Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?

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Abstract

Civil protection order schemes were introduced in many western countries from the 1970s; in Australia from the 1980s. One of the key drivers for this development was the extensive feminist criticism of the criminal law which revealed that it failed to respond adequately to the particular harm of intimate partner violence ('IPV'). The nature of IPV as a gendered, repetitive and patterned harm, motivated by control, found a poor fit with the criminal law's focus on discrete incidents and its traditional emphasis on visible forms of violence. This article explores whether the New South Wales (NSW) civil protection order system (Apprehended Domestic Violence Orders or 'ADVOs'), despite a range of progressive elements, continues to mirror the criminal law's narrow understanding of IPV. It does so through a case study on cross-applications in NSW ADVO proceedings. This study reveals that the progressive promise of the ADVO system to look beyond the lens of the criminal law is militated by a range of factors such as: the limited nature of the complaint narrative; the continuing focus in practice on incidents of violence; and the constraints of the court environment.

I Introduction

Many western countries have implemented civil protection order systems[1] to provide future protection to victims of intimate partner violence ('IPV'). These systems were first introduced in the USA[2] and UK[3] in the 1970s and in Australia

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1 These have different names across jurisdictions; for example, protection orders, restraining orders, domestic violence orders, and intervention orders. In NSW they are known as Apprehended Domestic Violence Orders ('ADVOs').

2 In Pennsylvania in 1976: James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999) 48.

3 Mandy Burton, *Legal Responses to Domestic Violence* (Routledge-Cavendish, 2008) 11–12.

from the 1980s[4] in direct response to the 'growing recognition that existing legal mechanisms failed to protect victims — predominantly women — from family violence'.[5] This recognition was largely driven by the extensive critiques made by feminist academics and advocates which drew attention to the limitations of the criminal law as a (sole) response to IPV.[6] The criticisms were broad-ranging and included the criminal law's focus on discrete incidents, the rules of evidence, notions of corroboration and credibility, and the standard of proof.[7] By contrast, civil protection order schemes were seen as having many key advantages over the criminal law in terms of addressing a wider range of acts and behaviours, accessibility, the lower standard of proof and the provision of future protection. Importantly civil protection orders were seen as being able to ameliorate the reluctance many victims may have about involving the criminal law and its associated features of punishment. Civil protection order systems, then, were seen as providing a more appropriate mechanism to respond to the cumulative and varied experience of violence and abuse that comprises IPV.

This is not to suggest that civil protection order systems have been without criticism — from the outset they were criticised for countering the key message that 'domestic violence is a crime' and hence were seen further to privatise and domesticate IPV.[8] Indeed much of the literature about IPV and the criminal law vis-à-vis civil protection orders has focused on the relationship (or lack thereof) between these two legal responses — a key question being whether the civil protection order system, particularly as it plays out in Australia, is 'trumping' the criminal law.[9] In many ways this dichotomous debate has subsided, with both legal responses being seen as complementary, rather than alternative, measures[10] — although concerns remain about the low utilisation of the criminal law[11] particularly for breaches of protection orders.[12]

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4 NSW was the first Australian jurisdiction to introduce such orders: *Crimes (Domestic Violence) Amendment Act 1982* (NSW).

5 Australian Law Reform Commission ('ALRC') and New South Wales Law Reform Commission ('NSWLRC'), *Family Violence – A National Legal Response: Final Report*, Report No 128 (2010) 171 [4.6].

6 Ibid; Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008) 1.

7 See, eg, Deborah Tuerkheimer, 'Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence' (2004) 94 *Journal of Criminal Law and Criminology* 959, 971–4; Eve S Buzawa and Carl G Buzawa, *Domestic Violence: The Criminal Justice Response* (Sage Publications, 3rd ed, 2002); Elizabeth M Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press, 2000) especially ch 7.

8 Jocelyn Scutt, 'Going Backwards: Law Reform and Women Bashing' (1986) 9 *Women's Studies International Forum* 49, 51–2.

9 Heather Douglas and Lee Godden, *The Decriminalisation of Domestic Violence* (Griffith University, 2002).

10 See Julie Stubbs, 'Domestic Violence Reforms in NSW: Policy and Practice' in Suzanne Hatty (ed), *National Conference on Domestic Violence: vol 2* (Australian Institute of Criminology, 1986) cited in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) 318. See also Ruth Lewiset al, 'Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence' (2001) 10 *Social & Legal Studies* 105, 107–8.

11 See Heather Douglas, 'Crime in the Intimate Sphere: Prosecutions of Intimate Partner Violence' (2003) 7 *Newcastle Law Review* 79, 79; Douglas and Godden, above n 9.

12 See NSW Legislative Council Standing Committee on Social Issues, NSW Parliament, *Domestic Violence Trends and Issues in NSW* (2012) ch 10; NSW Ombudsman, *Domestic Violence:*

This article turns its focus to the complex question of whether civil protection order systems, despite a range of progressive elements, continue to mirror the criminal law's narrow understanding of IPV. The extent to which the various Australian civil protection order schemes have the capacity to look beyond incidents varies. This variation is seen in the extent to which the different legislative schemes adopt narrow or broad definitions of the acts of violence and abuse that might ground an order, the content of any objects or purpose statement, and the different tests that the various courts need to be satisfied of when granting an order.[13] Furthermore, and perhaps most critically, it is not simply the legislative provisions that shape how the legal system understands domestic violence, but the way in which those legislative provisions are implemented.

The article explores these concerns through a case study that examined the use of cross-applications in NSW Apprehended Domestic Violence Order (ADVO) proceedings involving intimate heterosexual relationships.[14] A cross-application takes place when one person in a current/former intimate relationship, usually the woman, applies for an ADVO and sometime afterwards the defendant in that originating application, usually the man, seeks an ADVO against the first person. Cross-applications provide a useful lens through which to examine whether the ADVO scheme has succeeded in providing a more appropriate mechanism to address IPV, by directly raising questions about: who requires protection; how is it assessed; whether discrete incidents are sufficient; whether physical violence is emphasised; and so on. This study reveals that the progressive promise of the ADVO system to look beyond incidents of violence (that is to look beyond the lens of the criminal law) is militated by a range of factors such as: the limited nature of the complaint narrative; the continuing focus on incidents; and the constraints of the court environment.

II Civil Protection Order Systems

A *Progressive Elements*

Civil protection orders are now in place in all Australian jurisdictions, having first been introduced in NSW in the early 1980s.[15] These orders are seen as having a number of potential advantages over the criminal law; for example, they generally respond to a wider range of acts/ behaviours, they tend to look beyond discrete incidents, and, in some jurisdictions the legislation contains an objects statement which refers to the gendered nature of IPV and its motivation in power and control.

Improving Police Practice: A Special Report to Parliament under s 31 of the Ombudsman Act 1974 (NSW Ombudsman, 2006) 17–18; and Hayley Katzen, 'It's a Family Matter, Not a Police Matter: The Enforcement of Protection Orders' (2000) 14 *Australian Journal of Family Law* 119.

13 See Karen Wilcox, *Recent Innovations in Australian Protection Order Law — A Comparative Discussion*, Australian Domestic & Family Violence Clearinghouse, Topic Paper 19 (2010).

14 This discussion forms part of a larger study: Jane Wangmann, *'She Said…' 'He Said…': Cross Applications in New South Wales Apprehended Domestic Violence Order Proceedings* (PhD thesis, University of Sydney, 2009) <http://hdl.handle.net/2123/5819>.

15 *Crimes (Domestic Violence) Amendment Act 1982* (NSW).

