examination into the Present and Future of Protection Orders Regulating the Family Home in Domestic Abuse Cases in England and Wales', Journal of Criminal Law (accepted/in press).

Section B

DECLARATION BY CANDIDATE *(delete as appropriate)*

I declare that my contribution to the above publication was as:

- (i) ~~principal author~~
- (ii) joint author
- (iii) ~~minor contributing author~~

My specific contribution to the publication was *(maximum 50 words):*

Planning: 50%

Data collection: 50%

Data analysis: 50%

Writing: 50%

Signed: Ana Kate Speed (candidate) 5.11.21 (date)

Section C

statement by co-author (delete as appropriate)

Either (i) I agree with the above declaration by the candidate

or ~~(ii) I do not agree with the above declaration by the candidate for the following reason(s):~~

Signed:  (co-author) 7 November 2021 (date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Kayleigh Richardson
Email address of co-author: kayleigh2.richardson@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
Speed, A., Richardson, K., Thomson, C & Coapes, L (2021) 'Covid-19 and the Family Courts: Key Practitioner Findings in Applications for Domestic Violence Remedy Orders' Child and Family Law Quarterly (accepted/in press)

Section B
DECLARATION BY CANDIDATE (*delete as appropriate*)
I declare that my contribution to the above publication was as:
(i) principal author
(ii) ~~joint author~~
(iii) ~~minor contributing author~~
My specific contribution to the publication was (maximum 50 words):
Planning: 33.3%
Data Collection: 33.3%
Data Analysis: 50%
Writing: 70%
Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
statement by co-author (delete as appropriate)
Either (i) I agree with the above declaration by the candidate
or (ii) ~~I do not agree with the above declaration by the candidate for the following reason(s):~~
Signed: *K Richardson*(co-author) 13/09/2021 (date)

□

□

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Callum Thomson
Email address of co-author: callum2.thomson@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
Speed, A., Richardson, K., Thomson, C & Coapes, L (2021) 'Covid-19 and the Family Courts: Key Practitioner Findings in Applications for Domestic Violence Remedy Orders' Child and Family Law Quarterly (accepted/in press)

Section B
DECLARATION BY CANDIDATE (*delete as appropriate*)
I declare that my contribution to the above publication was as:
(i) **principal author**
(ii) ~~joint author~~
(iii) ~~minor contributing author~~
My specific contribution to the publication was (maximum 50 words):
Planning: 33.3%
Data Collection: 33.3%
Data Analysis: 50%
Writing: 70%
Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
statement by co-author (delete as appropriate)
Either (i) I agree with the above declaration by the candidate
or ~~(ii) I do not agree with the above declaration by the candidate for the~~
~~following reason(s):~~
Signed: *C.Thomson* (co-author): CALLUM THOMSON (date): 10 September 2021

□

□

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Laura Coapes
Email address of co-author: laura.coapes@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
Speed, A., Richardson, K., Thomson, C & Coapes, L (2021) 'Covid-19 and the Family Courts: Key Practitioner Findings in Applications for Domestic Violence Remedy Orders' Child and Family Law Quarterly (accepted/in press)

Section B
DECLARATION BY CANDIDATE *(delete as appropriate)*
I declare that my contribution to the above publication was as:
(i) principal author
(ii) ~~joint author~~
(iii) ~~minor contributing author~~
My specific contribution to the publication was (maximum 50 words):
Planning: 33.3%
Data Collection: 33.3%
Data Analysis: 50%
Writing: 70%
Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
statement by co-author (delete as appropriate)
Either **(i) I agree with the above declaration by the candidate**

Signed:L.R.Coapes.....(co-author)21.09.21.....
(date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Kayleigh Richardson
Email address of co-author: kayleigh2.richardson@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
Speed, A., Thomson, C., & Richardson., K (2020) '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', Journal of Criminal Law 84(6), 539-572

Section B
DECLARATION BY CANDIDATE (*delete as appropriate*)
I declare that my contribution to the above publication was as:
(i) ~~principal author~~
(ii) **joint author**
(iii) ~~minor contributing author~~
My specific contribution to the publication was (maximum 50 words):
Planning: 33.3%
Data Collection: 33.3%
Data Analysis: 33.3%
Writing: 33.3%
Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
statement by co-author (delete as appropriate)
Either (i) I agree with the above declaration by the candidate
or ~~(ii) I do not agree with the above declaration by the candidate for the following reason(s):~~
Signed: *K. Richardson*(co-author) 13/09/2021 (date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

<p><i>Section A</i> Name of candidate: Ana Speed</p> <p>Name of co-author: Callum Thomson</p> <p>Email address of co-author: callum2.thomson@northumbria.ac.uk</p> <p>Full bibliographical details of the publication <i>(including authors)</i>:</p> <p>Speed, A., Thomson, C., & Richardson., K (2020) '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', Journal of Criminal Law 84(6), 539-572.</p>
--

<p><i>Section B</i> DECLARATION BY CANDIDATE <i>(delete as appropriate)</i></p> <p>I declare that my contribution to the above publication was as:</p> <p style="padding-left: 40px;">(i) principal author</p> <p style="padding-left: 40px;">(ii) joint author</p> <p style="padding-left: 40px;">(iii) minor contributing author</p> <p>My specific contribution to the publication was <i>(maximum 50 words)</i>:</p> <p>Planning: 33.3%</p> <p>Data Collection: 33.3%</p> <p>Data Analysis: 33.3%</p> <p>Writing: 33.3%</p> <p>Signed: Ana Kate Speed (candidate) 19.07.21 (date)</p>
--

<p><i>Section C</i> statement by co-author (delete as appropriate)</p> <p>Either (i) I agree with the above declaration by the candidate</p> <p>or (ii) I do not agree with the above declaration by the candidate for the following reason(s):</p> <p>Signed: <i>C.Thomson</i> (co-author): CALLUM THOMSON (date): 10 September 2021</p>
--

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Kayliegh Richardson
Email address of co-author: kayliegh2.richardson@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
Richardson, K., & Speed, A (2019) 'Two World's Apart: A Comparative Analysis of the Effectiveness of Domestic Abuse Law and Policy in England and Wales and the Russian Federation', 83(5), 320-351.

Section B
DECLARATION BY CANDIDATE (*delete as appropriate*)
I declare that my contribution to the above publication was as:
(i) ~~principal author~~
(ii) **joint author**
(iii) ~~minor contributing author~~
My specific contribution to the publication was (maximum 50 words):
Planning: 50%
Writing: 50%
Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
STATEMENT BY CO-AUTHOR (*delete as appropriate*)
Either (i) **I agree with the above declaration by the candidate**
or (ii) ~~I do not agree with the above declaration by the candidate for the following reason(s):~~
Signed: *K Richardson*.....(co-author) ...13/09/2021..... (date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Lyndsey Bengtsson
Email address of co-author: lyndsey2.bengtsson@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
Bengtsson, L., & Speed, A (2019) 'A Case Study Approach: Legal Outreach Clinics at Northumbria University', International Journal of Clinical Legal Education, 26(1), 179-215.

Section B
DECLARATION BY CANDIDATE *(delete as appropriate)*
I declare that my contribution to the above publication was as:
(i) ~~principal author~~
(ii) **joint author**
(iii) ~~minor contributing author~~
My specific contribution to the publication was (maximum 50 words):
Planning: 50%
Writing: 50%
Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
STATEMENT BY CO-AUTHOR
I agree with the above declaration by the candidate

Signed: ..Lyndsey Bengtsson(co-author) ..10.09.2021 (date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Kayliegh Richardson
Email address of co-author: kayliegh2.richardson@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
 Richardson, K., & Speed, A (2019) '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', *Journal of Social Welfare and Family Law*, 41(2), 135-152.

Section B
DECLARATION BY CANDIDATE *(delete as appropriate)*
I declare that my contribution to the above publication was as:
 (i) ~~principal author~~
 (ii) joint author
 (iii) ~~minor contributing author~~
My specific contribution to the publication was (maximum 50 words):
 Planning: 50%
 Writing: 50%
 Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
 statement by co-author (delete as appropriate)
 Either (i) I agree with the above declaration by the candidate
 or ~~(ii) I do not agree with the above declaration by the candidate for the following reason(s).~~
 Signed:  (co-author)7 November 2021(date)

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Kayliegh Richardson
Email address of co-author: kayliegh2.richardson@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
 Richardson K., Speed, A., Thomson C., & Coapes L (2021) 'Covid-19 and the Family Courts: Key Practitioner Findings in Children Proceedings', Journal of Social Welfare and Family Law (accepted/in press)

Section B
DECLARATION BY CANDIDATE (*delete as appropriate*)
I declare that my contribution to the above publication was as:
 (i) ~~principal author~~
 (ii) **joint author**
 (iii) ~~minor contributing author~~
My specific contribution to the publication was (maximum 50 words):
 Planning: 33.3 %
 Data collection: 33.3%
 Data analysis: 50%
 Writing: 20%
 Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
 statement by co-author (delete as appropriate)
 Either (i) I agree with the above declaration by the candidate
 or ~~(ii) I do not agree with the above declaration by the candidate for the following reason(s):~~

 Signed:  (co-author) 7 November 2021 (date)

□

□

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Laura Coapes
Email address of co-author: laura.coapes@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
Richardson K., Speed, A., Thomson C., & Coapes L (2021) 'Covid-19 and the Family Courts: Key Practitioner Findings in Children Proceedings', Journal of Social Welfare and Family Law (accepted/in press)

Section B
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I declare that my contribution to the above publication was as:
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(ii) joint author
(iii) — minor contributing author
My specific contribution to the publication was (maximum 50 words):
Planning: 33.3 %
Data collection: 33.3%
Data analysis: 50%
Writing: 20%
Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
statement by co-author (delete as appropriate)
Either (i) I agree with the above declaration by the candidate

Signed:L.R.Coapes.....(co-author)21.09.21.....
(date)

□

□

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Callum Thomson
Email address of co-author: callum2.thomson@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
Speed, A., Richardson, K., Thomson, C & Coapes, L (2021) 'Covid-19 and the Family Courts: Key Practitioner Findings in Applications for Domestic Violence Remedy Orders' Child and Family Law Quarterly (accepted/in press)

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(i) principal author
(ii) ~~joint author~~
(iii) ~~minor contributing author~~
My specific contribution to the publication was (maximum 50 words):
Planning: 33.3%
Data Collection: 33.3%
Data Analysis: 50%
Writing: 70%
Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
statement by co-author (delete as appropriate)
Either **(i) I agree with the above declaration by the candidate**
or ~~**(ii) I do not agree with the above declaration by the candidate for the**~~
~~following reason(s):~~
Signed: *C.Thomson* (co-author): CALLUM THOMSON (date): 10 September 2021

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Ana Speed
Name of co-author: Kayliegh Richardson
Email address of co-author: kayliegh2.richardson@northumbria.ac.uk
Full bibliographical details of the publication (including authors):
 Speed, A., & Richardson, K (2019) 'Promoting Gender Justice within the Clinical Curriculum: Evaluating Student Participation in the 16 Days of Activism against Gender-Based Violence Campaign', International Journal of Clinical legal Education, 26(1), 87-131.

Section B
DECLARATION BY CANDIDATE *(delete as appropriate)*
I declare that my contribution to the above publication was as:
 (i) ~~principal author~~
 (ii) joint author
 (iii) ~~minor contributing author~~
My specific contribution to the publication was (maximum 50 words):
 Planning: 50%
 Data Collection: 50%
 Data Analysis: 50%
 Writing: 50%
 Signed: Ana Kate Speed (candidate) 19.07.21 (date)

Section C
 statement by co-author (delete as appropriate)
 Either (i) I agree with the above declaration by the candidate
 or ~~(ii) I do not agree with the above declaration by the candidate for the following reason(s):~~
 Signed: *K Richardson*.....(co-author)13/09/2021..... (date)

Appendix 4: Further supporting publications

- (i) K. Richardson, A. Speed, C. Thomson, and L. Coapes, 'Covid-19 and the Family Courts: Key Practitioner Findings in Children Cases' (2021) *Journal of Social Welfare and Family Law*, 1-25.

(Pages 471 to 496 of this document)

- (ii) K. Richardson and A. Speed, 'Promoting Gender Justice within the Clinical Curriculum: Evaluating Student Participation in the 16 Days of Activism against Gender-Based Violence Campaign' (2019) 21:1 *International Journal of Clinical Legal Education*, 87-131.

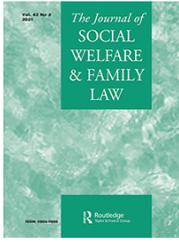
(Pages 497 to 541 of this document)

- (iii) A. Speed, 'Academic Perspectives on Teaching International Family Law in Higher Education Institutions in England and Wales' (2019) 54:1 *The Law Teacher*, 69-102.

(Pages 542 to 576 of this document)

- (iv) A. Speed, 'Making the Case for International Family Law in the Law School Curriculum' (2018) 2 *International Family Law Journal*, 120-131.

(Pages 577 to 588 of this document)



COVID-19 and the family courts: key practitioner findings in children cases

Kayliegh Richardson, Ana Kate Speed, Callum Thomson & Laura Rachel Coapes

To cite this article: Kayliegh Richardson, Ana Kate Speed, Callum Thomson & Laura Rachel Coapes (2021): COVID-19 and the family courts: key practitioner findings in children cases, Journal of Social Welfare and Family Law, DOI: [10.1080/09649069.2021.1996079](https://doi.org/10.1080/09649069.2021.1996079)

To link to this article: <https://doi.org/10.1080/09649069.2021.1996079>



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COVID-19 and the family courts: key practitioner findings in children cases

Kayliegh Richardson, Ana Kate Speed, Callum Thomson and Laura Rachel Coapes

Faculty of Law, Northumbria University, Newcastle upon Tyne, UK

ABSTRACT

In March 2020, stringent social distancing measures were introduced across England and Wales to reduce the spread of Covid-19. These measures have presented significant challenges for the family justice system. This article sets out the findings of interviews conducted with professionals in the North East of England who have represented or otherwise supported litigants in private and public children proceedings since social distancing measures were introduced. The findings reveal that whilst practitioners are broadly positive about their experiences of shorter non-contested hearings, they nonetheless have concerns about the effectiveness of remote/hybrid hearings in ensuring a fair and just process in lengthy and complex cases. In particular, the findings indicate that the move to remote hearings has exacerbated pre-existing barriers to justice for unrepresented and vulnerable litigants. The aims of this article are not to 'name and shame' any particular court but to highlight evidence of good practice in the North East of England and provide scope for improving practitioners' and litigants' experiences within current restrictions.

KEYWORDS

Family court; Covid-19; remote hearings; access to justice; public law; private law; children

Introduction

The introduction of social distancing measures in March 2020 presented significant challenges for the operation of the family justice system, with the need to implement a remote court process in an extremely short timescale. The family court promptly distinguished between three categories of work: 'work that must be done', 'work that will be done' and 'work that we will do our best to accommodate' (Court and Tribunals Judiciary 2020a). Whilst applications for emergency protection, interim care orders and other urgent applications in children cases were prioritised, general administration to progress public and private children disputes fell within the latter two categories, leading to a significant decline in the number of cases being concluded. Prioritised cases were transitioned to the new remote format and in the two-week period between 23 March and 6 April 2020, audio hearings across all courts and tribunals in England and Wales increased by over 500%, and video hearings by 340% (Nuffield Family Justice Observatory, 2020a). At the time of writing, HMCTS have confirmed that work should continue to be prioritised in line the President's guidance but have indicated that the

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volume of work is 'slowly returning to pre Covid-19 levels' (HMCTS 2021). With vaccine rollout now well underway, the President has remarked with increased optimism that 'the light is now at the end of the tunnel' (Courts and Tribunals Judiciary 2021, p. 5), but there remains uncertainty about the likely timescales for returning to the courtroom. There is therefore still a pressing need to 'maintain and enhance good practice with respect to the conduct of remote or hybrid hearings' (Courts and Tribunals Judiciary 2021, p. 1).

Whilst the civil and criminal justice systems have experienced comparable levels of upheaval due to social distancing measures, the impact is likely to have been more acutely felt by family court users. In part, this is because social distancing measures have intensified situations of conflict within families, leading to greater reliance on the family courts. Moreover, in comparison to the civil courts where remote hearings have been permitted for some time for procedural hearings, the family courts were at an earlier stage of the digital reform programme, with remote engagement being primarily reserved for the filing of applications and orders. Evidence being given remotely has, until the introduction of social distancing measures, typically been reserved for victims of domestic abuse as a 'special measure' to facilitate victims' effective participation in hearings (Practice Direction 3AA Family Procedure Rules 2010). Remote technologies in the family courts have proved widely problematic, with Sir James Munby reporting that 'video links in too many family courts are a disgrace – prone to the link failing and with desperately poor sound and picture quality' (2017, p. 12). He argued that 'more, much more, needs to be done to bring the family courts up to an acceptable standard, indeed, to match the facilities available in the crown court' (p.12). Finally, the family court has been the victim of considerable cost-saving measures over the last few years (The Law Society of England and Wales 2017, Speed 2020). Literature demonstrates that the family courts have been plagued by delays and backlogs for some time now because of reductions in judicial staffing and closures of the court estate (Kaganas 2017, Ministry of Justice 2019). Cuts to the scope and availability of legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 have led to both an increase in the volume of work being dealt with in the family courts following unsuccessful attempts to divert cases through mediation (Barlow 2017) and the number of litigants in person in the family courts (Richardson and Speed 2019). It is widely documented that litigants in person increase the administrative burden on the family courts due to difficulties in identifying the key issues in dispute and complying with litigation procedure (Organ and Sigafos 2018, Richardson and Speed 2019). Accordingly, cost-saving measures had reduced the capacity of the family courts to function effectively even in a pre Covid-19 landscape.

This article sets out the findings of interviews conducted with professionals in the North East of England who have represented or otherwise supported litigants in family court proceedings since social distancing measures were introduced. The first part of the article sets out the key changes to private and public law children practice as a result of the pandemic. The second part outlines the findings of the research. The findings reveal that whilst practitioners are broadly positive about their experiences of supporting litigants with shorter non-contested hearings, they nonetheless have concerns about the effectiveness of remote/hybrid hearings in ensuring a fair and just process for court users in lengthy and complex children proceedings. In particular, the findings indicate that the move to remote hearings has exacerbated pre-existing barriers to justice for unrepresented and vulnerable litigants. The aims of this article are not to 'name and

shame' any particular court, but to highlight evidence of good practice in the North East of England and where there is scope for improving practitioners' and litigants' experiences within the current restrictions.

Guidance on private children cases during the pandemic

In response to confusion amongst parents, the President set out an exception to the 'Stay at Home' regulations that '[w]here parents do not live in the same household, children under 18 can be moved between their parents' homes' (Courts and Tribunals Judiciary, 2020d). The guidance created ambiguity by noting that the exception does not mean children *must* be moved between homes; rather, parents should make 'a sensible assessment of the circumstances, including the child's present health, the risk of infection and the presence of any recognised vulnerable individuals in one household or the other' (Courts and Tribunals Judiciary 2020d). It was recommended that parents could depart from the arrangements through mutual agreement, as would be the case regardless of the Covid-19 crisis, but it was also acknowledged that a parent could unilaterally restrict or wholly depart from arrangements that may compromise compliance with Public Health England advice (Courts and Tribunals Judiciary 2020d). Parents were encouraged to use technology to support contact when direct contact was not possible. This sentiment does not seem to accord with the provisions for children to continue to attend school throughout most of the pandemic and mix with peers and teachers. Moreover, the guidance refers to the child's parents, but makes no mention of others with the benefit of a Child Arrangements Order (CAO), such as grandparents or extended family members.

Where one parent has unilaterally departed from a CAO, an enforcement application may be necessary under s11J Children Act 1989. In consequence of the demand on the family justice system and in line with pilot Practice Direction 36Q, temporary procedural changes have been permitted. Where an application for enforcement is made, the court will determine whether the application has arisen due to the pandemic (Cafcass, 2020a). If so, the court will send a standard letter to the applicant providing advice and recommendations, as well as a note that the First Hearing Dispute Resolution Appointment will likely be listed on a date in excess of 12 weeks from issuing the application (Cafcass 2020a). The Family Court Adviser will contact the applicant and work with the parties with a view to resolving the dispute when completing the usual safeguarding checks. The family court will consider during the proceedings whether each parent acted 'reasonably and sensibly' considering official advice and the rules in place at the time (Courts and Tribunals Judiciary, 2020d).

As at the time of writing in May 2021, the advice of the President had not changed in respect of private law children cases since March 2020. Regional specific guidance for Cleveland, Durham and Northumbria was however produced in April 2020 (HHJ Hudson and HHJ Matthews QC 2020). On the one hand, this guidance made clear that during the pandemic cases should continue to be heard as listed and 'all appropriate efforts should be made to resolve cases/issues where this can safely be done in the interests of children, particularly to agree at least interim holding positions for their care' (HHJ Hudson and HHJ Matthews QC 2020, p. 1). On the other hand, for private law proceedings the guidance also recommends that 'where there does not appear to be

a safeguarding issue and the case is not urgent, the court may consider staying or adjourning for the parties to consider non-court dispute resolution including MIAMs or mediation' (HHJ Hudson and HHJ Matthews QC 2020, p. 4). Adjourning proceedings for this purpose has always been a possibility in private law children cases, even prior to the pandemic (Practice Direction 12B, para 6.3). If the parties agree to and successfully use non-court dispute resolution to reach an agreement, this will of course assist with the backlog of cases. However, many parties will already have considered this option prior to proceedings as part of the compulsory pre-application MIAM (Practice Direction 12B, para 5.3). For those parties, this adjournment could simply be an unnecessary and unhelpful delay to their cases. To the authors' knowledge, this regional guidance has not been updated since April 2020.

Guidance on public children cases during the pandemic

In contrast with the limited guidance provided in private law cases, a substantial amount has been produced in relation to public law children proceedings.

On 19 March 2020, the President set out that emergency protection orders, interim care orders and issue resolution hearings were likely to be capable of being dealt with remotely, and that any case which could not be listed for a remote hearing 'should be adjourned and promptly listed for a directions hearing, which should be conducted remotely' (Court and Tribunals Judiciary 2020a). In urgent cases, the guidance was that a remote hearing should be favoured unless this was not possible (Courts and Tribunals Judiciary 2020a).

At this early stage, concerns were also raised regarding the legislative provisions for adoption and fostering. On 24 April 2020, after being laid before Parliament for 24 hours, The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 (SI 2020/445) came into force, providing temporary changes to local authority duties in relation to children's services and adoption. These amendments allowed visits to a child in a foster placement to take place by telephone, video link or other electronic means (Regulation 8) and relaxed Looked After Children Reviews to at least every six months where this was 'reasonably practicable' (The Adoption and Children (Coronavirus) (Amendment) Regulations 2020). The amendments were subsequently successfully challenged in the Court of Appeal who considered that the government had acted unlawfully by failing to consult bodies representing children in care before making the amendments. Five amendments to the regulations remain in force until 30 September 2021 (The Adoption and Children (Coronavirus) (Amendment) Regulations 2021).

In initial cases where a final care decision was required, the conflict between urgency for the child and fairness for the parties became a pressing issue. The case of *Re P (A Child: Remote Hearing)* [2020] EWFC 32 initially outlined factors for consideration in deciding whether a final hearing should be conducted remotely or adjourned. These include:

- The category of case or the seriousness of the decision;
- The availability of local facilities and technology;
- The personalities and expectations of key family members; and
- The experience of the judge or magistrate in remote working

The judge emphasised that each case would be fact specific (paragraph 24) and that the court should consider whether a case *should* proceed remotely, even if it can logistically (paragraph 8).

Following this decision, the cases of *Re A (Children)* [2020] EWCA Civ 583 and *Re B (Children) (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584 set out that deciding whether a hearing should be dealt with on a remote basis would be a case management decision for the Judge. In *Re A*, factors to assist with the making of this decision were given and included criteria such as the importance and nature of the decision to be determined, the need for urgency, and whether the parties were legally represented (paragraph 8). In this case, the ability of the father, who had a diagnosis of dyslexia, to engage with remote proceedings, was found to be a determinative factor in allowing the appeal against the decision to hold a hybrid hearing (*Re A (Children)* [2020] EWCA Civ 583, paragraph 10). *Re B* further considered the procedural fairness of a remote hearing and again overturned a decision made by the lower court. In this matter, the approach of the court was criticised, with decisions such as the lack of notice of change in relation to the care plan, and the grandmother's opportunity to consider evidence and discuss matters with her representative calling into question the fairness of the proceedings (*Re B (Children) (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584, paragraphs 24–25). The court determined that an adjournment should have been granted but acknowledged the 'highly pressurised circumstances in which all the participants were working' (*Re B (Children) (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584, paragraph 39).

Amid this context, the Nuffield Family Justice Observatory (, 2020a) identified concerns about the urgent removal of new-born babies under interim care orders with many professionals expressing concerns at the way in which parties, and particularly new mothers, were able to access and engage with this type of hearing (Nuffield Family Justice Observatory 2020a, p. 21) and technology (para 3.3). The need to achieve finality in decision making for children subject to care proceedings, particularly considering the overarching consideration of the child's welfare, has also been a key consideration of the President (Courts and Tribunals Judiciary , 2020c). Professionals were reminded that 'delay in determining a case is likely to prejudice the welfare of the child and all public law children cases are still expected to be completed within 26 weeks' (Courts and Tribunals Judiciary , 2020c). To achieve this, a move towards 'hybrid' hearings was identified for those cases previously deemed unsuitable for remote hearing, although it was acknowledged that the ability to achieve this in all cases would be resource dependent. Guidance was given that while 'telephone hearings may be well suited to short case management or review hearings, they are unlikely to be suitable for any hearings where evidence is to be given or where the hearing is otherwise of substance' (Courts and Tribunals Judiciary 2020c, p. 6). Suggestions were made to promote support for parties involved in court proceedings, by facilitating their engagement from a location other than their home so that they could be assisted by a member of their legal team (Courts and Tribunals Judiciary 2020c).

The complications of achieving fairness and parity between parties in 'sub-optimal court settings' (Courts and Tribunals Judiciary 2020c, p. 3) was more fully considered in the cases of *A Local Authority v The Mother and Others (Covid 19: Fair Hearing: Adjournment)* [2020] EWHC 1233 (Fam) and *A Local Authority v M* [2020] EWFC

43. The court found that it was clear from the President's guidance at paragraph 6 and 11 (Courts and Tribunals Judiciary, 2020c) that there was a need to achieve finality in decision making and that continuing to adjourn the case would not be a viable option.

The issue of contact between parents and children in care has also become a key issue during the pandemic. Department for Education guidance (2021) makes clear that the expectation is for contact arrangements to continue during the pandemic where possible, with virtual alternatives being the exception rather than the norm (Department for Education 2021). Despite this, the Nuffield Family Justice Observatory (, 2020b) reported 'considerable concern that mothers have frequently not been able to have any physical contact with their babies following their removal' and that contact has been predominantly virtual (Nuffield Family Justice Observatory 2020b, p. 32). In the case of *Re D-S (Contact with Children in care: COVID-19)* [2020] EWCA Civ 1031, the appeal of the mother was allowed on the basis that the wrong approach had been taken in consideration of the application, in that the Judge had erred in assessing whether the local authority's contact arrangements were reasonable, rather than determining what was in the best interests of the child. While the NFJO report indicates that some face-to-face contact now appears to be resuming (p.32), reports are that this continues to be a slow process and one which remains a real issue for families involved in care proceedings. In the North-East, local guidance also reiterates that, 'what is reasonable must be considered in that context and section 34 applications for contact made sparingly' (HHJ Hudson and HHJ Matthews QC 2020).

Methodology

The paper draws on data obtained from 15 in-depth interviews with professionals in the North East of England who participated in remote and/or hybrid hearings in the family court since lockdown measures were introduced in March 2020. This paper considers the findings relating to private and public law children proceedings. The findings in relation to applications for injunctive protection under the Family Law Act 1996 are reported separately (see Speed *et al.* 2021).

The study is one of the first of its kind to consider the effectiveness of the remote family court during the pandemic. Whilst the authors are aware that the NFJO has published two reports on the capacity of the remote family court to provide fairness and justice for court users, their data was based primarily on quantitative survey data (, 2020a, , 2020b). By focusing on in-depth interviews, this is the first paper to provide qualitative understandings of some of the issues raised in the NFJO's reports. Further, this is the only study to offer specific insight into the experiences of practitioners supporting family court users in the North East of England during this time.

The interviews were conducted between September 2020 and December 2020. This represented a period of significant activity within the Covid-19 restrictions in the North-East. Within weeks of beginning the interviews, many council areas in the region were moved into Tier 2 restrictions, meaning residents were not permitted to socialise with those outside their own households (or support bubbles) in private homes. On 5 November 2020, England and Wales moved into a second national lockdown and

subsequently, many of the local authority areas in the North-East were moved into tier 3 restrictions, resulting in continued restrictions on socialising and the closure of non-essential shops and the hospitality industry.

Semi-structured interviews were used, all of which were conducted remotely. This decision was one of ‘methodological necessity’ owing to the regulations described above (Johnson *et al.* 2019, p. 3). Johnson *et al.* recognise that whilst interviews conducted remotely ‘do not significantly differ in interview length and substantive coding, they likely do often come at a cost to the richness of information produced’ (p.1). This is largely because in-person interviews ‘provide the most natural conversational setting, the strongest foundation for building rapport, and the best opportunity to observe visual and emotional cues’ whereas remote interviews can be ‘difficult to manage, more likely to result in misunderstandings and limited in their ability to generate meaningful conversations’ (Johnson *et al.* 2019, p. 2–3). It is the authors’ position that the risk of remote interviewing resulting in misunderstanding or otherwise affecting the validity of the findings was mitigated by the authors’ qualifications as family law practitioners. Further, utilising video conferencing facilities in most of the interviews, ensured that at least some non-verbal and emotional cues could be identified.

Figure 1 sets out the roles/professions of the 15 participants in this study. Six of the professionals worked in predominantly legal aid practices whilst two described their work as mostly privately paid. Two of the solicitors worked for different local authorities in the region. All respondents had experience representing or supporting parties in private and/or public children proceedings since March 2020. Three of the interviewees exclusively practised in public children work, whilst only one practised solely in private law. Six of the interviewees reported specialising in both areas. The remaining six respondents were less specialised either because they were still in training or because they were volunteers at services which supported litigants in all types of family law (and general civil) disputes.

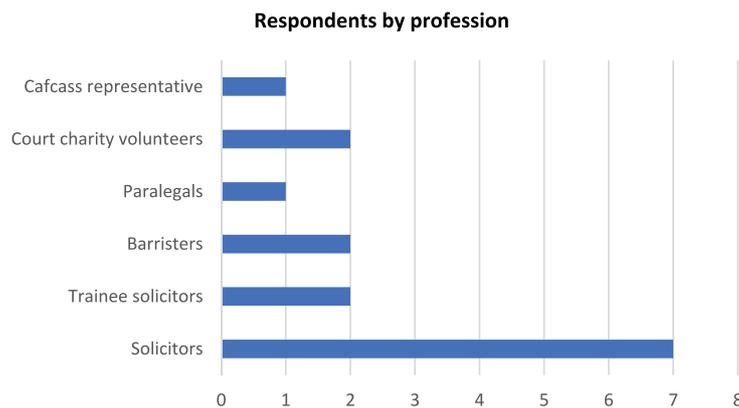


Figure 1. Respondents by profession

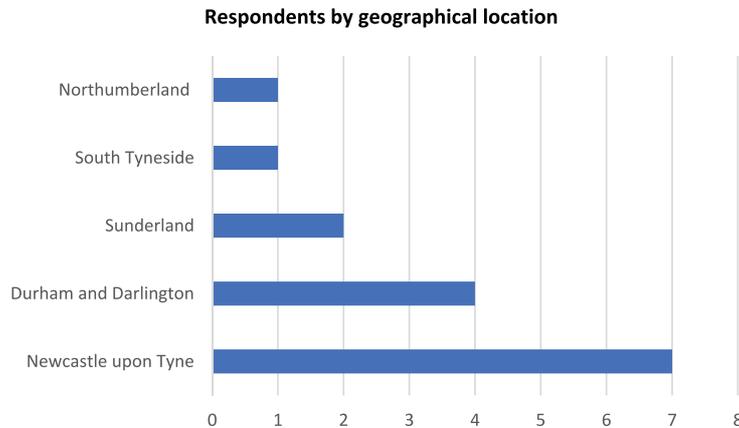


Figure 2. Respondents by geographical area

In terms of geographical spread, as [Figure 2](#) demonstrates, the respondents' offices were located in various places across the region. Whilst the interviewees reported having experiences of multiple courts in the North-East region over the relevant period, the data focusses on the geographic region of the North East of England rather than the judicial definition, which also includes York, Bradford, Sheffield, Leeds and Hull.

