UNIVERSITY OF LEICESTER

Domestic Abuse Literature Review

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Contents

Summary

This literature review was carried out for the LSC to examine trends in applications for non-molestation orders and to consider explanations for any changes in the numbers of applications being made.

Findings

- The number of applications for non-molestation orders has been declining since 2002. Prior to 2002 there was some fluctuation in the number of applications, but the overall trend has been downward since a peak in the early 1990's.

- The downward trend in applications was in progress before the Family Law Act 1997 (FLA) came into force. There are a variety of possible explanations why the more generous criteria for making orders under the FLA may not have reversed the trend. One possibility is that enhanced enforcement provisions made it more difficult to obtain orders.

- There is some evidence that the Domestic Violence Crime and Victims Act 2004 (DVCVA), in particular the provision criminalising breaches of non-molestation orders, may have produced a sharper downturn applications since July 2007. However it is still too early to assess the impact of the DVCVA.

- Societal trends in domestic abuse show that the prevalence of abuse has remained fairly constant during the period in which applications have been declining. Women in heterosexual relationships are the main victims of serious abuse, and the majority of these are in the younger age ranges. It has been suggested that victims from 'diverse' groups experience high levels of abuse but find it particularly difficult to access support.

- Some commentators have hypothesised that the decline in applications for non-molestation orders may be due to improvements in the criminal justice response (with victims turning away from the civil remedies towards the criminal law). There have been some improvements in the criminal law and criminal justice response. However there are still many limitations with criminal law remedies and the approach of the criminal justice agencies to domestic abuse. It is therefore unlikely that this is the sole explanation for a reduction in applications for non-molestation orders.

- The help seeking patterns of victims are varied but they are more likely to seek help and support from outside the legal system than within it. When legal professionals are contacted the helpfulness of the response victims receive is often dependent upon whether they are dealt with by specialists or non-specialists.

- One of the key factors influencing the accessibility of the civil remedies for domestic abuse is the quality of advice that victims receive from family law solicitors. There is evidence that some solicitors who do not specialise in

domestic violence give inappropriate advice or unsympathetic treatment to victims seeking protection orders.

- Other barriers to seeking non-molestation orders include perceptions about the efficacy of orders and issues surrounding cost.

- No single factor appears to account for the decline in applications for non-molestation orders. It is most likely to be a combination of legal and other developments.

Recommendations

- Efforts to improve the civil justice response to domestic violence should be focused upon those most in need of support and protection, bearing in mind that these might include some 'hard to reach' groups.

- The impact of the DVCVA should be kept under review. It is important to ensure that all those working with the legislation, not just police officers, are properly trained on the implications of the Act for the making and enforcement of orders.

- The trend towards specialisation in the criminal justice system should be replicated in the civil justice system.

- Solicitors receiving LSC funding for domestic violence proceedings should participate in accredited domestic violence training. Solicitors should also be encouraged to participate in local multi agency groups/networks to improve their own awareness of the range of support available for victims and to facilitate appropriate multi agency referrals.

1. Introduction

1.1 The Policy Context

The policy context for this review is the Community Legal Service strategy for 'Making Legal Rights a Reality'. Family legal aid comprises a significant part of the civil legal aid budget and the LSC wishes to ensure that services for families experiencing clusters of problems are joined up. There is also a priority to increase access to services for those at risk of domestic abuse. The Funding Code gives solicitors delegated powers to grant legal aid so that they can seek non-molestation orders for victims of domestic violence without delay. An extension to funding can be obtained for the enforcement of orders. There has been considerable speculation about the impact of public funding provisions on the numbers of applications for orders. In this context the LSC wishes to consider the literature on use of non-molestation orders to provide an evidence base to pursue its policy objectives effectively. The Legal Services Commission (LSC) commissioned this literature review to investigate whether applications for non-molestation orders in domestic abuse cases are declining and, if so, what factors may be influencing the decline.

1.2 Methods

The review is socio-legal in approach and draws upon the sociological and legal literature pertaining to domestic abuse in England and Wales. To assist in the review the LSC provided data on the certificates for funding in domestic violence proceedings issued in the last three years. Two years of this data was also broken down by reference to the sex and age of the parties.

1.3 Scope

In addition to examining recent developments in the law and legal processes, the review will consider long term trends in applications for protection orders under the Family Law Act 1996 and the preceding legislation. The data on the number of applications will be contextualised within the literature on societal trends in domestic abuse. Recently concern has been expressed that the criminalisation of the breach of non-molestation orders by section 1 of the Domestic violence Crime and Victims Act 2004 has produced a sharp decline in applications for orders since the provision was implemented in July 2007. The evidence for the impact of this particular provision will be analysed. Other factors influencing victims' decision-making, including the advice from their solicitors, will be examined.

2. Changes in the number of protection orders being sought and made

Since the 1970's the civil law has provided a range of remedies specifically for victims of domestic violence. These remedies are now primarily contained within the Family Law Act 1996 (FLA), which replaced earlier legislation that gave remedies to a much narrower category of victims on the basis of criteria which varied according to whether action was being taken in the magistrates or county court. The FLA contained a presumption in favour of powers of arrest being attached to protection orders where violence had either been used or threatened against the applicant or relevant child. Although powers of arrest could be attached to protection orders under the old law, the courts had more discretion about whether or not to do so.