1 *Beyond an Emphasis on (Largely) Physical Violence*

The criminal law has traditionally focused on discrete acts of 'violence' to the exclusion of the varied acts of violence and abuse prominent in feminist definitions of IPV.[16] Thus, a great deal of what women describe as violence and abuse is not captured by the criminal law.[17] Critically, this emphasis on acts of 'violence' has also meant that any appreciation of, let alone response to, coercive control has been absent from criminal justice responses.[18] As Evan Stark describes, the visibility of physical violence and injuries has left obscured the many mechanisms of 'personal entrapment' that characterise IPV (for example, surveillance mechanisms such as requiring a woman to answer the phone within a certain number of rings, checking the odometer of her car, and making demands about the way she cooks, dresses and engages in sex).[19]

It has only been in recent years that some jurisdictions have sought to expand the way the criminal law responds to IPV by creating a specific offence,[20] making the relationship context an aggravating factor,[21] or criminalising some acts, such as stalking. While no Australian jurisdiction has created a dedicated offence, some jurisdictions have sought to widen the reach of the criminal law, for example, in 2004 Tasmania introduced offences of emotional and economic abuse.[22] This has been criticised,[23] and there have been no prosecutions to date.[24]

By contrast, civil protection orders generally have the capacity to address a broader range of acts and behaviours. While the NSW ADVO scheme was initially confined to acts of physical violence, sexual violence and property damage, within a year it expanded to include harassment or molestation.[25] In 1989 it was clarified that harassment and molestation could be directed at a person's property and did

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16 David Hirschel and Eve Buzawa, 'Understanding the Context of Dual Arrest with Directions for Future Research' (2002) 8 *Violence Against Women* 1449, 1456–7; Carolyn Hartley and Roxann Ryan, *Prosecution Strategies in Domestic Violence Felonies: Telling the Story of Domestic Violence* (1998) 1–2; Leigh Goodmark, 'Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women' (2004) 23 *St Louis University Public Law Review* 7, 2830.

17 Rosanna Langer, 'Male Domestic Abuse: The Continuing Contrast Between Women's Experiences and Juridical Responses' (1995) 10 *Canadian Journal of Law and Society* 65, 81.

18 As a result some scholars have proposed changes to the criminal law: see Tuerkheimer, above n 7; Alafair S Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2007) 75 *George Washington Law Review* 552; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) 382–4. See also the discussion in ALRC and NSWLRC, above n 5, 563–4 [13.6]–[13.9].

19 Stark, above n 18, 15. See also Kathleen J Ferraro, *Neither Angels Nor Demons: Women, Crime and Victimization* (Northeastern University Press, 2006) 16.

20 For example in Andorra, Croatia, the Czech Republic, Hungary, Iceland, Montenegro, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain and Sweden: ALRC and NSWLRC, above n 5, 566 [13.13].

21 See, eg, *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g); *Criminal Code Act Compilation Act 1913* (WA) sch 1 s 221(1)(a).

22 *Family Violence Act 2004* (Tas) ss 8–9.

23 Urbis, *Review of the Family Violence Act 2004 (Tas)* (2008) 8, 11–12. See also the submissions against such a proposal received by the ALRC and NSWLRC, above n 5, 586–97 [13.83]–[13.84].

24 See ALRC and NSWLRC, above n 5, 574 [13.39].

25 By the *Crimes (Domestic Violence) Amendment Act 1983* (NSW).

not have to involve actual violence to the person,[26] and in 1993 stalking and intimidation were included as grounds for an ADVO.[27] While these are the types of acts/behaviours that ground an ADVO, the complaint process also provides scope for a complainant to detail other acts/behaviours. This can provide important context to the victim's experiences. This is particularly the case after 2006 when the legislation made it clear that the court may refer to any 'pattern of behaviour' in determining whether conduct amounts to intimidation.[28] Other Australian jurisdictions have also widened the scope of their protection order legislation; for example the Victorian legislation defines family violence as behaviour that is 'physically or sexually abusive', 'emotionally of psychologically abusive', 'economically abusive', 'threatening', 'coercive' or in any way 'controls or dominates' a person.[29]

The reach of civil protection orders to cover other behaviour not proscribed by the criminal law is also extended by the way that orders may limit the extent to which the defendant can come into contact with the victim. An ADVO that prohibits contact, for example, may effectively reduce the opportunity to engage in a wide range of adverse behaviours that would otherwise evade legal apprehension.[30]

2 *Beyond Single Discrete Acts*

The criminal law addresses single incidents of violence. This means that while a person may have perpetrated multiple assaults during, and after a relationship, that person may only be charged with offences relating to specific incidents (although they may be charged with multiple offences). Thus the prosecution of a criminal offence represents a 'fleeting snapshot of an ongoing relationship, a snapshot that may not accurately reflect the dynamics of the ongoing relationship'.[31] In this way the defence may be able to cast the presenting incident, often a minor criminal offence, as an isolated, aberrant event that is 'out-of-character'. As Rosemary Hunter notes:

> Regarded in isolation, much abusive or threatening behaviour can be explained away, given a benign interpretation, or made to appear innocuous.

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[26] By the *Crimes (Apprehended Violence) Amendment Act 1989* (NSW), sch 1 item 6 amending then s 562B of the *Crimes Act 1900* (NSW). See now *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16 and the definition of intimidation in s 7.

[27] By the *Crimes (Domestic Violence) Amendment Act 1993* (NSW) sch 1 item 2. Intimidation was then defined as '(a) conduct amounting to harassment or molestation; or (b) the making of repeated telephone calls; or (c) any conduct that causes a reasonable apprehension of injury to a person or to a person with whom he or she has a domestic relationship, or of damage to any person or property' in s 562A of the *Crimes Act 1900* (NSW). In 2006 'repeated telephone calls' was replaced with a subsection that refers to new technologies (eg SMS messages and email) by the *Crimes Amendment (Apprehended Violence) Act 2006* (NSW). Now *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7.

[28] By the *Crimes Amendment (Apprehended Violence) Act 2006* (NSW) adding s 562D to the then *Crimes Act 1900* (NSW). Now *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7(2).

[29] *Family Violence Protection Act 2008* (Vic) s 5(1).

[30] See Sally F Goldfarb, 'Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship' (2008) 29 *Cardozo Law Review* 1487, 1509.

[31] Hirschel and Buzawa, above n 16, 1457; Tuerkheimer, above n 7, 973.

> The decontextualized examination of disaggregated incidents can leave a case in shreds.[32]

Thus the minor nature of the presenting crime is emphasised, rather than its evidence as a 'serious' pattern of behaviour.[33]

In contrast, while incidents are certainly mentioned in civil protection orders, these incidents can be accompanied by other incidents, past events, and acts not otherwise deemed as criminal that provide context to the need for protection.

In addition, a distinctive feature of the NSW ADVO system is the linkage between the incidents that might ground an ADVO and their impact on the victim: the generation of fear.[34] Arguably, this requirement should activate an understanding that the behaviour alone is not sufficient; that there must be this other component: fear. This is quite different to the requirement of 'repetition' used in Victoria, criticised by Hunter because it focuses on the *perpetration* of acts rather than *how they operate*.[35] The connection to 'fear' is a potentially useful mechanism, as it can assist in moving the legal response from incidents (whether an event happened) to examining how the acts function ('who is in fear?' and 'who requires protection?').

3 *A Guiding Statement*

The legislation providing for ADVOs in NSW contains an objects statement and statement of parliamentary recognition.[36] Such statements also appear in legislation in South Australia, Victoria and Queensland in varying ways.[37] These provisions are seen as providing an important 'contextual framework' for decision-makers as well as serving an educative function for key professionals working in the field.[38]

The objects of the NSW ADVO legislation are to ensure the safety and protection of people experiencing or witnessing domestic violence, to reduce and

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32 Hunter, above n 6, 41. See also Meda Chesney-Lind, 'Criminalizing Victimization: The Unintended Consequences of Pro-Arrest Policies for Girls and Women' (2002) 2 *Criminology and Public Policy* 81, 86.

33 This may emerge in sentencing, where prior acts that resulted in a conviction may be taken into account (but not those that were not reported, not prosecuted or that did not result in conviction).

34 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16(1). Two other Australian jurisdictions also include fear or a similar criterion: *Domestic and Family Violence Act 2007* (NT) s 18; and *Restraining Orders Act 1997* (WA) s 11A.

35 Hunter, above n 6, 53–4. Hunter was referring to then *Crimes (Family Violence) Act 1987* (Vic) s 4. Repetition remains in the *Family Violence Protection Act 2008* (Vic) s 74(1). However, the breadth of the new definition of 'family violence' (s 5) may generate a different approach to the granting of orders. Tasmania also relies on repetition: *Family Violence Act 2004* (Tas) s 16(1). In Queensland, the *Domestic and Family Violence Protection Act 2012* (Qld) requires the court to be satisfied that 'the protection order is necessary or desirable to protect the aggrieved from domestic violence': s 37(1). The ACT simply requires that a domestic violence offence has taken place: *Domestic Violence and Protection Orders Act 2008* (ACT) s 46(1)(a).

36 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9.