A snowball (or chain-referral) sample was utilised to recruit the respondents (Naderifar *et al.* 2017, p. 3). As the research team comprised family law practitioners, initial access proved unproblematic and referrals to other colleagues were forthcoming. Qualitative thematic analysis was conducted on the interview data using NVivo, which is recognised for providing a more rigorous method of coding compared to manual or other digital processes (Hoover and Koerber 2011). Two of the authors separately coded three of the interview transcripts to ensure a consistent approach. Thereafter, each of the remaining transcripts were coded by one of those two authors. Following both Urquhart (2013, p. 194) and Given (2016, p. 135), saturation was considered to be reached at the point in coding where there were 'mounting instances of the same codes', but no new codes or themes emerged from the data.

In order to protect the identities of the participants, no pseudonyms have been attached to any of the quotes. This is due to the small family law circuit of professionals operating in the North-East and concerns that, when taken together, multiple quotes attached to a pseudonym may reveal the identity of the participant.

Limitations of the study

Whilst it is a central claim of the article that the move to remote hearings has exacerbated pre-existing barriers to the family courts for litigants in person, the data on which these findings are reached reflect the experiences and perceptions of the professionals interviewed rather than through the authors having direct contact with litigants themselves. This was also a limitation in the first NFJO report (, 2020a) and something that they sought to address in their second report through the involvement of the Parents, Families

and Allies Network and Litigant in Person Engagement Group in their research (, 2020b). Despite this, the number of responses from litigants in person within the second report was still low (42% of the 132 parents surveyed reported being unrepresented in proceedings) (Nuffield Family Justice Observatory 2020b, p. 9).

As the respondents in this study worked in varied settings, so too were their interactions with litigants in person. Principally, the respondents faced unrepresented opponents (or other parties) as part of the cases in which they were involved. For the two volunteers who worked at a court-based charity, their roles involved them providing practical and emotional assistance to litigants in person before, during and after family court hearings. The trainee solicitors and paralegal interviewed also reported triaging prospective clients and endeavouring to facilitate referrals to alternative sources of advice and support where they were not eligible for legal aid.

Earlier studies have highlighted that there is value in seeking practitioners' views about the challenges faced by litigants in person because of their understanding of legal process and the issues being litigated (see Trinder *et al.* 2014, Nuffield Family Justice Observatory , 2020a, , 2020b). The authors are nonetheless mindful that as legal professionals conducting interviews with other practitioners, there may have been common understandings and shared experiences between the interviewer and interviewee 'about' litigants in person which is reflected in the data. The NFJO identified in their second report that the perceptions of professionals can sometimes be at odds with the perceptions of litigants themselves (2020b). This absence of data 'from' litigants in person therefore represents a gap in the research which should be addressed in future studies.

Findings and discussion

Operational guidance

Respondents were asked about their ability to keep on top of developing guidance and changing court practice. A volunteer at a court-based charity was critical of the lack of guidance from the local family court, indicating that they have had to ask directly for updates and seek out information for themselves. They noted that, where guidance was provided, it was '*at a national level*'. They felt that their local court had not been '*great at keeping us updated or keeping in touch*'. This is despite a court-based support service (Support Through Court) being acknowledged in the regional guidance as a helpline for vulnerable litigants who require support with the remote court process and therefore a key stakeholder in the court experience (HHJ Hudson and HHJ Matthews QC 2020, p. 5).

Legal practitioners had the opposite issue and often felt bombarded with information. They gave examples of colleagues and other agencies trying to be helpful by recirculating information but '*sometimes you end up getting the same information three times just because everyone wants to make sure that at least it's been disseminated*'. Practitioners also commented on the amount of guidance being provided, the frequency of updates and the number of times that guidance is revised with some documents now having multiple iterations. This reflects concerns raised by the Law Society that members were experiencing 'guidance fatigue' (Law Society, 2020).

Whilst most practitioners appeared to have kept on top of the guidance, they felt this was likely to be difficult for litigants in person. This was exacerbated by limitations in the assistance which could be offered by Support Through Court, law clinics and McKenzie Friends (NFJO , 2020b). One respondent suggested that information must be more accessible, such as through the provision of leaflets. The Transparency Project (2020) have taken steps to try and make information accessible for lay parties through online documents, including a guidance note on ‘Remote Court Hearings’. However, this guide was produced in June 2020 and may not therefore reflect the most recent guidance on remote court proceedings. The success of guidance notes also relies on litigants in person knowing where to find them. Litigants in person often require more information about the court process in ordinary times, notwithstanding the increased pressure and changeable rules throughout the pandemic (Trinder *et al.* 2014).

The findings also demonstrate inconsistency in judicial interpretation of guidance. The respondents noted that, particularly at the outset of the pandemic, this made advising clients a difficult task. Discussing private law children disputes, one respondent noted:

Say I’m instructed by someone who didn’t want to hand the child over and I said ‘look, I can’t advise not to especially with a court order in place, but you have parental responsibility; you need to do what’s in the best interest of your child. You’ve got to balance that with the fact that it’s within the best interests to have contact with the other parent as well’. As soon as the guidance came out, I mean, it kind of depended on what judge you got, but a lot of judges were saying no contact needs to take place. . . . And that was just kind of the line . . . it’s obviously got a lot better now, but at that point, when the guidance was initially released, it was really confusing.

Different practices were also acknowledged in remote hearings. The respondents noted that in some courts, the Judge dials in the parties whereas in other courts, parties are provided with joining instructions. A consistent approach should be taken by all courts across all regions, technology permitting. Where this is not possible, the authors echo the recommendation by Speed *et al.* (2020) that regional guidance for litigants in person should be produced and updated regularly. The guides should be made widely accessible, perhaps through the court providing a copy enclosed with the notice of hearing to any self-representing parties in proceedings. This recommendation is echoed by The Law Society in their response to the NFJO (, 2020b, p. 30). Solicitors could also provide this guidance to their clients, alleviating some of the onus on legal professionals at a time when the workload is so high.

Delay

Many respondents commented on the ‘*significant delays, resulting from adjournment of hearings during the initial lockdown*’ and felt that, while cases were now beginning to return to court, there continued to be delays in decision making for families in children proceedings. Comments about delays were made in relation to both public and private children cases, notwithstanding that a considerable proportion of public law children work has fallen into the category of ‘work that must be done’ and should in theory have faced lower levels of disruption (Court and Tribunals Judiciary 2020a). Because of delays,

cases were effectively forced to restart. The respondents noted, *'you can't just jump straight back in when you've got young children; you have to start it all over again'* and *'Covid stopped a lot of plans from progressing'*.

In public law proceedings, some respondents reported positive benefits to the delay, in that it offered parents an opportunity to demonstrate a change in circumstances and request a reassessment due to the time that had passed. However, respondents also noted the impact that this could have on the 26-week limit implemented by s14 Children and Families Act 2014, particularly where new expert evidence was required. In direct conflict with the guidance issued by the President that proceedings should still be concluded within these timescales (Courts and Tribunals Judiciary, 2020c), respondents gave examples of some public law cases being at *'35–40 weeks'* due to adjournments and requests for reassessments. This issue is also evidenced by the family court statistics from July to September 2020, which demonstrate that the average length of public law proceedings from application to disposal was 40 weeks, with only 29% of cases being disposed of within the 26-week limit (Ministry of Justice 2020b). That said, if this gives an opportunity for parents to make positive lifestyle changes and for children to potentially remain with their biological families in the long term, this is arguably a positive use of this time. As raised earlier, this always needs to be balanced against the need for urgency for the child (Re A (Children) [2020] EWCA Civ 583) and the implementation of the no delay principle (section 1(2) Children Act 1989).

Whilst some families will undoubtedly make use of this extra time to improve their position within proceedings and to make long lasting changes, there were concerns that remote working had impacted some lay parties' willingness to participate with third party services. Many felt that there was greater opportunity for evasion for those unwilling to engage:

I don't know whether there's some people that have tried to play the system, I can imagine that that has happened on quite a few occasions. Where people are "ah, I can't attend I need to isolate", or "I've come into contact with this person and that person".

Considering this, it is understandable why some respondents have taken the view that delay was unlikely to make a material difference to the outcome of proceedings and, if anything, could be detrimental to their client's case:

I've yet to see [delay] actually assist a parent. I do know that a lot of them out there have already said "oh well this is going to give me some more time now. I can show you that I do this, this and this and the sustainability that you didn't have before, I have now got". I think it could help some parents, but again, on the flip side of things, if things haven't improved or digressed ...

The respondents acknowledged that it is not just parents creating delay. There was mention of local authority delay through inconsistent approaches to gathering evidence and conducting assessments across different areas of the North-East, as well as some local authorities prioritising urgent matters only. There were also delays in awaiting safeguarding disclosures from the police.

Similar findings can be made in relation to private children proceedings where contact has been prevented by one parent. In such cases, delay provides an opportunity for a parent to argue that the child is now in a routine, and contact should be gradually increased, rather than returning immediately to the original level of contact.

Reassuringly, guidance from the President acknowledges that avoiding delay will be an important, sometimes determinative, factor in case management (Courts and Tribunals Judiciary 2021). However, the reality appears to be different. A respondent noted that, *'there were significant delays, resulting from adjournment of hearings during the initial lockdown – hearings have been delayed for months'*. Another respondent (a Cafcass representative) reported having been instructed in private law cases which had been issued over 12 months previously but were no further forward due to delays arising from the pandemic. As mentioned earlier, the standard court letter to applicants seeking enforcement provides that the first hearing will have to be listed on a date in excess of 12 weeks and regional North-East guidance recommends that adjournments should be considered for the parties to engage in non-court dispute resolution instead of progressing with the proceedings as listed, thus stifling contact arrangements and prompt access to justice.

A respondent noted that they *'did have a couple of parents where the conflict was already there, that [they] felt they were using Covid as an excuse not to promote contact . . . citing Covid when it was very clear that contact could be promoted'*. Where there is conflict, parents will inevitably look for reasons to prevent contact and Covid has presented a justification which is indirectly supported by government and the court.

Notwithstanding, many parents have legitimate concerns arising from the government regulations, including holiday quarantine periods changing while away with a child, or cessation of arrangements where one parent or a member of the household is vulnerable. Guidance on contact arrangements where a child is self-isolating or has to quarantine on return from a trip abroad has since been provided in a House of Commons briefing paper (Foster and Loft 2021). In relation to quarantining, a shared care arrangement is a permitted reason for moving between two households (Foster and Loft 2021). The position is less clear where a child is self-isolating, with parents being encouraged to agree *'for a child to remain at the same address during their period of self-isolation'* and to seek *'specialist advice'* if contact is court ordered (Foster and Loft 2021).

The respondents noted that in public children proceedings, Judges are listing subsequent hearings during the course of the hearing, yet with private law children proceedings, there is a tendency to list after the hearing has concluded, therefore causing further delays. This has led to occasions where the court has listed hearings when representatives, local authority, Cafcass, or experts were not free. It would be sensible for a consistent approach ensuring that professionals are consulted about their availability to minimise hearings being vacated.

Backlog/workload

Respondents talked about a *'backlog'* of cases, echoing a similar view to the President that the backlog had existed long before Covid-19, but had been exacerbated by the reduction of cases concluded in the immediate response to the first lockdown (Court and Tribunals Judiciary, 2020c, 2021). One practitioner reported public law proceedings being issued during the first lockdown, but not having a final hearing listed until the first quarter of 2021. This is also evident in the July to September 2020 family court statistics, where the

average time for a care or supervision case to reach first disposal has been the highest since mid-2013 when the most recent legal aid cuts came into force (Ministry of Justice , 2020b).

Many respondents noted the strain on the family justice system in tackling this increase in both volume and complexity, whilst meeting the necessary time management requirements (Courts and Tribunals Judiciary , 2020c, paras 42 and 43). There was significant concern at the impact this had on the decision-making process:

... we need to think how to get rid of the backlog, but also how it's fair ... I don't think getting rid of the backlog by rushing through cases by remote means for public law is acceptable at all. I just don't.

Practitioners talked about the increased workload experienced as the family court clears some of the backlog, reporting starting work as early as 5:00am and not finishing court hearings until 6.30pm. The working day of course does not end with the last court hearing. For practitioners who are qualified as mediators, the working hours can be even longer, with one respondent reporting that her mediator colleague's mediations would begin at 8pm or 9pm and last for '*a couple of hours*'. Those working hours are clearly not sustainable and it is hoped that reopening schools and early years settings has somewhat eased the need for out of hours services. This issue was acknowledged by the President of the Family Division in his 2021 guidance, where he encouraged a return to normal working hours of between 10.00am and 4.30pm with additional hearings outside those times becoming 'an exceptional occurrence, and not the norm, and limited to no more than a 30-minute extension to the court day' (Courts and Tribunals Judiciary 2021, para 16).

In private law disputes, the volume of cases was considered to be higher than pre Covid-19 levels owing to the fact that '*a lot of previous arrangements have gone out of the window*'. One respondent noted '*when the first lockdown was announced, it was incredibly quiet, I mean there was nothing coming through, no referrals. Then I would say over the last two months, or really since September, it's just been really, really, really busy, very busy*'. This increase is supported by Cafcass' Private Law Data (2020b), which demonstrates there were 2,560 cases in April 2020, compared with 4,200 cases in September 2020, as well as the national statistics for July to September, which show private law case starts increasing by 8% compared to the equivalent quarter in 2019 (Ministry of Justice 2020a, 2020b).

As with public law proceedings, concerns were raised about the impact of a high volume of private children cases on case management decisions. Respondents noted that in cases where domestic abuse or safeguarding concerns are alleged, few fact-finding hearings are currently being directed, with practitioners required to justify the need for such hearings. A respondent noted, '*fact-finding hearings have been reduced because obviously the amount of court time it takes and being able to do it remotely*'. Some necessary fact-finding hearings simply had to keep being adjourned. The low rate at which fact-finding hearings are ordered is a concern which precedes Covid-19. Hunter *et al.* (2017) identified that fact-finding hearings are 'inconsistently and rarely held' (p.405), whilst a study by Cafcass and Women's Aid found that fact-finding cases were only held in five out of 134 cases where allegations of domestic abuse were raised (2017, p. 10). Although the Ministry of Justice Harm Panel Report reported evidence being provided at a judicial roundtable and by Rights of Women that more fact-finding

hearings have been held since 2017 (Ministry of Justice 2020, p. 84), this was not reflected in the experiences of all the professionals and organisations with which they had consulted. Others reported a continued reluctance to order such hearings and a systemic minimisation of the relevance of domestic abuse allegations (Ministry of Justice 2020, p. 90–91). It is therefore concerning that the courts are seemingly more reluctant to order such hearings during the pandemic, particularly given that they are one of the leading mechanisms for safeguarding compliance with Practice Direction 12J. A balance must be struck between tackling the backlog and preventing cases being rushed through, particularly where the outcome may be life-changing for those involved.

Format of hearings

The regional guidance issued in April 2020 provided that ‘the default position is that all family court hearings will be carried out remotely until further notice’ and ‘attended hearings will be exceptional’ (HHJ Hudson and HHJ Matthews QC 2020, p. 1–2). In line with the guidance set out by the Courts and Tribunals Judiciary (2020a, 2020b), the respondents acknowledged that the format of hearings has developed since then. They reported that initially ‘everything was taking place via telephone’, then it ‘moved to hearings via CVP’, whereas ‘hybrid hearings . . . are the new sort of thing now at this moment in time’. However, many of the respondents were interviewed prior to the most recent guidance issued by the President, which emphasised the need to minimise footfall in the court (Courts and Tribunals Judiciary 2021). The responses provided may therefore be different if the participants were interviewed again.

The respondents supporting litigants in person highlighted a need for correspondence to be more explicit that hearings are taking place remotely. One noted, ‘the letter that goes out to them isn’t massively clear about what they’re being asked to do’. The same respondent acknowledged that letters simply refer to parties being ‘requested to attend a hearing’ . . . ‘so a lot of litigants in person are reading that letter and presuming that they need to come into the court. When actually the hearing is taking place remotely’. This conflicts with the standard letter to litigants in person which is appended to the regional guidance and explicitly states ‘this means that you are not to attend court for the hearing but can attend the hearing by [telephone/Skype]’ (HHJ Hudson and HHJ Matthews QC 2020, Appendix 3). This may indicate that the standard approved letter is not being used by all courts in the region. It would be possible for courts to address this issue with relative ease by consistently adopting the letter recommended by HHJ Hudson and HHJ Matthews QC. This finding supports the recommendations of Trinder *et al.* (2014) advocating for provision of clearer and more accessible guidance to litigants in person.

Those respondents who had been involved in hybrid hearings highlighted several administrative difficulties. Respondents commented that ‘those types of hearings take an enormous amount of time and effort, energy and are just very stressful to deal with, from Judges and across the board to be honest’. Discussing the administrative onus that the court places on representatives in setting up those hearings, one respondent commented that they felt like they ‘almost became the judge’s PA . . . it was just constant’. They gave examples of having to make all the arrangements with witnesses and having to give witnesses’ details to the clerk multiple times. One of the volunteers at a support service reported similar issues with providing their

details to the court, only for those details to be lost at some stage meaning that they were not called into a hearing to support a litigant in person whose first language was not English. However, it should be noted that the respondent was referring to a court elsewhere in England when giving this example, not within the North-East where the regional guidance specifies an email address which is to be used for this purpose (HHJ Hudson and HHJ Matthews QC 2020, p. 2). Nonetheless, these examples point to a clear administrative issue with communication of and recording of key details by courts elsewhere in the country. This issue is perhaps not surprising given the cuts made to court staffing over recent years which have seen the number of full-time staff employed by HMCTS fall from 20,392 in 2010 to 14,269 in 2017 (Kaganas 2017, Ministry of Justice and HM Courts & Tribunal Service 2019). The authors therefore recommend that family courts across England and Wales follow the approach of the North-East courts by designating an email address for the purpose of providing contact details to the court. The authors also support the recommendation made by Speed *et al.* (2020) that a specific court form should be used to provide the court with information about the parties' access to technology and ability to engage with remote court hearings. The current C100 and C79 forms do not fully provide for engagement in remote and hybrid hearings.

Despite practical difficulties, many respondents were in favour of the continued use of remote hearings in straightforward case management hearings to counter some of the additional delays. A representative from Cafcass discussed being able to attend more hearings, rather than prioritising one if she is listed in one court at 10am and another at 11am, leading to more cases being finalised within a shorter period. Respondents were particularly positive about the reduced travel time for short case management hearings, where the travel time would often exceed the length of the hearing itself. However, there was also a strong feeling that '*remote hearings do not work for final hearings*' or for contested hearings, particularly in public law cases. Discussing some of the technological issues, one respondent commented:

I think ones where evidence is being given are impossible because not just withstanding the fact that the audio isn't always great on CVP, people drop out of it, people can't be joined and they're waiting and then they are not there anymore and you've got to dial them back in or somebody hangs up by mistake. People are on mute and are speaking and think people can hear them. I'm not fantastic at IT, but I don't think the IT is of the level where it is appropriate for a hearing at all. It's very difficult to hear what judges are saying. Parents sitting at home on a telephone line can hardly hear anything at all.

In public law proceedings, there will inevitably be cases where urgency prevails over the time it would take to make arrangements for a hybrid/in person hearing, but respondents raised some very concerning examples of where urgency has led to parents being expected to participate in wholly inappropriate circumstances:

I've had a case very early on in lockdown where I think the courts were just desperately trying to keep things going where it was a removal case, an interim care order and the mother was in hospital, crouched under a stairwell in the hospital. Listening to, well being cross examined, giving evidence about why she should keep her child in a, well she was trying to be in a public quiet place, but she was in the hospital and she had just given birth. I appreciate that it wasn't a case of "oh well we will come back next week". It was an urgent case. It has to be dealt with urgently, but it just didn't feel right at all.

Unfortunately, the second NFJO report demonstrates that this was not a one-off or regional incident, with multiple examples being provided of mothers of newborn babies being forced to attend emergency court proceedings by telephone (2020b, p. 19). The family court has been critical of local authorities who have sought consent to section 20 accommodation in similar circumstances (*Coventry City Council v C* [2013] EWHC 2190), so it is difficult to understand how fairness can be achieved by expecting a mother to participate in emergency proceedings, without any support due to the restrictions that hospitals now have in place on visitors attending.

Even in ‘normal’ circumstances where a parent has been able to seek legal advice and is participating in the proceedings from home, a primary concern for respondents was the available support for parents involved in care proceedings. Concerns have been highlighted above about the need for privacy, but for many parents, this will not be possible due to the presence of children at home. One respondent discussed a situation where the subject child was not only present, but was asked to become involved in the proceedings.

Their father was saying “well that’s not true at all . . . you can ask him ‘cause he’s here”. And then this child was put on the phone in the middle of a hearing with the dad shouting in the background at the child to tell the judge what had happened, that it “wasn’t f-ing true”.

While some respondents highlighted occasions where additional arrangements were made to assist with children who would otherwise be present in the family home, they indicated that these arrangements were often down to the discretion of, and resources available to, the relevant local authority. It is unsurprising that this was quoted as an issue in the North-East region, which has been impacted heavily by government funding cuts over the last 10 years. Those cuts are set to continue, with the TUC estimating that councils in the region will face a £1.2bn funding gap by 2025 (TUC 2019). However, this is unlikely to be unique to the North-East with many other regions across England having experienced similar cuts.

For many, there were concerns at the level of support available to parents in situations where a care or placement order was made under remote circumstances:

She couldn’t see anybody, she couldn’t see who was talking about her, she couldn’t see the judge giving his judgment at the end of the day. She, one particular mother, was extremely distressed and it was harrowing to listen to her audibly upset, understandably so on the telephone . . . I was concerned about what support she had after the hearing because I had no idea who she was with . . . I was so concerned I actually contacted a solicitor to see if there was anything that could be done to see if there was any support that could be offered to this mother who’d just effectively lost her child.

This is a clear argument against remote proceedings being used for final hearings in public law proceedings. For professionals, there was an overwhelming feeling that remote hearings were impinging on their ability to engage and empathise with clients and parties involved in proceedings, something which many felt to be a key part of their role.

There were concerns for lay parties with additional needs, who have a strong accent or whose first language is not English, and whether these needs were being fully met in remote circumstances. Studies prior to Covid-19 have highlighted that ‘language difficulties’ can be a source of vulnerability for litigants, whether or not they are legally represented (Trinder *et al.* 2014). Evidence also suggests that due to poor outsourcing decisions,

there is a limited availability of good quality and independent interpreters, a situation which has been worsened by ‘the contemporary political backdrop of cost-saving imperatives and rising concerns about immigration’ (Aliverti and Seoighe 2017, p.137).

The need for an interpreter was a factor listed by The Law Society as a reason against holding a hearing remotely (The Law Society 2020). The difficulty with using interpreters in remote proceedings was also accepted by the President (Courts and Tribunals Judiciary, 2020c). However, he indicated that hybrid or in-person hearings may also have similar difficulties due to the interpreter needing to remain two metres away from the party who requires their assistance because of social distancing requirements (Courts and Tribunals Judiciary 2020c, para 29). In debating this issue, he suggested that:

Active thought should be given to arranging for a lay party to engage with the remote process from a location other than their home (for example a solicitor’s office, barrister’s chambers, room in a court building or a local authority facility) where they can be supported by at least one member of their legal team and, where appropriate, any interpreter or intermediary (Courts and Tribunals Judiciary 2020c, para 28).

Social distancing requirements would apply equally to any of those venues, as they would to a courtroom, so it is difficult to see how this would assist. A better solution proposed by the President is for interpretation to be provided ‘over a separate open phone line with the interpreter and client using earpieces, or typed interpretation over linked computers or email’ (Courts and Tribunals Judiciary 2020c, para 29). However, this relies on the party having access to this technology themselves or their solicitor being able to provide them with access. Whilst many solicitors are working from home, this may have practical difficulties, and courts may have to be willing to either provide access to this technology themselves or accept that hearings are likely to take far longer (and need to take place in person or in a hybrid format) where an interpreter is required.

Litigants in person

Accessibility of technology

While to some extent it is to be expected that solicitors may assist their own clients with the remote court process by providing an office space, this study revealed that there was also an expectation that professionals would assist litigants in persons. In public law proceedings, this primarily appeared to be an expectation placed on local authorities or the solicitor for the children to provide a room or other remote assistance. No participant reported rooms being provided by the court for this purpose.

One practitioner reported being instructed by a Judge to set up a Skype meeting with two unrepresented parents before then spending most of the day on the phone to them, talking them through how to use Skype. This example indicates that representatives have gone above and beyond the usual requirement to support the court in cases where litigants in person are involved, such as by preparing bundles, preparing preliminary documents and drawing up orders (The Law Society 2015, para 32). Whilst in this case, it was not clear how the cost of this was met, the Law Society guidance (2015) states that where providing assistance to the court gives rise to a significant expense to the lawyer or their client, the court should either direct the litigant in person to professional services or direct that the litigant bears this cost (para 33). Invariably, there may be potential benefits for represented

clients in their lawyer providing such assistance to litigants in person, such as avoiding the time taken at hearings and the delays that may otherwise be incurred if the hearing needs to be adjourned because of the parties' inability to use the required technology. However, this must not compromise a representatives' ability to prepare for upcoming hearings on behalf of their own client. Further, in most cases, it is likely that such assistance will fall short of being a 'significant expense' meaning that legal representatives are not paid for this work.

It is well documented that litigants in person often struggle to comply with the procedural requirements of litigation (Trinder and Hunter 2015). The findings of this study indicate that practitioners perceive this has been exacerbated by the temporary closure of support services which are located at court buildings. One of the respondents from a court-based charity highlighted:

I had a client on Friday who was struggling. He has a mobile phone, he doesn't have a computer, he's not particularly computer literate. Previously he could come into the office with all his paperwork and we could try and sort him out. The judge is saying to him "well, you know, can you get to a library?" And well, given what he was asking him to do, I don't think he could even do it himself, to be honest.

One of these respondents acknowledged that the courts had not been '*forthcoming in providing us any additional space to enable us to see clients easily*'. Given the finding that the judiciary has expected legal representatives to accommodate some non-client parties in their own offices, it is disappointing that the court has not put forward its own resources to facilitate this support to litigants in person, particularly as many court buildings in the North-East remain open but are not hearing cases in-person.

Experiences in the hearings

The Judicial College Equal Treatment Bench Book (2021) acknowledges that 'the aim of the judge should be to ensure that the parties leave with the sense that they have been listened to and have had a fair hearing – whatever the outcome' (para 17). Unfortunately, several respondents perceived that this aim was not always achieved in remote proceedings.

One respondent identified a tendency of some judges to ignore the litigant in person and speak mostly with the representative of the other party. Explaining the impact on the litigant in person in one such case, they noted:

This guy was very upset afterwards, because he didn't feel he'd the chance to even say anything. They'd done a deal with Cafcass and the solicitor before.

In another case, a respondent noted how a litigant in person had been cut off from the hearing because of technological difficulties, but the hearing proceeded in their absence. In such cases, it is vital that attempts to contact litigants through alternative channels are made to ensure that a litigant's right to present their case are not compromised.

Examples were also given by four respondents of judges using technology to actively mute parties (and in one example, a representative). Reasons for this varied from the need to prevent background noise to '*parents shouting and screaming in the middle of court hearings*'. In one case, the Judge herself even noted concerns with this:

The judge ended up having to mute them, but she kept reminding herself that she shouldn't really because if you're in an active court you can't just mute somebody.

In some cases, the respondents perceived that a Judge's decision to mute a litigant was necessary in ensuring fairness for other parties and making effective use of the court's limited resources. As such, they did not necessarily regard this as a Judge failing to demonstrate the 'even-handed' approach that is expected when dealing with litigants in person (Judicial College 2021, para 17). One support service volunteer discussed a case in which the litigant in person wished to offer evidence through an electronic dongle however the judge was unable to review the evidence at the hearing. In response, she perceived that the litigant became aggressive:

It was a District Judge and he really is very good, he was very tolerant. He really did his best but it just got past his patience level in the end. In the end all he said was "I'm going to mute you" and then the guy just put the phone down. He didn't tell him he couldn't stay on the line, he just said "I'm going to mute you".

Whilst a Judge may take the view that muting parties is necessary where a litigant in person becomes aggressive, it may nonetheless have an impact on a litigant in person's perception of justice and whether it has been achieved in their case. It is well documented that without the benefit of representation, litigants in person are not protected from their own emotions, which may adversely affect the way they conduct themselves throughout the proceedings, as in the example above (Re JC (Discharge of Care Order: Legal Aid [2015] EWFC B39)). Whilst this is an issue which has preceded Covid-19, the respondents acknowledged that '*it might not have gotten (sic) that far had we been in the courtroom*' because it may have been easier for a Judge to de-escalate the situation in person.

However, respondents also accepted that some judges have taken this approach because they considered litigants in person may not be taking hearings as seriously as those conducted in person. Examples were provided of unrepresented parties attending telephone hearings whilst in the supermarket doing their weekly food shop, on the toilet or audibly speaking to other people who should not be privy to the proceedings. The Nuffield Family Justice Observatory (, 2020b) set out similar concerns, demonstrating that this is a national, rather than regional issue. It is difficult to identify a solution to this problem, as it does not seem to be a result of a lack of information, with respondents to both research studies noting that warnings are provided to court users in advance and at the start of the hearing in line with the regional guidance (HHJ Hudson and HHJ Matthews QC 2020 para 2.5), but that these warnings are occasionally ignored.

Contact with children in care

Contact with children in care was a key issue for respondents involved in public law proceedings. Many discussed the initial difficulties with variations in contact following a sharp decrease in March 2020:

Direct contact that was to take place, especially for children that were in a local authority foster care arrangement, had just completely stopped. I know that quite a lot of people were having video contact like Facetime, but again, that was dependent upon the social workers because they would have to provide their telephone number to the client.

Although respondents acknowledged that contact arrangements were now progressing, issues with the frequency, quality and form of contact remained apparent for many, with a lack of available local authority venues being a major barrier to contact taking place on a more regular basis. The extent of this barrier varied depending on the age of the child and the local authority involved, with respondents reporting difficulties ranging from limited availability within venues due to cleaning schedules, to parents being prevented from having any physical contact with their children. Smith et al's research (2018) found that local authority spending on children and young people's services in the North-east had decreased by at least 20% since 2010/11, leading to the closure of many children's centres. This issue has no doubt been exacerbated by Covid-19 and the additional restrictions placed on venues to ensure social distancing and sanitisation procedures.

Respondents were mindful of the consequences for children in care placements and felt that this would impact on their overall welfare. They discussed that children were not only seeing their parents less, but that for significant periods of time since the start of the pandemic they had also been unable to see their friends or go to school, limiting their social networks and peer support considerably. Similarly to the second NFJO report (2020b), concerns were also raised about the impact of reduced contact on much younger children, specifically new-born babies, where indirect contact is not an option.

