

DOMESTIC VIOLENCE BILL - POLICY EVIDENCE SUMMARY 2: PROTECTION ORDERS FOR DV

The information in this briefing note has been prepared to assist End Violence Against Women (EVAW) and others engaging with the UK Government's forthcoming Domestic Violence Bill. It draws on data collected for the ESRC-funded research project *Justice, Inequality and Gender-Based Violence* (Grant number: ES/M010090/1), carried out by the Universities of Bristol, West of England and Cardiff between 2016 and 2018 (PI: Professor Marianne Hester).

Please reference this note as:

Bates, L., Hester, M. and Justice Project Team (2018), Policy Evidence Summary 2: Protection orders for Domestic Violence. Bristol: University of Bristol.

<http://www.bristol.ac.uk/sps/research/projects/current/justiceinequality/>

OVERVIEW OF GOVERNMENT'S PROPOSALS

(a) A new Domestic Violence Protection Notice (DVPN) to replace the current DVPN. The new notice will remain police-issued, but the circumstances in which it can be issued will be extended to a wider set of behaviours linked to the proposed new domestic abuse definition in the Bill, not limited to violence or threats of violence.

(b) A new Domestic Violence Protection Order (DVPO) to replace the current DVPO. This will be extended so it may be issued by any court (criminal, civil, family), on conviction or acquittal in criminal cases, to extend to a wider range of applicants including police, victims/survivors themselves, some friends/family members, and some other third parties. It is not clear if the victim/survivor's consent will be sought, but presumably consent will not be required. Breach of the Order will be criminal, though the Government is consulting on whether to include an alternative breach offence of contempt of court. It also adds notification requirements from perpetrators, if subject to an Order, to the police.

The Government's rationale for change is: to increase victim safety, prevent escalation of violence/abuse, help give victims 'breathing space' and give police more time to investigate/build a case. It proposes keeping other existing orders - Restraining Orders (RO), Non-Molestation Orders (NMO) and Occupation Orders (OO) - but does not specify how they will interact with the new Order.

Drawing on new evidence from the *Justice, Inequality and Gender-Based Violence* project (*justice project*), this note summarises key issues for the proposed measures on protection orders. It draws on new analysis conducted by Dr Bates and Professor Hester for the project, which will be published in a forthcoming journal paper (Bates and Hester, forthcoming). The note addresses each of the Government's main proposals for change with the new Order.

GENERAL COMMENTS

These orders address couples who separate, but what about those still together?

Currently, the limited evidence on DVPOs shows that – unlike other protection orders, especially ROs and NMOs – they may be used more to 'contain' and 'manage' violence and abuse where the partners are still together. This is part of their design, which was always of an 'early intervention' order, to give victims/survivors space to consider their options (ACPO, 2009). The package of changes proposed for the new Order (criminalising, linking across courts, notification requirements) is likely to work less well for those still together, compared with those who separate – for whom the ROs and NMOs already



present good options with sanctions and requirements. There is a need to consider how the new Order might work for couples who remain together (or reconcile), and how police can be expected to enforce the Order in these circumstances? For instance, these victims/survivors may well not report breach to police, and if couples remain together, it is likely that conditions such as staying away from the home will be difficult to enforce. In these circumstances, we see that victims/survivors can be blamed or held responsible by the police and authorities (for reconciling/'allowing' the perpetrator back) – which often means that victims/survivors stop engaging with police. None of this makes victims safer.

Support and advocacy for victims/survivors

One vital element which is missing from the current proposals is provision of linked support services for victims/survivors. We know that support services are critical to the success of protection orders for domestic violence – evaluation evidence from Germany and Austria is clear that key to success is a requirement in law for the police to link/refer victims in to support and advocacy services, which are by law resourced by Government (ACPO, 2009). We would urge the Government to make the same resourcing provisions and links in the bill for its proposed new Order. This is one reason that implementation of the Istanbul Convention is so important – since it enshrines provision of support for victims.

Previous research in this country has shown that victim advocates (e.g. IDVAs, ISVAs) are critical to the success of protection orders. Hester & Lilley (2015) showed that it was the involvement of specialized sexual violence advocates which made a significant difference to victims staying engaged through criminal justice (especially court) processes, and had a significant impact on rape convictions.

Emerging findings from the *justice project* reiterates these findings. Analysis of police data on rape showed that where the victim was supported by Rape Crisis or by an Independent Sexual Violence Advocate (ISVA), the case was significantly more likely to progress to a criminal charge (Lilley *et al*, forthcoming). Analysis of Women's Aid data from victims/survivors for the same project shows also that the support of Women's Aid advocates was also a significant feature in attaining restraining orders.