37 *Family Violence Protection Act 2008* (Vic) s 1; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10; and *Domestic and Family Violence Protection Act 2012* (Qld) ss 3–4. Other Australian jurisdictions also have guiding statements, however they tend to be quite limited: *Family Violence Act 2004* (Tas) s 3; *Domestic Violence and Protection Orders Act 2008* (ACT) s 6; *Domestic and Family Violence Act 2007* (NT) s 3.

38 ALRC and NSWLRC, above n 5, 304 [7.38].

prevent domestic violence, to 'enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence Against Women' and to 'enact provisions that are consistent with the United Nations Convention on the Rights of the Child.[39] The statement of what Parliament recognises extends further, tending to be the site where more progressive statements are articulated. For example, Parliament has specifically recognised the gendered nature of domestic violence, that it occurs across all sectors of the community, and that it is characterised by an imbalance of power and patterns of abuse, among other matters.[40]

B *Criticisms*

From the outset there have been criticisms of civil protection order systems. As noted above, one of the key criticisms was that civil protection orders undermine the criminal response by not responding to an assault as an assault.[41] The other key criticism centres on what has been termed the 'implementation problem';[42] that is, the gap between the law as written and its practical application. This is a problem that dogs much feminist engagement with law reform.[43] Hunter details two reasons for this implementation problem. [44] First, there is a gap between the intent of the reform and the prevailing legal culture, where feminist measures may always be seen as radical because they aim to disrupt existing structures. Second, that the law itself may not be a useful mechanism to bring about change for women, in that measures that might assist women need to be translated and fitted within existing legal categories; this process removes the transformative power of what was intended.[45]

III Case Study: Cross-Applications

In this section, I present findings from a larger study on cross-applications in NSW ADVO proceedings,[46] which explored a number of related questions: Whether there were gender differences in the types of violence alleged to have been used? Was a cross-application indicative of mutual violence? How did the legal system

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39 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1).

40 Ibid s 9(3).

41 See Scutt, above n 8; Douglas and Godden, above n 9, i.

42 Hunter, above n 6, 6. See also Burton, above n 3, 36, 45.

43 See Regina Graycar and Jenny Morgan, 'Law Reform: What's in it for Women?' (2005) 23 *Windsor Yearbook of Access to Justice* 393; Schneider, above n 7, 109–110; Martha McMahon and Ellen Pence, 'Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence' (2003) 9 *Violence against Women* 47, 47–8.

44 Hunter, above n 6, 5–9.

45 See Carol Smart, 'Feminism and Law: Some Problems of Analysis and Strategy' (1986) 14 *International Journal of the Sociology of Law* 109; Carol Smart, *Feminism and the Power of Law* (Routledge, 1989); Margaret Thornton, 'Feminism and the Contradictions of Law Reform' (1991) 19 *International Journal of the Sociology of Law* 453.

46 Wangmann, above n 14. The fieldwork was undertaken when the ADVO provisions were contained in part 15A of the *Crimes Act 1900* (NSW). In 2008, a stand-alone Act, the *Crimes (Domestic and Personal Violence) Act 2007*, replaced these provisions. I therefore refer to the law as it was at the time of the fieldwork and provide a reference to the new provision where required.

negotiate and resolve cross-applications? Was a cross-application in itself another tool of harassment? Whether the ADVO system focuses on incidents rather than context in deciding whether to grant a protection order? In essence this study was concerned with how IPV is defined and understood — by men and women, and by the legal system that seeks to provide some response to that violence. The research gathered and analysed qualitative and quantitative information from the following sources:[47]

- *In-depth semi-structured interviews with women involved in cross-applications.*[48] Ten women were interviewed from November 2002 to October 2003. Most were recruited via Women's Domestic Violence Court Advocacy Schemes (WDVCAS). These interviews are not representative, as women self-selected to participate; however, this method of recruitment is appropriate in such a sensitive area.[49] The interviews took approximately two hours to complete and covered the woman's experience of IPV, the contents of her ADVO, the contents of the ADVO sought against her, and the resolution of the cross-applications.[50]

- *In-depth semi-structured interviews with various professionals working within the legal system* (six specialist domestic violence police officers, five police prosecutors, five magistrates, six solicitors, and five coordinators of WDVCASs) (a total of 27 professionals).[51] The interview schedule incorporated some variation to take account of the different professional roles and covered such matters as: definitions of domestic violence, cross-applications in the work setting, outcomes of cross-applications, and areas for reform.

- *Documentary analysis of 12 months of court files from three large metropolitan courts* (a total of 78 cross-applications involving 156 individual applications).[52] Court files were examined to gather quantitative and qualitative data about cross-applications, the type of violence alleged to have taken place, and how the applications were resolved.

- *Court observations.* Observations were conducted at two large metropolitan courts during 2006 and 2007. Seventy-three ADVO mentions were observed, and two hearings (one of which settled). Observations noted such things as the gender of the

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47 For a detailed discussion of each of these components see Wangmann, above n 14, 61–85.

48 A key limitation of this research was the absence of interviews with men involved in cross-applications; several recruitment methods were attempted, ultimately unsuccessful. Similar difficulties were encountered in a Scottish study: Clare Connelly and Kate Cavanagh, 'Domestic Abuse, Civil Protection Orders and the "New Criminologies": Is There Any Value in Engaging with the Law?' (2007) 15 *Feminist Legal Studies* 259, 265.

49 Miranda Kaye, Julie Stubbs and Julia Tolmie, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (Research Report 1, Families, Law and Social Policy Research Unit, Griffith University, June 2003) 15.

50 The women interviewed are referred to by a pseudonym.

51 The professionals interviewed have been allocated a code number indicating their professional grouping followed by a number, for example MAG1 (magistrate), DVLO1 (Domestic Violence Liaison Officer), SOL1 (solicitor), PP1 (police prosecutor), and CAS1 (coordinator of a Women's Domestic Violence Court Advocacy Scheme).

52 The court files have been given a code, indicating the court (CourtA, CourtB, or CourtC), the number for the case and in parenthesis whether it is a police or private application, whether the complaint is made by a man or woman, and who was first in time. For example, CourtA-1 (Police M 1st).

> parties, whether the order was police initiated or private,[53] whether an interpreter was required, whether the parties were represented, the demeanour of the magistrate,[54] and whether there was any discussion, via comments, submissions or evidence about the nature of the violence alleged.

As a general picture — cross-applications represent a small number of ADVO applications; in this study they represented between five and 11 per cent of intimate partner ADVO applications. Overwhelmingly, women were the first to apply (women were first-in-time in 76.5 per cent of the cross-applications in the court file sample, and in 90 per cent of the interview sample). First applications, whether by men or women, were more likely to have been made by the police (70.6 per cent of first applications in the court file sample were made by the police, compared to only 11.8 per cent of second applications; similarly the police had sought the order for nine of the 10 women interviewed).

In this article I draw on these data sources to explore questions about the adequacy of the conception of IPV that underpins the ADVO system.

A *The Inadequacy of ADVO Complaint Narratives*

Few studies have examined complaint narratives for protection orders. There are three notable exceptions from the US.[55] No studies in Australia have examined the actual complaint narrative (as opposed to what the person, in a research interview, has recounted as their experience of violence), yet it is these narratives that form the basis of the legal response that follows and hence are a critical component in any assessment of the adequacy of that response.

In NSW, ADVO complaint narratives are either written by the police officer attending the incident, or by a chamber magistrate at a local court.[56] These professionals play a role in 'paraphras[ing]' and 'shap[ing]' a person's account of violence and in this way 'filtering' and translating the experience into a legal format.[57] In her study of the Victorian protection order system, Hunter places the registrar or chamber magistrate as the 'ultimate author' of the complaint, with the:

> …power to rewrite the applicant's story, to highlight and discard elements they regarded as ir/relevant, and to blanch emotion from the scene…[It is] the registrar who filtered the applicant's story and produced a legally acceptable account to place before the court.[58]

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53 In NSW an ADVO may be applied for by the police on behalf of the person in need of protection (a police application) or by the person themselves (a private application). The police have a strong legislative obligation to apply for ADVOs: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49.

54 Following Ptacek's work: above n 2.

55 See Ptacek, above n 2, ch 4; Shonna L Trinch, *Latina's Narratives of Domestic Abuse: Discrepant Versions of Violence* (John Benjamins Publishing, 2003); Alesha Durfee, *Domestic Violence in the Civil Court System* (PhD Dissertation, University of Washington, 2004).