2.1 Trends in applications before and at the time of implementation of the FLA

Edwards (2001) analysed the trend in applications made under the old law and compared this with data on the early operation of the FLA. Examining the data from 1985 to 1999 she noted that the number of personal protection orders appeared to plateau around the introduction of the FLA, but that there had been a downward trend in applications for such orders prior to the Act coming into force. An upward trend in the number of applications for personal protection orders being made in the early 1990's, peaking at 28,240 in 1993, had been reversed in the three years before the FLA.

The victim-focused criteria in the FLA might be expected to have produced another upward turn in applications (Burton, 2008 p.37), but this was not the case. The data arguably shows that the anticipated benefits of more generous criteria for making orders must be seen in the context of other developments that might explain a counter intuitive downward trend in applications. There was a dramatic increase in the proportion of orders with a power of arrest attached to non-molestation orders after the FLA (up from 44% in 1996 to 80% by 1999). Edwards observed that one possible 'invidious' explanation for the FLA not working as well as might have been anticipated was that judges might have become more reluctant to grant orders in situations where they did not want to attach a power of arrest but faced a legislative presumption to do so (Edwards, 2001). It is possible that the strengthened provisions for enforcement in the FLA contributed towards a reduction in the numbers of orders being made.

2.2 Trends in the ten years since the FLA was implemented

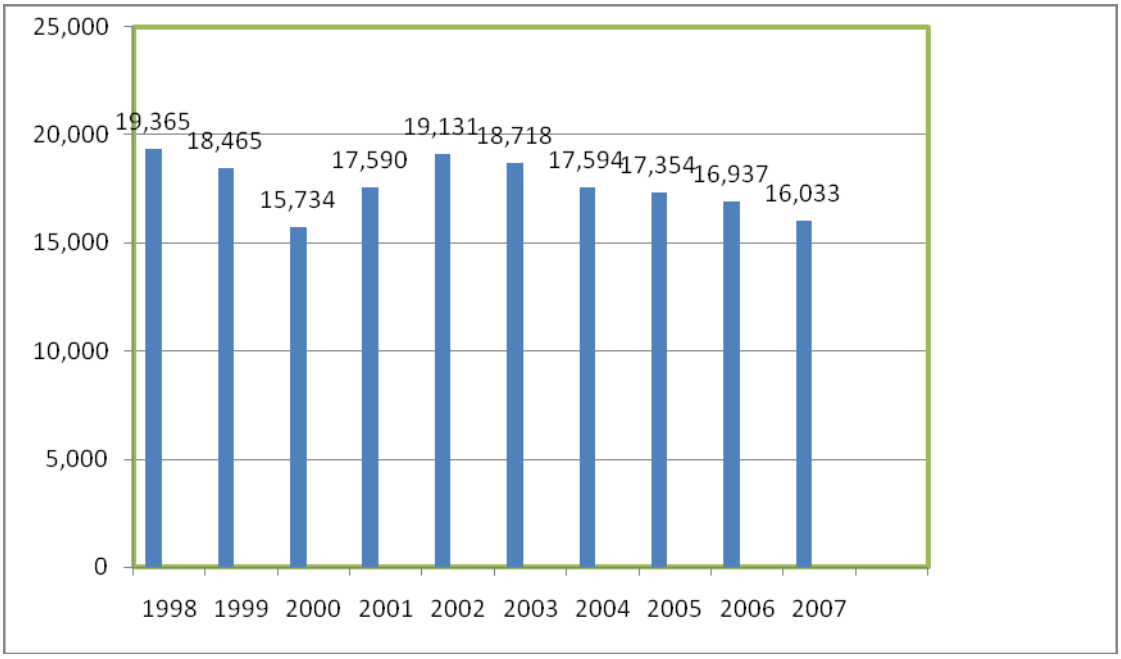
The data since 1997 show some fluctuation in the number of applications for non molestation orders in the first five years following implementation of the FLA (see chart 1 below).[1] There was a large drop in applications in 2000 but this was followed by an increase in applications in the next two years taking the overall numbers of applications in 2002 to a level just below those made in 1998. There is no suggestion in the literature as to what might have precipitated such a sharp decline in applications

[1] The FLA was implemented towards the end 2007. The figures for protection orders that year are incomplete but estimated to be 17, 169.

in 2000; there is, for example, no obvious legal development coinciding with that particular drop in applications.

Since 2002 the numbers of applications for non-molestation orders has steadily declined, with a 15% reduction in applications 2002-2006. However, the numbers of orders with powers of arrest attached has increased, with just 6% of orders in 2006 not having a power of arrest attached (Hester et al, 2008).