Respondents acknowledged that there remain difficulties with contact in cases where a staged reduction of contact was ordered following a care or placement order, reporting that this was much quicker or non-existent. One respondent gave the concerning example of parents being offered '30 minutes, next Friday and that's it' as a final pre-adoption contact, rather than the usual staged decrease. Regardless of the impact that Covid-19 has had on contact arrangements, it is difficult to see the humanity in a decision of this kind in circumstances when this will be the last opportunity for parents to spend time with their child.

Despite voicing concerns about the impact of this disruption on families, many felt that the disruption was, while distressing, inevitable and that it was best to avoid '*flood-[ing] the courts with applications where we know that, at the minute, there isn't anything that we can do*'.

The voice of the child

Respondents raised concerns about the ability to hear the voice of the child during proceedings. They noted that at the outset of the pandemic, face-to-face meetings with children stopped entirely and whilst this was gradually reintroduced in Autumn 2020, they are likely to have been stopped again during subsequent periods of lockdown. Overwhelmingly, respondents were negative about their experiences of meeting children remotely. They agreed that the quality of information obtained is often compromised, both because children are reluctant to engage and because professionals struggle to assess whether information provided is a free and genuine reflection of the child's wishes and feelings. As such, they were concerned about the impact of remote assessments on the outcome of proceedings.

Interestingly, the Family Justice Young People's Board has expressed the alternative view that . . .

Whilst face-to-face meetings are very important, remote direct work does provide an extra positive option to children and young people. For some young people, this could feel a more comfortable and usual setting, it could be less intimidating, and it might allow a young person to be a bit more open as they are in their own space. It could also feel less intrusive than a worker going into school (Cafcass , 2020c)

This was considered by Cafcass as part of their protocol on returning to in-person work with children. While ultimately, like the majority of respondents, Cafcass staff felt strongly in support of a return to in-person work, given the risks associated with new variants of Covid-19, the default position that at least one in-person meeting should take place with a child has currently been halted, with face-to-face work only taking place where it is considered to be essential and safe for all involved (Cafcass 2020c).

Conclusions

The dominant use of remote hearings, remains, at the time of writing in May 2021, part of the day-to-day working of the family courts. In the President's most recent guidance (Courts and Tribunals Judiciary 2021), issues of remote working remain at the forefront of the family law landscape, with emphasis on the importance of the findings of the NFJO reports and the wellbeing of practitioners at the coal face. With a period of 'enhanced provision of remote hearings' (Courts and Tribunals Judiciary 2021, paragraph 2) ahead, it is increasingly evident that 'the need to maintain and enhance good practice with respect to the conduct of remote or hybrid hearings remains a priority for all professionals, court staff and judiciary' (Courts and Tribunals Judiciary 2021, paragraph 3) for the foreseeable future. In reality, the remote court is needed at this time, but the importance of safeguarding access to justice for court users and mitigating the impact on litigants in person cannot be overstated.

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**PROMOTING GENDER JUSTICE WITHIN
THE CLINICAL CURRICULUM: EVALUATING STUDENT
PARTICIPATION IN THE 16 DAYS OF ACTIVISM AGAINST
GENDER-BASED VIOLENCE CAMPAIGN**

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Abstract

The 16 Days of Activism against Gender-Based Violence is an international campaign which runs annually from 25 November (The International Day for the Elimination of Violence against Women) to 10 December (Human Rights Day)¹. The campaign aims to raise awareness of and stimulate action to end violence against women and girls globally. The issue of gender violence has gained worldwide prominence in the last few decades with the emergence of legislative frameworks including the Convention on the Elimination of all Forms of Discrimination against Women and the Istanbul Convention². More recently, there has been a policy focus on education as a tool for raising awareness of gender-based violence. The recent public unrest regarding sexual harassment, epitomised by the ‘#Me too’³ and ‘Times Up’⁴ movements, demonstrate that gender-based violence remains an everyday reality for many women and girls. In England and Wales, there has been an increase in applications to the Family Court for domestic abuse

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¹ More information about the 16 Days campaign can be found at the website: <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/take-action/16-days-of-activism>

² Fully referred to as The Council of Europe Convention on preventing and combating violence against women and domestic violence (Council of Europe Treaty Series Number 210)

³ See more about the movement at: <https://metoomvmt.org>

⁴ See more about the movement at: <https://www.timesupnow.com>

protection,⁵ however this has come at a time where cuts to the availability of legal aid have led to concerns about the ability of survivors to seek access to justice⁶.

During the 2017-2018 academic year the authors designed and delivered a range of teaching activities for clinical students as part of the 16 Days of Activism against Gender-Based Violence campaign. The aims were to increase student engagement with issues of gender justice and develop their understanding of the different forms of gender violence, the domestic and international frameworks for protecting victims and the roles that different organisations play in achieving this. It was hoped that this would better prepare students for the realities of family practice in England and Wales. Surveys and a semi-structured interview were used to gain insights into the student experience of participating in the campaign. This article will address how their participation went some way to meeting the objectives set out above in that students demonstrated increased knowledge of civil and criminal law relating to gender-based violence, developed their critical lawyering skills and competency in working with vulnerable clients and contributed to wider efforts to advance gender justice. Further the article will draw on the ancillary advantages of participating in the campaign, including improved client outcomes and reputational benefit. The limitations of the 16 Days campaign will also be acknowledged along with ideas for developing the programme in the future.

INTRODUCTION

Gender-based violence (GBV) can be defined as “any interpersonal, organisational, or politically oriented violation perpetrated against people due to their gender identity, sexual orientation, or location in the hierarchy of male-dominated social systems”⁷.

⁵ Ministry of Justice and National Statistics (29 March 2018) *Family Court Statistics Quarterly: October – December 2017*.

⁶ See, for example, Amnesty International UK (October 2016) ‘Cuts that Hurt: The Impact of Legal Aid Cuts in England on Access to Justice’ (www.amnesty.org.uk/cutsthathurt) and The Law Society of England and Wales (June 2017) ‘Access Denied? LASPO Four Years On: Law Society Review’ (www.lawsociety.org.uk)

⁷ O’Toole, L. Schiffman, J. Edwards, M. (2007) *Gender Violence: Interdisciplinary Perspectives*. New York: New York University Press

Within international law, it is regarded as encompassing “all acts of violence which may result in physical, sexual, psychological or economic harm or suffering... such as coercion or arbitrary deprivation of liberty, whether occurring in public or private life”⁸. GBV is often synonymous with ‘violence against women’ because acts such as human trafficking, domestic servitude, forced marriage, female genital mutilation, sexual exploitation and harassment are disproportionately perpetrated against women⁹. GBV is viewed as an expression of gender inequality and a human rights infringement because it often stems from and reflects structural power inequalities which discriminate against women¹⁰.

This article will examine how the elimination of GBV is increasingly recognised as a priority for the international community. In part, this has arisen organically through a series of grassroots social media campaigns following the allegations of sexual abuse against Harvey Weinstein and other male celebrities¹¹. However, there are also legal frameworks which require states to pursue a policy of eliminating discrimination against women and put in place measures to protect women from domestic violence and unequal treatment¹².

In particular, there is a new legislative and policy focus on educating the general public through awareness raising campaigns as a means to challenge understandings of gender

⁸ See Article 3a, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention)

⁹ The European Institute for Gender Inequality (2015) “Strategic Framework on Violence against Women 2015-2018” Luxembourg: Publications Office of the European Union.

¹⁰ See the European Institute for Gender Inequality (2014) “Estimating the Costs of Gender-Based Violence in the European Union” Luxembourg: Publications Office of the European Union.

¹¹ See, for example, the ‘Me Too’ and ‘Time’s Up’ movements at <https://www.timesupnow.com> and <https://metoomvmt.org>

¹² See Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women and General Recommendation No 19 of the CEDAW Committee on violence against Women.

norms, gender stereotypes and to promote a better understanding of legal rights and responsibilities with regards to GBV. This arguably reflects the current climate of austerity in which the Government are keen to reduce the economic cost of GBV and comply with their international obligations in the most cost effective manner¹³. Further, the focus on public legal education is revealing at a time when many victims are struggling to enforce their rights and seek justice through the legal system as a result of the cuts to legal aid implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

Alongside public legal education the demand for legal services from law school based clinics demonstrates they make an important contribution to facilitating access to justice in areas where public funding is no longer available and for those clients where paying privately for advice is not feasible. This is particularly important in the context of GBV where women (and in particular Black, Asian and minority ethnic (BAME)) women face multiple disadvantages. Not only are they more likely to be victims of GBV but they have been disproportionately affected by the legal aid cuts and are therefore more likely to require the assistance of law school clinics¹⁴. This is reflected in statistics which report that in the year ending April 2017, 58% of clinic users were women and 48% were from BAME communities¹⁵. Whilst there are no figures directly relating to GBV, 67% of clinics

¹³ Domestic violence alone costs the UK economy £16 billion per annum – as reported in Siddiqui, H (2018) 'Counting the Cost: BME women and gender-based violence in the UK'. IPPR Progressive Review Volume 24 Issue 4. pp 362 -368.

¹⁴ Sandhu, K. Stephenson, M.A. (2015) 'Open space layers of inequality – a human rights and equality impact assessment of the public spending cuts on black, Asian and minority ethnic women in Coventry'. Feminist Review Volume 109. pp 169-179.

¹⁵ LawWorks Clinic Network Report April 2016 – March 2017 (December 2017) 'Analysis of pro bono legal advice work being done across the LawWorks clinic network between April 2016 and March 2017'. Published by LawWorks.

reported seeing an increase in the number of clients in crisis or distress¹⁶. It is possible these figures may include victims of domestic abuse on the basis that over a quarter of the work carried out by clinics relates to family law¹⁷. This would reflect the authors' own experiences where there has been a considerable increase in the number of domestic abuse survivors making enquiries at their clinic. Further, the authors have been contacted by three domestic violence organisations over the last year who have wished to establish links with the clinic. They have sought advice on behalf of their service users and legal training for their volunteers. There is evidence that clinics in the USA are engaging with work relating to GBV¹⁸ however to date, there has been no evidence that this is being replicated in the United Kingdom.

Against the backdrop of unmet legal need, new domestic laws in relation to GBV and a policy focus on awareness raising, the authors, who are clinical supervisors at a full representation law clinic at Northumbria University, identified a critical need to incorporate training about GBV within the family law clinical curriculum. This was achieved through accepting instructions on client cases relating to GBV and setting up a referral system for enquiries with a local domestic abuse organisation for those clients

¹⁶ LawWorks Clinic Network Report April 2016 – March 2017 (December 2017) 'Analysis of pro bono legal advice work being done across the LawWorks clinic network between April 2016 and March 2017'. Published by LawWorks.

¹⁷ LawWorks Clinic Network Report April 2016 – March 2017 (December 2017) 'Analysis of pro bono legal advice work being done across the LawWorks clinic network between April 2016 and March 2017'. Published by LawWorks.

¹⁸ At the University of Chicago Law School students can elect to take part in the Gendered Violence and the Law clinic. The clinic aims to increase students' understanding of the civil and criminal systems that address GBV through field work complemented by a weekly seminar which addresses cases on domestic violence, sexual assault and child protection issues (see <https://www.law.uchicago.edu/clinics/genderedviolence>). The University of Buffalo also has a Family Violence and Women's Rights Clinic. Students have the opportunity to work on projects which impact the local community, including the preparation of self-help leaflets for survivors and the provision of community legal education for domestic abuse service providers. The clinic has also worked with advocacy groups to support domestic violence legislative reform (see <http://www.law.buffalo.edu/beyond/clinics/domestic-violence.html>).

who were unable to secure alternative funding. Further, the authors established a drop-in clinic (*Empower 4 Justice*) with a local BAME women's organisation. Empower 4 Justice is an interdisciplinary project which allows BAME women to receive one-off legal advice alongside independent domestic violence advocate (IDVA) services. The project was conceived out of the idea that BAME women often experience culturally specific forms of abuse, multiple barriers to reporting and difficulties accessing advice because of a shame culture, immigration insecurities and a lack of awareness of their rights.

Alongside these projects, the authors felt it was appropriate to supplement the students' case work with an overarching teaching programme about GBV. This was because many of the students' cases related to a single issue and this prevented the students developing a breadth of understanding that would allow them to put their learning experiences in a wider context. In order to achieve this, the authors decided to participate in the 16 Days of Activism against Gender-Based Violence (16 Days campaign). The 16 Days campaign takes place annually between 25 November (The International Day for the Elimination of Violence against Women) to 10 December (Human Rights Day) and aims to raise awareness of and stimulate action to end violence against women and girls globally. The dates of the campaign are intended to highlight that the act of perpetrating gender violence is a human rights violation¹⁹. It was felt that the 16 Days campaign was an appropriate cultural fit due to its interdisciplinary focus, international reach and

¹⁹ The 16 Days campaign was first run in 1991 by the Women's Global Leadership Institute coordinated by the Centre for Women's Global Leadership. Since then, it is estimated that over 2,800 organisations from approximately 156 countries have taken part. More information about the campaign can be found at <http://16dayscwgil.rutgers.edu/>.

emphasis on building local alliances. It was also an academic fit for law students because of its focus on advocacy and policy development. Whilst participants were invited to use a 16 Days toolkit²⁰ this was not compulsory and the authors retained full discretion about the topics covered and style of teaching activities. Further, as time is a premium within the clinic, the 16 Days campaign did not take too much time out of an otherwise busy clinic curriculum.

The authors' main objectives in participating in the campaign were to:

- a) Increase student engagement with issues of gender justice; and
- b) Develop an effective educational tool for raising student understanding of the different forms of gender violence, the domestic and international framework for protecting victims and the roles that different organisations play in achieving this.

If these aims were met, it was felt that we would realise the overall aim of;

- c) Better preparing the students for the realities of family practice in England and Wales.

Following completion of the 16 Days campaign, the students were asked to participate in a focus group or complete a questionnaire about their experiences.

The authors are not aware of any similar studies which have been conducted about the effectiveness of GBV awareness raising programmes in higher education students or within clinical legal education. There are however a number of studies regarding gender justice programmes which have been conducted with middle and high school students²¹.

²⁰ The 16 Days toolkit can be accessed at The Centre for Women's Global Leadership, Rutgers School of Arts and Sciences (https://www.sas.rutgers.edu/cms/16days/images/16dayscwg/2017_16_Days_of_Activism_Against_Gender-based_Violence_Action_Kit_Complete_September_28_2017.pdf).

²¹ A helpful summary of this literature is provided in Malhotra, K. Gonzales-Guarda, R. Mitchell, E (2015) 'A Review of Teen Dating Violence Prevention Research: What About Hispanic Youth?' *Trauma, Violence and Abuse* Volume 16, Issue 4. pp. 444-465. Sage Publications. Further studies are discussed later in this article.

These studies have focussed on improving student knowledge of domestic abuse and healthy relationships and preventing teen dating violence. These studies differ from ours in that they often do not deal with issues of GBV which occur outside an intimate partner relationship. In the authors' view, many of these studies fail to recognise wider issues of family violence such as forced marriage, female genital mutilation and honour violence. Further, whilst it was an aim of this programme to improve the students' knowledge, the authors did not intend to change the students' behaviour in their own personal relationships. The majority of the studies in this area have been carried out in America and the authors are not aware of any studies which have taken place in the United Kingdom.

This article will discuss the teaching materials that were designed and will present the students' experiences of participating in the campaign. It will address how their participation went some way to meeting the objectives set out above in that the students demonstrated increased knowledge of civil and criminal laws relating to GBV, developed their critical lawyering skills and competency in working with vulnerable clients and contributed to wider efforts to advance gender justice. Further, the article will draw on the ancillary advantages of participating in the campaign, including improved client outcomes and reputational benefit. The limitations of the 16 Days campaign will also be acknowledged along with ideas for developing the programme in the future.

SCOPING THE PROBLEM - GBV IN ENGLAND AND WALES

The legal and political significance of GBV has gained momentum in recent years. On an international level this can be evidenced through the Sustainable Development Goals which vowed to achieve gender equality and empower all women and girls by 2030²². The targets to achieve this goal include eliminating all forms of violence against women and girls in the public and private sphere including trafficking, sexual and other types of exploitation and eliminating harmful practices such as child and forced marriage and female genital mutilation. Likewise, the United Nations and the Council of Europe have developed international instruments to provide legal frameworks for ending GBV. An example of this is The Convention on the Elimination of All Forms of Discrimination against Women which was adopted in 1979 and requires signatory states to implement measures to abolish discriminatory laws, establish public institutions to ensure the effective protection of women against discrimination and the elimination of all acts of discrimination by persons and organisations. More recently, the Istanbul Convention obliges signatories to develop a comprehensive legal framework and approach to combat violence against women, through preventing violence, protecting victims and prosecuting perpetrators. The UK Government is a signatory to both conventions but is yet to take steps to ratify the Istanbul Convention. Providing a comprehensive legal

²² See the United Nations Sustainable Development Goals - 'Gender equality and women's empowerment' available at: <http://www.un.org/sustainabledevelopment/gender-equality/>

framework is important for providing protection and access to support services for victims and acting as a deterrent to perpetrators²³.

At a domestic level, there has been growing recognition of the different forms that GBV takes. This is evidenced through the introduction of the Modern Slavery Act 2015 which seeks to protect victims of human trafficking. In the same year, the Serious Crime Act 2015 came into force, criminalising coercive and controlling behaviour. There have also been considerable developments in relation to forced marriage. In 2005, the Foreign and Commonwealth Office and Home Office launched the Forced Marriage Unit (FMU) to lead on the Government's forced marriage policy and casework. In the last year, the FMU gave advice or support in relation to a possible forced marriage in 1,196 cases²⁴. In 2014, it became a criminal offence to force a person to marry, under the Anti-Social Behaviour, Crime and Policing Act 2014. The Government also introduced forced marriage protection orders as a civil remedy to protect someone who is facing being forced into a marriage or who is in a forced marriage²⁵. These provisions have been met with some success in tackling violence against women. Over the last year, 247 forced marriage protection orders have been granted (in all cases the applicants were women)²⁶ and two convictions for forced marriage have taken place²⁷.

²³ Klugman, J (2017) 'Background paper for World Development Report 2017 'Gender Based Violence and the Law' Georgetown University. Available at: <http://pubdocs.worldbank.org/en/232551485539744935/WDR17-BP-Gender-based-violence-and-the-law.pdf>

²⁴ Home Office and Foreign and Commonwealth Office (16 March 2018) 'Forced Marriage Unit Statistics 2017'. Home Office Publications.

²⁵ See the Forced Marriage (Civil Protection) Act 2007.

²⁶ Ministry of Justice and National Statistics (2018) 'Family Court Statistics Quarterly: Annual 2017 including October to December 2017' Published by the Ministry of Justice.

²⁷ See <http://www.familylawweek.co.uk/site.aspx?i=ed190141>

Whilst GBV may be encountered in many legal practice areas, it has particularly close links with family and criminal law because these areas regulate the most prevalent forms of GBV - intimate partner violence and domestic abuse. In the year ending March 2017, an estimated 1.9 million adults in England and Wales experienced domestic abuse²⁸. In the same year, the Crime Survey for England and Wales reported that 26% of women and 15% of men had experienced some form of domestic abuse since the age of 16 – equivalent to 4.3 million female victims and 2.4 million male victims²⁹. There continues to be an upward trend in applications for domestic violence remedy orders (e.g. non-molestation orders and occupation orders) in England and Wales³⁰. In 2017, there were 24,912 such applications, representing an increase of 5% in the year ending December 2017. Of course, this does not reflect the full reality of the situation as domestic violence is a vastly underreported area.

However, whilst on the one hand the Government has demonstrated a commitment to conferring rights on women and girls by becoming signatories to CEDAW and the Istanbul Convention, they have simultaneously made cuts to the funding which allows victims to enforce these rights. LASPO came into effect on 1 April 2013 and removed large parts of family law from the scope of public funding and removed completely funding for civil claims for compensation³¹. Funding remains available for victims of domestic

²⁸ Office of National Statistics (November 2017) 'Domestic Abuse in England and Wales: year ending March 2017. Statistical Bulletin'. Published by the Office of National Statistics.

²⁹ Office of National Statistics (November 2017) 'Domestic Abuse in England and Wales: year ending March 2017. Statistical Bulletin'. Published by the Office of National Statistics.

³⁰ Ministry of Justice and National Statistics (29 March 2018) 'Family Court Statistics Quarterly: October – December 2017'. Published by the Ministry of Justice.

³¹ In the context of GBV this is important because victims can pursue civil claims for compensation against perpetrators in respect of injuries suffered. Exceptional Case Funding (ECF) remains available for categories of law which do not ordinarily

abuse in family law proceedings, however in practice many victims are ineligible because they cannot provide the requisite gateway evidence and/or satisfy the strict means test. This has led to an increase in domestic abuse survivors representing themselves in court proceedings³². This situation is indefensible because despite promises from the Government, there are no legal prohibitions on unrepresented defendants cross-examining their alleged victims and no firm plans to introduce this³³. Court proceedings can therefore be a forum for perpetrators to exercise further control over their victims³⁴.

A REVIEW OF EXISTING LITERATURE – GBV IN EDUCATION

There have been attempts to raise public awareness of GBV through formal and informal channels of education. To some extent, this has happened organically following the allegations of sexual misconduct against Harvey Weinstein and other male celebrities, which have led to grassroots social media campaigns such as “#Me too” and “Time’s Up” and which aim to demonstrate the worldwide prevalence of sexual assault and

attract public funding but where a failure to provide legal services would be in breach of an individual’s rights under the Human Rights Act 1998. However, research suggests that there have been fewer than expected applications for funding. The Government estimated there would be between 5,000 – 7,000 applications for ECF per annum, however in 2013/2014 only 1,516 applications were made, of which around 50% were granted. Statistics reported in: The Law Society of England and Wales (June 2017) ‘Access Denied? LASPO Four Years On: Law Society Review’ Published by the Law Society.

³² Statistics indicate that in 2017 neither party had legal representation in 35% of cases in front of the family courts. Reported in the Ministry of Justice and National Statistics (29 March 2018) ‘Family Court Statistics Quarterly: October – December 2017’ Published by the Ministry of Justice.

³³ This issue has been raised in the HM Government consultation (2018) ‘Transforming the Approach to Domestic Abuse’. The consultation document acknowledges that unlike the criminal courts, the family courts do not have a specific power to prevent cross-examination of a victim by an alleged perpetrator. The consultation goes on to state ‘the government is committed to addressing this issue and will legislate to give family courts the power to stop this practice as soon as legislative time allows’ (p. 52) however no definitive time frame has been indicated.

³⁴ Richardson, K. & Speed, A (2019) ‘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?’. *Journal of Social Welfare and Family Law* Volume 41 Issue 2 pp.135-152 DOI: 10.1080/09649069.2019.1590898.

harassment³⁵. Changing and challenging attitudes towards GBV through education however is also a key focus of GBV legislation. This shift towards prevention and education about legal rights and responsibilities is arguably reflective of the current climate of austerity in which the Government are keen to reduce the economic cost of GBV and comply with their legal obligations in the most cost effective manner³⁶. Further, the focus on public legal education is revealing at a time when many victims are struggling to enforce their rights and seek justice through the legal system as a result of the cuts to legal aid implemented by LASPO. Article 12 of the Istanbul Convention, for example, obliges states to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and other practices which are based on the inferiority of women. It is expected this will be achieved through Article 13 which requires signatories to “promote or conduct on a regular basis awareness raising campaigns or programmes... to increase awareness and understanding among the general public of the different manifestations of all forms of violence covered by the Convention, their consequences on children and the need to prevent such violence”. Further, under Article 14, parties must “include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-

³⁵ It is reported that within 24 hours of the ‘Me Too’ hashtag going viral, there were more than 12 million posts, comments and reactions by 4.7 million internet users around the world. Reported at: <https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/>.

³⁶ Domestic violence alone costs the UK economy £16 billion per annum. Reported in Siddiqui, H (2018) *Counting the Cost: BME women and gender-based violence in the UK*. IPPR Progressive Review Volume 24 Issue 4. pp 362 -368.

based violence against women and the right to personal integrity... in formal curricula and *at all levels of education*".

The need for early education has been emphasised in the global 'Think Equal' initiative, which calls for governments across the world to embed "social and emotional learning" into their curriculums at an early stage (from 3 years old) in order to "end the discriminatory mind set and cycle of violence across our world".³⁷ So far 147 schools across 15 countries (including the United Kingdom) are piloting the Think Equal educational programme.³⁸ The outcome of that pilot study is currently being evaluated.

In March 2018, the Government launched a consultation on 'transforming the response to domestic violence'³⁹ in respect of the Domestic Violence and Abuse Bill, which (together with the Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017) will enable ratification of the Istanbul Convention into domestic law. One of the four key themes of the consultation is 'promoting public and professional awareness' of GBV. In order to ensure that domestic abuse is properly understood, the consultation proposes introducing a statutory definition of domestic abuse which will include economic abuse and controlling and coercive behaviour. In addition, it is intended that funding will be provided for all schools to deliver Relationships Education, Relationships and Sex Education (RSE) and Personal, Social, Health and Economic (PSHE) Education so that young adults leave

³⁷ <http://www.thinkequal.com/>

³⁸ <http://www.thinkequal.com/where-we-work/>

³⁹HM Government (2018) 'Transforming the Response to Domestic Abuse – Government Consultation'. Available at: https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf

school with the knowledge to prepare them for adult life. The Children and Social Work Act 2017 places a duty on the Secretary of State for Education to introduce 'relationship education' at all schools in England. Crucially, most of our students are between 21 and 22 years old and therefore are unlikely to have received any education around domestic abuse in their formative educational years. They have therefore not benefited from the changes that are currently being implemented into primary and secondary education.

The implication in the Istanbul Convention and the domestic abuse consultation is that improved knowledge and awareness will have a positive effect on reducing domestic abuse perpetration and will lead to more competent practitioners in this field. This because knowledge is typically regarded as a precursor to attitudinal and/or behaviour change⁴⁰. Whether this is in fact accurate has been the subject of many academic studies. The majority of studies in this area have been conducted with middle and high school students in the USA and have focussed on improving student knowledge of domestic abuse and healthy relationships and preventing youth violence within relationships. Whilst GBV is taught within university clinics, the authors are not aware of any such studies which have been conducted about the effectiveness of GBV awareness raising programmes in higher education students or within clinical legal education. Further, these studies often do not deal with issues of GBV which occur outside an intimate partner relationship and therefore fail to capture the full scope of family violence. These

⁴⁰ Salazar, L. Cook, A (2006) 'Preliminary findings from an outcome evaluation of an intimate partner violence preventing program for adjudicated, African American, adolescent males' *Journal of Youth Violence and Juvenile Justice* Volume 4, Issue 4, pp. 386-385.

studies are motivated by a desire to change youth behaviour within personal relationships rather than in a professional capacity. The findings suggest that such programmes have varying levels of success – a factor which may be attributable to the different teaching activities, format of the programmes and the time dedicated to teaching these issues. A comprehensive analysis of studies in this area has been prepared by Malhotra et al⁴¹ however for the purposes of this article, only those studies which focussed on developing students' knowledge and understanding of legal frameworks around domestic abuse/GBV have been considered.

Producing change in knowledge following an educational intervention has been well documented in studies⁴². Jaycox et al⁴³ for example, delivered a three-class programme over three hours to educate students aged 13-14 years old about domestic violence, healthy relationships and legal rights. The intervention group showed increased knowledge of the laws relating to domestic abuse and increased likelihood of seeking help (in particular from a lawyer specialising in domestic abuse) compared to a control group. However, the position on whether knowledge directly results in attitudinal or behavioural change is less clear. Salazar et al, for example, conducted five 2-hour sessions on intimate partner violence with predominantly African American males aged between

⁴¹ Malhotra, K. Gonzales-Guarda, R. Mitchell, E (2015) 'A Review of Teen Dating Violence Prevention Research: What About Hispanic Youth?' *Trauma, Violence and Abuse* Volume 16, Issue 4. pp. 444-465. Sage Publications.

⁴² See Foshee, V. A. Bauman, K. E. Arriga, X. B. Helms, R. W. Koch, G. G & Linder, G. F. (1998) 'An evaluation of Safe Dates, an adolescent dating violence prevention program' *American Journal of Public Health* Volume 88. pp 45-50 and Lavoie, F. Vezina, L. Piche, C. & Boivin, M. (1995) 'Evaluation of a prevention program for violence in teen dating relationships' *Journal of Interpersonal Violence* Volume 10. pp 516-524. Macgowan, M. J. (1997) 'An evaluation of a dating violence prevention program for middle school students' *Journal of Violence and Victims* Volume 12. pp 223-235.

⁴³ Jaycox, L.H. McCaffrey, D. Eiseman, B. Aronoff, J. Shelley, G.A. Collins, R.L. Marshall, G.N. (2006) 'Impact of a school-based dating violence prevention program among Latino teens: randomised controlled effectiveness trial' *Journal of Adolescent Health*, Volume 39 Issue 5 pp. 694-704.

12 and 18 with the aim of developing the students' awareness of violence against women, personal choice, and connecting violence against women to violence against ethnic minorities and the lesbian and gay community⁴⁴. Whilst the participants reported higher levels of knowledge of intimate partner violence, only those who had witnessed high levels of parental violence demonstrated lower patriarchal attitudes than the control group. Similar findings were reported by Lowe et al⁴⁵ whose study comprised four one-hour sessions on assault, coercion, victims' rights, legal information and healthy relationships. Lowe found that the students demonstrated a statistically significant increase in knowledge after the programme but there was no real effect on attitudes towards dating violence.

Another study which led to increased knowledge (but not necessarily behavioural change) was carried out by Taylor et al ⁴⁶. The researchers examined the effect of a teaching programme on student attitudes and knowledge of GBV and assessed whether participation reduced the probability of perpetration and/or victimisation. The study involved 123 sixth and seventh grade classrooms being randomly assigned to one of two five-session curriculum addressing GBV and sexual harassment or to a no-treatment control group. The first curriculum was 'interaction-based' which focussed on setting and communicating boundaries in relationships, the formation of relationships,

⁴⁴ Salazar, L. Cook, A (2006) 'Preliminary findings from an outcome evaluation of an intimate partner violence preventing program for adjudicated, African American, adolescent males' *Journal of Youth Violence and Juvenile Justice* Volume 4, Issue 4, pp. 386-385.

⁴⁵ Lowe, L. Jones, C.D. Banks, L (2007) 'Preventing Dating Violence in Public Schools: an evaluation of an interagency collaborative program for youth' *Journal of School Violence*, Volume 6 Issue 3. pp. 69-87

⁴⁶ Taylor, B. Stein, N. Burden, F (2010) 'The Effects of Gender Violence/Harassment Prevention Programming in Middle Schools: A Randomised Experimental Evaluation' *Violence and Victims Journal* Volume 25 Number 2. pp. 202-223.

wanted/unwanted behaviours and the role of the bystander as intervener. The lessons in this curriculum did not provide simple answers but required the students to engage with ambiguity. In contrast, the 'law and justice' curriculum focused on laws, definitions, information, data about penalties and the consequences for perpetrators of GBV. Students in the law and justice curriculum, compared to the control group (which received no training on GBV), had significantly improved outcomes in awareness of their abusive behaviours, attitudes towards GBV and knowledge. The knowledge gained was not long-lasting for all the groups however. Those in the interaction-based group demonstrated a similar level of knowledge as the control group after a six-month period. Students in the interaction-based curriculum experienced lower rates of victimisation, increased awareness of abusive behaviours, and improved attitudes toward personal space. Interestingly, students in both treatment groups were more likely to have committed violence against people they had dated. The researchers believed that the interventions affected the students' sensitivity to the problem of GBV, and it made it more likely for them to identify and report certain behaviours as GBV.