56 See above n 53.

57 Durfee, above n 55, 110. See also Victorian Law Reform Commission ('VLRC'), *Review of Family Violence Laws: Consultation Paper* No 2 (VLRC, 2004) 136 [7.22].

58 Hunter, above n 6, 109.

A similar view was articulated by one of the WDVCAS coordinators interviewed in the present study who stated that complaint narratives are 'skewed by the perception of the [police officer] writing [the complaint]…it's often about the police officer's interpretation of behaviours' rather than the victim's account of what happened'.

While this 'shaping' of narratives is true for a number of the complaints gathered in the present study, the direct opposite is also true; there were a number of complaints where there appeared to be little mediation between what the person seeking protection said and the text that was produced, instead it appeared that the police officer or the chamber magistrate simply asked 'tell me what has been happening?' and this is reproduced almost verbatim. One of the magistrates interviewed confirmed this assessment:

> Do you call it drafting? … they usually just start straight in with the consciousness. I mean you can actually see it coming out of the mouth, they just type as it came out. Yeah [it's] being kind…to describe it as 'drafting'…I mean there's usually a whole lot of junk in there you can't use anyway…they've [just] written down what she's said, half of which is valuable to me and half of which will be fertile grounds for cross-examination.[59]

The process of eliciting women's stories about violence within a legal setting is a complex one in which there are concerns about silencing women's accounts through the filter of what the law requires; in this context it might be argued that the absence of directive involvement in the writing of complaints may enhance access to the legal process.[60] My concern with the poor quality of complaint narratives is not so much about the way legal discourse may silence women's stories; rather that there seems to have been little attention paid to eliciting and documenting the information that the court requires at a basic level to determine whether to grant an order.

1 *Absence of Details, Inadequate Information and Irrelevant Content*

Many complaint narratives analysed in this study were clearly inadequate: they focused on a single incident, there was often too little information, inadequate detail, and/or a considerable amount of irrelevant information. The following complaint illustrates these concerns; it fails to specify any of the acts and behaviour that took place:

> The parties have been married for about four years. Police were called to the premises today by a third party. Police have attended and found there has clearly been an altercation between the parties, however it is unclear who may have been the aggressor and who may have been the victim. Both parties have suffered injury consistent with some parts of their story and Police are satisfied that unless an order is made against each party there is the likelihood or probability of further violence between the parties. The matter still remains subject to further investigation.[61]

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59 MAG2.
60 Durfee, above n 55, 111.
61 CourtC-30 (police dual application).

Key professionals interviewed in this study confirmed the poor quality of many complaints.[62] One magistrate described the quality as 'atrocious' with complaints generally being 'bare bones…with very little information' resulting in a 'wonderful story which says nothing'.[63] Another noted the variability of complaints, with some being incredibly detailed, while others are 'a load of absolutely incomprehensible garbage'.[64] Police prosecutors were similarly scathing:

> … [t]here's not enough put in the actual allegation itself to get the order. Say for example, … a [Person in need of protection ('PINOP')] makes [a complaint that] … she was harassed on a particular day and that's why she wants the application and that's all that appears in the [complaint]. And when you roll along to court she'll walk in with you know a trolley load of documents and records and 'oh this has been going on for months'.[65]

Dual applications (cases in which the police have applied for an ADVO for both parties arising from the same incident)[66] represented a distinct category. These narratives were of extremely poor quality; very brief, using identical text for both parties, and referring to a history of IPV in a way that implicated both parties (despite in at least two cases evidence being available that the woman had been the victim of previous acts of violence)[67]. While the police interviewed suggested that dual applications arose out of complicated cases where it was difficult to assess who was the main aggressor, and who might require protection, the quality of the complaint narratives suggested that there had been little, if any, investigation of the different actions each party was alleged to have engaged in or the consequences of those acts.[68]

While the Domestic Violence Liaison Officers ('DVLOs') and police prosecutors interviewed in this study made critical comments about the standard of complaints written by police, they also asserted that there had been improvements in recent years as a result of the training provided to general duties officers.[69] In addition, one DVLO, who also recognised issues with the quality of complaint narratives, asserted that that 'in the end' they 'serve their purpose'.[70] That is to say, if the purpose is to obtain an ADVO then, by and large, the complaint narratives satisfy this goal.[71]

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62 See DVLO1, DVLO3, DVLO4, DVLO5, MAG2, MAG3, MAG4, MAG5, PP1, PP2, PP3, PP5, WDVCAS2 and WDVCAS3. Compare MAG1 who noted that while complaints were 'fairly…brief' they generally provided 'adequate [information]…to ascertain…the circumstances of the dispute'.

63 MAG4.

64 MAG3.

65 PP1. See also PP3.

66 Dual applications comprised 10 out of 78 cross-applications in the court file sample. None of the women interviewed were a party to a dual application.

67 In one of the dual applications it transpired that the woman already had an existing ADVO against her de factor partner; in the other, the woman presented medical evidence of previous injuries which she had reported to her doctor.

68 Also suggested by DVLO1.

69 See DVLO3, DVLO4 and PP1.

70 Email communication (9 August 2005).

71 However one might question this proposition when 'over 40 per cent of ADVO applications are withdrawn or dismissed before the final hearing': NSWLRC, *Apprehended Violence Orders*, Report No 103 (2003) 191 [9.28].

While the absence of detailed information may not present a problem in 'serious' cases, where the violence used is easily 'visible' and corroborated, it does create problems in 'border cases';[72] that is cases which are complex, contested, or present an awkward fit with the legislation or notions of a 'real' victim. Such cases clearly risk being unsuccessful when the complaint narrative is inadequate. Cross-applications represent just such a 'border case', where the competing stories about violence are not easily open to identification of victim and perpetrator, who needs protection and who does not.

2 *Brevity*

ADVO complaint narratives are brief. Of the 156 individual complaints that formed the court file sample, approximately 47 per cent were between one and 10 lines in length (with just under half of these being less than five lines), approximately 36 per cent were between 11 and 20 lines, approximately 11 per cent were between 21 and 30 lines and approximately five per cent were over 30 lines in length. Those complaints generated by the police as urgent orders[73] tended to be the briefest.

While there is no restriction on the length of a complaint, invariably narratives fit the space provided on the institutional form that commences the process. As one police prosecutor said:

> … the complaints on roneoed forms are only half a page so authors tend to restrict themselves to that, for that reason subconsciously or consciously.[74]

It is possible for the complaint to be appended to the form, however this is rare.[75]

While most magistrates allow complainants to provide evidence in addition to those matters specified in the complaint, some do not. As one police prosecutor noted 'some magistrates hold you to that bloody complaint'.[76] This may be a particular issue in busy courts with high workloads. One magistrate, for example, explained that in most circumstances (unless it is a 'contested matter with some substance') she restricts parties to the matters specified in the complaint 'otherwise it's unfair to the other side if they've got to meet matters that … they're not … aware they have to meet'.[77]

3 *Continuing Emphasis on Incidents*

A large number of the ADVO complaint narratives examined in this study were limited to detailing a single incident. Out of the 10 women interviewed, six of the complaint narratives were so limited.[78] In terms of the court file sample, 26 out of

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72 Durfee, above n 55, 135–6.

73 At the time of the field work known as 'telephone interim orders' ('TIOs'), they are now known as provisional orders. See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) part 7.

74 PP3.

75 Eight male second applicants in the present study adopted this process. See Wangmann, above n 14, 189–95.

76 PP2.

77 MAG4.

78 Chloe, Frances, Janet, Kate, Lillian and Louise.

68 applications made on different dates, and eight of the 10 dual applications referred to a single incident. This means that 43.6 per cent of cases in the court file sample detailed a single incident.