Chart 1 - Number of applications for non-molestation orders 1998-2007



2.3 Numbers of applications since July 2007

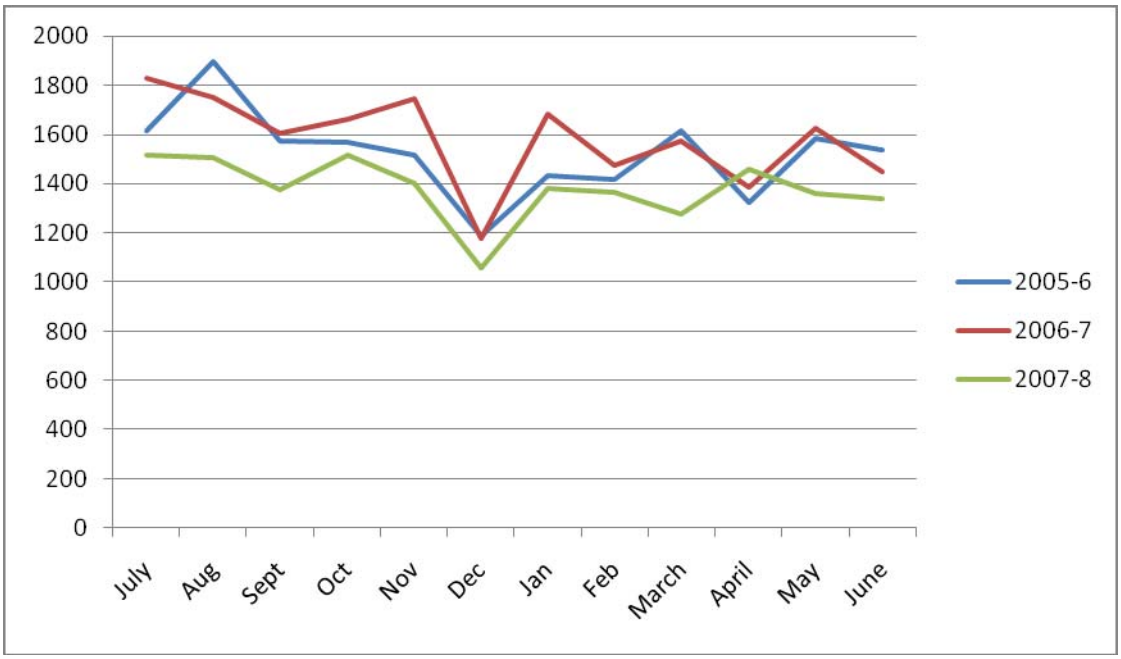
In July 2007 key provisions of the Domestic Violence Crime and Victims Act 2004 (DVCVA) were implemented. Intuitively it might be expected that the numbers of applications would rise following implementation of the DVCVA because it expands the categories of victims eligible for non-molestation orders, to include same sex couples as cohabitants and to include non cohabiting people in an intimate personal relationship of significant duration as a new category of associated person. However the Act also changed the method of enforcement, making breach of a non-molestation order a criminal offence, and the likely impact of this provision was more contentious. The Ministry of Justice commissioned research to provide an 'early' evaluation of the impact of the DVCVA (Hester et al, 2008). The findings of the research are tentative because the key provisions described above had only been in force for six months at the time the evaluation was completed. The researchers hypothesised that the most likely impact of the DVCVA would be a consolidation of previous trends and that 'large shifts would not be expected' (p.26). However their qualitative data indicated that professionals had contradictory views; some were expecting a further reduction in the number of applications for non-molestation orders but others anticipated a possible increase.

A small scale study of applications for non molestation orders, published shortly before the MOJ evaluation, reported a sharp decline in the number of applications in the six months July to December 2007 (Platt, 2008). The numbers of applications made in six County Courts in the six months following July 2007 were compared with the six months immediately prior to implementation of the DVCVA provisions. It was found that there was a drop in applications between 15% and 30%, with an average fall close to 25% (Platt, 2008). His Honour Judge Platt considered there might be a number of explanations for this fall, but concluded that strong suspicion rested upon the provision in the Act criminalising breach and its effect on the willingness of potential applicants to pursue orders. Judge Platt acknowledges that the figures do not give a clear indication of the potential longer term impact, if any, of the DVCVA. However he argued that if the fall of the first six months were sustained over a 12 month period that it would translate into 5,000 fewer applicants a year coming to the family courts for a protection. Such a drop would clearly be much sharper than any decline in previous years.

Hester et al (2008) tried to quantitatively evaluate the impact of breach of a non-molestation order being made a criminal offence by examining national figures on applications and orders for the period January 06-December 07. The data show quite a lot of monthly variation in the number of applications with large dips in December, which the researchers speculate is due to solicitor's offices being closed. It is possible that some of the reduction observed in Platt's study may therefore be accounted for by the annual drop in applications in December, although Hester et al do not specifically note this. Hester et al (2008) factored out the impact of seasonal variations by comparing the four month period immediately after implementation with same four month period the previous year. Thus, comparing July-October 2007 with July – October 2006, they found that the number of applications fell by 10% from 6, 195 to 5,560. They also observed a 20% reduction in the numbers of orders made comparing the same two periods. The researchers observe that their findings echo Platt's study but conclude 'a longer time period would be needed to confirm whether or not any changes are a direct consequence of the new measure within the DVCV Act'. Although the reduction in applications and orders is larger than in previous years, they argue 'It is also possible that this data simply indicates a further consolidation of the previous downward trend' (Hester et al (2008) p.27).