In a second study, Taylor et al ran an intervention programme in public middle schools in New York City⁴⁷. Students were allocated to a 'classroom-based intervention', a 'building based intervention', a mixed building and classroom intervention group or a control group. The classroom-based intervention consisted of six sessions over a ten-week period and covered consequences of domestic abuse for perpetrators, laws relating

⁴⁷ Taylor, B.G. Stein, N.D. Mumford, E.A. and Woods, D (2013) 'Shifting Boundaries: an experimental evaluation of a dating violence prevention program in middle schools' *Journal of Prevention Science*. Volume 14 Issue 1. pp 64-76.

to domestic abuse, the social construction of gender roles and healthy relationships. The building-based intervention included temporary building-based restraining orders, posters in school buildings to increase awareness and reporting of domestic abuse and higher levels of security presence in safe/unsafe ‘hotspots’ mapped by students. The results indicate that there was no significant difference between groups on the prevalence of sexual harassment perpetration. Contrary to expectations, prevalence of sexual harassment victimisation was significantly higher in the building only group, compared to the control group.

Some studies have reported an increase in prejudicial attitudes and behaviours following participation in gender justice programmes. For example, Jaffe found an increase in sexist attitudes among a minority of the males who participated⁴⁸. It was felt this could have arisen from a feeling of male defensiveness as females were present in the teaching sessions but the content related solely to male-to-female abuse. Edwards et al⁴⁹ also found that whilst the majority of the programmes had a moderate positive effect, 25% of the eight studies they analysed lead to a deterioration in the students’ attitudes. These students appeared to be more supportive of dating violence after participating in the programme. This is also referred to as ‘backlash effect’⁵⁰. However, there have also been

⁴⁸ Jaffe, P.G. Sudermann, M. Reitzel, D. Killip, S.M (1992) *An evaluation of secondary school primary prevention program on violence in intimate relationships*. *Violence Vict* 1992 Summer: 7(2) pp.129-26.

⁴⁹ Edwards, A. Hinsz, V (2014) *A Meta-Analysis of Empirically Tested School-Based Dating Violence Prevention Programs*. *SAGE Open* April-June 2014 1-8.

⁵⁰ Salazar, L. Cook, A (2006) *Preliminary findings from an outcome evaluation of an intimate partner violence preventing program for adjudicated, African American, adolescent males*. *Journal of Youth Violence and Juvenile Justice* Volume 4, Issue 4, pp. 386-385. *Academy of Criminal Justice Sciences*.

criticism of those programmes which have adopted a ‘gender neutral approach’ and failed to recognise that GBV disproportionately affects women⁵¹.

Negative effects can also stem from poor programme design, including sessions that are not engaging or effective, and adopting a ‘one size fits all’ approach which is not sufficiently tailored to the audiences they address. This was identified by Salazar who noted that many studies lack cultural competency and do not address culturally specific forms of abuse⁵².

THE STUDY

In order to try and meet the aims outlined above, the authors asked clinical students to take part in a number of activities centred around GBV. Those activities were compulsory for the 18 final year Masters in Law Exempting degree (M Law)⁵³ students who chose to undertake family law casework in the Student Law Office. However, all other final year students on the MLaw (Solicitors Route) degree programme at Northumbria University were invited to take part on a voluntary basis. Only three additional students chose to take part. As such, a total of 21 students participated in the programme. 19 of these students were female and 2 were male. The activities organised were as follows:

⁵¹ *ibid*

⁵² *ibid*

⁵³ The MLaw programme is an Integrated Master’s which meets the requirements of a Qualifying Law Degree, and incorporates the knowledge and professional skills needed to succeed as a solicitor (M Law Exempting) or barrister (M Law Exempting (Bar Professional Training Course)).

- a) A documentary screening of “Banaz: a love story”. The documentary chronicles the life and death of Banaz Mahmood, a young British Kurdish woman killed in a so-called ‘honour’ killing. Following the screening, the students took part in a discussion about the issues raised in the documentary.
- b) A workshop on GBV and online abuse ran by an academic whose research focusses on the online abuse of feminists as a form of violence against women and girls⁵⁴.
- c) A workshop on the domestic and international frameworks for protecting victims of domestic abuse.
- d) A seminar by a domestic violence organisation which focussed on identifying domestic abuse, the services offered by independent domestic violence advocates and the role that different organisations play in supporting survivors.
- e) The authors established a family law blog called “A Family Affair”⁵⁵ and all students were asked to submit a blog article on the subject of GBV. Students were able to pick their own topics, which ranged from sexual harassment in the workplace through to rape as an act of genocide.

⁵⁴ Lewis, R. Rowe, M and Wiper, C (2017) ‘Online abuse of feminists as an emerging form of violence against women and girls’. *British Journal of Criminology*, 57 (6). pp. 1462-1481.

⁵⁵ The blog can be accessed at <https://afamilyaffairsite.wordpress.com/>

In addition to these compulsory activities, the authors also ran a voluntary poster competition during the 16 Days campaign in which all students were invited to submit a poster considering the different forms of GBV or proposals for ending violence against women. Five students submitted posters to the competition. The posters were displayed at Northumbria University's Festival of Feminism in February 2018.

The students took part in these activities alongside their case work in the Student Law Office and additional one off advice provided through the Empower 4 Justice project.

Methodology

The authors adopted a mixed-methods approach for this research, using a semi-structured interview and electronic questionnaires. Ethical approval was provided for this by Northumbria University.

The initial approach was to only use focus groups with a mix of closed and open ended questions. All students who participated in at least one of the activities as part of the campaign were emailed inviting them to attend the focus groups to provide their views on their participation. 21 students were therefore emailed to participate. Participation was anonymous and the focus groups were to be conducted by a third party experienced researcher. This was important as the authors were also the academics who were responsible for marking the students on their clinical work. It was therefore important to avoid students perceiving the research as impacting on their clinic mark or distorting their opinions to please the researchers. Unfortunately, due to the focus groups taking

place at a busy time during the students' studies, one participant volunteered to take part in the focus group. The focus group therefore took the format of a semi-structured interview instead. There were specific points for discussion but the idea was that the interview would be conversational in order to obtain the student's general views on participating in the campaign. The interview was audio-recorded and transcribed by a research assistant. To maintain anonymity, the transcription, but not the audio recording, was provided to the authors.

The low response rate meant that the data gathered from the focus group could not in any way be reflective of the overall view of the participants more generally. A number of students did however indicate to the third-party researcher that they would like to give feedback on the campaign in a different method. To increase the response rate and provide more reliable data, the decision was therefore made to adopt a mixed approach using a combination of the feedback already gathered from the interview, together with additional electronic questionnaires.

Electronic questionnaires were emailed to all the students who participated in at least one of the campaign activities. Information was provided to the students about the aims of the research and they were asked to email their completed questionnaires, together with a signed consent form, to the same third-party researcher who had conducted the semi-structured interview. This again maintained appropriate anonymity for the respondents. In addition to the student who had already provided their views in an interview, four other students provided responses to the questionnaire. From a sample of 21 students, a

response was therefore received from 5 students, providing an improved response rate of 24%. Whilst this is not a particularly high response rate, research conducted by Fosnacht et al into the importance of high response rates for college surveys indicates that a response rate of 20 to 25 percent in a survey of higher education users with a small sampling frame should provide reliable results⁵⁶.

Once the authors received the questionnaires and transcription they separately coded the data on paper to ensure consistent analysis⁵⁷. The authors both used thematic analysis to identify any themes or patterns in the data, which was particularly useful when analysing the data from the semi-structured interview⁵⁸. After coding the data, the authors compared the themes they had identified and found them to be consistent, adding validity to the findings. In the next section, the authors will analyse the themes identified.

FINDINGS

Many of the themes that arose from the questionnaires and the semi-structured interview were as a result of the specific questions posed. For example, participants were asked about the impact on student well-being and whether they thought that the campaign was 'too female-victim focused'. However, there were other additional themes that arose naturally from the qualitative nature of the questionnaire. These largely related to the

⁵⁶ Fosnacht, K. Sarraf, S. Howe, E and Peck, L.K (2017) 'How Important are High Response Rates for College Surveys?' *The Review of Higher Education*, Vol 40, Number 2, Winter 2017, John Hopkins University Press p.245-266

⁵⁷ Schreier, M (2014) 'Qualitative Content Analysis' in *The SAGE Handbook of Qualitative Data Analysis*, SAGE Publishing, p. 179

⁵⁸ Burnard, P (1991) 'A method of analysing interview transcripts in qualitative research' *Nurse Education Today* 11:6. p461

different benefits the students felt they had obtained from their participation in the campaign.

The main themes the authors identified were as follows:

1. Educational benefits/skills enhancement
2. Employability benefits
3. Student well-being
4. Limitations/feed-forward ideas

Educational benefits

The findings were broadly consistent with Jaycox⁵⁹ and Taylors⁶⁰ studies in that there was a positive correlation between the students' participation in the programme and their improved knowledge and understanding of GBV. All of the participants agreed that the campaign increased their awareness of GBV issues. This was also supported by the definitions that the participants were able to provide about their understanding of GBV (a specific question within both the electronic questionnaires and the semi-structured interview):

“Gender-based violence can be understood as a violation of human of rights and a form of discrimination against women”

⁵⁹ Jaycox, L.H. McCaffrey, D. Eiseman, B. Aronoff, J. Shelley, G.A. Collins, R.L. Marshall, G.N. (2006) 'Impact of a school-based dating violence prevention program among Latino teens: randomised controlled effectiveness trial' *Journal of Adolescent Health*, Volume 39 Issue 5 pp. 694-704.

⁶⁰ Taylor, B. Stein, N. Burden, F (2010) 'The Effects of Gender Violence/Harassment Prevention Programming in Middle Schools: A Randomised Experimental Evaluation' *Violence and Victims Journal* Volume 25 Number 2. pp. 202-223. Taylor, B.G. Stein, N.D. Mumford, E.A. and Woods, D (2013) 'Shifting Boundaries: an experimental evaluation of a dating violence prevention program in middle schools' *Journal of Prevention Science*. Volume 14 Issue 1. pp 64-76.

“Violence predominantly impacting women but can also be men. This can be in various ways and not limited to hurting an individual physically”

“Gender-based violence is a widespread issue of violence against someone because of their gender.”

“Where an individual is a victim of domestic violence due to their gender.”

“Gender-based violence is an extremely wide term and includes acts such as FGM, forced marriage, rape and domestic servitude. Gender-based violence is often a societal norm in many cultures.”

Whilst each participant gave a different interpretation of their understanding of GBV, the definitions acknowledge the wide range of issues that could fall under the GBV heading. Many of these definitions also fit within the guidance provided by the international frameworks for protection against GBV including CEDAW and the Istanbul Convention, as discussed above. Furthermore, many of the definitions acknowledge that GBV is predominantly (although not always exclusively) perpetrated against women and girls. In one case, the respondent used the term GBV interchangeably with domestic violence. This suggests that particular student's understanding was weaker than the other students' because they did not comprehend the fact that GBV is broader than domestic violence and also includes gendered abuse which takes place in the public sphere.

The final definition quoted above expressly mentioned the international and cultural elements of GBV. This increased knowledge of international family law issues was

another key theme running through the responses to the questionnaires. For example, when asked about their experience of writing for the blog, one participant commented:

“I thought it was really interesting, it allowed me to research an area of law I have never been able to before, in jurisdictions I have not looked at before.”

When discussing their experience of working on the Empower 4 Justice project, that same participant commented that:

“If I am honest, I had no idea of BME issues, never mind that they occurred so locally.”

Building on Salazar’s findings that many educational programmes fail to appropriately address cultural forms of violence⁶¹, the authors specifically set out to educate the students about forms of violence that disproportionately affect minority communities. Recognising the diversity of GBV was reflected in their initial aims. The authors did this by ensuring that the workshops dealt with a wide range of culturally sensitive issues and the international frameworks for protecting women and children from GBV.

Evidence of the students’ knowledge development was also evident from the blog articles and academic posters. The students both correctly identified the domestic and international legal provisions (despite being provided with minimal supervisor

⁶¹ Salazar, L. Cook, A (2006) ‘Preliminary findings from an outcome evaluation of an intimate partner violence preventing program for adjudicated, African American, *adolescent males*’ *Journal of Youth Violence and Juvenile Justice* Volume 4, Issue 4, pp. 386-385.

guidance) and included insightful practical assistance to support victims⁶². The choice of topics demonstrated that the students understood the broad spectrum of GBV and the fact that eradicating it demands a multi-agency approach. The '16 blogs for 16 days' were:

- 16 Days of Activism – about the campaign
- Social norms of GBV
- Sexual harassment in the workplace: a study of the Weinstein allegations
- The Istanbul Convention: Tackling Violence against Women and Girls
- Female Genital Mutilation: the law in England and Wales
- Female Genital Mutilation and Child Marriage in Kenya
- Raising awareness of domestic abuse in same-sex relationships
- Rape as an act of Genocide in Rwanda: the Role of the International Criminal Tribunal
- Marital rape: an exploration of the position in India
- Protection available under civil law for victims of domestic violence
- Forced marriage protection orders
- 21st Century honour killings
- Banaz: a love story – review
- Strategies to prevent Gender Based Violence
- Strategies for ending Female Genital Mutilation
- Legal aid for victims of domestic abuse

The respondents appeared to feel empowered by this knowledge. They felt there was value in understanding about GBV because of its prevalence and because as future

⁶² See for example *Strategies to Prevent Gender Based Violence* at <https://afamilyaffairsite.wordpress.com/2017/12/10/strategies-to-prevent-gender-based-violence> and *Protection available under the civil law for victims of gender based violence* at <https://afamilyaffairsite.wordpress.com/2017/12/04/protection-available-under-civil-law-for-victims-of-domestic-violence/>

family law practitioners they may be called upon to support victims of abuse. The personal rewards for the students are demonstrated in the participant comments below:

“Working in this project has helped me learn and grow and I think become a more well-rounded individual never mind practitioner.”

“Working in communities and with women where they seemingly have no other access to legal advice made it more satisfying that I was able to be a part of it.”

“You just felt so sorry for the women that you were helping, just it really made me feel like I was doing something worthwhile.”

“I found it rewarding to write an article which is aimed at helping others.”

Many of the respondents recognised that during the 16 Days campaign, they were exposed to topics and legislation which was not covered elsewhere on their degree programme. This raises the question about whether GBV should form part of the formal curriculum because only limited topics could be covered during the relatively short 16 Days campaign. Students were therefore also asked whether they would have benefited from the opportunity to undertake an academic module in International Family Law. One participant responded by stating:

“I think this would be a brilliant module to take, regardless of the E4J project... if I had been previously exposed to these issues, I would have had a wider understanding of them. Without this module, I had to understand the context

of their issues before I could begin to consider legal advice – a module would have removed this.”

As a result of this feedback, one of the authors has now developed an elective International Family Law module which will be available to level 6 students.

Unlike the majority of studies considered earlier in this article, this study did not attempt to measure attitudinal or behavioral change in the respondents’ own relationships. However, in a professional capacity it was apparent to the authors that the students became more sensitive to issues of GBV, which is consistent with the findings of Taylor’s research in this area⁶³. The students demonstrated increased competency in recognising triggers that many suggest a client had been subject to GBV that they may have previously overlooked. In turn, this allowed the students to ask appropriate fact find questions and direct their research appropriately.

Employability benefits

From the data gathered, the respondents appeared to value the employability benefits of participating in the campaign and comments were made about the fact that they could talk about this in job interviews. The authors are aware from separate conversations with students who participated in the campaign, that several students took a copy of their blog article along to job interviews as evidence of their written communication skills and understanding of the legal climate. Many of the students

⁶³ Taylor, B. Stein, N. Burden, F (2010) ‘The Effects of Gender Violence/Harassment Prevention Programming in Middle Schools: A Randomised Experimental Evaluation’ *Violence and Victims Journal* Volume 25 Number 2. pp. 202-223.

opted to prepare a second article on GBV, thereby demonstrating an engagement with GBV even after the campaign was over.

The focus on employability could be as a result of the stage of education that these students were at. All students who participated in the campaign were in their final year of study and may therefore be more focused on their impending graduation and post-education job prospects.

Participants were also asked about whether the campaign had any impact on their future career choices. There was an equal split of participants who said that the campaign had made them rethink their future career choices and those who said that it had no impact. One student now wants to pursue a career as a police officer specialising in domestic abuse and another wishes to become an IDVA. One student commented:

“It made me more interested in working within the area of family law.... I was able to gain a deeper insight into something that normally happens behind closed doors. I want to help people that are in similar situations”.

The fact that students reported a change in their career aspirations suggests that at least some of the students’ engagement with issues of gender justice continued beyond involvement in the 16 Days campaign. The choice of their careers (i.e. a police officer and IDVA) also demonstrates that the students appreciate the roles of different organisations in tackling GBV. This suggests the students did not simply view GBV as a ‘legal’ issue for lawyers to solve.

Student well-being

The authors were aware that many of the issues covered during the campaign could potentially be distressing for students with no previous experience of GBV. That said, the authors recognised the benefit to students in learning about those issues in a safe educational environment before being exposed to these issues in practice. In order to limit the risk of vicarious trauma, students were provided with information about each of the sessions in advance and were given the opportunity to opt out of sessions if they felt that the issues covered would be too distressing. Both in advance of and following the sessions a number of students made disclosures to their supervisor about previous experiences of GBV. For some of them, this was the first time they had spoken out about their experience and they indicated that the campaign had given them the courage to make those disclosures. This meant that their supervisors were then able to direct them to appropriate support services. It is possible that the students had not identified their experiences as GBV before they participated in the campaign but that the sessions made them more sensitive to this. This would be in line with the findings of Taylor et al who found that their participants were more likely to identify their own behaviour as GBV after participating in the programme⁶⁴.

Participants in the study were asked whether they found any of the topics covered during the campaign distressing and all indicated that they did. However, those who

⁶⁴ Taylor, B. Stein, N. Burden, F (2010) 'The Effects of Gender Violence/Harassment Prevention Programming in Middle Schools: A Randomised Experimental Evaluation' *Violence and Victims Journal* Volume 25 Number 2. pp. 202-223.

responded to the questionnaires also felt that they did not feel the need to approach their supervisor for additional support. The reasons given for this included:

“Although some of this information was distressing, it is the truth and it made me more aware and gain a greater understanding of gender-based violence although I did speak to my friends about this.”

“Whilst the issues in discussed the various sessions were distressing, I did not feel the need to discuss the issues with my supervisor further. I also think discussing these issues in the sessions themselves, allowed me to reflect on them and deal with them.”

One student said that the documentary was distressing but they did not feel the need to approach their supervisor and decided to watch a similar documentary after the session because, whilst it was on a distressing topic, they found the subject matter interesting. This again suggests that this particular students continued to have an interest in gender justice issues after the campaign ended. They also said that they would have been able to approach their supervisor for support if they had needed to because their supervisor was so *“approachable”*.

The documentary screening appeared to be the session that the participants found most distressing but the responses also indicated that it was also one of the most enjoyable sessions, alongside the blog articles. The participants clearly valued the educative aspects of these activities and felt appropriately prepared and supported to deal with them within a classroom environment. For example, one participant stated:

“Some of the topics were distressing, such as the violence Banaz was exposed to. However, we are warned of this at the start and had the option to leave. Gender-based violence is real life for many young girls and therefore the activities were more eye opening than distressing.”

The data suggests that the authors struck an appropriate balance in meeting their duty of care to the students whilst also highlighting issues that in practice they may be exposed to with little support or prior warning.

Limitations of the campaign

When asked about the limitations of the campaign and areas that could be improved in future campaigns/activities, a number of issues were raised by the participants.

Firstly, students were asked whether they thought the campaign was too “female victim focused”. Four out of five respondents felt that it was. The female focus of the campaign was also reflected in the definitions of GBV outlined above, where two out of five of the students specifically mentioned abuse perpetrated against women. Students made the following comments about the mainly female-victim focus of the campaign:

“I know that Gender-based Violence and Violence against Women is interchangeable, but it has been really women focused and I’m just wondering if it could be more men focused”

“I just feel like it needs to be a bit more like, “ok, this can encompass everyone”, whereas it was just really “women, women, women, women”, which I understand. It’s mainly just against women...”

“When [X] came in, you could tell straight off that she was really, just a feminist basically... which isn’t like awful, but... the way she was speaking was a bit against men in some aspects. She was like “when men do this” and “when men do that.”

“Whilst I appreciate that GBV is considered to be generally towards females and their perspectives need to be presented, I think it would allow students to have a more well-rounded and informed viewpoint if other groups of people are also considered.”

The negative reaction to the female focus of this campaign appears to be evidence of the ‘backlash effect’ as highlighted by Salazar.⁶⁵ This was particularly apparent in the session on online abuse against feminists. It is possible that students who did not identify as feminist felt ostracised by this session or that the focus on male-to-female abuse led to some students feeling defensive about the treatment of men within the sessions. However, as is apparent from the quotes above, students appeared to understand that the reason for the female-victim approach was that statistically there are more female victims of GBV.

However, as identified in the final quote, students were also keen to hear about other victims of GBV. Students expressly indicated a wish to hear about male victims of domestic abuse and abuse within same-sex relationships.

⁶⁵ Salazar, L. Cook, A (2006) ‘Preliminary findings from an outcome evaluation of an intimate partner violence preventing program for adjudicated, African American, *adolescent males*’ *Journal of Youth Violence and Juvenile Justice* Volume 4, Issue 4, pp. 386-385.

REFLECTING ON OUR INITIAL AIMS

After analysing the data and identifying the key themes, the authors then considered the feedback from the participants, reflecting on the initial aims. All respondents agreed that participation in the campaign had increased their awareness of GBV and in particular the practical issues of advising BAME victims of domestic abuse. England is a multicultural, diverse society and as a result family law practitioners are now often being expected advise in culturally sensitive or international family law cases. As has been highlighted earlier in this article, recent family court statistics demonstrate a continuing general upward trend in both the number of applications and actual orders made for Forced Marriage Protection Orders and Female Genital Mutilation Protection Orders.⁶⁶ By increasing the students' awareness of these issues the authors would argue that they have taken steps towards developing an effective educational tool to ensure that students are equipped to deal with the realities of family practice in England. There was some evidence that the students' engagement with issues of gender justice was continued beyond participation in the campaign in those students who completed second blog articles on GBV and those who reported changed career aspirations after participating in the 16 Days campaign.

There was also evidence that the students' knowledge of the domestic and international frameworks around GBV had increased. This was reflected in the blog articles and the definitions that the students provided of GBV. As this was not a longitudinal study, the

⁶⁶ Ministry of Justice and National Statistics (28 June 2018) *Family Court Statistics Quarterly: January to March 2018*.

data does not reveal whether this knowledge was retained after the end of the programme. This is discussed in the research limitations.

However, the campaign largely focused on GBV perpetrated against female victims by male perpetrators. This was somewhat led by female victim focus of the international campaign and also by the generally accepted view that the majority of victims of gender-based violence and abuse are female.⁶⁷ That said, the number of male victims of GBV is not insignificant. For example, there were an estimated 713,000 male victims of domestic abuse in 2017⁶⁸ and in the same year 21.4% of the cases referred to the Forced Marriage Protection Unit involved male victims⁶⁹. This limitation in the campaign was identified by many of the students in their responses and cannot be ignored. By failing to consider the wider victims of gender violence such as male victims, victims of abuse in a same-sex relationships or non-binary victims, it could be argued that the authors have not yet succeeded in fully achieving the aims of the study.

Research limitations

The research had other general limitations. This study only relates to students undertaking the Student Law Office module on the MLaw (Solicitors Route) Exempting course at Northumbria University. It therefore cannot be said to be representative of

⁶⁷ The Office of National Statistics estimates that, for the year ending March 2017, there were 1.2 million female victims of domestic abuse compared to 713,000 male victims: Office for National Statistics (23 November 2017) *Domestic abuse in England and Wales: year ending March 2017* <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017>>.

⁶⁸ Ibid

⁶⁹ Home Office (16 March 2018) *Forced Marriage Unit Statistics 2017*

students on other programmes or at other Higher Education institutions. It is recognised that the findings therefore cannot be generalised and further research is necessary to understand if this is an effective way of educating students more generally about GBV.

To maintain anonymity in the responses the students were not asked to identify whether they were participating in a family law firm in the clinic and therefore required to attend the sessions or whether they were a member of a different firm and therefore attending voluntarily. It could be argued that the 18 students who elected to participate in a family law firm, may have an existing interest in some of the issues covered. The findings may therefore not be representative of MLaw students more generally.

It was not possible to identify from the data which of the particular activities were most effective in developing the students' knowledge or practical skills. As such, the authors are only able to comment on the campaign as a whole. Furthermore, whilst the authors noted an improvement in the students' confidence and ability to deal with vulnerable clients (and this was mirrored in comments made by the respondents), it was not clear from the data whether this was directly related to their participation in the campaign or the fact that the students simply became more experienced at working with such clients over the course of the academic year. It is the authors' belief, however, that the campaign provided the students with the breadth of knowledge that allowed them to think more broadly (and more creatively) about the issues affecting their clients.

A final limitation of the study is that the data does not show whether the students' knowledge was retained beyond their participation in the 16 Days campaign. Research

suggests that studies which focus on ‘laws and justice’ may be more likely to have longer term benefits than curriculums which are interaction based (i.e. focussed on setting and communicating boundaries in relationships, the formation of relationships, wanted/unwanted behaviours)⁷⁰. The authors’ curriculum was predominantly focussed on law and justice however further research would be needed to evaluate the longer-term effects of the study.

IMPACT ON THE WIDER COMMUNITY

One of the underlying reasons for asking students to participate in the campaign was to aid them in assisting victims of GBV both in their clinic work but also in their future employment, should they choose a career in this field. The true aim of the project therefore goes beyond the impact on the students participating in the campaign, towards the impact on victims of GBV in the local community and beyond. This is something that was acknowledged by one of the participants who stated that:

“I know that working in family firms is rewarding but working in communities and with women where they seemingly have no other access to legal advice made it more satisfying.”

Since 2017, students in the family firms in the Student Law Office have provided assistance by way of advice or representation in over 30 cases and over 20 women have received advice through the Empower 4 Justice drop in clinic. In addition to this, the A

⁷⁰ Taylor, B. Stein, N. Burden, F (2010) ‘The Effects of Gender Violence/Harassment Prevention Programming in Middle Schools: A Randomised Experimental Evaluation’ *Violence and Victims Journal* Volume 25 Number 2. pp. 202-223.

Family Affair blog has received over 2200 views across 35 countries since its launch in November 2017.

The impact of this project was acknowledged at the annual Law Works & Attorney General Student Pro-Bono Awards, where it was awarded “Best New Pro Bono Activity”.⁷¹ The award nomination acknowledged the 16 Days campaign, combined with the wider work that the students do to assist victims of domestic abuse in the local community through the clinic, Empower 4 Justice and the online blog.

TAKING THE RESEARCH FORWARD – CONCLUDING REMARKS

Building on the feedback received and in a continued attempt to meet the aims set out, the authors now plan to move away from the female-focused 16 Days campaign, towards a two-day student conference that will consider a wider range of victims of GBV. Workshops will be developed to specifically discuss male victims of domestic abuse and domestic abuse within same-sex relationships.

However, when educating students about these issues, the authors consider that it is important to maintain the pedagogical focus of the activities, acknowledging that students learn in very different ways. Jacobson discusses the importance of this in her work around learning style theory and particularly how increased diversity of gender and ethnicity in law schools has equally led to increased diversity in thought and learning

⁷¹<https://www.lawworks.org.uk/solicitors-and-volunteers/get-involved/lawworks-and-attorney-generals-student-pro-bono-awards-2018>

styles.⁷² A variety of different learning activities will therefore be incorporated into the conference structure including workshops, poster competitions and documentary screenings.

Adopting a conference structure will also be an opportunity to engage students in research-rich learning, a focus for many UK higher education institutions. At the end of the conference, students will be invited to either submit an article to the “A Family Affair” blog⁷³ or a paper to the Student Journal of Professional Education and Academic Research⁷⁴. This has employability benefits for the students who choose to take up these publication opportunities and provides evidence of their research and written communication skills that they can provide to potential employers. The data already gathered indicates that this is a benefit that students particularly value.

Staff and students from other higher education institutions will also be invited to attend the conference. This will be an opportunity to share best practice in this area and to engage other universities where there is a demand for this type of work but where there may be a lack of expertise, time or funding to be able to run similar programmes. Secondly, this will allow data to be gathered on methods of educating students about GBV outside of Northumbria University, making the findings more widely applicable to higher education institutions.

⁷² Jacobson, M.H. Sam (2001) *A primer on learning styles: reaching every student (law school)*, Seattle University Law Review, Summer, 2001, Vol.25(1), p.140,

⁷³ <https://afamilyaffairsite.wordpress.com>

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- Forced Marriage (Civil Protection) Act 2007
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Academic perspectives on teaching international family law in higher education institutions in England and Wales

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ABSTRACT

The increasing prevalence of family law disputes in England and Wales with an international element is well documented in the development of domestic legislation, case law and family practice. However, despite changes to the legal landscape and the academic recognition of international family law as a legal subject, it is still often disregarded within the undergraduate family law curriculum or as a standalone module. This article explores the development of international family law in England and Wales and presents the findings of a national questionnaire into whether international family law is taught as part of the undergraduate curriculum. The article also explores what barriers exist to including international family law topics. To conclude, the author offers some general advice about incorporating these topics into the curriculum to ensure that students are equipped to deal with the realities of family practice in England and Wales.

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KEYWORDS International family law; legal education; curricula innovation; internationalisation

Introduction

International family law (IFL) regulates family law disputes with an international dimension, how the law in England and Wales compares with other jurisdictions and how international laws and treaties are implemented, interpreted and enforced.¹ The spread of IFL is arguably the result of globalisation, increased migration and the spread of human rights which has led to many parts of the world becoming more legally pluralistic and multicultural than ever before.² Increasingly, lawyers in England and Wales are called to advise on cases relating to adoption, child abduction, divorce, custody, and domestic violence where the parties live in or have assets in multiple jurisdictions.³ The family courts are also responding to an increase in cases where allegations of traditional harmful practices, such as forced marriage and female genital mutilation, are raised. Cultural competency is now a pre-requisite for family practitioners and the family justice system.

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¹A Speed, "Making the Case for International Family Law in the Law School Curriculum" (2018) 2 International Family Law Journal 120. Lexis Nexis.

²B Stark, "When Globalisation Hits Home: International Family Law Comes of Age" (2006) 39 Vanderbilt Journal of Transnational Law 1551.

³Speed (n 1).

However, despite changes to the legal landscape and the increasing academic recognition of IFL as a legal subject in its own right,⁴ the existing literature in this area suggests that the broad range of IFL issues rarely forms part of the undergraduate family law curriculum.⁵ Rather, the family law curriculum has remained concerned with teaching the basic principles of divorce and financial relief, private (and occasionally public) law children proceedings, domestic violence and cohabitation disputes. Research suggests that this is because of perceptions that IFL is a quickly changing area of law,⁶ because academics can be reluctant to promote change within the curriculum⁷ and there is no scope for new materials to be included in an already busy family law curriculum.⁸ However, the author is not aware of any empirical research that has been conducted to elicit the views of academics who are responsible for designing curriculum content and delivering family law modules.

This study aims to address this gap in the research by presenting the findings of a national study into whether IFL is taught as part of the undergraduate family law curriculum and, if not, what barriers exist for its inclusion. The author invited all of the 92 Higher Education Institutions (HEIs) that deliver an undergraduate family law module in England and Wales to participate in an online questionnaire. Thirty responses were received. The author also carried out a content analysis of the undergraduate family law curricula of the 62 HEIs that did not respond to the questionnaire, based on course materials available on their websites.

Why does teaching IFL matter?

Proponents of incorporating IFL into the family law curriculum often rely on the changing legal climate and demographics of many Western countries to argue that IFL no longer affects a minority of families and therefore is no longer only dealt with by a minority of specialist family law practitioners. The American scholar Stark argues that IFL is not simply a “curricula development” but rather a product of globalisation and the spread of human rights.⁹ These forces have changed family forms and dynamics and the laws that are required to regulate them:

Borders have become more porous, allowing adoptees and mail order brides to join new families and women fleeing domestic violence to escape from old ones. People of different nationalities marry, have children, and divorce, not necessarily in that order.¹⁰

Stark argues that in the US, IFL has become a legal subject because it matters enough to generate demands that it does so, because there is a coherent body of substantive law and an agreed-upon set of rules and processes that enable it to function, and because it grapples with the issues of the day:¹¹

Until that point, a legal subject can dally in elective seminars and esoteric panels... but when clients demand lawyers, judges ask for memos, lawyers call their old professors, committees are

⁴See Stark (n 2).