In the context of the women interviewed, many of these single incidents were clearly of sufficient seriousness to support the making of an ADVO, and did so in all but one case. However, they failed to capture the full experience of IPV. For example, two of the women interviewed experienced what could be described as siege-style incidents, and these incidents formed the sole subject of their ADVO complaint.[79] When interviewed, they described a relationship that involved more extensive and longstanding experiences of violence and control. One woman described multiple physical assaults, attempted strangulation, verbal abuse, isolating tactics, threats against her and people close to her, constant telephone calls, messages and stalking.[80]

While these siege incidents were clearly serious and sufficient to ground an order (and on this basis it may seem a trifling point to assert that no other aspects of their experience of violence had been documented), nonetheless the fact that the incident was part of a pattern of repeated violence seems a relevant consideration for the court in considering what orders should be made to ensure future safety. My concern rests with the fact that the focus on incidents means that the multiple and repetitive environment of IPV is not conveyed. Such information is important to convey the full experience of violence (particularly that which is not on the scale of a siege) and to provide a connective framework by which to appreciate acts that might otherwise be viewed as 'minor', 'trivial' or 'one-off'.[81]

The spotlight on single incidents also enables counter stories to be raised by the defence that suggest that the behaviour was uncharacteristic. This may be a particular problem if the incident took place at separation. For example, there are well-worn stories about the devastation experienced on the failure of the relationship, or the pain of still being in love with the woman, which are often deployed to conceal stories of control.[82] The documentation of multiple incidents can prevent such stories of thwarted romance from taking a dominant role in the interpretation of events.

Furthermore the incident most likely to be detailed is the most recent. Yet the 'most recent incident' is generally not the first, nor is it necessarily the most serious.[83] Alesha Durfee, who conducted a qualitative analysis of protection order petitions in Washington State,[84] noted that this incident is often one of the more trivial events, yet because it is the most recent, it is the most 'raw' and as a result

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79 Frances and Lillian.

80 Lillian.

81 See Stark, above n 18, 14–15.

82 See Ruth Busch, '"Don't Throw Bouquets at Me…(Judges) Will Say We're in Love": An Analysis of New Zealand Judges Attitudes Towards Domestic Violence' in Julie Stubbs (ed), *Women, Male Violence and the Law* (Institute of Criminology, 1994); Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell no Tales, Tales are Told About Them' (1997) 21 *Melbourne University Law Review* 237.

83 See Busch, above n 82, 106–7; Durfee, above n 55, 120.

84 Durfee, above n 555. In Washington State, petitioners are asked about the most recent incident.

petitioners often expend a considerable amount of time detailing this event, and leave other stronger examples brief and lacking in detail.[85] This obviously has an impact on the likelihood of success. It may also be that the most recent incident holds for the victim certain indicators of what was likely to take place; that is to say that the presenting incident, while perhaps minor or trivial, is read by the victim through the lens of past experience. The precipitating incident is obviously important (particularly to the police seeking an urgent order), but it still needs to be understood in context for an adequate account of the violence to be intelligible to the court.

4 *Routine References to 'Fear'*

As noted above, the NSW legislation requires the court to be satisfied on the balance of probabilities that the person in need of protection fears and has 'reasonable grounds to fear' the commission of a range of offences.[86] The examination of complaint narratives in the present study revealed that references to 'fear' appeared to be included in a routine and habitual manner, often as bald statements to conclude a complaint without any thematic connection to the victim's experience.[87] For example:

> Former de facto partners until [date]. Tonight [PINOP] went to RSL with [defendant], argument ensued. [PINOP] tried to leave and [defendant] would not let him. Both then left and went into … Police Station. [PINOP] then left and went home and short time later [defendant] arrived banging on windows yelling abuse and threats. *[Defendant] (sic) fears for his safety*.[88]

Durfee notes in her research that those narratives that provide some thematic structure and connection between events and their impact may be most persuasive.[89] Some of the complaint narratives gathered in the present study did some of this work, actively explaining the nature of various acts and behaviours and their impact.[90] However, the routine approach to concluding complaint narratives was the more dominant approach.

The routine reference to 'fear' may have a range of repercussions. For example, one magistrate discussed a case in which she had refused to grant an ADVO, after which the defence sought costs against the police. The police have extensive protection against the awarding of costs; it is only possible to be awarded costs where the court is satisfied 'that the police officer made the complaint knowing it contained matter that was false or misleading in a material particular'.[91]

> [T]he defendant was [pursuing costs] … on the basis that the police officer had in fact made a statement that she knew to be false, that statement being

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85 Ibid 40–1 and 120.

86 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16(1). There are some circumstances where the court does not need to be satisfied of such fears: see s 16(2).

87 Durfee, above n 55, 126.

88 CourtC–1 (Police M 1st) (emphasis added).

89 Alesha Durfee, 'Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders' (2009) 4 *Feminist Criminology* 7, 11.

90 See, eg, CourtC–7 (Police W 1st).

91 At the time of the field work *Crimes Act 1900* (NSW) s 562N(3), now *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 99(4).

> the absolutely standard things they put in every single [ADVO] which is you know the … 'she fears for her safety if the order is not granted' or …something like that, and that tends to go in every single [complaint]. …[The defence] was asserting that [the police officer] couldn't possibly have [known that and that it was] false because they were say[ing]… [the victim] did not in fact tell [the police] that she [had fears] — that there was no evidence that the particular police officer actually knew that [the woman had fears]…[92]

The tendency then to adduce 'fear' via incidents and in a routine way in complaint narratives appears to undermine the benefit of 'fear' as a legislative criterion.

The poor quality of many complaint narratives raises questions about the understanding of IPV that is conveyed to, and in turn, underpins the ADVO system. The absence of in-depth, detailed accounts that portray the context of violence means that key professionals have insufficient information when making decisions about claims for protection. This has implications not only for the administration of the ADVO system but also for related legal proceedings; if the detail and quality of the ADVO complaint narrative is lacking, then this obviously has implications for the extent to which IPV is taken into account in any subsequent or concurrent family law proceedings.[93]

B *Incidents in the Accounts of Professionals*

Not only were incidents emphasised in many of the complaint narratives examined in this study, they also appeared to continue to play a significant role in the practice of the key professionals interviewed (particularly the police interviewed). This is despite the progressive legislative framework, and the generally well-developed understanding of domestic violence held by the professionals interviewed in this study.

When asked 'how do you define or understand domestic violence?' most of the professionals interviewed articulated broad, well-developed understandings of domestic violence. This included reference to: a wide range of acts and behaviours;[94] power and/or control;[95] gender;[96] and recognised it as patterned and repetitive.[97] For example, one magistrate made specific connections between the experience of IPV and women's unequal position in society:

> [Domestic violence] … is a plethora of acts perpetrated by a man overwhelmingly against women involving the use of power to control….I

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92 MAG3.

93 See Lawrie Moloney et al, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (Australian Institute of Family Studies, 2007) 119.

94 DVLO1, DVLO2, DVLO3, DVLO5 and DVLO6 (5/6); MAG2, MAG5 (2/5); PP1, PP2, PP3 (3/5); SOL1, SOL5, SOL6 (3/5); WDVCAS1, WDVCAS2 (2/5).

95 DVLO1, DVLO5, DVLO6 (3/6); MAG2, MAG4, MAG5 (3/5); SOL1, SOL2, SOL6 (3/5); WDVCAS1, WDVCAS2, WDVCAS4, WDVCAS5 (4/5).

96 DVLO1, DVLO4 (2/6); MAG2, MAG3, MAG5 (3/5); PP1, PP2, PP3, PP5 (4/5); SOL1, SOL2, SOL6 (3/5); WDVCAS1, WDVCAS4 (2/5).

97 DVLO1, DVLO4, DVLO5 (3/6); SOL1 (1/5); WDVCAS5 (1/5).

> think violence is a political issue really.… a political issue of the subordination of women and the use of violence to control one's subordinate …[98]

However, when these professionals were asked practice-based questions or work-orientated questions there was a tendency for incident based approaches to re-emerge. This was particularly evident in the responses the police (DVLOs and prosecutors) offered to scenarios involving dual applications, where there was a return to identifying and carving off discrete incidents. This meant that a person could be identified as a perpetrator in one incident, and a victim in the next.[99] This took place even in those cases where the 'incidents' appeared more as a sequence of events. For example, one police prosecutor explained:

> … we have to look at the brief and we have to basically either, … [ask ourselves] 'why have we done this?', look at the evidence, is it a case where there's one incident followed quickly after by another incident? If that's the case we split the proceedings.[100]