The LSC data on the number of certificates funded in domestic violence proceedings can be used to give further insights into changes in the number of applications being made. LSC statistics covering a three year period; two years before and one after implementation of section 1 of the DVCVA were examined for this review (see Chart 2 below). The majority of certificates were issued to applicants, although some were for respondents. The data show that in the year post implementation the number of certificates issued was consistently lower than in the previous two years, apart from in one month (April 2008). There is large monthly variation, including a large Christmas period dip in all years, but there were 13% fewer certificates issued in the year after implementation than there were the year before (16, 537 in total compared with 18, 976).

Chart 2 Certificates issued for domestic violence proceedings July 05- July 08



The fall in the numbers of public funding certificates issued for domestic violence proceedings in the year following implementation of key provisions in the DVCVA is more marked than in the year before. However a longer term view shows that marked drops in applications have in the past been followed by increases in subsequent years (as in 2000-2002). Thus whilst the LSC figures are consistent with those analysed by Hester et al (2008), it is arguably still too early to conclude that the DVCVA has resulted in a significant downturn in the numbers of applications for non-molestation orders. Some drop in applications would have been expected in any event and the sharpness of the drop may be corrected.

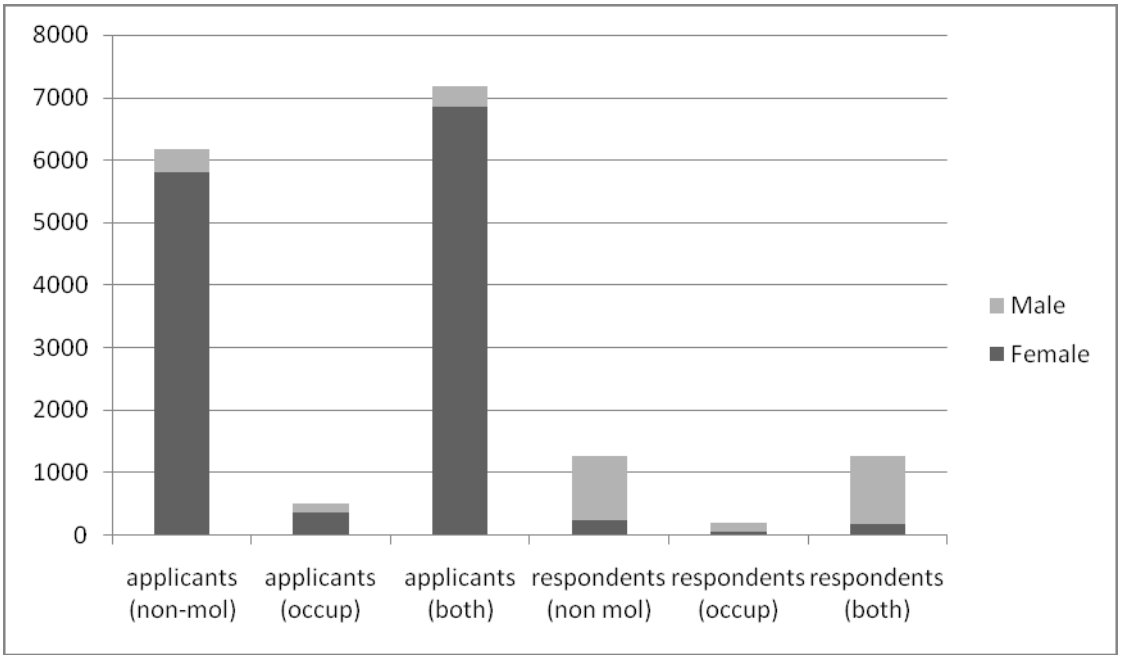
3. Societal trends in domestic abuse

One hypothesis for the decline in the numbers of non-molestation orders being sought could be that domestic violence itself is declining. Whilst is possible that either legal measures, or other social developments, are reducing the level of abuse and therefore demand for legal remedies, this is unlikely to be the case. Reliable information about the nature and extent of domestic abuse is difficult to obtain, but British Crime Survey (BCS) data suggests that the prevalence of abuse has remained stable over the period that applications for civil protection orders have been declining. BCS estimates for the prevalence of domestic abuse for 2004/5 were roughly of the same order as they were in 2001 (Finney, 2006). The latest figures from the 2006/7 BCS show little evidence of changing prevalence, with women still generally at higher risk than men (Hoare and Jansson, 2008).

3.1 Sex

LSC data show that the majority of funded applicants are women and the majority of funded respondents are men (chart 3).