⁵W Reynolds, “Why Teach International Family Law in Conflicts” (1995) 28 *Vanderbilt Journal of Transnational Law* 411.

⁶D Hodson, *International Family Law Practice* (5th edn, Jordan Publishing 2016).

⁷Reynolds (n 5).

⁸T Mijatov, “Why and How to Internationalise Law Curriculum Content” (2014) 24 *Legal Education Review* 152, 153.

⁹Stark (n 2) 1551.

¹⁰*Ibid.*

¹¹*Ibid.* 1586.

formed, and bar panels organised, the legal subject must put aside the games of childhood and become rigorous and responsible.¹²

Stark's observations are mirrored in England and Wales, where it has been recognised that globalisation of the legal professions "has been rapid with exponential growth" from the mid-1980s.¹³ Flood argues that there "is an interdependence between the organisation of legal work and its cultural context ... law firms develop specific cultures which are forced to adapt to changing social and economic circumstance".¹⁴ This can clearly be seen in relation to IFL, which used to be the preserve of wealthy clients and highly specialised practitioners whose main remit was forum shopping for high net worth clients who wished to commence divorce and financial relief proceedings in the most favourable jurisdiction for their case.¹⁵ However, as a result of people seeking betterment in countries outside those in which they were born, the "black hole to which IFL was once consigned has imploded and IFL has made the leap from mega money couples to average families".¹⁶ Ignoring IFL is therefore an "unwise chauvinism" because citizens will encounter these issues and there is a significant volume of work awaiting legal practices.¹⁷

The demographic changes referred to by Stark and Hodson can be charted in England and Wales. Such changes are partly attributable to the common European citizenship as well as immigration from non-EU countries and asylum applications. It is estimated that around 9.2 million people – approximately 14% of the UK population – were born abroad.¹⁸ These statistics inevitably do not take into account second and third generations of migrant families who were born and raised in the UK but nonetheless retain strong familial ties to other jurisdictions. International aspects may also arise in a case if a party or child:

- (1) is or has been resident abroad, including spending any time abroad;
- (2) is or has been habitually resident abroad;
- (3) is or has been domiciled abroad;
- (4) is or has been a foreign national;
- (5) is or has been a citizen of another country;
- (6) has passports of more than one country;
- (7) was married abroad;
- (8) is in a polygamous relationship;
- (9) has entered into a civil registered relationship abroad;
- (10) has a foreign pre-marriage or other marital/relationship agreement;
- (11) has an agreement with a jurisdiction and/or choice of law clause;
- (12) has chosen the law of another country as the law to govern the marriage or financial relationship;
- (13) considers that another personal law, including religious laws, should apply to the relationship;

¹²*Ibid.*

¹³J Faulconbridge, "Global Law Firms: Globalization and Organizational Spaces of Cross Legal Work" (2008) 28 (3) *Northwestern Journal of Cross-Border Legal Work* 455.

¹⁴J Flood, "Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice" (1996) 3(1–2) *International Journal of the Legal Profession* 169, 172.

¹⁵Hodson (n 6).

¹⁶*Ibid.*

¹⁷Reynolds (n 5) 412.

¹⁸Office of National Statistics, *Migration Statistics* (2017) <www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/whatinformationisthereonbritishmigrantslivingineurope/jan2017#migration-statistics-background> accessed 20 August 2018.

- (14) owns real property abroad;
- (15) has a foreign pension;
- (16) has material assets held abroad;
- (17) has assets held by foreign companies or trusts;
- (18) is being educated abroad; and/or
- (19) is or has been involved in family law related proceedings abroad.¹⁹

These extensive circumstances demonstrate that whilst migration and globalisation may have resulted in the internationalisation of many other legal practice areas (and therefore similar arguments could be raised about the need to internationalise other areas of the law school curriculum), the laws that regulate families touch most of our lives in a way that many legal subjects do not. This is supported by Stark, who argues that families “matter most both in the sense that they matter more to people than to anyone else and in the sense that it may well matter more to them than anything else in their lives”.²⁰ Similarly, Bias recognises that family law may affect many elements of a person’s life, from concluding valid marriages, the disposition of claims in the event of a separation or dissolution, the protection of women’s rights and issues regarding where and with whom their children may live.²¹ This, he argues, has resulted in practitioners “‘internationalising’ practice even where they do not see themselves as practicing transnational law per se”.²²

Demographic changes have also led to an internationalisation of laws and the politicisation of many aspects of family law. International treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²³ and the Istanbul Convention²⁴ have set minimum standards with which signatories must comply to ensure the protection of women and girls from harmful practices such as early and forced marriage, female genital mutilation (FGM) and domestic servitude.²⁵ Such practices are now recognised not only as a form of familial violence but as a potential human rights infringement resulting from structural gender inequality that states have a positive obligation to prevent.²⁶ The legalisation of same-sex marriage is another such example of family law internationalisation that has followed the spread of human rights. Since the Netherlands was the first country to legalise same-sex marriage in 2010, over 27 countries have followed suit, including South Africa, Argentina and Colombia.²⁷

The internationalisation and politicisation of IFL has also led to the development of new domestic and international laws that lawyers must be able to understand, interpret and

¹⁹Hodson (n 6) 5–6.

²⁰Stark (n 2) 1587.

²¹B Bitas, “Comparative Law and 21st Century Legal Practice – An Evolving Nexus” (2012) 24 *The Singapore Academy of Law Journal* 331.

²²*Ibid.*

²³The Convention on the Elimination of All Forms of Discrimination Against Women is available at <www.un.org/womenwatch/daw/cedaw/cedaw.htm> accessed 18 February 2019.

²⁴The Istanbul Convention is more formally referred to as the Convention on preventing and combating violence against women and domestic violence. The full text can be accessed at <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>.

²⁵Istanbul Convention, art 12(1) requires states parties to “promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men”.

²⁶See the European Institute for Gender Inequality, “Estimating the Costs of Gender-Based Violence in the European Union” (Luxembourg: Publications Office of the European Union 2014).

²⁷See Pew Research Forum on Religious and Public Life <www.pewforum.org/2017/08/08/gay-marriage-around-the-world-2013/> accessed 17 July 2018.

apply. IFL laws have developed piecemeal in Europe.²⁸ However, they play a valuable role in providing legal certainty, ensuring reciprocity and enforceability and minimising delays (and therefore legal costs) for the parties. At an international level, the UK government has become a signatory to numerous intervention conventions that seek to ensure cooperation in children²⁹ and maintenance cases.³⁰ In respect of child abduction, the 1980 Convention on the Civil Aspects of International Child Abduction ensures the prompt return of children to their country of habitual residence unless a successful defence can be raised.³¹ Year on year there has been an increase in applications for return orders under the Convention. There were 954 applications worldwide in 1999 compared to 1961 in 2008.³² In England alone, the International Child Abduction and Contact Unit (the UK's Central Authority) dealt with 444 applications in 2011, up from 288 in 2010.³³

However, it is not necessary for the parties to be located in different countries for a case to have an international element and therefore domestic laws are equally relevant in teaching IFL. In England and Wales there has been a legislative and policy focus on ending cultural practices such as forced marriage and FGM. In 2005, the Foreign and Commonwealth Office and Home Office launched the Forced Marriage Unit (FMU) to lead on the government's forced marriage policy and casework.³⁴ In 2017, the FMU provided advice or support in relation to a possible forced marriage in 1196 cases.³⁵ Whilst forced marriage is a criminal offence under the Anti-Social Behaviour, Crime and Policing Act 2014 it is also linked to family law because victims may seek legal advice about the validity of their marriage. In November 2008, the government also introduced forced marriage protection orders as a civil remedy to protect someone who is being forced into a marriage or to declare a forced marriage invalid.³⁶ These provisions have met with some success in tackling violence against women. In 2018, 247 forced marriage protection orders were granted (in all cases the applicants were women).³⁷ Likewise, FGM protection orders were introduced in 2014 and since then over 222 applications have been made.³⁸

²⁸Hodson (n 6).

²⁹See Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L160/19 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000R1347>> accessed 18 February 2019.

³⁰See Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009R0004>> accessed 18 February 2019.

³¹See Hague Convention on the Civil Aspects of International Child Abduction 1980, art 1.

³²Judiciary of England and Wales. Office of the Head of International Family Justice for England and Wales, *Annual Report 1 January–31 December 2012* <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/international_family_justice_2013.pdf> accessed 18 February 2019.

³³*Ibid.*

³⁴The role of the Forced Marriage Unit (FMU) is to assist in the UK government's forced marriage policy, outreach and case work. In particular, it operates a national telephone line that provides advice and support in potential forced marriage cases. The FMU also works closely with consulates and embassies in other jurisdictions to assist in rescuing girls who have been removed from England and Wales for the purposes of a forced marriage. It provides training and awareness raising campaigns for professionals and affected communities.

³⁵Home Office and Foreign and Commonwealth Office, *Forced Marriage Unit Statistics 2017* (16 March 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709954/2017_FMU_statistics_FINAL.pdf> accessed 1 July 2018.

³⁶See the Forced Marriage (Civil Protection) Act 2007.

³⁷Ministry of Justice and National Statistics, *Family Court Statistics Quarterly: Annual 2017, including October to December 2017* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695363/family-court-stats-oct-dec-2017.pdf> accessed 18 February 2019.

³⁸*Ibid.*

Most recently, the government introduced the Modern Slavery Act 2015. The Act extends support for victims of human trafficking, slavery, servitude and forced and compulsory labour. As the author has examined in a separate article, modern slavery is a family law issue because women around the world perform a disproportionate amount of unpaid work in households and family businesses, and domestic servitude is an increasingly recognised form of familial abuse, particularly within black and minority ethnic households.³⁹ Children are also disproportionately likely to be victims of modern slavery and human trafficking and family practitioners may become involved in the representation of one of the parties in public law proceedings.⁴⁰ It is vital that family practitioners adapt to the changing family laws to ensure clients can secure representation from practitioners who are able to deal with their cases quickly, knowledgeably and expertly.⁴¹ Alongside new legislation, a number of practice directions under the Family Procedure Rules 2010 have been developed to provide guidance to practitioners involved in cases regarding international child abduction,⁴² polygamous marriages⁴³ and to regulate procedural matters.⁴⁴

The importance of IFL has also been recognised by the judiciary through the creation of the Office of the Head of International Family Justice,⁴⁵ which deals with IFL enquiries from judges, practitioners and academics globally and works with the Ministry of Justice and the Foreign and Commonwealth Office to ensure that cross-border family law cases are managed effectively. In its most recent annual report (2011–2012) the Office states:

The need for all involved in family law to integrate a trans-national mindset into their approach to resolving cases is self-evident, especially given globalisation, increasing movement of persons across borders, and the ever-rising number of family units which are truly international.⁴⁶

Similar comments have also been made by judges in relation to potential negligence claims. In the case of *Re H (Abduction: Habitual Residence: Consent)* Holman J issued a reminder to solicitors that they have a duty to draw the attention of the court to the 1980 Hague Convention where this is relevant:

... just as every general practitioner must be alert to spot a rare illness (even if he doesn't have the experience to treat it), so also anyone, whether judge or practitioner, having involvement in cases concerning children, must always be alert to spot a possible case of international child abduction.⁴⁷

³⁹Speed (n 1).

⁴⁰Ibid.

⁴¹Hodson (n 6).

⁴²See Practice Direction 12F of the Family Procedure Rules 2010.

⁴³See Practice Direction 7C of the Family Procedure Rules 2010.

⁴⁴See e.g. service outside of the jurisdiction (Practice Direction 6B), registration and enforcements of orders (Practice Directions 31 and 32), child arrival by air (Practice Direction 120), reciprocal enforcement of maintenance orders (Practice Direction 34A) and tracing payers overseas (Practice Direction 34B).

⁴⁵Information about the office can be accessed at <www.judiciary.gov.uk/about-the-judiciary/international/international-family-justice/> accessed 18 February 2019.

⁴⁶Judiciary of England and Wales (n 32).

⁴⁷*Re H (Abduction: Habitual Residence: Consent)* [2000] 2 FLR 294.

It is acknowledged that not all law students wish to enter legal practice. However, law students may go on to become frontline professionals in social work or in the police and increasingly such professionals are under a duty to identify and safeguard victims in IFL cases.⁴⁸

What are the objections and potential barriers to teaching IFL?

Many academics have recognised that there is some reluctance within legal education to break with tradition and innovate in the curriculum in response to changing legal climates. Reynolds, for example, acknowledges that academics can be “parochial” and unwilling to engage with new materials, particularly when those materials are complex or deal with sensitive issues.⁴⁹ Similarly, Sanders argues that undergraduate legal education in England and Wales is too intellectually narrow in its focus. He suggests that barristers and solicitors in England and Wales need a broader intellectual education in addition to their technical training “if we wish them to be professional and not merely technicians”.⁵⁰ Waters provides a practical example of this. He recognises that the legal curriculum has failed to incorporate dispute resolution within litigation courses, despite the policy focus on resolving disputes out of court.⁵¹ He argues that in order for less traditional content to be prioritised within the curriculum, law schools must adopt a more socio-legal approach. Adopting a socio-legal and vocational approach to legal education may increase the likelihood of IFL issues being taught within the undergraduate curriculum, given that it has emerged following a series of demographic and legal practice changes in England and Wales. IFL also has a socio-legal focus because it allows students to learn about the law and different religious, cultural and political perspectives.⁵² It is a subject that recognises and regulates all walks of life and allows students to engage with the current socio-legal climate in a way that many of the foundation subjects (i.e. contract, tort, equity and trusts) fail to do.⁵³ Bentley argues that such a shift within legal education has already started to take place. He recognises that traditionally, university education has focussed on “highly intellectual, theoretical learning and research”; however, this has gradually adapted to dominant social, political and economic circumstances.⁵⁴ In part, this is because of the shift from universities as sites of knowledge generation and research to their playing an increasingly vocational role in the education and training of a competent workforce.⁵⁵

In light of Brexit and the globalisation of legal practice described above, the curriculum must also become more internationalised. This relates to the fact that “legal training must

⁴⁸See e.g. the mandatory reporting duty on health and social care professionals under s 74 of the Serious Crime Act 2015, amending the Female Genital Mutilation Act 2003. This duty requires professionals to disclose cases of FGM to the police if they are informed by a girl under the age of 18 that she has undergone an act of FGM or they observe physical signs that an act of FGM may have been carried out on a girl under the age of 18.

⁴⁹Reynolds (n 5).

⁵⁰Cited in B Waters, “The Importance of Teaching Dispute Resolution in a Twenty-first Century Law School” (2017) 51(2) *The Law Teacher* 227.

⁵¹A Sanders, “Poor Thinking, Poor Outcome? The Future of the Law Degree after the Legal Education Training Review and the Case for Socio-Legalism” in H Sommerlad, S Harris-Short, S Vaughan and R Young (eds), *The Futures of Legal Education and the Legal Profession* (1st edn, Hart Publishing 2015) 140, 147–48; as cited in Waters (n 51).

⁵²Reynolds (n 5).

⁵³Speed (n 1).

⁵⁴D Bentley, “Employer Perspectives on Essential Knowledge, Skills and Attributes for Law Graduates to Work in a Global Context” (2014) 34 *Legal Education Review* 98.

⁵⁵*Ibid.*

bear a relationship to legal practice ... as the contours of the latter change, so, too, must the former".⁵⁶ Bitas argues that this should be achieved at an early stage of legal education (i.e. at undergraduate level) so that students develop an appreciation that law and legal practice do not occur in a "jurisdictional vacuum".⁵⁷ Mijatov defines "internationalisation" within the curriculum as "the process of integrating the international dimension into the major functions of a university course" whereas "international" refers to an "intercultural, global outlook and where 'dimension' includes perspectives, activities and programmes with that end in sight".⁵⁸ This geographical diversity is seemingly missing from the undergraduate legal curriculum in England and Wales, where only one of the core modules – EU law – considers international law. EU law can be regarded as a specific "supranational" form of international law due to the principle of direct effectiveness, which allows it to be directly pleaded and relied upon by individuals before national courts and provides that it has primacy over any conflicting national laws. As such, international law, in its strictest sense, is often entirely absent from the core curriculum. Twining argues that confining the core subjects to domestic law cannot last long in light of the changes to legal practice considered above.⁵⁹ This position is further supported by a report undertaken for the Legal Services Board, which found that the UK is one of the biggest exports of lawyers to other jurisdictions. Using data from the Law Society the Board identified that 6000 solicitors on the Electoral Roll in 2010 were practising outside their home jurisdiction.⁶⁰

The benefits of internationalising the curriculum are recognised by academics as economic, political, humanistic, and academic.⁶¹ The economic arguments revolve around the contention that law graduates, law firms and universities cannot survive in a globalised world with a legal education that focusses only on domestic law. This is because universities need to attract international students for financial and reputational purposes, and law students themselves must be equipped to deal with legal disputes and their clients' legal interests, which are likely to extend beyond their local practice area.⁶² This supports Bentley, who suggests that globalisation has facilitated a shift from "small local law firms, working within the parochial confines of national law and single jurisdictions, to law firms working across multiple jurisdictions and within a much broader international legal context".⁶³ Bentley's study, which was conducted in Australia and Hong Kong, identified that law firms are increasingly seeking graduates with an "international perspective", "global sensitivities" and a familiarity with different legal systems. Therefore, modules that lend themselves to international perspectives should integrate these core values and skills within existing courses.⁶⁴ His respondents also felt that modules in private international law and comparative international law would be useful to help graduates work with or within multiple jurisdictions.⁶⁵ This supposes that employers expect graduates to understand

⁵⁶Bitas (n 21) 319.

⁵⁷Ibid.

⁵⁸Mijatov (n 18) 143.

⁵⁹W Twining, *Law in Context: Enlarging a Discipline Chapter 8 General and Particular Jurisprudence: Three Chapters in a Story* (Oxford University Press 2012).

⁶⁰Speed (n 1).

⁶¹Mijatov (n 18). See also D Bourn, "From Internationalisation to Global Perspectives" (2011) 30 *Higher Education Research and Development* 559; J Knight, "Internationalization Remodeled: Definition, Approaches, and Rationales" (2004) 8 *Journal of Studies in International Education* 5.

⁶²Mijatov (n 18); Bentley (n 55) 95.

⁶³Bentley (n 55) 95.

⁶⁴Ibid.

⁶⁵Ibid.

the law and values underpinning international practice before they enter the world of work and do not regard it as a specialist skill or knowledge that is picked up on the job.

In relation to IFL specifically, law schools play a particularly important role in developing students' interest in this area because there has been reluctance among some family law practitioners to engage with IFL. Hodson believes this is because IFL can be a complex, alien and quickly changing area of law.⁶⁶ This is a self-fulfilling prophecy however, because if IFL was taught within undergraduate family law curriculums, it is arguable that future practitioners would have the confidence to engage with these legal provisions. Further, it may encourage more scholarly activity in this field.⁶⁷ This is important because England is the world's leading family law jurisdiction for international cases due to its close connections within Europe, North America and the Commonwealth.⁶⁸

The political, humanistic and academic benefits of internationalising the curriculum all derive from the fact that teaching students about alternate legal systems encourages them to think critically and develop their curiosity⁶⁹ whilst also enhancing their "sense of the interconnectedness of all things in a globalised world".⁷⁰ This criticality, in turn, may develop students' interest in law reform as they are naturally more willing to challenge why the law is how it is. This approach supports Reynolds' proposition that IFL is "important, liberating, cross cultural and fun" because it allows students to engage with topics and materials that they may not otherwise encounter on their degree programmes and exposes them to different legal systems and approaches to the law that promote "fascinating discussion" and "intriguing legal questions" for students to engage with.⁷¹ As the author has examined in a separate article, the implications of the UK leaving the EU and the impact this will have on family law will likely provide interesting and contentious legal fodder over the coming few years: Should we maintain the current system of full reciprocity? What are the dangers of incorporating EU law in domestic law but losing the existing EU reciprocal arrangements? Could we start from scratch and set up a new arrangement? Would other international instruments suffice?⁷² There are a range of publications in relation to child abduction, divorce and children which have already started to critique these different options.⁷³

However, there remain a number of objections to internationalising the curriculum. These objections can be applied directly to teaching IFL topics. The first concern is that such a curriculum development reduces the time available for teaching domestic law and that

⁶⁶Hodson (n 6) 5.

⁶⁷Jonathan Barrett, "Barriers and Bridges: Reflections on Teaching New Zealand Commercial Law to International Students" (Paper presented at Reflective Practice: The Key to Innovation in International Education Conference, Centre for Research in International Education, Auckland, New Zealand, 23–26 June 2005).

⁶⁸Ibid.

⁶⁹Mijatov (n 18) notes that internationalising the curriculum can lead to students questioning legal authority, legitimacy and acceptance within their particular legal system and can reinforce or shatter underlying notions about what is the "best" legal system.

⁷⁰Ibid.

⁷¹Reynolds (n 5).

⁷²Speed (n 1).

⁷³See e.g. P Beaumont, "Private International Law Concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations"; A Dutta, "Brexit and International Family Law from a Continental Perspective"; B Crawford, "Divorcing Europe: Reflections from a Scottish Perspective on the Implications of Brexit for Cross-border Divorce Proceedings"; N Lowe, "What are the Implications of the Brexit Vote for the Law on International Child Abduction?"; R Lamont, "Not a European Family: Implications of 'Brexit' for International Family Law". All published in the *Child and Family Law Quarterly*, 3 September 2017.

the increasing complexity of domestic law is already a pressure for academics. In addition, academics are apprehensive about the level of specialist knowledge and experience they require in order to incorporate international topics into their course content.⁷⁴ These are practical burdens rather than true objections to the idea that IFL should be taught. Mijatov states that the first argument is not persuasive because internationalising the curriculum does not mean a reduction in the amount or quality of domestic law teaching, and lecturers can easily be taught how to add international material to their existing course content.⁷⁵ In addition, unless an area is particularly complex, many international concepts and legal provisions can be mastered with some reading and determination. This is certainly true of IFL, where many of the topics (i.e. forced marriage and FGM) are regulated by domestic law. As such, it is more likely that the real obstacle is that academics have a lack of interest or a closed attitude towards teaching international and foreign law.⁷⁶

A further resourcing difficulty is lack of financial support.⁷⁷ Again, cost will depend on the method of incorporation. For example, it is less expensive to add international materials to an existing module or develop relationships with overseas institutions for the purposes of facilitating placements abroad compared to the costs associated with developing new modules and recruiting qualified staff to teach on these modules. However, it is also recognised that support in the form of financial resourcing can increase the rewards from internationalisation. Bitas, for example, argues that an approach that addresses the issue simply in a manner that is manageable for academic purposes is likely to be too detached from reality to be useful. Instead, he argues that it is necessary to “change the terms of reference” to allow for internationalisation to be at the forefront of legal education. Many academics have argued that these practical burdens should not therefore outweigh the benefits that come with incorporating international material.⁷⁸

A further argument is that students cannot gain a meaningful understanding of international law or legal systems over a short period of time, and that attempting to teach students can lead to confusion. Arguably, the effectiveness of any curriculum development will depend on *how* IFL is incorporated into the curriculum. Further, as has already been considered, many IFL issues are also regulated by domestic law, so consideration of these topics does not necessarily require significant knowledge of international provisions. In any event, academics have dismissed this objection as being “irrelevant”. Mijatov, for example, notes that “internationalising is not primarily valuable for its ability to thoroughly teach a foreign legal system” as freestanding elective courses exist to achieve this aim.⁷⁹ Instead, the key aims are to achieve the academic, humanistic, political and economic benefits described above. Similarly, Jukier dismisses the suggestion

⁷⁴D Bentley and J Squelch, “Employer Perspectives on Essential Knowledge, Skills and Attributes for Law Graduates to Work in a Global Context” (2014) 24(1) *Legal Education Review* 93.

⁷⁵Mijatov (n 18).

⁷⁶Reynolds (n 4); E. Salehi-Sangari and T Foster, “Curriculum Internationalization: A Comparative Study in Iran and Sweden” (1999) 33(7/8) *European Journal of Marketing* 760.

⁷⁷Salehi-Sangari and Foster (n 77).

⁷⁸See C O’Sullivan and J McNamara, “Creating a Global Law Graduate: The Need, Benefits and Practical Approaches to Internationalise the Curriculum” (2015) 8(2) *Journal of Learning Design* 53. See also the Special Edition of the *German Law Review* (2009) 10 (6/7), “Following the Call of the Wild: The Promises and Perils of Transnationalising Legal Education”.

⁷⁹Mijatov (n 18) 153.

that teaching students about international law can confuse them.⁸⁰ Instead, she argues that it can strengthen students' understanding of domestic law by making them better able to deal with diversity and complexity in law. Jukier makes an analogy with linguistics:

Exposing young children to two languages simultaneously leads them to become more fluently bilingual than would be the case if the children had been exposed to the two languages sequentially, first mastering one and then moving to the other. Similarly, the philosophy of legal education at McGill posits that the best way to learn multiple modes of legal perspectives is to integrate their study right from the outset.⁸¹

In relation to IFL more specifically, it has also been argued that legal education in England and Wales prioritises subjects concerned with property and the protection of property rather than those subjects that necessarily effect our day-to-day lives. In turn, this means that IFL is less likely to be taught. Sanders argues that law schools typically prioritise subjects that serve a particular section of society – “contract law, property law, equity and trusts with the doctrinal approach focused on appellate decisions, in other words the law of the wealthy”.⁸² This means that the laws of the majority are written out of the curriculum.⁸³ Sanders argues that social welfare law does not feature in the curriculum because there is a belief that legal aid cuts have significantly reduced practice in this area.⁸⁴ Whilst this may be more accurate in areas such as immigration and welfare law, this does not correspond with IFL because legal aid remains available for cases involving domestic abuse and honour-based violence, child abduction and cases where children are at risk of harm.⁸⁵ Teaching IFL can therefore provide a balance against privilege within the curriculum.⁸⁶ This is because whilst in the past IFL has been the reserve of wealthy individuals, increasingly it regulates cases with a social justice and human rights focus, such as forced marriage and FGM. Misconceptions may therefore arise from the fact that academics are not always also practitioners, and changes to substantive law and practice take time to filter from the courts to the classroom.

The introduction of the solicitors qualifying examination (SQE) will be an opportunity to introduce new materials into the legal curriculum. It is anticipated that many institutions will continue to offer a traditional liberal arts programme. These institutions will ultimately have more scope to include subjects such as IFL through elective modules (either within existing family law modules or as a freestanding module) as there will be no requirement to teach the core modules. In relation to the bar programme, future barristers will still need to complete a qualifying law degree, meaning there will still be scope for bar students to complete electives in family law and/or IFL at an undergraduate level. However, institutions that intend only to offer preparatory courses for SQE 1 and SQE 2 are unlikely to teach family law (let alone IFL) given that it is not one of the core subjects for SQE 1 or practical contexts for SQE 2. This reveals a paradox in that whilst one of the stated aims of the reform is to

⁸⁰R Jukier, “Transnationalising the Legal Education: How to Teach What we Live” (2006) 56 *Journal of Education* 172.

⁸¹*Ibid* 178.

⁸²Sanders (n 52).

⁸³F Crownie, A Bradney and M Burton, *English Legal Systems in Context* (6th edn, Oxford University Press 2013) 129.

⁸⁴Sanders (n 52).

⁸⁵Speed (n 1).

⁸⁶*Ibid*.

ensure the competence of solicitors through a wholesale reform of legal education and training, it is proposed that this will be achieved through a much more restricted curriculum than is currently taught.⁸⁷ A restricted curriculum is likely to have disadvantages. As Sanders has noted, it encourages students to be “merely technicians” with no broader intellectual understanding.⁸⁸ Further, it is arguable that this may reduce the number of students seeking to pursue a career in family law, legal aid or social justice law where many IFL topics (such as forced marriage and FGM) are encountered. This is because, with the exception of criminal law, the SQE 2 contexts are almost exclusively commercially focussed.⁸⁹ Teaching students about IFL as part of their legal education could provide them with a foundation of knowledge or spark an interest that might otherwise not be explored if these issues are absent from the curriculum. In turn, this would mean that future practitioners are less able to identify and respond to their clients’ needs. In this sense, it is difficult to see how a more restricted and commercial focussed curriculum could lead to more competent IFL practitioners.

How can IFL be incorporated into the curriculum?

It is recognised that responses from law schools to incorporating international materials have ranged from “trail blazing to apathetic”.⁹⁰ At one end of the spectrum, some law schools have sought to develop international teaching partnerships and encourage their students to study or work abroad throughout their legal programmes.⁹¹ At the other end of the spectrum, institutions such as McGill University in Canada have adopted a transnational approach to all legal programmes.⁹² McGill University exposes students to legislative, jurisprudential and doctrinal materials from Canada, the US, Australia and many European countries. The ambition is to create more broadly trained “cosmopolitan jurists” who have outward-looking, responsive legal minds.⁹³ Ultimately, the approach adopted is likely to depend on the institutions’ commitment to internationalisation and the resources they are able to dedicate to the endeavour.

O’Sullivan et al. argue that there are four key approaches to internationalising the curriculum, which are not necessarily mutually exclusive. These are: the aggregation approach, the segregation approach, the integration approach and the immersion approach.⁹⁴ The aggregation approach involves setting up separate specialist modules for international law or comparative law which are offered as elective subjects. A limitation of this approach is that it can treat international issues as “specialised” and does not allow students to gain an appreciation of how international issues permeate every legal practice area. The segregation approach requires an institution to establish a separate international centre for teaching and research around international issues. This approach is arguably the most resource intensive and, as such, it requires an academic commitment to

⁸⁷Solicitors Regulation Authority: a new route to qualification: The Solicitors Qualification Examination (SQE) (October 2016) Consultation.

⁸⁸Sanders (n 52).

⁸⁹The SQE 2 contexts are dispute resolution, property, wills and the administration of estates, and commercial and corporate practice.

⁹⁰Mijatov (n 18); Bentley (n 55).

⁹¹M Davis and B Withers, “Reproductive Rights in the Legal Academy: A New Role for Transnational Law” (2009) 59(1) *Journal of Legal Education* 35.

⁹²Jukier (n 81).

⁹³*Ibid.*

⁹⁴O’Sullivan and McNamara (n 79).

internationalisation. The integration approach is the most extensive method and requires institutions to “comprehensively integrate the law in other jurisdictions and global perspectives into core subjects and electives as well as research and student services”.⁹⁵ In the author’s view this is the most effective approach as it places internationalisation at the forefront of legal education. However, it requires a similar level of commitment to internationalisation as the segregation approach. Finally, the immersion approach provides opportunities for students to study in a different jurisdiction. This approach is premised on the idea that it is preferable to learn the law of another jurisdiction while physically present in that jurisdiction.