Domestic and sexual violence cannot be addressed separately

There is a significant overlap between domestic and sexual violence. The same victims experience both, and the same perpetrators often carry them out. Attempts to tackle domestic violence separately to sexual violence risks only seeing half the picture.

(a) Many domestic violence victims are also sexual violence victims – whether from the same perpetrators, or a different one:

- Prior research (Hester, 2013) has shown that one-third of rape cases happen within DV relationships.
- This is confirmed in our *justice project* data: of 595 police rape cases in our dataset, a minimum¹ of one-third (30%) had experienced DV.
- And, of 400 police DV cases in the same project, 12% (46) also experienced rape or sexual assault
- Our victim interviews showed that the overlap is even higher than in the police data: of the 213 victims we interviewed who had experienced domestic abuse once or more in their lives, 97 (46%) had also experienced rape or sexual assault.

¹ This proportion will be an underestimate, as it's only what was specified in police case notes which don't systematically record these issues. Our victim interview data show that it's higher than one-third.

(b) Many domestic violence perpetrators are also sexual violence perpetrators:

- Perpetrators aren't restricted to DV or SV – at least 10% of the perpetrators in police DV cases in our *justice project* data were previously known to the police for perpetrating SV (many more may have not been known to the police).

(c) The overlap of domestic and sexual violence is hidden in police data – disguising the true scale:

- Due to police recording practices, many cases of DV are recorded as rape incidents (and not DV incidents) – so a big chunk of domestic abuse is being missed or made invisible in statistics by treating sexual violence separately to domestic abuse

(d) Treating domestic and honour-based violence (HBV) separately also gives a partial picture. Our *justice project* data shows that, of the 42 victims interviewed who had experienced HBV, 38 (90%) were also experiencing domestic abuse. Recent research (Bates, 2017) also shows these experiences overlap – analysis of almost 1,500 HBV cases found that perpetrators in two-thirds of cases were an intimate partner, with or without other family members too.

We would strongly urge legislators and policy-makers not respond separately to forms of gender-based violence, but to consider the bigger picture. Not doing so will continue the acknowledged mismatch in the criminal justice system, whereby treating only incidents of abuse in isolation misses the vital patterns of how abuse and control operate, and allows perpetrators to continue to 'slip through the cracks'.

COMMENT ON SPECIFIC PROPOSALS

- **Joining up courts - new Order to be available across family, civil, criminal courts**

We welcome the proposal to make the new Order in any court. Currently there is too much separation between courts in relation to domestic abuse, and often orders and charges/convictions made in one (often criminal or civil) are excluded or ignored in another (often family). For instance, the *justice project* has found evidence of some solicitors and judges putting victims/survivors off applying for existing protection orders in the civil court because of fears of how it would play in other courts. In interviews conducted for the project, one woman reported being warned by her solicitor that it would look "hostile" in family court, despite her ex-partner having been convicted in criminal court for harassment and having police bail conditions not to contact her:

In the family court my solicitor advised me not to [apply for a NMO] because it would make me look like I was hostile [case 049].

Another reported that the judge was reluctant to grant an NMO because the abuse was not physical:

I got the non-mol, and then he had a chance to contest it, which he did, and he tried that, and he contested it. And I had a real fight on my hands to put it in place. Anyway in the end the judge downgraded it to an undertaking, so for the last half of the year it was changed into an undertaking because the judge said that because there wasn't any evidence of him having badly beaten me up or anything like that ...and this is the judge's own words, he said you know abuse needs to be very bad for me to feel justified in keeping a non-mol in place if it's been contested [case 029].

The Government's proposals to link the new Order across the courts, and to link the Order to the new definition (i.e. wider than just physical violence) should help prevent situations like these. The

Government must issue strong, clear guidance and training especially for judges/magistrates and solicitors to accompany the changes, and make sure that courts do not deter victims from applying for the Order.

Previous evaluations of joined-up criminal and family courts for DV (Hester *et al*, 2008) found that, even with a specialist DVA judge presiding, the family and criminal courts make different decisions on the very same case – showing that there are systemic challenges in the way these different courts think about DVA which still need addressing.

- **Order to be available on both conviction or acquittal in criminal courts**

Being able to make orders on both conviction and acquittal is important. The Government should also make clear that the new Order can be issued for a wide range of domestic abuse related offences, not limited to domestic violence specific ones (e.g. stalking, harassment, violence against the person).

In 2009 Restraining Orders (ROs) were extended to allow their issue on conviction for any offence and on acquittal for some offences. This seems to have been effective: new analysis conducted for the *justice project* of Ministry of Justice data on ROs issued for a forthcoming paper (Bates and Hester, forthcoming) shows that ROs have steadily increased since 2011 (table 1). Whilst they are primarily still issued on conviction, around 1 in 10 are issued on acquittal (and whilst most are domestic abuse-related), the range of offences for which they are issued on conviction is varied, with only a small proportion relating to domestic violence-specific harassment or stalking charges.