Chart 3 Certificates for protection orders (April 06-March 08) shown by sex



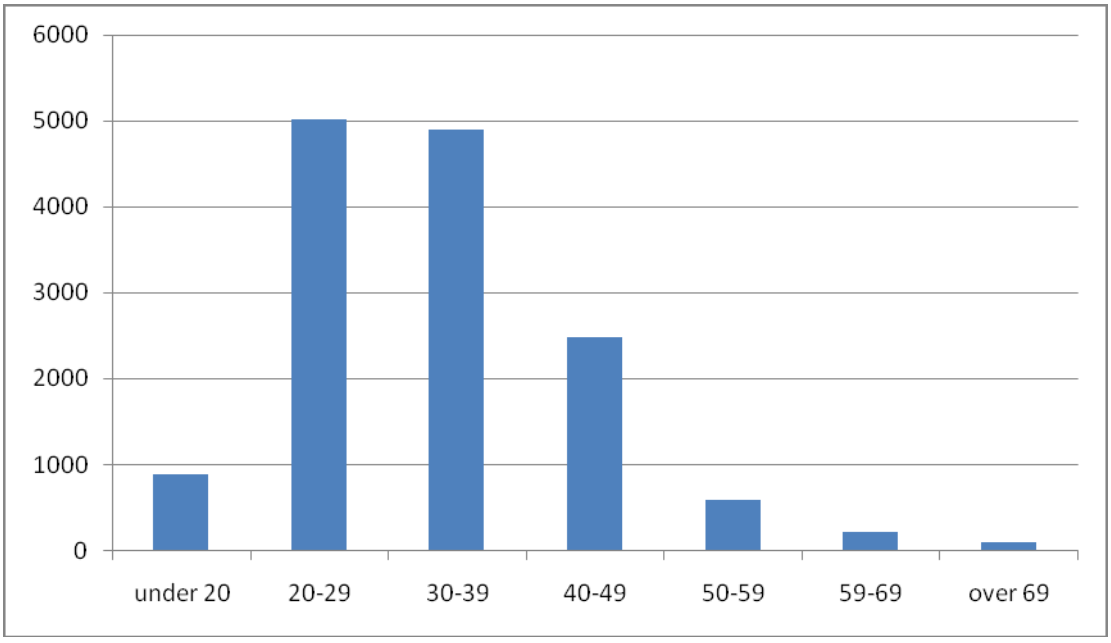
The LSC data is consistent with BCS data shows that women are the primary victims of domestic abuse. The 2004/5 BCS suggests 1 in 4 women are subjected to domestic violence during their lifetime, compared with 1 in 6 men. In the 2006/07 survey 28% of women and 18% of men reported having experienced partner abuse (Hoare and Jansson, 2008). There is a lively debate in the literature about the extent of male victimisation, with some researchers arguing that men are as likely to be victims of domestic abuse as women but are less inclined to identify themselves as such or to pursue a legal remedy (Grady, 2002). However research which examines the context

and consequences of abuse shows that women are more likely than men to be the victims of repeated, offensive and serious violence (Dobash and Dobash, 2004). Women are more likely than men to sustain physical or emotional injury as a result of domestic abuse (Walby and Allen, 2004). On the basis of this research one would expect that the applicants for non-molestation orders under the FLA would be mainly women. Although the FLA provides remedies for a wide range of domestic abuse including emotional abuse, operationally, it still seems to favour victims who have physical injuries. Professionals working with the FLA have commented that it is easier to get remedies for physical abuse than for emotional abuse (Burton et al, 2002). Although it might be argued that more should be done to help men access civil remedies, the gender bias in applications is a reflection of the nature and extent of domestic violence across the sexes. It is therefore recommended that efforts are concentrated upon improving support for female victims of domestic abuse, including those who sustain emotional injury.

3.2 Age

Domestic violence can occur at any age, but the young appear to be at greatest risk. BCS data show that the female age group at highest risk is 16-24 (Mirlees Black, 1999). It is therefore not surprising to find that the LSC certificates for domestic violence proceedings show higher proportions of applicants and respondents in the lower age ranges (chart 4).The phenomenon of domestic abuse in older age has received little academic attention in England and Wales. Older victims of domestic abuse may encounter many of the same barriers that younger victims face in seeking help, but it is possible that they also face additional barriers such as higher levels of physical disability and dependency on the abuser for care. Research shows that victims with disabilities, whatever their age, face specific problems in accessing mainstream services for domestic abuse (Hague et al, 2008).

Chart 4 Certificates for protection orders (April 06-Mar 08) shown by applicants age



3.3 Sexuality

It is unclear how many certificates for either applicants or respondents relate to abuse in same sex relationships. Most of the domestic abuse literature focuses on heterosexual relationships. One survey suggests that the level of prevalence of domestic abuse in same sex relationships is the same as female victimisation in heterosexual relationships; one in four relationships affected (Henderson, 2003). It was noted above that the wider the definition of cohabitants introduced by the DVCVA, to include same sex relationships, perhaps ought to be expected to increase the level of applications for non-molestation orders. However there is a strong probability that there will be no increase in applications for non molestation orders as same sex cohabiting relationships have always been covered by the FLA, albeit under the separate heading of persons living together in the same household (Burton, 2008). Hester et al's (2008) data, although limited, suggest the provision has had no impact in the first few months after the expanded definition was introduced. This is also consistent with the research showing the reluctance same sex victims have to seeking outside support for dealing with domestic abuse, partly due to a belief they will encounter an unsympathetic response (Donovan and Hester, 2007).