Similarly, Mijatov argues that institutions can either quantitatively or qualitatively internationalise the curriculum.⁹⁶ The former requires incorporating international materials in any way possible since the goal is simply to increase global exposure. This approach is more aligned with the aggregation and segregation approaches described above as it favours teaching international material through separate courses, increasing the number of international cases referred to and potentially the number of internationally authored textbooks.⁹⁷ This approach invariably risks “tokenism” since there is no overall commitment to internationalism. Further, arguably it does not go far enough to “reap the rewards” of internationalisation, as discussed above.⁹⁸

In contrast, the qualitative approach requires a paradigmatic shift in the attitude adopted to legal education. This approach focuses on the legal problem and then “provides a range of solutions to that problem drawn from a number of jurisdictions instead of providing students with a single – domestic – response to that problem”.⁹⁹ This approach is more aligned with the integration approach identified by O’Sullivan. The qualitative approach is arguably more effective, not least because elective programmes typically come later in the degree programme and it may be more difficult for students to engage with internationalisation if they are not exposed to it at an earlier stage. Further, the qualitative approach stresses the importance of giving international material a substantial role in the programme by “discussing the differences, contradictions and similarities between international and domestic materials” rather than simply mentioning international materials for its own sake.¹⁰⁰

Following the aggregated approach, IFL can be taught as a standalone module. Alternatively, within the integrated approach it could be taught as part of a family law elective. The most comprehensive approach would adopt both measures. There is an argument that IFL could simply be taught within a private international law (better known as “conflicts”) module. This suggestion has been rejected by academics, such as Stark, as it undermines the fact that IFL has “grown up” and become a subject of its own.¹⁰¹ Whilst conflicts may be offered on an elective basis at some institutions to introduce topics such as jurisdiction, choice of law and recognition and enforcement of judgments, this is by no means as popular an option as family law. Forsyth describes conflicts as “the Cinderella

⁹⁵Ibid 56.

⁹⁶Mijatov (n 18); Bentley (n 55).

⁹⁷Ibid.

⁹⁸Ibid.

⁹⁹Ibid.

¹⁰⁰Ibid.

¹⁰¹Stark (n 2).

subject; seldom studied [and] little understood".¹⁰² Prosser also recognises that the way conflicts is taught can make it inaccessible to students and non-conflicts academics. He notes:

The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.¹⁰³

Further, the conflicts module is more likely to consider these issues in the context of contract law and tort than family law disputes.¹⁰⁴ As such, it is not an appropriate substitute for teaching IFL in a family law elective. The importance attributed to commercial private international law over family law in international concerns can be evidenced in the ongoing Brexit negotiations. The draft withdrawal agreement published in November 2018 makes innumerable references to trade relations and agreements, but there appear to be no proposals for regulating arrangements in family cases or how the proposed withdrawal agreement will affect the EU family law legislation on which millions of people rely each year.¹⁰⁵ This is despite the recital to the draft withdrawal agreement stating that one of the key aims is to "recognise that it is necessary to provide reciprocal protection for Union citizens and UK nationals, as well as their respective family members".¹⁰⁶

Methodology

The existing literature in this area suggests that IFL rarely forms part of the undergraduate family law curriculum. However, the author is not aware of any empirical research eliciting the views of academics who are responsible for designing curriculum content and delivering family law modules. This is

¹⁰²C Forsyth, *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the High Court* (Juta & Company 2003).

¹⁰³W Prosser, "Interstate Publications" (1953) 51 Michigan Law Review 1952.

¹⁰⁴Reynolds (n 4).

¹⁰⁵It was suggested in the Brexit and family law Joint paper of Resolution, the Family Law Bar Association and the International Academy of Family Lawyers (October 2017) available at <http://www.resolution.org.uk/site_content_files/files/brexit_and_family_law.pdf> that there are four broad possibilities in relation to family law upon the UK's withdrawal from the EU. The first would be to maintain a system of full reciprocity (i.e. that EU instruments are replicated in domestic law and current reciprocal arrangements with EU Member States are maintained). The second approach would involve EU instruments being replicated in domestic arrangements but the current reciprocal arrangements with EU Member States would no longer be maintained. The third approach would require a bespoke arrangement. The fourth approach would be a "no deal" scenario. On 6 November 2018, Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, wrote a letter to the chair of the Justice Select Committee in response to the Committee's letter concerning a 23 October 2018 evidence session on the implications of Brexit for the justice system. Concerning the question of whether international child abduction is sufficiently addressed in the draft withdrawal agreement, specifically in reference to Brussels II, art 11, Frazer said that the government agreed that the current EU civil judicial cooperation rules will continue to apply during the implementation period that runs until the end of 2020 and stated that the government will continue to operate the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction to secure the prompt return of abducted children. The ongoing role of the Court of Justice of the European Union (CJEU) after Brexit is not yet clear, but it may continue to have jurisdiction in relation to the UK during a Brexit implementation period. In family law cases, the CJEU has considered issues such as jurisdiction, enforcement and the definition of habitual residence.

¹⁰⁶The draft withdrawal agreement published in November 2018 is available at <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf> accessed 18 February 2019.

potentially due to the fact that there is still a clear preference towards doctrinal studies within English and European scholarship and therefore there is a paucity of empirical legal studies more generally, although literature indicates that this is improving.¹⁰⁷ This study aims to address this gap in the research.

The sample was identified by conducting an electronic UCAS search of all HEIs in England and Wales offering law as an undergraduate degree programme. The results highlighted 114 such HEIs, which comprised 107 universities and 7 colleges and professional education providers. A manual analysis of course prospectuses published online revealed that 22 of these institutions did not offer a module in family law. Given the scope of the questionnaire, these institutions were excluded from the sample. An invitation to participate in the questionnaire was sent to the remaining 92 institutions in December 2017. Thereby, the whole of the research population was invited to participate. In the majority of cases, the online prospectuses identified a teaching lead which meant that email invitations were targeted to an appropriate contact. It was hoped that this would improve the response rate and therefore the representativeness of the study. Where no contact was identified, the email was sent to a generic law department email address. A chaser email was sent in January 2018. The questionnaire was hosted by Bristol Online and remained open for completion until 4 February 2018.

An online questionnaire was designed to elicit information about whether IFL topics are taught within the undergraduate family law curriculum and, where they are not, to identify any barriers or counterarguments that exist to incorporating these subjects within the curriculum. The questionnaire focussed on substantive legal topics that have been the focus of legislative or practice development, case law or media attention in recent years. As there is no readily accepted definition of IFL, it was not possible to include a definition, or to ask family law academics whether they teach "IFL". Instead, the respondents were asked whether they taught any of the following subjects within their undergraduate family law modules:

- (1) child abduction;
- (2) child relocation;
- (3) FGM;
- (4) forced marriage;
- (5) honour based violence;
- (6) human trafficking;
- (7) international adoption;
- (8) international injunctions;
- (9) international surrogacy;
- (10) jurisdiction;
- (11) modern-day slavery;
- (12) religious marriage contracts; and
- (13) recognition and enforcement of judgments.

¹⁰⁷See e.g. P Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012); L Cahillane and J Schweppe, "Legal Research Methods: Principles and Practicalities" (Clarus Press 2016); T Eisenberg, "The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns", Cornell Law Faculty Publications, Paper 974 (2011).

This approach was designed to ensure all of the respondents had the same understanding of the topics regarded as falling within the scope of IFL for the purposes of the questionnaire. The legal significance of many of these topics was addressed earlier in this article.

If the respondents reported that they did teach a particular topic, they were asked how the topic was incorporated into the curriculum. This could include one or more of the following options:

- (1) students can gain experience in this topic by practising live cases within our pro bono clinic;¹⁰⁸
- (2) students can complete their dissertation in this area;
- (3) students will complete or have completed coursework in this topic;¹⁰⁹
- (4) the topic is taught in a lecture;
- (5) we deliver a seminar/workshop on this topic; and
- (6) other, please specify.

Alternatively, if the respondents did not teach a particular topic, they were asked to explain this with reference to the following list:

¹⁰⁸Clinical legal education (CLE) has been one of the most widespread trends in legal education in England and Wales over the last few decades. It is “a method of training law students by putting them in situations where they must apply the legal theory, principles, and doctrines they have studied in the classroom setting”: R Dunn, “A Systematic Review of the Literature in Europe Relating to Clinical Legal Education” (2017) 24(2) *International Journal of Clinical Legal Education* 81. CLE takes various forms, including simulation, drop-in clinics and full representation clinics. Research suggests that over 70% of all law schools offer practical, focussed, pro bono opportunities to their students (P McKeown, “Pro Bono: What’s in it for Law Students? The Students’ Perspective” (2017) 24(2) *International Journal of Clinical Legal Education* 43). In the year ending March 2017 40% of the 225 clinics within the LawWorks Network operated within law schools. These law school clinics received 18,461 enquiries over the year. Law school clinics accounted for 50% of all clients receiving general information, signposting or referral. This suggests that many students at universities in England and Wales have the opportunity to engage with clinical education. In 2017, family law was the most popular area of law with which clinics assisted, comprising over 25% of the enquiries received (LawWorks, “LawWorks Clinic Network Report April 2016–March 2017: analysis of pro bono legal advice work being done across the LawWorks network between April 2016 and March 2017” (2017)).

¹⁰⁹Elective modules are typically summatively assessed by way of a written piece of coursework or examination. It was felt that if an IFL topic was included within the assessment it was more likely to be regarded as a core element of the curriculum, rather than an ancillary topic or simply being taught as part of a wider topic.

Table 1. Response rate by geographical region.

Region	Invitations	Responses	Response rate (%)
North East	5	4	80.0
North West	18	6	33.3
Midlands	17	6	35.3
South East	37	10	27.0
South West	8	3	37.5
Wales	7	1	14.3

Table 2. Response rate by type of institution.

Type of institution	Invitations	Responses	Response rate (%)
Russell Group ¹¹⁵	20	12	60.0
Plate Glass	9	3	33.3
New Universities	56	13	23.2
Other ¹¹⁶	7	2	28.6

- (1) there is not enough time to cover this topic within the course;
- (2) the topic is not relevant to the practice of family law;
- (3) the topic is not relevant to the subject area;
- (4) the topic is too complex to cover within this module;
- (5) this is a sensitive topic – we would have concerns for student wellbeing if we taught this topic;¹¹⁰
- (6) there is no student demand for this topic to be taught;
- (7) we cover this topic in other modules;
- (8) we do not have any staff specialising in this area who teach on the module; and
- (9) other, please specify

The benefit of using an online questionnaire was that it was quick and relatively easy to design and allowed the author to reach individuals in distant locations.¹¹¹ In addition, questionnaires are widely regarded as an appropriate method to test people's attitudes, beliefs, views and opinions in relation to a particular topic.¹¹² The questionnaire was free to design, albeit the university pays a subscription for the use

¹¹⁰In relation to sensitive content, the family law curriculum covers many potentially distressing topics, including domestic abuse and child abuse. The author argues that there are benefits to teaching such subjects as they contribute towards students' ability to work with clients from diverse backgrounds who may have different values to their own. In order to appropriately prepare students for professional practice, it is also necessary to address sensitive issues in order to develop students' resilience. Heath et al. agree that classes on sensitive material can provide "spaces for students to hear and respectfully engage with opinions that may confront their own, which is an important skill in any professional or social environment": M Heath, C Due, W Hamood, A Hutchison, T Leiman, K Maxfield and J Warland, "Teaching Sensitive Material: A Multi-disciplinary Approach" (2017) 4(1) ERGO 9). However, law schools are increasingly conscious of whether and how they teach sensitive or controversial topics. This is because, as educators, we owe a duty of care towards our students to ensure their wellbeing in addressing such topics. As researchers such as Heath et al. have highlighted, our cohorts are likely to be comprised of students who have experienced trauma or potentially the subject matter in discussion and we should rightly be mindful of exposing such students to re-victimisation. However, rather than simply leaving a topic off the curriculum, curriculum planning should ensure that students have advance notice if sensitive content is being taught.

¹¹¹B Wright, "Researching Internet-Based Populations: Advantages and Disadvantages of Online Survey Research, Online Questionnaire Authoring Software Packages, and Web Survey Services (2005) 10(3) Journal of Computer-Mediated Communication. Available at <<https://academic.oup.com/jcmc/article/10/3/JCMC1034/4614509>>

¹¹²See e.g. M McConville and W Chui, *Research Methods for Law* (Edinburgh University Press 2007).

of Bristol Online's services. In addition to providing design tools, Bristol Online offers features that assist data collection and analysis, such as the ability to export responses to statistical software packages such as SAS and SPSS.¹¹³

A total of 30 responses to the questionnaire were received, meaning the study had an overall response rate of 32.6%. This can be broken down as shown in Table 1 and Table 2.

As the questionnaire was sent to the entire research population (i.e. all HEIs who appear to teach family law), the data had the potential to be representative of the population being examined. However, the response rate of 32% meant that the data gathered from the questionnaire could not be reflective of the overall participants more generally.¹¹⁶ The response rate was higher among particular populations of respondents and therefore could make some claims about its representativeness amongst these groups. For example, as Table 1 illustrates, 80% of HEIs in the north east of England responded to the questionnaire. A response rate of 80% is likely to be regarded as representative.¹¹⁷ In contrast, as Table 1 demonstrates, there was a very low response rate of 14.3% from HEIs based in Wales; therefore the study cannot make any claims about its representativeness in this region. Further affecting the representativeness of the data was the potential for response bias, in that those institutions with an interest in IFL may have been more likely to complete the questionnaire and/or teach IFL topics. In contrast, it may be that those institutions that did not respond are less likely to teach IFL. This, in itself, would have been revealing about the treatment of IFL topics within the curriculum as 67.4% of the sample did not complete the questionnaire. However, if response bias was present, the exclusion of these responses from the questionnaire would also have reduced the representativeness of the data obtained. This is discussed further, below.

A descriptive statistical analysis was used to examine the prevalence of teaching IFL topics and to identify any counterarguments or barriers to incorporating IFL in the curriculum. The responses were also classified according to the geographical region of the HEI and the type of institution. This allowed for regional and institutional patterns to be identified. A free text box was included at the end of the questionnaire to allow participants to express any other thoughts about including IFL topics within the curriculum. Twenty-one comments were received and coded on paper.¹¹⁸ The study received ethical approval from Northumbria University.

¹¹³Ibid.

¹¹⁴There are 24 Russell Group universities (see <https://russellgroup.ac.uk>). However, Edinburgh, Glasgow and Queen's University Belfast were not included because they are not located in England and Wales. Further, Imperial College London was excluded from the survey since, according to its website, it did not appear to offer an undergraduate module in family law.

¹¹⁵"Other" refers to colleges and professional education providers that do not have university status.

¹¹⁶See e.g. social scientist researchers JM Converse and H Schuman, *Conversations at Random* (Wiley 1974) 40 where it was said that a non-response rate of 20% is a reasonable amount of missing data and does not jeopardise the representativeness of the sample. In the present study, the response rate was closer to 68%.

¹¹⁷Ibid.

¹¹⁸The author designed a matrix of squares that recorded each of the respondents' free text box answers based on the different themes that the answer raised. This allowed the most popular themes raised by the respondents to be identified. This was a relatively simple process because the comments were frequently short. For example, one of the comments simply stated "the biggest hindrance is the lack of time". This comment was only included in one square under the theme of "barrier: time". In contrast, the response "we discuss impact of human rights and Brexit" was recorded in the squares relating to "scope of the module" and "additional topics covered". The key themes identified in the matrix were (1) scope of the module, (2) recognition of IFL as important to the family law curriculum, (3) barrier: expertise, (4) barrier: time, and (5) additional topics covered (i.e. which were not asked about in the questionnaire). The use of the matrix was in part based on a coding strategy discussed in T Basit, "Manual or Electronic? The Role of Coding in Qualitative Data Analysis" (2003) 45(2) Educational Research 143.

In order to test whether response bias was present in the questionnaire responses, the author also carried out a review of the prospectus information available about the content of the undergraduate family law curriculums of the 62 institutions that did not respond to the questionnaire. This was carried out in August 2018, six months after the questionnaire closed. The review took the form of a content analysis. Hall et al. define a “content analysis” as where a researcher “collects a set of documents on a particular subject and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning”.¹¹⁹ Content analysis is predominantly utilised in empirical legal studies to analyse legislation and court judgments;¹²⁰ and, as Cane argues, there is still an apparent reluctance of empirical legal researchers to use non-legal documents (such as, in this case, module prospectuses) as sources of data, which may be due to concerns about the reliance that can be placed on such documents. However, Hall et al. note that this method has the potential to produce data that is high in reliability as it follows systematic procedures that can be replicated.¹²¹ Further, “this method comes naturally to legal scholars because it resembles the classic scholarly exercise of reading a collection of cases, finding common threads that link the opinions and commenting on their significance”.¹²²

In this study the author reviewed the information published online in relation to the content of the non-responding HEI’s family law curriculums. To identify the appropriate modules, the author carried out an online search for each institution’s “family law” module. Where this did not produce any results, alternative searches were carried out such as “child law”, “matrimonial law” and “private international family law” and “international family law”. In the majority of cases, each institution only had one relevant module. However, where an HEI appeared to be delivering more than one relevant module, both modules were analysed. The module information was coded according to the different topics that were listed as being taught. This allowed the author to examine whether IFL issues were taught either as a standalone topic or as part of a wider topic. The occurrences of each topic were also recorded to allow inferences to be drawn about which, if any, IFL topics seemed to be most prevalent in the curriculum. Each time a topic fell within a code, it was given a score of 1. The following codes were identified and many of the topics fell within multiple codes:

- IFL
- Marriage and divorce
- Financial claims
- Cohabitation
- Private children law
- Public children law
- Domestic abuse
- Miscellaneous

¹¹⁹M Hall and R Wright, “Systematic Content Analysis of Judicial Opinions” (2008) 96(1) *California Law Review* 63, art 2.

¹²⁰*Ibid.*

¹²¹*Ibid.*

¹²²*Ibid.* 64.

In 42 cases (67.74%), information about the undergraduate family law curriculums was published on the HEIs' websites. In 20 cases, no information was available, and the analysis could not be completed in respect of these modules. Taken together with the data obtained through the questionnaires, the analysis therefore considered the curriculums of 72 out of a total of 92 HEIs that appeared to teach family law at an undergraduate level. This was an effective response rate of 78.3% across the two research methods.

A limitation of the content analysis that will affect the reliability of the data collected and the representativeness of the study is that the information included on institutions' websites was taken at face value. It is possible that this information was out of date and therefore not reflective of the current curriculum. This was particularly relevant as the content analysis was carried out during the academic summer when module materials are most likely to be updated. Further, in many cases, the only information provided about the module content was broad headings or blurbs about the topics covered. This meant that it was not always possible to identify whether IFL topics were taught within broader subjects (for example, whether forced marriage was taught as part of marriage validity or domestic abuse). Where this was not explicit, the author inferred that such topics were not taught. This reveals a further limitation of this method, which is that the selection and interpretation of codes is subjective to the author. Again, this will affect the representativeness and reliability of this study.

Discussion

As discussed above, all of the HEIs were selected on the basis that they taught family law at undergraduate level. The respondents reported that in all cases family law was taught as an elective module. As is shown in Table 3, the modules attracted varying levels of credits.

One of the respondents selected "other" and noted that its institution offers two family law modules, each of which attracts 20 credits. Typically, 20 credit modules are

Table 3. Credits attached to family law modules.

	Number of respondents	Percentage (%)
10 credits	0	0
15 credits	4	13
20 credits	16	53
25 credits	0	0.0
30 credits	9	30
Other	1	3

delivered over one semester, therefore the majority of these modules will have taken place over approximately a 12-week period.

Is IFL taught in undergraduate family law curriculums?

The content analysis confirmed that, as one might expect, the majority of undergraduate family law modules focus on the basic principles of divorce and financial relief

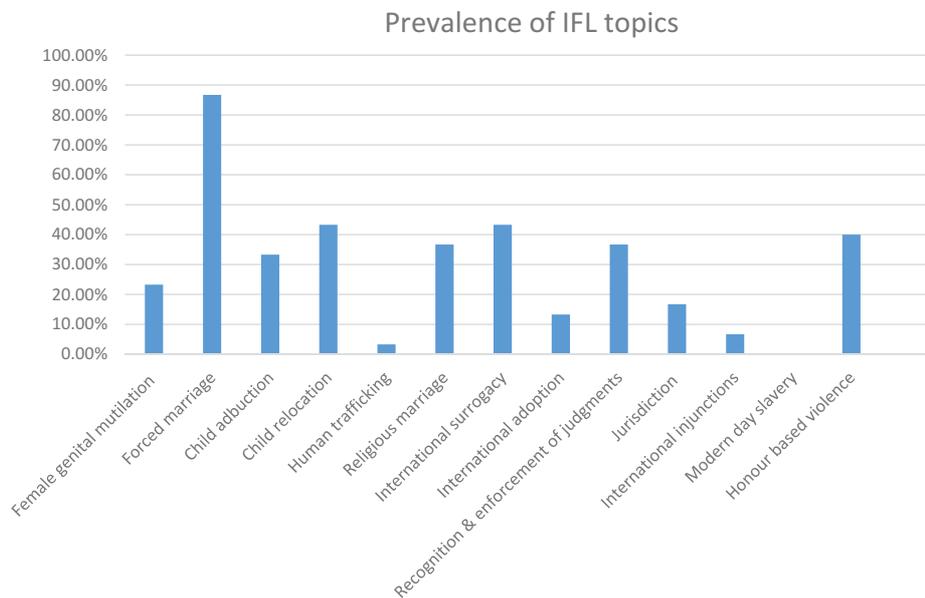


Figure 1. Prevalence of IFL topics.

proceedings, private (and to a lesser extent public) law children proceedings, domestic violence applications and cohabitation disputes. This appeared also to be representative of the respondents that completed the questionnaire. One respondent, for example, stated “the focus of the module is on divorce, finances, children and domestic abuse in a workshop format”, whilst another noted that its module covered “marriage, divorce, division of assets, cohabitation and private and public aspects of child law”.

The data from the questionnaire indicates that many of the respondents acknowledge the increasing importance of IFL and internationalisation more generally. This was evidenced through the author being invited to deliver a guest lecture on IFL to family law students by one of the respondents directly as a result of the questionnaire. Another of the respondents reported that it had been contacted by a leading family law judge about the importance of including the significant issue of forced marriage in the undergraduate law curriculum and how the law can prevent such practice, especially when a minor is involved. Following Mijatov, the respondents also acknowledged the economic, political, humanistic and academic value of IFL in the qualitative comments:

Our college is based in a wider participation area, so subjects like FGM, forced marriage and religious marriages are of relevance in terms of domestic law. Students find these sessions both informative and eye opening.

International law is often disregarded within the context of family law, but I feel it adds a level of depth to critiquing family law issues at the domestic level.¹²³

¹²³One respondent made a similar comment that “as a new member of staff, I am planning to develop the curriculum to incorporate FGM in subsequent years”. The same respondent stated that they were also “planning to incorporate honour violence into the module development”. Another respondent noted that international perspectives “can illustrate western constructs of family, childhood and cultural imperialism”.

The increasing importance of IFL was also reflected in the curriculum where it was clear that efforts are being made to incorporate some IFL topics. All of the respondents identified teaching at least one of the IFL subjects; however, there were differences between the number of subjects that were taught, the extent to which they were incorporated into the formal curriculum and the method of incorporation. This is demonstrated by Figure 1.

The respondents to the questionnaire taught an average of 3.8 of the 13 topics shown in Figure 1 within their family law curriculums; however, inevitably not all institutions taught the same topics. The content analysis indicated that IFL topics were also taught by those institutions that did not participate in the survey, albeit to a lower extent. This suggests that there was some degree of response bias in the questionnaire data. In total, there were 16 references to IFL topics within the content analysis, meaning around 38% of the institutions taught at least one family law topic. The actual figure may be higher than this as most institutions did not include comprehensive details of the topics taught.

The data obtained through the questionnaire suggested that there was no positive statistical correlation between the type of institution (i.e. Russell Group, plate glass, new universities or other) and the extent to which IFL was incorporated into the curriculum. This was interesting because new universities are typically regarded as more innovative and practical focussed in their approach to legal education.¹²⁴ As such, it may be expected that they would be more likely to adapt their curriculums to reflect the changing legal landscape; however, this was not the case.

There was, however, a geographical variation in the extent to which IFL was incorporated into the curriculum. Of the 14 institutions that taught fewer topics than the 3.8 average, 10 (71%) were based in the north of England or Wales. Likewise, of the 16 institutions that taught more than the average, 12 (75%) were based in the Midlands or the south of England. This may be reflective of demographic trends that demonstrate that London has the highest population of non-UK-born and non-British nationals.¹²⁵ Further, individuals identifying as black or Asian are more likely to be concentrated in London and the Midlands.¹²⁶ In contrast, many of the least ethnically diverse local authorities are based in the north of England and Wales.¹²⁷ It is possible that institutions based in areas with high levels of internationalisation are more mindful of the issues facing their local communities (and student populace) and this has filtered into the curriculum.

Contrary to expectations, the most frequently taught topics were not those that would benefit clients seeking to protect assets or protect financial claims (such as jurisdiction, recognition and enforcement of judgments and international injunctions). There was therefore no evidence within the data that the curriculum favoured particular demographics, as hypothesised by Sanders and Crownie. In contrast, the most popular IFL subject that was included in the undergraduate family law curriculum was forced marriage. This was taught by 26 (87%) of the respondents that completed the

¹²⁴This can be seen, for example, in the introduction of clinical legal education that has been predominantly offered at new universities. Northumbria University and Sheffield Hallam are good examples of HEIs that have put clinical legal education at the forefront of legal education.

¹²⁵The Office of National Statistics statistical bulletin, *Population of the UK by country of nationality* (2017) <<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/2017>> accessed 23 July 2018.

¹²⁶HM Government, "Regional Ethnic Diversity Statistics" (2018) <<https://www.ethnicity-facts-figures.service.gov.uk/ethnicity-in-the-uk/ethnic-groups-by-region>> accessed 23 July 2018.

¹²⁷Examples include Cumbria, Red Car and Cleveland, Northumberland, Powys and Caerphilly: *ibid*.

questionnaire. This finding was also mirrored in the content analysis. The popularity of teaching forced marriage is arguably reflective of the legal and policy focus on protecting women through forced marriage protection orders and the creation of the Forced Marriage Unit. As such, the data suggests that there may be a link between the amount of policy attention given to a topic and its likelihood of inclusion within the curriculum. Pessimistically, as forced marriage also fits within the broader family law topics of marriage validity and domestic abuse, it is also possible that the respondents found it quantitatively easier to incorporate into existing topics, following Mijatov.¹²⁸

The content analysis also revealed that family law academics adopt a more socio-legal approach to the undergraduate curriculum than anticipated. This was evidenced in the following module descriptions:

We look at families and family law in their social and cultural contexts.

The changing nature of “the family”, with reference to issues such as scientifically assisted reproduction, ethnic cultures and traditions, sexual orientation.

The extent to which the law accommodates different family forms and interpersonal relationships in the light of cultural, religious and social variables.¹²⁹

These module descriptions indicate that institutions that adopt a socio-legal approach may be more likely to teach IFL. This is because these modules seem more open to examining the changing legal landscape that has brought about the need for IFL, the cultural issues that may affect international families, and wider legal practice developments. This supports the literature, which suggests that a socio-legal approach can bring added intellectual diversity to the legal curriculum and open the door for innovation within the curriculum.¹³⁰

The data from the questionnaire suggests that an IFL topic is more likely to be covered if it is regulated by domestic legislation. This was evident in relation to forced marriage, which is regulated entirely by the Family Law Act 1996. There was a perception that topics regulated by domestic legislation were not too complex to be included in the curriculum and, therefore, following Salehi-Sangari,¹³¹ did not require specialist knowledge on the part of the lecturer. However, this led to disparities in that complementary topics governed by international law were still largely ignored within the undergraduate family law curriculum.

An example of this can be found in international surrogacy (which was taught by 13 of the responding institutions) and international adoption (which was taught by only four of the HEIs). Surrogacy arrangements are regulated by domestic legislation (the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008) whereas there is an international framework for dealing with inter-country adoption through the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. However, the processes of surrogacy and adoption target similar markets (typically same-sex couples and those

¹²⁸Mijatov (n 18).

¹²⁹Another respondent commented that they “consider the extent to which English family law is based on the Judaeo-Christian tradition and how easily it accommodates family patterns from different ethnic and faith traditions. This is examined both in relation to domestic law and the recognition of overseas marriages and divorces”.

¹³⁰Sanders (n 52).

¹³¹Salehi-Sangari and Foster (n 77).

unable to conceive naturally) and involve third-party participation in the reproductive process.¹³² As such, they could logically be taught as complimentary subject areas. There was a perception that international adoption was more “complex” than surrogacy – three of the respondents cited this as a reason for not teaching adoption, compared to two similar responses in relation to surrogacy. Further, eight of the respondents stated that they did not have staff specialising in adoption, whereas this was only mentioned in five responses for surrogacy. Twenty-one of the respondents reported that there was “not enough time” to cover adoption, whereas this was only cited in 14 responses in relation to why surrogacy was not taught. The exclusion of international adoption from the family law curriculum suggests that practical barriers such as time, expertise and attitudes to internationalisation may be key drivers affecting whether a topic is incorporated in the curriculum. It also suggests that academics are adopting a “quantitative” approach and looking for an “easy” fix to the issue of internationalisation.¹³³ Surrogacy and adoption both provide stimulating legal questions for students to critically engage with. For example, why is adoption perceived as an acceptable method of building a family, whereas in many countries surrogacy is illegal or discouraged? Should it be lawful for Madonna to adopt twins in Malawi who have a living father?

The findings of this study support the work of Davies, who argues that many areas of reproductive rights lend themselves to being studied with an international focus, but they are often neglected within the curriculum.¹³⁴ Her research found that only 19 universities in the US offered courses in reproductive rights law and, of these, only five adopted a transnational approach.¹³⁵ In relation to family law, she notes that topics such as sterilisation, abortion and surrogacy are often relevant in the context of fundamental rights to make decisions about one’s own family life. The contrasting case law that has emerged globally demonstrates differing approaches to the law and promotes students’ curiosity and ability to challenge perceived injustice. High profile cases include the Canadian Supreme Court case of *Eve (Mrs) v Eve*, which concerned a mother’s application to sterilise her daughter who had significant mental impairments;¹³⁶ *Javed v State of Haryana*, where the Supreme Court of India addressed a policy that individuals with more than two children were barred from seeking election for certain official government positions;¹³⁷ *Chavez v Peru*, which arose from the Peru government’s policy of sterilising poor women in the 1980s and 1990s;¹³⁸ and the recent US decision of *Carhart II*, which banned particular methods of abortion regardless of the impact on women’s health.¹³⁹ As such, teaching about reproductive health in family law has the potential for academic benefits. In addition, there are likely to be economic benefits to discussing these topics, as our domestic case law demonstrates that judges are regularly asked to adjudicate on cases relating to the

¹³²S Mohapatra, “Adopting an International Convention on Surrogacy – a lesson from intercountry adoption”, Digital Commons at Barry University (2015) <<https://lawpublications.barry.edu/cgi/viewcontent.cgi?article=1082&context=facultyscholarship>> accessed 25 June 2018.

¹³³Mijatov (n 18).

¹³⁴Davis and Withers (n 92).

¹³⁵*Ibid.*

¹³⁶*Eve (Mrs) v Eve* [1986] 2 SCR 388 (Can).

¹³⁷*Javed v State of Haryana* (2003) AIR SC 3057.

¹³⁸*Maria Mamerita Mestanza Chávez v Peru* (Case 12.191), Inter-Am CHR, Report No 71/03, Friendly Settlement Agreement (2003) <<http://cidh.org/annualrep/2003eng/Peru.12191.htm>> accessed 19 February 2019.

¹³⁹*Gonzales v Carhart* 127 S Ct 1610 (2007).

validity of adoption and surrogacy agreements entered into or to decide where and with whom such children should live.¹⁴⁰

The discrepancy in the inclusion of domestic versus international materials was also reflected in the statistics on child relocation and child abduction, which are complementary subjects because they both regulate cases where one parent wants to remove or does remove a child from the jurisdiction. Child relocation, for example, was taught by 13 of the respondents and is regulated by domestic case law (specifically the Children Act 1989 and the case of *Re F (A Child) (International Relocation Case)*).¹⁴¹ In contrast, only 10 of the respondents reported teaching child abduction. In the majority of cases, child abduction is regulated by international legislation including the 1980 Hague Convention on the Civil Aspects of International Child Abduction and Brussels II.¹⁴² As has been explored above, there is an economic case for teaching child abduction as there are thousands of applications for the summary return of abducted children under the Hague Convention each year.