The emphasis on incidents is connected to the way in which the work of the police is defined by the parameters of the law — where the law, particularly the criminal law, is all about whether a particular incident is a crime; who was the victim and who was the perpetrator. This focus then, appears to be translated to the ADVO environment where even though multiple acts might form the basis of an application, it is inextricably connected to incidents — who did what to whom — rather than the context of those acts (which could arguably find a basis for an assessment of what amounts to a 'good reason' for not applying for an ADVO)[101]. Hirschel and Buzawa have noted the tension between how researchers increasingly view domestic violence as a 'process' but the police and legal system continue to focus on a 'single incident or a series of discrete independent incidents'.[102] This vision of discrete incidents is clearly illustrated in the comments from police explaining when dual applications would be appropriate; for example:

> we had a situation um where a DV incident took place over a fairly short period of time, over a couple of hours, where the victim in one assault went inside and the incident moved inside and then the victim became the offender … by assaulting the previous defendant. So the victim outside had moved inside and became the defendant.
>
> Do you remember what happened?
>
> … the defendant went inside, the victim was outside, um and the defendant claimed that the victim was hurting their dog in the yard by hitting it with a broom and so they've come outside and they've hit them, got the broom out of their hand and started hitting the other party. That was the first assault. And then the victim in that matter moved inside, went into the bedroom, started crying. Some time passed, went back outside and to retaliate for being assaulted previously went out and punched the other party in the face. You've

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98 MAG5. See also DVLO1 and SOL1.
99 DVLO3, DVLO4, DVLO5, DVLO6 (4/6); PP1, PP2 (2/5).
100 PP1. See also DVLO3.
101 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49(5).
102 Hirschel and Buzawa, above n 16, 1456.

> got two assaults in that time frame, we got telephone interim orders for both parties and we ended up charging both … for the two separate assaults.[103]

Police officers in Susan Miller's study of women arrested for domestic violence also spoke about separate incidents based on the elapse of time.[104] Miller noted that the police were concerned with whether a crime occurred and did not make any reference to 'context, motivation, or history of abuse [as] important factors to use when trying to assess a situation'.[105] Miller argued that this focus illustrates a 'simplistic approach' that is part of the 'incident-driven philosophy' of the criminal legal system 'that is devoid of contextual understandings and explanations of violence'.[106] As Hirschel and Buzawa argue, the incident focus of the criminal law, and hence the actions of the police, adopts a dichotomous view of an incident where there is an identifiable victim and perpetrator; this means that the police find it difficult to view the 'interaction' that is part of ongoing domestic violence.[107]

Unlike the question, 'has a crime has occurred?' (the focus of a decision to charge), the decision to apply for an ADVO is not only concerned with whether certain acts have taken place, but with 'who requires protection?'. In this way civil protection orders ask different questions from the outset — I suggest that these questions are not necessarily premised on a single incident which is the focus of the decision to charge.

It is worth noting here that there is a mismatch between the legislative requirements placed on the police when applying for an ADVO and those placed on the court when determining whether to grant an ADVO. The legislation mandates police to apply for an ADVO when certain acts/behaviours have taken place or are likely to take place.[108] For the police there is no specific connection to fear or the requirement of future protection. In contrast, a magistrate, when determining an ADVO, is required to consider whether such acts/behaviours have caused the victim/complainant to fear and that those fears are reasonable.[109] The police obligation to apply for an ADVO does not make the same connection to 'fear' or even 'future protection'. By leaving these factors absent from the legislation, the obligation to apply for an ADVO retains many of the incident defining features that animates the criminal law and the traditional police response to IPV.

C *The Constraints of the Institutional Setting*

The Local Court setting is burdened with high workloads. This is particularly so in the context of ADVO matters where the workload has increased markedly since

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103 DVLO5. See also PP2.

104 Susan Miller, *Victims as Offenders: The Paradox of Women's Violence in Relationships* (Rutgers University Press 2005) 62–3.

105 Ibid 63.

106 Ibid 75.

107 Hirschel and Buzawa, above n 16, 1458.

108 *Crimes Act 1900* (NSW) s 562C(3), now *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49.

109 *Crimes Act 1900* (NSW) s 562AE, now *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16.

such orders were first available.[110] AVOs occupy a great deal of the time of the Local Court. In a survey of magistrates conducted for the NSW Judicial Commission in 1998, two-thirds of the magistrates estimated that between 10 and 20 per cent of their time is consumed by AVO matters, and of that work load, approximately two-thirds would involve domestic violence.[111]

In the Victorian context, Hunter made comments about both the high workload and absence of additional resources to deal with that work which has meant that intervention orders 'tend to be dealt with in similar, routinized, ways to other matters'.[112] The same can be said for NSW. This has been referred to as the 'gap' between legal principles (laws, rights, processes) and 'the daily reality of the administration of justice'.[113]

The magistrates interviewed emphasised their workload and noted the constraints it placed on the way that they conducted their work. Five magistrates were interviewed for this research and all emphasised the length of the ADVO list that they handle and the manner in which this impacted on their practice. The length of the list was seen as an impediment to applying the training and education they had received. MAG4 suggested a schism between 'ideological based training' and the practical context of:

> …the sheer volume of getting through 80 matters in an AVO list … what you need training in is recognising the matters where you're going to have to spend more time [on] … given that if you've got 80 matters in a five-hour day how many minutes is that per matter? Not very many.[114]

One of the most striking features about the conduct of the ADVO list (mention) day was the extreme brevity of proceedings. Court observations undertaken in this study found that most ADVO matters were dealt with in three minutes or less (with the exception of ADVOs with associated criminal charges where the cases took up to 15 minutes of court time, particularly where an early guilty plea was entered and the sentence was determined at that time). As a result, there is typically no comment at all about the violence or abuse that has taken place and what fears might be held by the complainant for the future. Hunter, in her research on protection orders, also commented on the 'extreme brevity' of proceedings in the Victorian Magistrates' Court, where she also found that, with the exception of contested matters, most cases were dealt with in three minutes.[115]

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110 In the first five months following the introduction of the *Crimes (Domestic Violence) Amendment Act 1982* (NSW) 82 ADVOs were granted: NSW, *Parliamentary Debates*, Legislative Assembly, 19 October 1983, 1878 (Neville Wran, Premier); in 1995, 12 457 ADVOs were granted, five years later 15 701 ADVOs were granted, and in 2011 almost 25 000 ADVOs were granted: NSW Bureau of Crimes Statistics and Research, Apprehended Violence Orders granted from 1996: NSW Bureau of Crime Statistics and Research, *Publications and statistics by subject (A to C)* NSW Government <http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_pub_atoc#avo>.

111 Jennifer Hickey and Stephen Cumines, *Apprehended Violence Orders: A Survey of Magistrates* (Judicial Commission of NSW, 1999) 16.

112 Hunter, above n 6, 52. See also Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95, 121.

113 John Baldwin, 'Research on the Criminal Courts' in Roy D King and Emma Wincup (eds), *Doing Research on Crime and Justice* (Oxford University Press, 2000) 244.

114 See also MAG2.

115 Hunter, above n 6, 81–2.

Magistrates in Hunter's study explained that it was not possible, within the constraints of the list, to allow people to convey all the evidence that they wanted to provide.[116] In a similar way, one magistrate in the present study stated:

> …the reason I don't take evidence is simply one doesn't have time [to hear] 50 or 60 interim orders. And some courts are worse…I've heard of some of my colleagues getting 130 [AVO matters] in a day.[117]

Hunter suggests that the pressure of case loads and the lack of time to devote to each case means that cases are '"processed" or "handled" rather than given individual attention'.[118] This has been documented in other jurisdictions.[119]

It is not simply the brevity of matters that is of concern, but rather the effect that such brief treatment may have in terms of the absence of statements and messages about IPV. In the 73 ADVO cases that were observed in three Sydney courts, it was rare for there to be any comment about the violence experienced, how the victim felt as a consequence, how the defendant responded to the allegations, or any comments from the magistrate about the allegations. This creates a number of issues of concern. First, it means that there is an almost complete absence of statements by magistrates that denounce domestic violence on the busiest day at court. James Ptacek, in his study of judicial demeanour in domestic violence cases in Massachusetts, emphasised the crucial role performed when judicial officers publicly acknowledge and denounce domestic violence:

> Through these kinds of statements, judges define abuse as injustice. Such public acknowledgements, made to women who have taken considerable risks to appear in court, offer support at a critical point in the process of victimization.[120]

Second, victims of domestic violence are not provided with any stories about the experiences of others which may serve to validate or affirm their own experience. If one of the issues women face is not defining their experience as violence, then the power of the court environment in documenting the experience of others can serve to reinforce the messages that 'you are not alone', that 'your experience is violence and abuse', and that 'the law can assist'.