3.4 Ethnicity

It has been reported that minority ethnic groups have particular problems accessing support for domestic abuse (Patel, 2008). Data on the ethnicity of applicants for non-molestation orders was not available, but it is likely that they are under represented amongst those making applications for non-molestation orders.

4. The Impact of Legal Changes

Over the past decade or so there have been several developments in the law and legal processes which may have influenced the numbers of applications for non-molestation orders. These developments have mainly taken place in the criminal justice response to domestic violence. More recently an 'integrated' justice response, combining elements of the civil and criminal process has been favoured, with criminalisation of breach of non-molestation being one manifestation of this phenomenon. The impact of these changes will be examined in this section

4. 1 Improved criminal justice response

4.1.1 Changes in the policing of domestic abuse

One explanation for a reduction in applications for non-molestation orders may be that more victims are obtaining effective redress under the criminal law without need to resort to the civil remedies available. Edwards (2001) considered this a possible reason for the plateau in applications around the introduction of the FLA. She suggested her discussions with the police indicated that the plateau might be a result of improvements in the police response to domestic violence. However at the same time there were continuing criticisms of the police handling of domestic violence and research evidence suggesting that pro-arrest policies were not being understood and implemented by frontline (non specialist) officers (Grace, 1995: Plotnikoff and Woolfson, 1998). So whilst old cultural attitudes about domestic violence might have begun to be eroded, there were still significant obstacles to cases being pursued under the criminal law. Assessments of the willingness of victims to pursue a complaint remained a significant feature of the policing of domestic violence in the 1990's (Hoyle, 1998). Even within specialist projects victims of domestic violence did not receive a consistently good response (Hamner and Griffiths, 2001). A decade on lessons have still to be learned in orientating police interventions towards the safety of victims (Stanko, 2008).

4.1.2 Protection from Harassment Act 1997

One criminal law development coinciding with the FLA was the introduction of the Protection from Harassment Act 1997 (PHA). Whilst the PHA was designed to deal with stranger stalking its potential application to domestic violence was noted (Edwards, 2001b). The legislation included two criminal offences allowing for restraining orders to be imposed on conviction, breach of which would constitute a criminal offence. It also included a civil remedy, with a criminal penalty for breach (section 3) and in this respect was a forerunner of section 1 of the DVCVA. The opportunities afforded by the criminal and civil routes under the PHA could constitute an explanation for the fall in applications for non-molestation orders in the years immediately after the FLA and PHA were introduced. This argument is strengthened by Home Office research showing that the PHA was mainly used for domestic abuse rather than the stranger scenario (Harris, 2000). The data on the number of prosecutions for offences under the PHA and the number of restraining orders imposed show an upward trend since the legislation came into force. However the overall numbers are relatively small and even if all the restraining orders related to domestic abuse cases, which is unlikely, it would not account for the downturn in applications for non-molestation orders over the same period. Research on the

criminal justice response to domestic violence suggests if anything the full potential of the PHA in domestic abuse cases is not being realised by the police and Crown Prosecution Service (CPS) (HMCPSI and HMIC, 2004).

4.1.3 The Crown Prosecution Service response

The CPS response to domestic violence, once heavily criticised (Cretney and Davis, 1996; 1997), has improved in recent years (WNC, 2006). Since 1993 the CPS has had a domestic violence policy, revised on several occasions, which emphasises the commitment to taking domestic violence seriously and outlines the specific evidential and public interest considerations applying in domestic violence cases (CPS, 2005). However, as with the police, there has been some difficulty translating policy into practice. Despite speculating that a plateau in applications under the FLA might be attributable to improvements in the police response, Edwards (2001b) noted the continuing limitations of pursuing criminal law remedies, observing the likelihood of prosecution remained 'poor'. Recent research found a heavy reliance on the evidence of victims and a failure to consistently adhere to the policy for handling victim withdrawals (HMCPSI and HMIC, 2004). The CPS face evidential barriers in cases where the victim does not want to testify (Ellison 2002; 2003). The courts show a continuing reluctance to admit hearsay evidence, although they have suggested that evidence besides the victim's testimony (such as the fact of an emergency call and the observations of attending police officers) might be enough for a case to proceed (R v C (2007) EWCA Crim 3463).

Victims may be as concerned with the protection they receive during the process as they are with the outcome of criminal proceedings. Appropriate bail conditions, whilst arguably never an effective substitute for civil protection orders, can be part of a package that provides protection against further domestic abuse. The performance of the CPS in this respect is difficult to assess because of poor file endorsement. Overall the rate of successful prosecutions for domestic violence has increased from 46% in 2003 to 67% in 2007-8, if 'success' is measured by the conviction rate. However as the HASC (2008) observed this data only tells us about the proportion of charges resulting in conviction and is not related to data on incidence, reporting, arrest and charging. The attrition rate in domestic violence cases looking at the whole process is very high (Hester et al, 2003). An improvement in CPS figures, viewed in isolation, do not therefore provide an adequate explanation for a drop in applications for non-molestation orders 'coincidental' (Platt, 2008) with the DVCVA.