There may be a number of reasons why those responsible for designing course content decide not to incorporate topics regulated by international law. In addition to the practical barriers discussed above, it is possible that this finding supports Reynolds' suggestion that academics do not like complex and unfamiliar statutes and, as a result, often avoid teaching these materials.¹⁴³ If module leaders are exercising their discretion to deliberately avoid these subjects based simply on their own parochialism, then at best they are doing a disservice to their students, and at worst this is a form of professional misconduct.

This level of parochialism will be increasingly problematic in a post-Brexit era when England will be more closed-off to other legal systems. However, Brexit will also add legal complexity to some previously well settled areas of family law and therefore it is vital that academics are not hesitant to keep pace with these changes. In the coming months (and potentially years) UK policy makers will have to consider how to re-shape the UK private international law regime, whilst EU policy makers will need to assess the impact of the UK's decision to leave the EU.¹⁴⁴ In the post-Brexit era, there will also be a need for arrangements between the UK and EU to ensure an effectively functioning regime that facilitates parties' access to remedies in cross-border cases.¹⁴⁵ As Briggs has identified, Brexit will have a considerable impact on the relevant legal literature: "[i]t could mean that about half the pages in the current edition of Dicey – the better half, as some would say – could be torn out and thrown away".¹⁴⁶ Academics will therefore need to assess which areas of their module are affected and what proposals are being considered for reform. Failing to do so may result in students being taught outdated and irrelevant provisions that will clearly compromise any academic, political and economic benefits derived from the module.

¹⁴⁰See e.g. *Re JJ (A Child)* [2011] EWHC 921 (Fam); and *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

¹⁴¹[2015] EWCA Civ 882, [2017] 1 FLR 979.

¹⁴²Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1, repealing Regulation (EC) No 1347/2000.

¹⁴³Reynolds (n 4).

¹⁴⁴M Danov, "Cross-Border Litigation in England and Wales: Pre-Brexit Data and Post-Brexit Implications" (2018) 25(1) *Maastricht Journal of European and Comparative Law* 139.

¹⁴⁵*ibid.*

¹⁴⁶As reported in *ibid.*

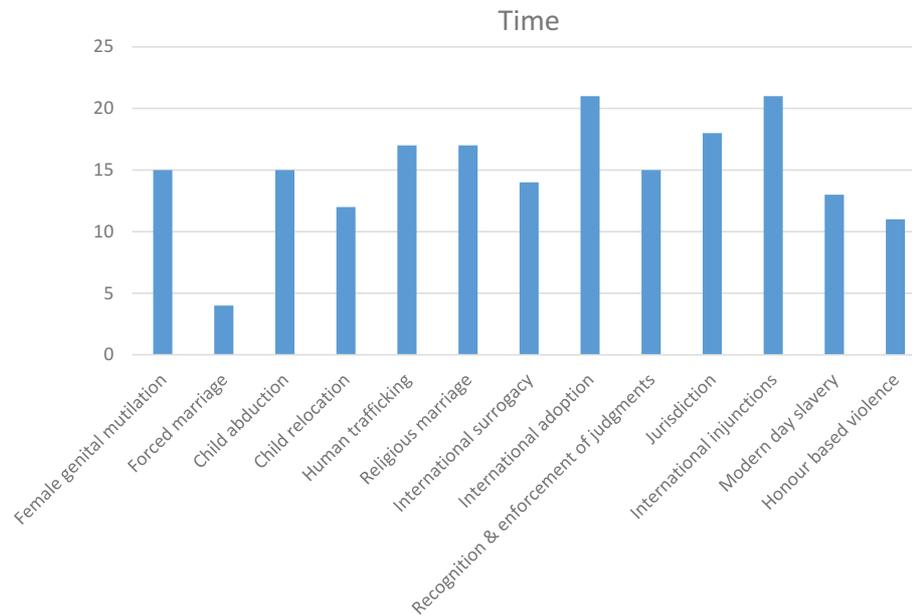


Figure 2. Time.

Barriers in practice to incorporating IFL into the family law curriculum

As outlined above, in principle the respondents were positive about incorporating IFL into the curriculum. However, they identified key practical obstacles to taking such a step. This reflects Jukier's observation that "not much time was spent at the conference on the somewhat tired and trite theme of globalization or the reality of cross-border transactions. These were accepted as givens. Rather, the focus of that day was on the 'how'".¹⁴⁷

Supporting the literature in this area, the main barriers were perceived to be time and staff expertise. However, one barrier emerged that was not identified in the literature – this was that some of the IFL topics were not recognised as being relevant to the subject area or practice of family law. In contrast, a lack of student demand for these topics to be taught and concerns about student wellbeing were rarely cited as barriers to incorporating IFL topics. This suggests that academics were more concerned with the practical barriers that would burden themselves, rather than the student experience.

Time

Supporting Mijatov's findings, time was perceived to be the main practical obstacle to incorporating IFL into the curriculum as most of the modules were delivered over one semester (see Figure 2). This resulted from the fact that the existing family law curriculum was perceived to be at capacity. This was also one of the key themes arising from qualitative comments:

¹⁴⁷Jukier (n 81).

The undergraduate family law module is limited in scope due to the amount of lectures that can be provided.

We do not teach the full range of international family law topics primarily because there would be insufficient time within an already packed curriculum.

The biggest hindrance is lack of time.¹⁴⁸

Whilst time was identified as a key obstacle, there was no positive relationship between the number of IFL topics taught at an institution and the amount of credits attached to a module. For example, one of the respondents, whose module was only worth 15 credits, taught five of the IFL topics, whereas another, whose module attracted 30 credits, taught only two of the topics. This suggests that either there is no direct link between the length of a module and the amount of credits attached to it, or in fact time was not the obstacle the respondents perceived it to be.

As this article has already considered, there are a number of ways in which IFL topics could be brought into an existing family law module. At a very basic level, this could include referring to cases with an international element. In relation to domestic abuse, for example, the topic could be contextualised within the wider international instruments to which the UK is a signatory, such as CEDAW and the Istanbul Convention. This would allow for students to develop an understanding of domestic abuse as a gendered human rights infringement and the proposals for tackling violence against women and girls. Forced marriage, for example, could be considered in the context of marriage validity and declarations of nullity and non-recognition. Within a lecture or seminar on domestic abuse, forced marriage could also be taught alongside occupation orders and non-molestation orders as a form of injunctive protection. Similarly, child relocation proceedings could be taught within a lecture or seminar on parental responsibility and child arrangements. This approach could be regarded as either the integrated approach discussed by O'Sullivan or the quantitative approach discussed by Mijatov, as it would achieve a measurable increase in the IFL topics discussed but by incorporating this within an existing course. This also replicates the approach adopted at McGill University, where international issues (and legislation) are interwoven with domestic law.¹⁴⁹ It was clear that some of the respondents were also making attempts to do this:

We bring in honour-based issues within domestic violence. The part of the module dealing with children covers relationships and orders within England and Wales. Child abduction is mentioned but only in passing.

We discuss FGM briefly as a child safeguarding topic.

¹⁴⁸Other respondents made similar comments, including "international family law issues are explored to some extent on this course but ... we currently have 20 hours of lectures. Therefore, with such limited time availability, the key topics in domestic law are prioritised (marriage, divorce, division of assets, cohabitation, private and public aspects of child law)"; "the international dimension is only covered insofar as relevant for domestic law. Time precludes proper engagement with international family law"; "the undergraduate module cannot accommodate these diverse issues".

¹⁴⁹Jukier (n 81).

Forced marriage is not taught as a separate, specific topic, but within the topics of marriage and domestic abuse.¹⁵⁰

Within the content analysis, there was also evidence that international issues, legislation and legal traditions were being explored alongside domestic perspectives. One institution, for example, reported that its family law module included a tutorial on international perspectives that considers how children are protected under EU laws, whilst another noted that the module would conclude with a session on European and international family law. One module stood out as achieving full integration between family law and IFL. The scope of this family module included:

Sources of the law of the family in the legal systems of selected countries: Africa or Asia including diasporic minority ethnic and religious communities in England and Wales.... where appropriate, the received laws, local statutory laws, religious and customary laws in the field of marriage and domestic relations, their comparison and interaction will be studied. The module includes the law of family property and succession and both the traditional and modern law will be studied.

This module most closely resembled a qualitative integrated approach as it placed internationalisation at the forefront of the exercise and considered the legal traditions and perspectives of other countries rather than just giving a cursory mention to international legislation to which England is bound.

The benefit of the integrated approach is that it does not treat international issues as “specialist” or only affecting a minority of communities. It also appears to have academic benefits for students in that it can lead to improved levels of comprehension amongst students who study different legal systems. From an economic perspective, it also enables students to gain an international perspective and global sensitivity, as discussed by Bentley.¹⁵¹ However, the potential disadvantage of this approach is that there is unlikely to be sufficient time to consider all of the topics in any level of detail. Further, as Mijatov highlights, considering IFL topics as part of a wider subject will usually not result in the full benefits of internationalisation because it is typically achieved without a qualitative shift in the pedagogical approach to incorporating such subjects.

An alternative approach would be for IFL to be taught as a standalone module. This would mean that IFL topics did not encroach on an already busy curriculum. This is the aggregation approach, propounded by O’Sullivan.¹⁵² The respondents appeared to favour this approach, despite the fact that it was rarely practised by them:

I find it difficult to find the time to teach all of these topics together with traditional family law topics – it is probably suited to a stand-alone elective module.

It seems that there is more than enough for a bespoke international family law module.¹⁵³

At the author’s own institution, a range of responses to incorporating IFL has been adopted, using a mixed qualitative and quantitative approach, in order to reap maximum benefits. For example, efforts have been made to incorporate IFL issues into the mainstream family law curriculum where possible. Within the law school

¹⁵⁰Another respondent noted “we do teach about restrictions on removing children from the jurisdiction as an aspect of parental responsibility (in a tutorial)”.

¹⁵¹Bentley (n 55) 95.

¹⁵²O’Sullivan and McNamara (n 79).

¹⁵³Other respondents made similar comments including “international family law issues would need to be dealt with in a stand-alone module”; “In order to do justice to the full range of international family law topics, we would almost require a separate module”.

clinic, for example, family law students work with a black and minority ethnic women's organisation to advise their clients about issues such as marriage validity (i.e. to what extent Islamic marriages are recognised under domestic law) and how their clients can be protected against culturally specific forms of domestic abuse such as FGM, slavery, forced marriages and honour-based violence. Students are also invited to attend a range of documentary screenings about IFL issues, including *Banaz: A Love Story*,¹⁵⁴ *Eve's Apple*¹⁵⁵ and *Not my Life*.¹⁵⁶ After the screenings, students discuss the issues raised. Finally, students are encouraged to develop their knowledge of IFL areas by preparing articles for the law school's family law blog.¹⁵⁷ Documentary screenings and blog articles are simple, inexpensive and effective ways of bringing additional elements into the curriculum.

Ultimately, however, IFL at the author's institution is offered as a standalone 20-credit, level 6 elective module. The module runs alongside the elective in family law; however, it is not compulsory for students of IFL also to study family law. The module covers jurisdiction, connecting factors, marriage validity and religious marriage contracts, forced marriage, FGM and child abduction, over one semester.¹⁵⁸ The module provides intellectual and pedagogical diversity by combining black letter law (i.e. an academic focus on conflicts concepts including the connecting factors of domicile and habitual residence), a practical focus on substantive areas of law (i.e. through problem-based learning) and law reform.

As an example, the recognition of Islamic marriage is taught as an area of law in need of reform through an exploration of the key case law in this area, which demonstrates the unpredictability with which Islamic marriages have been regarded as valid, void or non-marriages.¹⁵⁹ This issue has been at the forefront of research and practice in recent years.¹⁶⁰ Many Muslim men and women only have an Islamic Nikah ceremony (i.e. the religious ceremony) and are unaware that in the majority of cases, a Nikah does not create a legally recognised marriage, with the couple regarded as cohabitants in English law.¹⁶¹ Therefore, should the marriage break down, the parties will not have the same protection of the law as they would have if they had had a civil registry marriage. This can be disadvantageous because it allows men to marry multiple women – one woman by way of a Nikah and civil registry and a second wife by way of a Nikah only. In such circumstances, there is no polygamy in the eyes of English

¹⁵⁴*Banaz: A Love Story* (2012) documents the life and death of Banaz Mahood, a young Kurdish Iranian girl living in Britain who was subject to a so-called honour killing by her parents. The documentary is available at <<https://www.youtube.com/watch?v=VepuyvhHYdM>> accessed 26 August 2018.

¹⁵⁵*Eve's Apple* (2017) is a documentary about the fight to end female genital mutilation around the world. The documentary is currently available to subscribers of Netflix (as at 26 August 2018).

¹⁵⁶*Not My Life* (2011) tells the story of human trafficking and modern slavery across all five continents. The documentary can be purchased at <<https://www.notmylife.org>> accessed 26 August 2018.

¹⁵⁷IFL topics covered include FGM protection orders, strategies to end FGM, honour killings and international child abduction case updates. To view the articles, see the "A Family Affair" blog at <<https://afamilyaffairsite.wordpress.com>> accessed 19 February 2019.

¹⁵⁸For more information about the module, see <<https://www.northumbria.ac.uk/study-at-northumbria/courses/m-law-exempting-ft-uufmay1/modules/lw6028-international-family-law/>> accessed 20 August 2018.

¹⁵⁹See e.g. the key cases of *Akhter v Khan* [2018] EWFC 54; *Hudson v Leigh* [2009] EWHC 1306 (Fam); *MA v JA and the Attorney General* [2012] EWHC 2219 (Fam).

¹⁶⁰See e.g. K O'Sullivan and L Jackson, "Muslim Marriage (Non) Recognition: Implications and Possible Solutions" (2017) 39(1) *The Journal of Social Welfare and Family Law* 22; Law Commission, "Getting Married; a Scoping Paper" (2015); "The Independent review into the application of sharia law in England and Wales", Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty (2018).

¹⁶¹See <https://www.familylaw.co.uk/news_and_comment/the-big-islamic-nikah-myth#.WkgVLSOcauk> accessed 19 February 2019.

law but if the relationship with the second wife breaks down, she will have limited financial claims against her husband. The difficulties with this have led to the “Register our Marriage” campaign, which consists of lawyers, academics and parliamentarians who are lobbying for a change to the Marriage Act 1949 to increase the prospects of a Nikah ceremony falling within the requirements of the Act. Drawing on the academic benefits, teaching Islamic marriage as an area for law reform also provides students with an opportunity to consider whether this is an issue of some faiths receiving unfavourable treatment under the law or whether it is an issue of integration as this is seemingly a problem affecting only Islamic communities rather than other minority faiths such as Sikhs and Hindus.¹⁶²

Three of the respondents to the questionnaire reported teaching standalone international modules in international family law, international child law or Islamic family law. The focus on child law and Islamic law are likely to be because of the disproportionate number of cases dealt with in the family courts involving children¹⁶³ and Islamic women.¹⁶⁴ The focus on Islamic law is also perhaps unsurprising given that there are over 3.3 million Muslims living in England, many of whom will be first and second generation migrants who have retained close links to their country of origin.¹⁶⁵ Within the content analysis, only one of the institutions delivered a freestanding IFL module and this was in private international family law (i.e. conflicts of law). This suggests that whilst private international law may be an alternative way of teaching IFL topics, it does not appear to be a popular offering. The benefit of a standalone module is that topics can be covered in more detail than they would through being integrated into existing family law topics; however, this risks “tokenism”.¹⁶⁶

Not recognising the topics as relevant to family law

Another obstacle to incorporating IFL into the curriculum was that a few of the topics were not identified as relevant to the subject area or practice of family law, as shown in Figure 3. Seven of the respondents reported that FGM was not relevant to the subject area or practice of family law. This suggests that there is a lack of understanding amongst family law academics about the protection afforded to victims of FGM through the family courts and the fact that family legal aid remains available to fund such proceedings. This perception had a clear effect on whether FGM was taught. Whilst forced marriage was taught by 87% of the respondents, FGM was taught by

¹⁶²Islamic Nikah ceremonies (just like any other religious marriages) can result in a valid marriage if they comply with the requirements of the Marriage Act 1949. This requires ceremonies to take place in a licensed premises and be conducted by an approved person in the presence of witnesses; the marriage must subsequently also be registered. It has been noted by both academics and the judiciary that the failure to comply with these requirements can be deliberate, in order to deprive the financially weaker “spouse” (usually the wife) of financial claims if, in the event of separation, the marriage is held to be a “non marriage” (see e.g. the case of *Akhter v Khan* [2018] EWFC 54; *O’Sullivan and Jackson* (n 166). Such control can, in itself, arguably be an example of domestic abuse.

¹⁶³As outlined earlier in this article, most recent figures for applications under The Hague Convention were collected in 2011. At that time, applications had increased from 954 worldwide in 1999, to 1259 in 2003 and 1961 in 2008. Since then, the number of return applications dealt with by the International Child Abduction and Contact Unit (the UK’s Central Authority) increased further, with 407 such applications in 2009, 288 in 2010 and 444 in 2011 (Judiciary of England and Wales (n 32)). Of course, this does not reflect the full picture as these figures do not include children removed to non-Hague/non-Brussels II countries whose return is sought under the court’s inherent jurisdiction.

¹⁶⁴See e.g. the discussions regarding the recognition of Islamic marriages and forced marriage.

¹⁶⁵Annual Population Survey April 2017 to March 2018, Weighted Person Weight APS 2017.

¹⁶⁶*O’Sullivan and McNamara* (n 79).

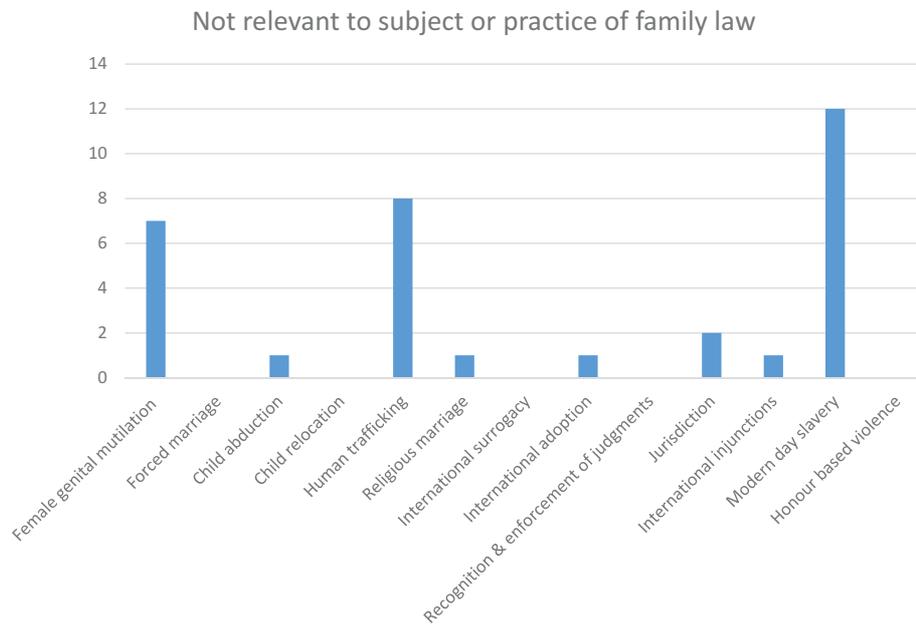


Figure 3. Not relevant.

only 23%. As mentioned earlier in this article, the government responded to both forms of violence by criminalising the practices, introducing protection orders and issuing guidance for professionals. There are also similarities between forced marriage and FGM in that both are a form of family violence and honour violence that are disproportionately perpetrated against young black and minority ethnic (BAME) women. This disparity suggests that more needs to be done to raise the profile of FGM protection. It also lends support to the view that most of the respondents adopted a quantitative approach, simply incorporating IFL topics where it was convenient to do so. This is because, with the exception of domestic violence, FGM does not fit as well into broader family law topics in the same way as forced marriage.

Academics may not keep pace with many of the practices regulated by IFL because such practices are viewed as regressive. As such, academics may be surprised to learn that they still exist (or that they have returned following large-scale migration) in twenty-first-century England and Wales. FGM and forced marriage are clear examples of this. The regressive nature of these practices only becomes more obvious when they are compared with other developments in family law in the UK in recent years. For example, the acquisition of equality within same-sex marriage and the acceptance of mono-parental, same-sex and blended family units demonstrate the uneasy political relationship between liberal Western democracies and many IFL practices.

Some of the IFL topics were recognised as multidisciplinary and therefore not exclusively within the scope of family law. This was particularly apparent in relation to human trafficking and modern-day slavery. Overall, only one institution reported teaching either of these topics within its family law curriculum. Eight respondents stated that it was not relevant to family law whereas 12 respondents cited this reason

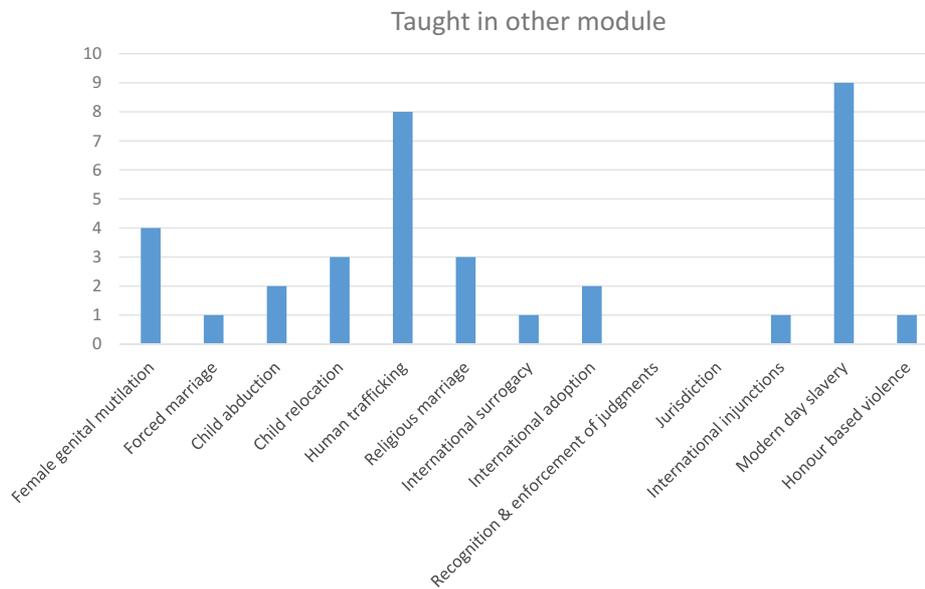


Figure 4. IFL topics taught in another module.

for modern day slavery. These subjects were, however, more likely than other topics to be taught in other modules (see [Figure 4](#)).

One of the respondents taught human trafficking within a “gender and the law” module whilst others suggested that it should feature within a criminal law, migrant law or human rights module. Within the content analysis, two institutions taught trafficking in the context of children’s rights. The author agrees there is also a clear place for human trafficking and modern-day slavery within a family law module. As examined earlier in this article, in 2016 the government introduced the Modern Slavery Act 2015, which seeks to protect victims and ensure they receive appropriate support. Domestic servitude (where victims are forced to carry out housework and domestic chores in private households with little or no pay) is a form of domestic abuse. Further, human trafficking involving children is a safeguarding concern. Cases dealt with through the National Referral Mechanism will inevitably be referred to the local authority and will involve the family court making decisions about children’s welfare.¹⁶⁷ The duties on the local authority derive from the Children Act 1989. It is anticipated that as these issues filter from the courtroom to the classroom through new case law, they may be more easily recognised as family law issues and, in turn, organically brought into the curriculum.

There was also a feeling amongst some of the respondents that IFL was a practice-focussed module and therefore more suited to a postgraduate or LPC course. One respondent, for example, noted that it did not teach the topics raised in the questionnaire because the module focussed on “black letter law rather than practice”. This was somewhat confusing given IFL is no more practice focussed than any other academic discipline that also happens to be a legal practice area (i.e. criminal law, housing law, private client

¹⁶⁷See e.g. *Re M (Children) (Suspected Trafficking – Competent Authority)* [2017] EWFC 56.

law). Further, as this article has already considered, IFL has academic, political and humanistic benefits as a black letter subject as it allows students to critically engage with the different approaches to legal provisions and the different responses taken by countries to family law concerns. It is also an area that is rife for law reform.

Staff expertise

A further barrier to incorporating IFL into the undergraduate family law curriculum was the perception that staff did not have the expertise to teach these issues, as shown in Figure 5. This mirrors the findings of Bentley et al.¹⁶⁸ In part this is likely to be because IFL has only emerged as a legal discipline within the last few decades and therefore its unfamiliarity to some may be disconcerting. However, as explored by Reynolds and Salehi-Sangari¹⁶⁹ the issue may also be one of willingness to learn and not having a closed attitude to IFL that will ultimately prevent real engagement with these issues and therefore the scope for any rewards. Many academics teach topics with which they are initially unfamiliar, and all academics must remain up to date with developments in their field to ensure their modules are relevant to the students they teach. IFL is an example of such a development in family law.

IFL materials are not impenetrable. Many of the laws regulating IFL issues are domestic laws with which academics will already be familiar. This can be seen in the context of forced marriage, which is regulated by the Family Law Act 1996, FGM,

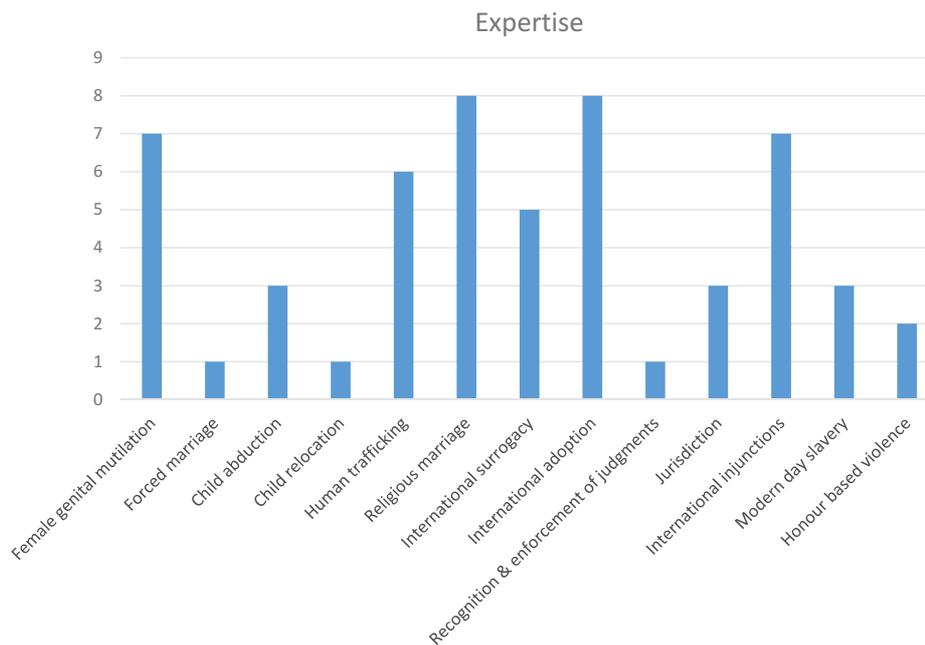


Figure 5. Expertise.

¹⁶⁸Bentley and Squelch (n 75).

¹⁶⁹Reynolds (n 4); Salehi-Sangari and Foster (n 77).

which is governed by the Female Genital Mutilation Act 2003,¹⁷⁰ and child relocation, for which applications are made under the Children Act 1989. This also means that many IFL topics are no more difficult for students to engage with as traditional family law topics. Jukier suggests that expertise should not be an impediment to academic reform.¹⁷¹ If academics with familiarity or expertise in a particular area or legal system cannot be identified, then hiring people with the commitment and energy to learn can be just as valuable. Of course, this requires a qualitative commitment to introducing IFL into the curriculum because of the resource requirements of hiring new staff.

Conclusions

The data from the content analysis and the questionnaire demonstrates that academics recognise the increasing importance of IFL, and efforts are being made to incorporate IFL into the undergraduate family law curriculum. On the whole, however, this often seems to be on a superficial level where IFL is discussed briefly as part of a wider family law topic. The data indicates that there are three main barriers to incorporating IFL into the family law curriculum. The first is a lack of time to incorporate additional materials into the family law curriculum. The second is a failure to identify IFL issues as relevant to the subject or practice of family law. This indicates that some family law academics are not keeping pace with the developments in family law. The final obstacle is that many institutions do not consider that they have sufficient academic expertise to teach IFL.

Many of these obstacles are not insurmountable but require commitment and creativity to overcome. As this article has examined, there are great rewards for students in studying IFL. Perhaps more importantly, however, as a result of globalisation and the internationalisation of legislation, clients with ties to more than one jurisdiction are here to stay. As such, the endeavour to internationalise the family law curriculum is vital if family law students are to be prepared for the realities of family law practice in England and Wales and equipped to serve this growing market at the forefront of societal challenges.

Disclosure statement

No potential conflict of interest was reported by the author.

¹⁷⁰As amended by the Serious Crime Act 2015.

¹⁷¹Jukier (n 81).

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 Family Law

Making the case for international family law in the law school curriculum

Ana Speed, *Senior Lecturer and Solicitor, Northumbria University*

Introduction

Over the last few decades, there has been a significant increase in the number of cases being dealt with in the family courts in England and Wales which have an international element. These cases draw on how the law regulates family issues with an international dimension, how the law in England and Wales compares with other jurisdictions and how international laws and treaties are implemented, interpreted and enforced.

A brief overview of case law in England and Wales demonstrates the breadth of issues regulated by international family law ('IFL'). When IFL first emerged, it was mainly concerned with high net worth divorce and, in particular, disagreements between wealthy couples who could not agree which jurisdiction divorce proceedings should take place in.¹ The parties would rush to secure jurisdiction under Brussels II or the rule of forum conveniens.² Whilst such cases still exist, IFL increasingly regulates the lives of women and children. This can be evidenced where couples who have been unable to conceive naturally have taken the decision to enter into an overseas surrogacy or adoption agreement. In such cases, courts may be asked to adjudicate on the validity of the agreement entered into or decide where and with whom the children should live.³

IFL also regulates the catastrophic situation where a child is removed from the jurisdiction by a family member. In the case of *Re B and another (Change of Names: Parental Responsibility: Evidence)* [2017] EWHC 3250 (Fam), the children were removed to Iran by their father. The children's mother had been unable to rely on

The Hague Convention on the Civil Aspects of International Child Abduction 1980 to secure their return because Iran is not a signatory. The children were made wards of court under the court's inherent jurisdiction and their return was eventually secured by their mother's courageous efforts in travelling to Iran with the assistance of the abduction team of the Foreign and Commonwealth office and the British Embassy in Turkey. Subsequently, she successfully sought the assistance of the court to allow her to change the children's names and to prevent the children's father exercising any aspect of his parental responsibility.

However, it is not necessary for one of the parties (or their assets) to be physically present outside the jurisdiction for a case to have an international dimension. This is demonstrated by the case of *Re E (Children) (Female Genital Mutilation Protection Orders)* [2015] EWHC 2275 (Fam), [2015] 2 FLR 997 and *Re CE (Female Genital Mutilation)* [2016] EWHC 1052 (Fam), [2017] 1 FLR 1255 which concerned an application by a Nigerian mother who was habitually resident in the UK for female genital mutilation ('FGM') Protection Orders in respect of her three daughters. The application was made some 19 days after the applicant mother's appeal against the decision to decline her leave to remain had been refused. In her witness statement, the applicant disclosed that she had been subject to a forced marriage and had undergone FGM at the hands of her ex-husband, the children's father. She also claimed that it was his intention for his daughters to undergo FGM and if she refused, he would remove them to Nigeria. The respondent father disputed these

¹ D Hodson *International Family Law Practice* (Jordan Publishing, Fifth Edition, 2016).