There was one exception to this invisibility of violence in the observation of court proceedings; one magistrate went to great lengths in domestic violence criminal charge cases to read out and emphasise the elements of the offence, describing what took place during the incident, as well as reprimanding the offender when delivering the sentence.[121] This approach countered the routine defence submissions (that the incident that led to the charge was 'out of character', that the defendant is a 'fine upstanding citizen', a 'good father', that alcohol had

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116 Ibid 82.

117 MAG4. See also MAG2; MAG5.

118 Hunter, above n 6, 82.

119 Edward Gondolf et al, 'Court Response to Petitions for Civil Protection Orders' (1994) 9 *Journal of Interpersonal Violence* 503, 513; Kit Kinports and Karla Fisher, 'Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of Reform Statutes' (1992) 2 *Texas Journal of Women and the Law* 163, 209.

120 Ptacek, above n 2, 157–8.

121 Observation CourtC (18 October 2006).

been consumed, that the defendant had expressed remorse and so on), which in a range of ways silence the woman's experience of violence by minimising the incident and the defendant's responsibility.

Emphasis on Settlement

Emphasis on settlement is both a consequence of the nature of civil proceedings where 'parties … will be actively encouraged by legal institutions to settle their differences between themselves',[122] and, as Marc Galanter pointed out, a product of a legal arena with limited resources and a high workload.[123] Settlement of an ADVO application can mean one of two outcomes: obtaining an order (by consent) or not obtaining an order (by withdrawal with or without undertakings). In this study, cross-applications were most commonly resolved by mutual withdrawal (45.5 per cent of the court file sample), followed by the making of mutual orders (generally by consent) (28.6 per cent), only one of the parties obtaining an order (18.2 per cent), and mutual dismissal (7.8 per cent). These figures mean that cross-applications most commonly result in neither party obtaining an ADVO (62.3 per cent of people in the court file sample did not obtain an ADVO); this stands in contrast with the general outcome for ADVOs where only 49.3 per cent did not obtain an ADVO.[124]

Complainants and defendants are faced with considerable 'encouragement' to settle their ADVO cases; for example, consent is promoted as a method of saving time, avoiding having to return to court (and hence having to take time off work and make child care arrangements), limiting legal costs, and avoiding the trauma that a hearing can entail.

The resolution of ADVO complaints by consent, the most popular way of resolving ADVO applications generally, warrants further exploration.[125] The legislation makes it clear that the court may grant consent orders without being satisfied of the matters alleged in the complaint;[126] and that the court may only conduct a hearing into 'the particulars of the complaint' if it is 'in the interests of justice to do so'.[127] Very few, if any, hearings are conducted into the making of consent orders. Hunter has argued that the notion of 'consent' in domestic violence

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[122] Rosemary Hunter, 'Having Her Day in Court? Violence, Legal Remedies and Consent' in Jan Breckenridge and Lesley Laing (eds), *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (Allen & Unwin, 1999) 61.

[123] Galanter, above n 112, 95, 121.

[124] Local Courts NSW, *Apprehended Violence Statistics: Year 2002*, Table 1.2; Local Courts NSW, *Apprehended Violence Statistics: Year 2003*, Table 2.4 (unpublished data, copy on file with author). 2002 data is presented here as the court files examined were from March 2002 to February 2003.

[125] There is no data available on *how* orders are resolved. The only NSW study that has documented mode of resolution found that 77.6 per cent of cases were resolved by consent, and 22 per cent by ex parte determinations. However the study excluded hearings because of researcher unavailability: Lily Trimboli and Roseanne Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (NSW Bureau of Crime Statistics and Research, 1997) 37.

[126] *Crimes Act 1900* (NSW) s 562BA, now *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 78.

[127] Then *Crimes Act 1900* (NSW) s 562BA(3)(b). See now *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 78(3).

proceedings is problematic.[128] While there are a range of benefits associated with the ability to consent to a protection order without the necessity of a contested hearing, there are also a range of disadvantages, for example, such a regime assumes that the parties are equal in their negotiations, that there are no other factors, such as intimidation and threats, that influence the willingness to consent, and it fails to provide a public forum in which the woman's story is affirmed and the man's actions are clearly denounced.[129] As Hunter stated; '[c]onsent makes the "problem" of violence disappear from view'.[130]

Hunter questions the way in which these orders are referred to as 'consent' orders, when in practice only the defendant consents; questions of consent are not raised with the victim at all.[131] In this way the practice of consent in civil protection order proceedings is different from settlement processes in other types of civil actions.[132] While the NSW legislation casts the making of consent orders as requiring some decision on the part of both parties,[133] in practice this is not how consent is obtained in the Local Court. While some may argue that consent on the part of the victim is implicit in seeking the order, those being the terms on which the victim would agree, and some women are indeed happy with this process, others express dissatisfaction with the fact that the defendant can effectively 'deny his behaviour'.[134] It is perhaps this additional feature, without admissions, that makes consent orders so problematic, where the object of the woman's legal action is not only to obtain a protection order but at some level to tell her story, be believed and have some attention focused on the wrong inherent in the defendant's behaviour.[135] In this area Hunter raises another concern about the dominance of consent orders made without admissions: the absence of a legal proceeding that affirms that the woman's story is indeed *true*.[136] Instead what eventuates is a dominance of orders where there has been no determination; this leaves us without measures to counter the resilient refrain that women lie about, fabricate or exaggerate their experiences of violence, nor do we have a process which clearly addresses and labels the defendant's behaviour as wrong.[137] Hunter sees this as a way in which men can continue to deny and minimise their violence, and that consent provides a means by which this denial is 'echoed by the state'.[138]

There is great pressure to generate consent outcomes.[139] One magistrate colourfully depicted her powers of persuasion in garnering consent orders:

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128 Hunter, above n 122. See also Hilary Astor, 'Domestic Violence and Mediation' (1990) 1 *Australian Dispute Resolution Journal* 143.

129 Hunter, above n 122, 66–7.

130 Ibid 67.

131 Hunter, above n 6, 95.

132 Rosemary Hunter, 'Consent in Violent Relationships' in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge-Cavendish, 2007) 162.

133 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 78(1).

134 Hunter, above n 132, 66.

135 Hunter, above n 6, 93–8.

136 Hunter, above n 122, 67.

137 Ibid.

138 Ibid.

139 See ibid, 64; Toni Dick, 'Protection or Quid Pro Quo' (Paper presented at Challenging the Legal System's Response to Domestic Violence Conference, Brisbane, 23–24 March 1994).

> I love consent without admission and I can sell it [like] ice to Eskimos in terms of by consent without admissions.[140]

This magistrate placed this persuasive power in the context of the court system, the workload and the fact that contested cases may be adjourned for a number of months. As she explained, often defendants are very clear that they do not agree with the order, but once they find out that they will be required to return to court, take another day off work, and so on, they are often more than willing to 'agree'. In this vein another magistrate explained:

> …one in five consents with great enthusiasm to final orders. I've certainly had matters here where I was concerned that defendants didn't really understand what it was they were agreeing to and I did my best to make sure that they haven't been bullied into agreeing to something that they're not prepared to agree to because … I mean I had a matter not that long ago where this guy said 'yeah I'm prepared to agree to orders' … and then he said '… but I want to make a statement'... And I said, 'well hang on a sec, you know you're consenting without admission … I don't need to know anything about these circumstances…' — he's reading out all this stuff about how 'it was all lies'… — I said 'well you know if you don't agree with the orders and you don't agree with the allegations you can have the matter stood over for a hearing', … And he said 'but I can't take another day off work'. I mean I'd say that's another one in five because they can't take another day off work and that's why they're going to consent [laughter].[141]

Thus the limited nature of the complaint narrative, the constraints created by the work environment and the overriding emphasis on settlement combine to create an environment in which little is revealed about domestic violence in the main legal arena for such matters in NSW. Cross-applications further obscure the limited visibility of domestic violence in ADVO proceedings due to the fact that the two complaints tend to be viewed and responded to as a pair (with mutual outcomes) rather than as individual cases requiring a determination on their own merits. This 'paired' approach fails to consider the contents and allegations made by the individual complainants thus creating, and reinforcing, the picture that both parties are responsible for the violence and abuse that occurred — that to some extent both are 'as bad as each other'.