4.1.4 Specialist domestic violence courts

Specialist domestic violence courts (SDVCs) have been part of the CPS package of improvements to their own response and have extended improvements to other parts of the system (Cook et al, 2004; Vallely et al, 2005). The rate of 'successful' prosecutions in some SDVCs is reported to be as high as 80%, with the same provisos as noted above (Home Office, 2008). There is no doubt that some victims feel that court specialisation has improved their experience of the criminal justice process, although much of the benefit seems to be attributable to the independent advocacy service available in the SDVC setting. Victims still feel that the provision of information from the criminal justice agencies is patchy and their confidence can be undermined by poor evidence gathering (Cook et al, 2004). Specialist training of magistrates has helped to address some of the old cultural stereotypes about domestic abuse (Gilchrist and Blissett, 2002), but the continued use of low level financial

penalties is a matter for concern (Cook et al, 2004). Even within SDVCs there is little evidence to support an argument that improved criminal justice responses have resulted in significant numbers of victims turning away from the civil law and towards the criminal justice route. It might be possible to try to test this hypothesis quantitatively by comparing data on the number of applications for non-molestation orders in areas with and without SDVCs, but this data was not available. However the qualitative data show that victims whose cases are progressed through SDVCs have mixed views on both the process and outcome.

Research on victims' perspectives on the criminal justice response to domestic violence shows that, in general, they have continued to report little improvement (WNC, 2003; Hague et al, 2003). Coupled with the research findings on SDVCs discussed above, this suggests it is unlikely that improvements in the criminal justice response are the sole reason for a decline in applications for non-molestation orders. Despite some improvements the criminal justice system still has some way to go before achieving its full potential in responding effectively to domestic violence. In addition the 'fit' between the objectives of the criminal justice agencies and those of victims can be poor (Hoyle and Sanders, 2000), with the victims measuring the 'success' of interventions quite differently from the agencies.

4.2 Combined or 'integrated' civil/criminal response

It would be wrong to assume that victims view civil and criminal justice remedies as mutually exclusive alternatives. The extent of overlap between the use of criminal and civil justice systems in domestic violence cases is not known, as statistics are not kept on this nationally. Even SDVCs do not routinely try to obtain information about overlapping civil cases (Cook et al, 2004). However cases such as Lomas v Parle [2004] 1 FLR 812 show that some victims do try to access remedies in both systems at the same time, and that this has caused both them and the legal system particular difficulties (Burton, 2004). The criminal and family courts need to ensure that victims and perpetrators are not subjected to contradictory or inconsistent requirements, which can undermine the victim safety and their willingness to engage with either system. An Integrated Domestic Violence Court may be one way of achieving this.

4.2.1 Integrated Domestic Violence Courts (IDVCs)

The findings of an evaluation of the first IDVC in England (based in Croydon) are currently awaited (Hester et al, forthcoming). Since the IDVC is new in England and Wales and currently confined to one geographical area it is unlikely to have had any impact on applications for non molestation orders. If the IDVC is a success then it might be possible to concentrate resources on ensuring that victims have appropriate support for accessing FLA remedies in the IDVC setting. Alternatively the criminal only SDVCS may need to significantly improve their arrangements for identifying cases where there are overlapping family law proceedings relating to the same abuse.

4.2.2 Criminalisation of breach of a non molestation order

It has already been noted that early quantitative evaluations of the DVCVA are inconclusive in relation to the impact that criminalisation of breach may have had upon the number of applications for orders (chapter two above). However, even during the passage of the DVCV bill some concern was expressed that the provision criminalising breach might result in a decline in the number of victims of domestic

abuse applying for non- molestation orders. Commentators highlighted several potential pitfalls with the provision and argued that, although well intentioned, criminalisation of breaches might reduce the protection available to victims of domestic violence by either making non-molestation orders more difficult to obtain, or putting victims off making applications.

One of the potential problems noted was that a heightened standard of proof might be applied to the making of a non-molestation order once the breach of such an order was criminalised. This was based partly on an analogy with Anti Social Behaviour Orders (ASBOs) and the House of Lords decision in McCann [2002] 3 WLR 1313 in which it was stated a court might feel it appropriate to apply a heightened standard of proof when breach of a civil order was punishable as a criminal offence. Consequently it was hypothesised that it might become more difficult evidentially to obtain non-molestation orders under the FLA, resulting in a drop in applications with the implementation of section 1 of the DVCVA (Burton, 2003). Subsequent case law suggests it should not have become more difficult to obtain orders due to the standard evidence of required. Firstly in Jones v Hipgrave [2005] 2 FLR 174 the Court of Appeal distinguished ASBOs from restraining orders under the PHA, making clear that the civil standard applied to the making of the later even though they had criminal sanctions for breach. It has been argued that non-molestation orders are more like restraining orders than ASBOs; they are orders for the protection of individual rights, and therefore a civil standard should apply to their making (Hitchings, 2005). Secondly, the House of Lords has recently clarified in Re B [2008] EWCA Civ 282 that the civil standard is not heightened by the seriousness of the allegations involved, or the seriousness of the consequences of the finding. Thus, as far as the standard of evidence is concerned, there is no reason for the DVCVA to result in a drop in applications for non-molestation orders. However Hester et al's research shows that there was a great deal of confusion surrounding the implementation of the DVCVA. They note that the police were particularly confused about the new enforcement provisions, but the confusion was more widespread. In the immediate aftermath some solicitors may have been confused about the impact of the DVCVA, including the standard of evidence required for the making of an order. It is important that a clear message is sent out to those all those working with victims and using the FLA that the civil standard still applies to the making of an order and it is, as a matter of law and evidence, no more difficult to obtain a order than it was when the old enforcement procedures applied.