² See *Chai v Peng* [2014] EWHC 1519 and *Mittal v Mittal* [2013] EWCA Civ 1255.

³ See *Re Tj (A Child)* [2011] EWHC 921 (Fam) and *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

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allegations and applied for permission to permanently remove the children to Nigeria. Following a fact-find hearing, the court found that the mother lacked credibility and had failed to put forward any positive evidence to support the risk to the children. The judge concluded that the allegations had been invented in order to support her application for asylum and accordingly her application was dismissed. It was also found to be in the children's best interest to return to Nigeria with their father.

Family law and practice has adapted to cater for the growth in IFL. This is demonstrated in the introduction of forced marriage protection orders and FGM protection orders, legislation to prevent domestic servitude and human trafficking through the Modern Slavery Act 2015 and a number of practice directions under the Family Procedure Rules 2010 which address practice issues regarding international child abduction and polygamous marriages. The growth of IFL has placed added demands on lawyers, Judges and frontline professional bodies in the family justice system, who are increasingly required to be culturally competent. Judges, for example, may be faced with the question of whether to award the return of a dowry specified in a Nikah contract in financial relief proceedings. Alternatively, a lawyer may be called upon to advise a Muslim woman with a Nikah contract (but no registered civil marriage) about the validity of her marriage and any financial claims she may (or may not) have on the relationship breakdown. Despite initial hesitance from practitioners, England is becoming a world leader in IFL because of its strong links with Europe, North America and the Commonwealth nations.⁴

The legal landscape reflects demographic changes which have been brought about as a result of globalisation, increased migration and the spread of human rights.⁵ In the context of England and Wales, such changes have in part been a result of the common European citizenship brought about through the Maastricht Treaty in 1992. The United Nations estimates that there are currently 1.22m British people permanently living in another European Union country.⁶ In the year to June 2017 there were around 3.7m people living in the UK who are citizens of another European Union Country, representing 6% of the UK population.⁷ This is an increase of 275,000 since the Brexit vote in June 2016.⁸ Asylum is also another source of migration into the United Kingdom. Approximately 177,000 people from non-EU countries sought asylum during the third quarter of 2017.⁹ These applications were received by citizens of 146 countries. More generally, it is estimated that around 9.2m people living in the UK were born abroad, around 14% of the total population of the UK.¹⁰

There is academic support for incorporating IFL within law school curriculums. Stark argues that in the USA IFL has become a legal subject because it matters enough to generate demands that it does so, there is a coherent body of substantive law and an agreed upon set of rules and processes that enable it to function and because it grapples with the issues of the day.¹¹ Until that point, she notes, a legal subject can 'dally in elective seminars and esoteric panels . . . but when clients demand lawyers, judges ask for memos, lawyers call their old professors, committees are formed, and bar panels organised, the legal subject must put aside the games of childhood and become

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4 D Hodson *International Family Law Practice* (Jordan Publishing, Fifth Edition, 2016).

5 B Stark 'When Globalisation Hits Home: International Family Law Comes of Age' (2006) 39(5) *Journal of Transnational Law* 1551.

6 United Nations, 2015, Department of Economic and Social Affairs, Population Division.

7 <https://fact.org/europe/how-many-uk-citizens-live-other-eu-countries>.

8 <https://fact.org/europe/how-many-uk-citizens-live-other-eu-countries>.

9 *Asylum Quarterly Report*, European Commission, 2017.

10 Office of National Statistics 2017.

<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/when-information-on-the-ombits-the-grass-is-growing-in-europe/jan2017#migration-statistics-background>.

11 B Stark 'When Globalisation Hits Home: International Family Law Comes of Age' (2006) 39(5) *Journal of Transnational Law* 1551 p 1586.

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rigorous and responsible'¹². Stark was not the first academic in the USA to make observations about the importance of teaching IFL. In 1995, Reynolds talked about the benefits of teaching IFL within a conflicts of law module, as a more topical alternative to the 'basic trioka' of jurisdiction, choice of law and judgments which was covered in the context of United States law.¹³ Reynolds wrote that conflicts professors are parochial in their focus and ignore IFL because they do not wish to engage with many of the complex statutes that underpin it. However, he felt that studying IFL has benefits for students because the issues are 'important, liberating, cross-cultural and just plain fun'.¹⁴

However, despite changes to the legal landscape and the increasing academic recognition of IFL as a legal subject, the broad range of IFL issues appear to be largely absent from the law school curriculum in England and Wales, both within family law and private international law modules. Whilst it is not compulsory for students in England and Wales to study family law, the majority are able to elect to study family law in the penultimate or final year of their undergraduate degrees or as part of their post-graduate vocational qualification. In many institutions, family law presents as a popular optional module choice. Many students are interested by the idea of helping private individuals through difficult periods and the human-interest element that comes with highly publicised legal battles such as *Great Ormond Street Hospital v Yates, Gard and Gard* [2017] EWHC 972 (Fam). A brief online review of the design, content and delivery of family law modules up and down the country however, does not make for particularly enlightening reading. Students are taught about divorce and financial relief proceedings, private and public law children proceedings, domestic violence applications and cohabitation disputes. IFL issues may

receive a courteous mention in a way that indicates it is ancillary to the studies and (importantly to students) is unlikely to form part of their assessment. Whilst modules in private international law do give students an opportunity to study the process for resolving cross-border disputes, they are more likely to do so in the context of international commercial disputes, contract, tort and property than family law.

This article will draw on recent case law and the work of Reynolds and Stark to conclude that in England and Wales IFL matters, that it is governed by a coherent body of law and agreed upon set of rules and that it grapples with the issues of the day. Accordingly, there is a case for it to be recognised within the legal curriculum.

Does international family law matter in England and Wales?

The extent to which IFL matters can be illustrated through the recent case of *Re M (Children) (Suspected Trafficking – Competent Authority)* [2017] EWFC 56. The case concerned two children (JM and EM) who were brought to the UK from Namibia by a lady claiming to be their grandmother. Border control suspected that the children were victims of human trafficking and they were made subject of protection orders and placed in foster care. It was the grandmother's case that she had been awarded parental responsibility for the children by a Namibian court and this had been made with the acquiescence of the children's parents, who lived in Canada. Under the Council of Europe Convention on Action against Trafficking of Human Beings, the Competent Authority was required to determine firstly, whether there were 'reasonable grounds' to believe the children were victims of trafficking. Where the Competent Authority finds that there are reasonable grounds to believe a person is a victim of trafficking it then has to make a

¹² B Stark 'When Globalisation Hits Home: International Family Law Comes of Age' (2006) 39(5) *Journal of Transnational Law* 1551 p 1856.

¹³ W Reynolds 'Why Teach International Family Law in Conflicts' 28 *Vanderbilt Journal of Transnational Law* (1995) p 412.

¹⁴ W Reynolds 'Why Teach International Family Law in Conflicts' 28 *Vanderbilt Journal of Transnational Law* (1995) pp 414–415.

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'conclusive grounds decision' as to whether there are sufficient grounds to decide that the individual is a victim of trafficking. If so, Children's Services and the Police will be notified.

This case first came before the court on the local authority's application for interim care orders which were granted on 19 January 2017. The court was satisfied, by virtue of Art 20 of Brussels II Revised that it had jurisdiction to make orders as 'protective measures'. The Competent Authority subsequently made a positive 'reasonable grounds' decision. Following further consideration of the evidence, however, the court accepted that the lady was the boys' grandmother and that she did hold a form of parental responsibility for the children. The court was not satisfied that they were brought to England for a two-week holiday, on the basis that the grandmother spoke little English, had insufficient funds and was unable to provide evidence about their accommodation or travel plans. The court concluded that it would be in the children's best interests to return to Namibia under the care of their grandmother. The Competent Authority therefore made a negative 'conclusive grounds' decision.

IFL is most important to the clients whose lives it regulates. This is because, regardless of one's culture, family lives and relationships matter most to people.¹⁵ This is particularly true of children, for whom events like trafficking and abduction are catastrophic and whose voices are not always heard in proceedings. The international element of litigation means that the stakes are high and emotions are more strained, both due to the seriousness of the allegations and the fact that litigation is often taking place in an unfamiliar country. For the children in this case, being removed into foster care during the proceedings would have been distressing and an incorrect or delayed decision would inevitably have led to them suffering further

harm. The judgments given can therefore permanently alter family dynamics.

The spread of IFL also means that it is now practised by a broader range of practitioners than ever before. Hodson recognises that the level of knowledge and practical experience of many family lawyers is still relatively low although this is increasing.¹⁶ IFL can be complex and fast-paced, making it daunting for many practitioners. However, IFL clients expect practitioners to deal with international cases 'quickly, knowledgeably and expertly'.¹⁷ In this case, the children, children's mother and grandmother, local authority and Competent Authority all benefitted from legal representation. In international cases, where processes and languages are unfamiliar, representation is vital to allow the parties to properly participate in the proceedings.

Practitioners may face negligence claims if they fail to correctly identify the issues faced by their clients. The need for practitioners to be mindful to IFL issues has been recognised by the judiciary in the context of child abduction. In *Re H (Abduction: Habitual Residence: Consent)* [2000] 2 FLR 294 Holman J stated that:

'... just as every general practitioner must be alert to spot a rare illness (even if he doesn't have the experience to treat it), so also anyone, whether judge or practitioner, having involvement in cases concerning children, must always be alert to spot a possible case of international child abduction'.

The requirement to understand IFL issues also extends to professionals who are expected to identify victims (such as border control, in the case above). In FGM cases regulated health and social care professionals and teachers in England and Wales are required to report known cases of FGM in under 18 year olds to the police.¹⁸

The case of *Re M (Children)* also demonstrates how IFL matters legally and

15 B Stark 'When Globalisation Hits Home: International Family Law Comes of Age' (2006) 39(5) *Journal of Transnational Law* 1551.

16 D Hodson *International Family Law Practice* (Jordan Publishing, Fifth Edition, 2016) p 5.

17 D Hodson *International Family Law Practice* (Jordan Publishing, Fifth Edition, 2016) p 5.

18 Section 74 of the Serious Crime Act.

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politically. Firstly, it matters because in this case, IFL was called upon (as it is in many cases) to protect vulnerable minors. Without international legislation (BIIR and the Convention on Action Against Trafficking of Human Beings) the court would not have had jurisdiction to make protective orders in respect of the children and the matter would have been reverted back to the courts in Namibia to determine what should happen to the children. This could have caused delays in a decision being made (which would be contrary to the children's welfare) and could have proved controversial politically because it is unclear what protection would be afforded to the children. Whilst Namibia has made efforts to eliminate trafficking, it does not fully comply with globally recognised standards¹⁹ and victims are often prosecuted for immigration, child labour and prostitution offences.²⁰ In contrast, in 2015, human trafficking was given increased recognition in England and Wales through the Modern Slavery Act 2015, which implemented the Council of Europe Convention on Action against Trafficking in Human Beings into domestic law.

A further indication that IFL matters politically, is that legal aid continues to be available in cases where children are at risk of harm, despite the considerable cuts to legal aid brought about by the Legal Aid Sentencing and Punishment of Offenders Act 2012. Legal aid is also available in domestic abuse cases. Domestic abuse is broadly interpreted and includes culturally specific forms of abuse including forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment.²¹

The importance of IFL has also been recognised by the judiciary through the creation of the Office of the Head of

International Family Justice,²² which was established in 2005. The office deals with IFL enquiries from judges, practitioners and academics and ensures the effective cross-border management of cases. It also works closely with the Ministry of Justice, the Foreign and Commonwealth Office and the Central Authority (International Child Abduction and Contact Unit (ICACU)) to develop European and international family law and practice. A number of panels, journals and conferences that promote the development of academic and practical knowledge in IFL have also been established. The most notable organisation is The Hague Conference on Private International Law. The Conference is an intergovernmental organisation which is made up of 69 members from all over the world whose legal systems (and the religious and political values underpinning them) can be vastly different.²³ The Conference has been instrumental in developing and administering much of the international legislation around IFL issues through The Hague Conventions and Protocols, and have provided unification, harmonisation and cooperation to cross-border cases.²⁴

The Conference has had particular success in the area of child abduction. In the 1970s, parental kidnapping was becoming a global concern and it was recognised that this was harmful to children's wellbeing.²⁵ The Conference subsequently drafted the Convention on the Civil Aspects of International Child Abduction 1980, which recognises and enforces existing custody rights and ensures the prompt return of children to their country of habitual residence.²⁶ Year on year there has been increase in applications for return orders under the Convention, globally. There were 954 applications worldwide in 1999

¹⁹ The Trafficking in Persons Report 2016.

²⁰ The Trafficking in Persons Report 2016.

²¹ Practice Direction 12J to the Family Procedure Rules 2010.

²² <https://www.judiciary.gov.uk/about-the-judiciary/international/international-family-justice/>.

²³ AL Estin, 'Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States' (2010) 62 *Fla. L. Rev.* 47, 108.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.* p. 37.

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compared to 1,961 in 2008.²⁷ In England alone, the ICACU dealt with 444 applications in 2011, up from 288 in 2010.²⁸ Of course, this does not reflect the full picture as these figures do not include children removed to non-Hague countries whose return is sought under the court's inherent jurisdiction.

Finally, IFL matters to our students, who are the future family law practitioners. It matters to them because they must be equipped to deal with the realities of legal practice in England and Wales once they have graduated. For Reynolds, however, the benefits of IFL are greater than this. He indicates that IFL matters because the issues are 'important, liberating, cross cultural and fun'.²⁹ IFL is important because family law policy can have a significant impact on the state and the citizens whose lives it regulates. This is demonstrated by unpaid child maintenance which creates a burden on the state through the payment of welfare benefits. The international element of the litigation also means there is 'no room for error' as the parties do not usually have the resources to have a second bite of the cherry. Students' skills are in no small part developed in law school and 'getting it right' is primarily the responsibility of lawyers and judges. Teaching IFL can therefore 'help reduce, albeit in a small way, the sum of human misery'.³⁰

The importance of IFL can be seen in the case of applications for the summary return of a child under the Hague Convention. In such cases, the stakes (and emotions) are undoubtedly high: it is alleged that a child has been unlawfully removed from the country in which they are habitually resident without the consent of the left-behind parent. There is usually a dispute as to the

circumstances of the removal and whether the child should be returned. The respondent may raise one of the defences available under Art 12 and 13 of the Convention, these being that the applicant consented to the removal or was not actually exercising their custody rights, that the return would cause the child grave risk of physical or psychological harm or place them in an intolerable situation or that the child objects to being returned. The disputed issues are likely to be compounded by the fact that it may have been some time since the left behind parent has seen the child. The litigation will take place in the country to which the child has been removed; this may be some distance from the child's country of habitual residence and the processes may be different and unfamiliar. The left behind parent will likely need to travel (at a cost to themselves) to attend the hearing and give evidence. There may also be language barriers for which an interpreter will be required. The applicant is likely to have the benefit of legal aid (as long as the case is registered with the ICACU) which is available on a non-means non-merit tested basis. Accordingly, the case should be referred to a specialist solicitor on the ICACU's panel. The same support is not, however, extended to the respondent, who may have a legitimate reason for removing the child(ren) but who will only receive legal aid if they satisfy the strict means and merits criteria.³¹ This inequity can raise tensions and power imbalances further.

Studying IFL is also liberating because it allows students to engage with topics and materials that they may not otherwise encounter on their degree programmes.³² This can promote 'fascinating discussion' and 'intriguing legal questions' for students to engage with.³³ The implications of the UK leaving the European Union and the

27 Judiciary of England and Wales. Office of the Head of International Family Justice for England and Wales. Annual Report 1 January – 31 December 2012.

28 Judiciary of England and Wales. Office of the Head of International Family Justice for England and Wales. Annual Report 1 January – 31 December 2012.

29 W Reynolds 'Why Teach International Family Law in Conflicts' 28 *Vanderbilt Journal of Transnational Law* (1995) pp 414–415.

30 W Reynolds 'Why Teach International Family Law in Conflicts' 28 *Vanderbilt Journal of Transnational Law* (1995) p 415.

31 See *Kandere v Kandere* [2013] EWGC 4139 (Fam).

32 W Reynolds 'Why Teach International Family Law in Conflicts' 28 *Vanderbilt Journal of Transnational Law* (1995).

33 *Ibid.*

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impact this will have on family law will likely provide interesting (and contentious) legal fodder over the coming few years. Should we maintain the current system of full reciprocity? Would it be preferable to turn EU law into domestic law but lose the existing EU reciprocal arrangements? Could we start from scratch and set up a new arrangement? Would other international instruments suffice?

IFL materials are often multi-disciplinary drawing on family law, private and public international law, immigration law, housing law, criminal law and human rights. This can be illustrated through the Istanbul Convention, which will be ratified into domestic legislation through the Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017. The issue of domestic abuse has gained an increased European focus following the European Council listing the 'protection of victims' as a family law priority for 5 years in 2014. The Convention aims to combat violence against women by implementing preventative and protective measures such as giving the police power to remove perpetrators of domestic violence from the home and setting up telephone helplines and accessible shelters. The English government has already complied with some of its obligations under the Convention such as criminalising coercive control as a form of domestic abuse.³⁴ From an IFL perspective, students can critically engage with the different responses taken by member states to implement their obligations and the effectiveness of these different provisions. These issues are also increasingly represented in the media driven by the rise in popular feminism and the female

empowerment campaigns that have been driven by women's rights organisations and celebrities.³⁵

IFL also offers students a different perspective and is therefore cross-cultural.³⁶ Students and lecturers are exposed to different legal systems and approaches to the law. The religious, cultural and political views underpinning these laws can challenge our understanding of concepts such as 'childhood' and 'family'. IFL is a subject which recognises and regulates all walks of life and allows students to engage with the current socio-legal climate that many of the foundation subjects (ie contract, tort, equity and trusts) do not.

Many practitioners would argue that the approach to legal education in England and Wales is too intellectually narrow³⁷ and prioritises the 'laws of the wealthy' which regulate large sums of money, major companies or significant economic actors.³⁸ The laws of the majority are largely ignored.³⁹ This intellectual focus may relate to the misconception that lawyers do little social welfare law these days, due to the cuts in legal aid.³⁹ Whilst this may be more accurate in areas such as immigration and welfare law, this does not correspond with IFL because legal aid remains available for cases involving domestic abuse and honour based violence, child abduction and cases where children are at risk of harm. In the context of IFL, it is therefore arguable that not only does the curriculum prioritise the law of the wealthy, but also those laws which reinforce power, race and gender inequalities. Teaching IFL therefore provides a balance against privilege within our curriculum. This means IFL matters pedagogically because it seems to add some much-needed intellectual diversity to legal education in England and Wales.

³⁴ See section 76 of the Serious Crime Act 2015.

³⁵ See, for example the 'Times up' and the 'Me Too' campaigns.

³⁶ W Reynolds 'Why Teach International Family Law in Conflicts?' 28 *Vanderbilt Journal of Transnational Law* (1995).

³⁷ See for example, A Sanders, 'Poor Thinking, Poor Outcome? The Future of the Law Degree after the Legal Education Training Review and the Case for Socio-Legalism', in H Sommerlad, S Harris-Short, S Vaughan and R Young (eds), *The Futures of Legal Education and the Legal Profession* (Oxford, Hart Publishing 1st ed, 2015) and B Waters 'The importance of teaching dispute resolution in a twenty-first century law school' (2016) *The Law Teacher*, 51(2), 227-246.

³⁸ F Crowne, A Bradney, M Burton, *English Legal System in Context* (Sixth Edition, 2013) p 129.

³⁹ A Sanders 'Poor Thinking, Poor Outcome? The Future of the Law Degree after the Legal Education Training Review and the Case for Socio-Legalism', in H Sommerlad, S Harris-Short, S Vaughan and R Young (eds), *The Futures of Legal Education and the Legal Profession* (Oxford, Hart Publishing, 1st ed, 2015).

Is there a coherent body of substantive law and an agreed upon set of rules and processes that enable IFL to function?

Family law and practice in England and Wales has adapted to cater for the growth in international family law, both in domestic law, international law and its rules of practice. This is clearly demonstrated by the introduction of Forced Marriage Protection Orders (by the Forced Marriage (Civil Protection) Act 2007) and FGM protection orders (by the Serious Crime Act 2015). Both forms of protection are injunctive relief which impose legally binding conditions on the Respondent to prevent these harmful practices. Legal aid remains available for the applicant on a means and merits basis.

Forced marriage protection orders were introduced in November 2008 to prevent the victim from being betrothed or married to a person without their consent and to declare invalid any such marriages which have already taken place. FGM protection orders were introduced in July 2015 with the aim of safeguarding potential victims of FGM. The conditions imposed by forced marriage or FGM protection orders can include prohibiting the respondent from removing the potential victim from the jurisdiction and requiring their passport to be surrendered. Breach of an order is a criminal offence. There has been a general upward trend in the number of forced marriage and FGM protection orders granted. In the period July 2017 to September 2017 there were 88 applications for forced marriage protection orders and 64 orders made.⁴⁰ This was an increase in the period April 2017 to June 2017, during which there were 78 applications and 72 orders made.⁴¹ There have been smaller numbers of applications for FGM protection, however this is also increasing. Between July 2017 and September 2017

there were 42 applications for FGM protection orders and 34 orders made.⁴² In total, there have been 205 applications and 179 orders made up to the end of September 2017 since their introduction in July 2015.⁴³

Protection orders form part of a wider campaign to protect victims in England and Wales from traditional harmful practices. This is also illustrated by the criminalisation of forced marriage in June 2014 by the Anti-Social Behaviour, Crime and Policing Act 2014 and the creation of the Forced Marriage Unit ('FMU'), which leads on the government's forced marriage policy and casework. In 2016, the FMU gave advice in 1,428 cases.⁴⁴ This represents an increase of 14% (208 cases) compared with the previous year⁴⁵.

Legislation relating to FGM has also been amended to reflect the realities of offences taking place in England and Wales. The Serious Crime Act 2015 extended the criminal offences in the Female Genital Mutilation Act 2003 of performing FGM or assisting a girl mutilate her own genitalia to include acts performed outside the UK by a UK national or a person who is resident in the UK.⁴⁶ These changes will mean that the legislation now captures offences committed abroad by or against those who have a significant connection to the UK but under the 2003 Act would have been missed because the perpetrator was not permanently resident in the UK. Additionally, s 72 of the 2015 Act inserts new s 3A into the 2003 Act, which creates a new offence of failing to protect a girl from FGM. This means that if an offence of FGM is committed against a girl under the age of 16, each person who is responsible for the girl at the time FGM occurred (ie anyone with parental responsibility for her) will be liable.

There have not been any prosecutions under the new legislation despite evidence that

40 Ministry of Justice (14 December 2017) Family Court Statistics Quarterly, England and Wales, July to September 2017.

41 Ministry of Justice (14 December 2017) Family Court Statistics Quarterly, England and Wales, April to June 2017.

42 Ministry of Justice (14 December 2017) Family Court Statistics Quarterly, England and Wales, July to September 2017.

43 *Ibid.*

44 Home Office and Foreign & Commonwealth Office (9 March 2017) Forced Marriage Unit Statistics 2016.

45 *Ibid.*

46 Ministry of Justice and the Home Office (March 2015) Factsheet on Female Genital Mutilation.

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FGM is a real concern in England and Wales. Statistics compiled by the National Health Service suggests there have been more than 14,000 new cases of FGM identified in the past two years.⁴⁷ There is also evidence that the number of cases of 'honour' based violence, forced marriage and FGM reported to the police in the UK has increased by 53% since 2014 (IKWRO, 2017). Disappointingly, the number of cases referred to the Crown Prosecution Service ('CPS') for a charging decision remains low. Only 256 cases of 'honour' based violence were referred to the CPS by the police in 2016–2017 (5% of the cases reported). This resulted in 215 prosecutions and 122 convictions.⁴⁸

Legislation has also been developed to acknowledge forms of abuse which impacts predominantly vulnerable adult women, migrants and children. An example of this is the Modern Slavery Act 2015. The Act includes a number of provisions extending support for victims of human trafficking to victims of slavery, servitude and forced and compulsory labour. Family practitioners must familiarise themselves with these issues because domestic servitude is a recognised form of familial abuse, particularly within black and minority ethnic ('BAME') households.⁴⁹ The world, Asian women perform a disproportionate amount of unpaid work both within the home and family businesses.⁵⁰ Many trafficked women also have unsettled immigration statuses or statuses which are dependent on a spouse who is also a trafficker. This can result in them being subject to higher levels of control by abusers as women fear they will be deported. Children (and in particular unaccompanied, internally displaced children) are also disproportionately likely to be victims of modern slavery and human trafficking.⁵¹ This requires a child protection response and frontline staff must be equipped to make the necessary referrals to

local authorities. Family practitioners may become involved in the representation of one of the parties in subsequent public law proceedings.

In addition to legislative developments, there have been advances relating to the practice of IFL. There are numerous Practice Directions relating to international matters. These regulate procedural issues such as service outside of the jurisdiction (PD 6B), registration and enforcements of orders (PDs 31 and 32), child arrival by air (PD 12O), reciprocal enforcement of maintenance orders (PD 34A) and tracing payers overseas (PD 34B). They also deal with more substantive issues such as adoptions with a foreign element (PD 14B), child abduction (PD 12F) and polygamous marriages (PD 7C).

A recent example of family practice adapting to the demands of IFL can be seen in the amendments to the divorce petition (Form D8) which came into effect in August 2017. For example, the form now includes a reference to the requirement for separate arrangements to dissolve religious marriages. The petition also includes a list of all grounds which may indicate the English and Welsh courts have jurisdiction, rather than making the presumption that both parties will be jointly habitually resident. Practitioners have however recognised that the petition could go further to reflect the requirements of international law. *Allum et al*⁵² note that the new petition does not provide space for the court to confirm the time that the divorce petition was received by the court. This is important as the European Court of Justice has directed that in a jurisdiction race, it is the petition which is lodged first which will receive priority under the Brussels II Regulations and not

47 NHS Digital (2017) Female Genital Mutilation Enhanced Dataset July 2017 to September 2017.

48 <http://ikwro.org.uk/2017/11/violence-criminalisation-marriage>.

49 N Mirza (2016) *South Asian Women's Experience of Family Abuse: The Role of the Husband's Mother*.

50 Asian Development Bank (2015) *Women in the Workforce: an unmet potential in Asia and the Pacific*.

51 I. Shelley, *Human Trafficking: a Global Perspective* (Cambridge University Press, 2000).

52 See the discussion at:

https://www.familylaw.co.uk/news_and_comments/imminent-changes-to-divorce-dissolution-petitions-and-to-the-family-procedure-rules#.WkeHRCOCzsk.

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the time that the petition was issued.⁵³ Further, whilst the petition asks whether there have been any existing or previous court proceedings, the reference to proceedings taking place abroad has been removed from the petition.

International family laws have developed in a piecemeal approach to reduce the stress and cost of litigation and promote harmonisation and cooperation between countries. These laws have proved invaluable at times when domestic legislation has been inadequate to handle IFL issues.⁵⁴ An example of this is child abduction. Without Brussels II, if an English mother removed her child to France and the French court subsequently decided not to return the child, the left behind father would lose the benefit of the EU provision that gives the English courts the ability to overrule the French decision and order that child's return. The UK return order would no longer be automatically enforceable in France. Instead, the father would have to take his case to France. There would likely be far greater delay which would not be in the child's best interests. Cases would take longer to litigate and greater costs would be incurred (or our legal aid system would be further burdened).

Has international family become a 'player'? Does it grapple with the issues of the day?

IFL deals with issues which affect all levels of society but which disproportionately affect women and in particular minority communities. The rights of cohabitants (or lack thereof) is a good example of this. Contrary to popular opinion, there is no such thing as a 'common law' marriage in England and when relationships break down the courts have no jurisdiction to redistribute the parties' assets and they cannot pursue claims for maintenance. Where family law is unable to assist, the

parties may turn to the law of trusts or contract for a remedy, which is unlikely to be satisfactory. There have been many calls for the law to recognise the rights of cohabitants.⁵⁵

In the context of IFL this issue has resurfaced in relation to the validity of Islamic marriages. Muslim men and women will usually have an Islamic Nikah ceremony, which is the religious ceremony. Many Muslims are unaware, however that a Nikah performed in England does not create a legally recognised marriage with the couple still classed as cohabitants in the eyes of English law.⁵⁶ Therefore, should the marriage break down, the parties will not have the same protection of the law as they would have if they had a civil registry marriage. This can be disadvantageous because wives who are brought over from South East Asia may lack the language skills and cultural capital to understand the status of their marriage (and therefore the choice as to whether to have a civil ceremony). Their immigration status may be dependent on their spouse. Muslim women may also be less likely to be financially independent as they may conduct domestic work within the house or unpaid work within a family business. It can also be disadvantageous because it allows husbands to marry multiple women – one woman by way of a Nikah and civil registry and a second wife by way of Nikah only. In such circumstances, there is no polygamy in the eyes of English law but if the relationship with the second wife breaks down, she will have limited financial claims against her husband and may rely on the state for re-housing and welfare benefits. The difficulties this has caused many women lead to the 'Register our Marriage' campaign, which consists of a group of lawyers, academics and parliamentarians who are lobbying for a change to the Marriage Act 1949 so that marriages of all

53 *MH v MH* [2015] BEHC 771.

54 AL Estin, 'Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States' (2010) 62 *Fla. L. Rev.* 47, 108.

55 See for example *Resolution's Manifesto for Family Law* which called for a legal framework of rights and responsibilities when unmarried couples who live together split up, to provide some legal protection and secure fair outcomes at the time of a couple's separation or on the death of one partner.

56 https://www.familylaw.co.uk/news_and_comment/the-big-islamic-nikah-myth#.WkqVLS0cauk

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faiths are automatically registered as legally married unless the couple consensually opt out.

A further issue which has received increased academic and practitioner attention is transnational marriage abandonment. This is the practice whereby a British national or resident husband deliberately abandons their foreign national wife abroad. The purpose of abandonment is to prevent wives from asserting matrimonial and/or residence rights in England and Wales.⁵⁷ This enables divorce proceedings, applications for financial relief and residence disputes to take place in England, where the wife is not situated. In turn, this makes it more difficult for her to understand her legal rights, effectively participate in proceedings, and secure adequate support or representation. Transnational marriage abandonment co-exists among forms of domestic abuse which disproportionately affect BAME women, including financial abuse (domestic servitude and dowry abuse), coercive control and physical violence. As a result of campaigns to raise awareness of this issue, transnational marriage abandonment has been recognised as a form of domestic abuse in PD 12J of the Family Procedure Rules 2010.

The examples listed above demonstrate how IFL incorporates much broader issues than simply family law. To be understood fully, transnational marriage abandonment must

be viewed within a discourse of access to justice, domestic abuse, human rights and gender inequality. In relation to international law, it fits within a framework of ending violence against women and girls which is evidenced by the UK's obligations under the Convention on the Elimination of all Forms of Discrimination against Women and Girls ('CEDAW') and the Istanbul Convention. Of particular importance here is Art 16.1 of CEDAW which requires state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and ensure the same rights and responsibility during marriage and its dissolution. In essence, both the study and practice of IFL requires us to recognise that law does not operate in a vacuum and engage with the social and economic context underpinning it.

Conclusion

IFL remains an under taught area of law,⁵⁸ confined to the peripheral of family law and private international law modules, if explored at all.⁵⁹ However, as this paper has examined, there is considerable evidence to suggest that it has become a subject in its own right in England and Wales and regulates all areas of family life including marriage and separation, children and domestic violence. The curriculum must recognise this for the benefit of IFL clients, lawyers and the students who will go on to become family law practitioners.

⁵⁷ S Anitha, A Roy and H Yalamaty *Disposable women: Abuse, violence and abandonment in transnational marriages* (2016) Lincoln: University of Lincoln.

⁵⁸ W Reynolds 'Why Teach International Family Law in Conflicts' 28 *Vanderbilt Journal of Transnational Law* (1995).