IV The Absence of Control from the NSW Legislative Scheme

The function of domestic violence as a mechanism of control is not articulated in the NSW legislation, and hence (not surprisingly) was generally absent from complaint narratives. Control emerged in only a small number of complaints in the court file sample through the limited framework of isolation tactics, such as restrictions on work, or contact with friends and family. Notably only women alleged these types of acts and behaviours in their complaints in the court files examined; no men made allegations of this kind. These acts on their own are very

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[140] MAG2. See also WDVCAS4.
[141] MAG3.

unlikely to ground an ADVO (not easily fitting within the concepts of a personal violence offence, stalking, intimidation, harassment or molestation)[142]. The only place where control finds some articulation is through the related, but more limited, notion of fear. While fear may be integrally related to the presence of coercive control (and illustrative of its power) the presence of fear is not the same as coercive control. The lack of articulation of control in the ADVO complaint narratives stood in marked contrast to the way in which the women interviewed described their relationship, which centred on control and not violence. It is important to note that the women themselves raised this as the defining feature of their experience, often in response to the general question: 'How would you describe your relationship?' The term 'control' or 'controlling' was actively volunteered by half of the women interviewed to describe the violence that they experienced and the intent of the perpetrator.

There has been considerable discussion in the literature about the capacity of the criminal law to move beyond incidents of domestic violence and encompass an approach to domestic violence that recognises coercive control.[143] A small number of researchers have attempted to articulate approaches that could achieve this aim. For example Evan Stark,[144] Deborah Tuerkheimer[145] and Alafair Burke[146] have all, in different ways, proposed a criminal offence that would better capture the controlling, repetitive and patterned nature of domestic violence. These theoretical developments have focused on the criminal law's response to domestic violence, and have not questioned the various civil protection systems.

As noted above, questions about responses to domestic violence within the civil protection order system pose different challenges to those that centre on the criminal law's response. Civil protection order systems were specifically introduced to respond in a more appropriate way to the experience of domestic violence and thus ask about 'who requires protection?' rather than simply whether an offence has been committed. Thus the failure of the civil protection order system to acknowledge and respond to dimensions of domestic violence beyond discrete acts poses quite fundamental questions for the legal response and practice. As a result it appears that the failure of the ADVO system to move beyond incidents is a failure that not only 'reflect[s] an inadequate understanding of the gendered nature of domestic violence', but also 'signals…weakness in institutionalized responses to domestic violence'.[147] These weakness are: the way in which traditional criminal legal responses continue to underscore the civil legal response, the continuing attraction of dichotomies of victim and offender and

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142 At the time of the fieldwork, *Crimes Act 1900* (NSW) s 562AE. The current provision setting out when a court may make an ADVO, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16, no longer refers to 'harassment' or 'molestation', however these are included within the definition of what amounts to 'intimidation': see s 7(1)(a).

143 See McMahon and Pence, above n 433, 48; Hirschel and Buzawa, above n 16, 1456–8; Miller, above n 1044, 131.

144 Stark, above n 18, 382–4.

145 Tuerkheimer, above n 7; Deborah Tuerkheimer, 'Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later' (2007) 75 *George Washington Law Review* 613.

146 Burke, above n 18.

147 McMahon and Pence, above n 43, 49.

associated notions about what a 'true' and 'genuine' victim is and how they are expected to respond to the violence and abuse used against them.

If control is critical to differentiating domestic violence from other acts of violence and abuse that might be perpetrated by intimate partners,[148] how can it find some mode of articulation within the ADVO setting? This is important if it is agreed that responses within the ADVO system are inadequate because it misconceives domestic violence as discrete incidents. New legislation in Victoria seeks to move that jurisdiction's civil protection order scheme in this direction by recognising coercive control as a feature of domestic violence. It does this by defining family violence to include physical and sexual violence, emotional and psychological abuse, economic abuse, threats, and the exposure of children to this form of behaviour through hearing or witnessing such acts, and:

> 5(1)(a)…behaviour by a person towards a family member of that person if that behaviour —
>
> ….
>
> (v) is coercive; or
>
> (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or…[149]

Unfortunately coercive or controlling behaviour is not defined in the new Act. Given this lack of legislative guidance it is unclear what behaviours 'control' and 'coercion' were intended to address, beyond the types of acts/behaviours already recognised as part of family violence. In addition, control and coercion are listed as discrete behaviours rather than as the context in which behaviours occur. This is not the approach recommended by the VLRC in the report that preceded the legislation. The VLRC specified the types of behaviours that should be encompassed in any new legislation (physical and non-physical forms of violence/abuse) and proposed the following definition of family violence:

> Family Violence is violent or threatening behaviour or any other form of behaviour which coerces, controls, and/or dominates a family member/s and/or causes them to be fearful.[150]

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[148] It is worth noting here that a growing area of work on IPV is concerned with differentiating types of IPV on the basis of the presence or absence of control: see, eg, Michael Johnson, 'Differentiating Among Types of Domestic Violence: Implications for Healthy Marriages' in H Elizabeth Peters and Claire Kamp Dush (eds), *Marriage and Family: Perspectives and Complexities* (Columbia University Press, 2009) 281; Michael Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence* (Northeastern University Press, 2008); Joan Kelly and Michael Johnson, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46 *Family Court Review* 476; Janet Johnston, 'A Child-Centered Approach to High-Conflict and Domestic-Violence Families: Differential Assessment and Interventions' (2006) 12 *Journal of Family Studies* 15; and Nancy Ver Steegh, 'Differentiating types of domestic violence: implications for child custody', (2005) 65 *Louisiana Law Review* 1379–1431; and Nancy Ver Steegh and Clare Dalton, 'Report from the Wingspread Conference on Domestic Violence and Family Courts' (2008) 46 *Family Court Review* 454–75.

[149] *Family Violence Protection Act 2008* (Vic) s 5(1)(a).

This recommendation positions coercion, control or domination as the way in which types of acts/behaviours function. This is quite different to the approach adopted in Victoria. It will be of interest to monitor how these provisions are used and whether they serve to encourage a broadened understanding of domestic violence beyond incidents in that jurisdiction.

V Conclusion

The first part of this article outlined a number of progressive features of civil protection order systems, and the NSW ADVO scheme in particular. It was argued that these progressive measures provide scope for legal practice under the ADVO scheme to move beyond incidents and respond to the broad experience of domestic violence, and in so doing provide for orders tailored to the requirements of a specific case. The study of cross-applications has revealed that for a range of reasons, both practical (in terms of institutional constraints such as workload and lack of resources) and conceptual (the approach professionals bring to their work), these progressive elements of the ADVO scheme have failed to be effectively translated into practice. Thus, despite its legislative promise, practice within the ADVO scheme continues to focus on a narrow depiction of violence that emphasises incidents. This reflects the long-standing problem of implementation noted in much work on the outcomes and barriers faced by feminist law reform efforts.[151] The implementation problem or gap has two key dimensions. The first is the way in which law reform fits, or does not fit, with the prevailing legal culture. As Hunter notes, many law reformers assume a top-down approach to bringing about change, thus ignoring the autonomy of key professionals in interpreting and putting reforms into practice. The second dimension is a more fundamental feminist critique which asks whether the law (and the emphasis placed on the law as *the* site for intervention) can actually bring about the desired change in women's lives.[152] Various researchers have commenced debates about how the criminal law might better conceive of domestic violence as a patterned form of behaviour, and as coercive control.[153] Asking the same questions of the civil protection order system raises additional concerns: if the civil law, despite its more progressive elements, replicates the criminal law's focus on incidents devoid of context, then the problems of implementation and conceptions of IPV that underscore the implementation of the legislation are more pronounced and challenging.

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150 VLRC, *Review of Family Violence Laws*, Report No 11 (2006) 105, Recommendation 14. By comparison, see the new definition inserted in the *Family Law Act 1975* (Cth) s 4AB(1) which does just this, providing that: '*family violence* means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member*), or causes the family member to be fearful'.

151 See Graycar and Morgan, above n 433; Schneider, above n 7, 109–10; McMahon and Pence, above n 433, 47–8.

152 See Smart, *Feminism and the Power of Law*, above n 45, ch 4 and discussion of 'de-centreing law', 163–5.

153 See above n 18.