Table 1: Restraining Orders issued 2011 to 2016

	2011	2012	2013	2014	2015	2016
ROs issued on conviction	n/k	18,611	18,656	19,410	20,693	23,132
As % of all ROs issued		93%	92%	90%	90%	92%
ROs issued on acquittal	1,358	1,448	1,667	2,062	2,328	2,117
As % of all ROs issued	7%	7%	8%	10%	10%	8%
Total ROs issued	19,123	20,059	20,325	21,472	23,021	25,249

- **A wider range of people can apply- including victim/survivor, friends/family, third parties**

Again, the principle of greater flexibility of application and conditions in the new Order is welcome. However, there is a need to consider how the victim/survivor's wishes are represented. A trend towards greater criminalisation across all protection orders in recent years has moved the field away from victim-led civil processes. Whilst increased penalties for perpetrators are positive, repeated moves towards criminalisation has had the effect of eroding victim choice over what happens in their case. Women may have very good reasons for not reporting to the police, or seeking alternative resolution, support or justice to the criminal system, and it is important to empower and enable women's choice as well as offering protection.

- **The Order replaces DVPO/DVPN - but not other existing orders**

It is good that other orders will remain – there is considerable demand for them. The *justice project* has found that Restraining Orders and Non-Molestation Orders in particular are still in demand by

victims/survivors. Ministry of Justice data analysed for the project shows a slight increase in use of NMOs since 2007, reversing the trend up to that point: in 2016, 23,627 NMOs were issued in England and Wales. In 2016, there were 25,249 ROs issued in England and Wales. By comparison (although figures on use are currently poor, and therefore hard to assess), there are an estimated 3,000 to 4,000 DVPOs currently issued per year in England and Wales (HMICFRS, 2017). The disparity in use of these different orders shows that it is vital to maintain ROs and NMOs as well as the new Order (Bates and Hester, forthcoming).

However, the Government has given no indication of how it sees this new Order interacting with the existing ones – this is particularly problematic as the proposed measures take the new DVPO closer to what ROs and NMOs already do (e.g. civil-criminal hybrid, wider range of measures, available on acquittal and conviction, and envisaged in cases where there is a criminal charge at all). Thus, it is likely to generate greater confusion and uncertainty around which Order to apply for, and also with police enforcement – one of the problems the Government says it is trying to address.

The Government therefore needs to clarify some of the differences it sees between these various orders, and issue strong clear guidance to police, solicitors, judges/magistrates, and practitioners as well as to victims/survivors about which are appropriate in which circumstances.

- **Breach is criminalised**

In general, this is a welcome development. In 2007 when breach of Non-Molestation Orders (NMOs) were criminalised, there was concern that this would put off victims/survivors from applying for orders for similar reasons the Government raises in this consultation (Burton, 2010; Hitchings, 2005). But this has not materialised – as outlined above, NMOs have continued to be applied for and issued, with the numbers rising steadily if slowly since 2007.

Victims/survivors told the *justice project* that they welcomed the ‘teeth’ of the deterrent provided by criminalisation of breach. For instance, one interviewee reported that the threat of police enforcement of an NMO alone was effective in reducing abuse:

Well he did breach [the NMO]. He did carry on ringing me and harassing me and that. But then when he got warned by the police, I’ve not heard nothing since. [case 095]

There is, however, a big caveat. NMOs (and ROs) usually are applied in cases where the couple has separated – and thus where the victim/survivor actively wants the perpetrator to stay away (or comply with other conditions) and wants the support of the police to enforce this. The design of the current DVPN/DVPO was to offer an immediate and temporary ‘breathing space’, and could work for couples who were still together. The proposed changes, and criminalisation of breach especially, may well have an adverse effect in these cases – in contrast to the effect of criminalising breach of NMOs – if applied to couples who remain together rather than those who have separated.

For criminalisation of breach to be effective, the police have to understand their powers and act on breach. Evidence from the *justice project*, and from successive HMIC inspection reports, is that there is already a good deal of confusion in the police about their powers to enforce existing orders. Several victims/survivors reported to the police but were told that the police did not have the power to enforce (civil-issued) NMOs, and so could not act unless the perpetrator ‘did something direct’, with stalking and harassment behaviour seemingly not being deemed enough in itself, for instance:

He’s not meant to even come on my road, and even now he comes and parks right outside the house and everything. I’ve rung the police and they’ve said to me that I would need to take it back to court because they can’t really do anything because I’ve got the injunction and

everything through the courts, not through the police. They said that because they've got no record of his behaviour, because they didn't give me the injunction, that they can't really do anything unless he's a direct threat [case 029].

Finally, evidence from the *justice project* shows problems with a (lack of) enforcement of breach of existing orders. Our police data shows that in only 7 out of 123 police DV cases (6%) where the perpetrator was arrested was the arrest for breach of an order or bail conditions. Given that the literature and victim interview data shows that the breach rate is high, we might expect arrest for breach to be higher as a proportion of all arrests if police were acting decisively on infringements. A lack of police action on breach seems to be particularly the case with breach of NMOs compared with breach of ROs. One victim/survivor interviewee said that her ex-partner breached the NMO multiple times with stalking and harassment. She logged the breaches and reported to the police, who took him to court but only for breach of the NMO, despite the evidence of significant harassment [case 272].

So, if criminalisation of breach is to protect victims, better police enforcement is vital.

The Government proposes that breach of the new Order could be alternatively punished as a contempt of court. It is not clear that this would be a positive alternative charge – victims/survivors are unlikely to make this distinction in deciding whether they want to pursue a criminal route, and it would likely only have the effect of downgrading the criminal justice response to breaches of protection orders, a process which is already happening (Bates and Hester, forthcoming).

- **A wider range of conditions can be specified in the Order**

We welcome the introduction of a range of positive requirements and prohibition measures – flexibility to tailor measures to individual cases is important.

The *justice project* has found poor data capture and recording in police data about whether protection orders are in place at all (whether NMOs, ROS, DVPN/DVPO). In 307 out of 400 police domestic violence incidents (77%) analysed, it was not known if an order was in place. Given that around a third of victims/survivors we interviewed reported having one or more protection orders (29%), it is likely that police data is not capturing a swathe of cases where orders are in place. Forces do not seem to systematically record (especially civil) protection orders.

We raise concerns in a forthcoming paper (Bates and Hester, forthcoming) about how police can be expected to enforce orders/breach when they do not necessarily know they are in place. Adding a wider range of conditions to the new Order will mean a greater burden on the police to enforce compliance – making it all the more important that they are aware of the conditions. To make this effective, Government will need to review and put in place mechanisms for making sure police know about orders, are clear about their roles and powers to enforce, and have a robust data and flagging system in place – current arrangements do not seem fit for purpose in this regard.

- **Adds notification requirements from perpetrator to police**

In principle, this is a positive idea. However, the Government will need to be clearer about what it wants the police to actually **do** as a result of any notifications. Are they intended to form part of an evidence base of a pattern of abuse (for example), to help put together a criminal charge, or is it about

Dr Lis Bates for End Violence Against Women. Drawing on Justice, Inequality and Gender-Based Violence project (ESRC-funded, Grant Number ES/M010090/1; PI Professor Marianne Hester)

fuller information to inform DASH risk assessments, or is it about monitoring compliance with any conditions made in an Order? If the latter, this is important information and vital to effective enforcement. On the other hand, from analysis of police case files carried out for our *justice project*, it is often very clear from police records if a perpetrator has a long offending history with the same and/or previous partners – so it's not likely that adding notification requirements alone are more likely to provide evidence to secure more criminal prosecutions.

References

ACPO (2009) Tackling perpetrators of VAWG: an ACPO review for the Home Secretary. London: ACPO.

Bates, L. (2017). *Honour-based abuse in England and Wales: Who does what to whom?* PhD thesis, Bristol: University of Bristol.

Bates, L. and Hester, M. (forthcoming), Application of domestic violence protection orders in the 21st century, in England and Wales.

Burton, M. (2010), Civil law remedies for domestic violence: why are applications for non-molestation orders declining?, *Journal of Social Welfare and Family Law*, 31:2, 109-120

Hester, M. (2013). *From Report to Court: Rape and the Criminal Justice System in the North East*. Bristol: Bristol: University of Bristol.

Hester, M., Pearce, J. and Westmarland, N. (2008) *Early evaluation of the Integrated Domestic Violence Court, Croydon*, Ministry of Justice Research Series 18/08, London: Ministry of Justice.

Hester, M. and Lilley, S-J (2015) *More than Support to Court: ISVAs in Teesside*. Bristol: University of Bristol in association with the Northern Rock Foundation.

Hitchings, E. (2005), A Consequence of Blurring the Boundaries – Less Choice for the Victims of Domestic Violence? *Social Policy & Society* 5:1, 91–101

HMICFRS (2017), *A progress report on the police response to domestic abuse*. London: HMICFRS.

Lilley-Walker, S.J., Hester, M., McPhee, D., Patsios, D., Bates, L. and Rumney, P. (forthcoming), *Rape, inequality and the criminal justice response in England: the importance of age, gender and mental health*.