However now that there are criminal penalties for breach, respondents may be more inclined to contest applications, which might either put victims off making applications and/or result in fewer orders being made (Burton, 2003). Victims of domestic abuse want the abuse to stop, they do not necessarily want their partner criminalised (Hoyle and Sanders, 2000). It has been argued that criminalisation reduces victims' choices and is disempowering because, for example, victims might be concerned that the CPS will prosecute breaches against their wishes (Hitchings, 2005)However some victims are reportedly enthusiastic about the criminalisation provision (Hester et al, 2008). The majority of victims' advocates interviewed by Hester et al (2008) stated that victims welcomed criminalisation of breach and that it was 'encouraging them rather than putting them off reporting breaches' (p.23). There is therefore some empirical evidence that criminalisation is encouraging victims to seek orders because of enhanced enforcements provisions. This will only work if

victims believe that the police and CPS take breaches of non-molestation orders seriously. Victims interviewed by Hester et al (2008) had variable experiences of the police response to breaches; some saying the police were unsure about the scope of the powers and unwilling to make arrests, others reporting the police were responding well to the breach (but that new assault charges arising out of the breach were not being rigorously pursued by the CPS). It is possible that victims may be less willing to pursue non-molestation orders, not so much because they fear that prosecutions will take place against their wishes, but because they are unable to get the criminal justice agencies to pursue a prosecution for breach and are left with an order that they cannot enforce themselves. Ironically the 'strengthening' of the enforcement provisions in the DVCVA may have the counterproductive effect of convincing victims that non-molestation orders are not 'worth the paper they are written on'. As yet there is no reliable empirical evidence on the police and CPS response to breaches, but the Home Affairs Select Committee on domestic violence (HASC, 2008) received anecdotal evidence that the police are using cautions rather than prosecuting breach; a practice it condemned. The lack of empirical evidence suggests that the implementation needs to be kept under review.

Criminalisation of breach has the advantage of opening up a wider range of penalties than would have been available in contempt proceedings, including the option of sentencing the defendant with a requirement to attend a perpetrator programme. There is some evidence that a perpetrator programme may be more effective than a short custodial penalty (Dobash et al, 2000; Mullender and Burton, 2001) and the Sentencing Guidelines Council (SGC) gauged its recommendations for sentencing domestic violence on this basis (SGC, 2006a & 2006b). It was argued before the DVCV bill was introduced that the benefits of wider penalties should be extended to contempt proceedings (Burton, 2003). Some judicial commentators observing a decline in applications after July 07 have suggested that consideration be given to repealing s 1 DVCVA and extending the sentencing options available to judges dealing with breaches as contempt (Millward, 2008). Repeal would be a difficult approach as it might symbolically indicate a downgrading of domestic violence, and would be contrary to qualitative research findings that some victims and professionals feel that the provision is effective. Consideration could still perhaps be given extending the 'sentencing' options for those orders that do go via the civil enforcement procedure. This would possibly address concerns that some victims might have about using the criminal route for enforcement and any potential problems they encounter with the criminal justice agency response. However it will only work if victims, and perhaps more significantly their solicitors, feel that the civil option remains a real choice. Research, reviewed in the next chapter, suggests that solicitors have negative perceptions about the availability of public funding to pursue a civil route when a criminal alternative is available. Consequently they may not give their clients accurate or helpful advice about the options available to them.

5. Victims' choices

Domestic violence is a social issue and it cannot simply be 'solved' with the use of legal remedies. Law certainly has a role to play (Burton, 2008), but the majority of victims of domestic abuse do not turn to the legal system for help. When victims do consider legal remedies their decisions may be affected by a variety of different factors. This section will consider some of the influences upon victims' choices, focusing in particular on the factors which may influence the decisions of victims who do consider applying for non-molestation orders.

5.1 Helping seeking behaviour

The 2006/07 BCS data show that many victims did not think that what had happened to them was 'domestic violence'. Almost a third (30%) of victims thought what had happened was 'wrong, but not a crime' and a further 29% thought that it was 'just something that happens' (Hoare and Jansson, 2008). These views have obvious implications for help seeking behaviour; if victims do not identify themselves as experiencing abuse, they will not seek a remedy for it. Even if they acknowledge a 'problem' it is clear that law is frequently not perceived as relevant. The BCS found that three quarters of victims of partner abuse told someone about what had happened but mainly they told their friends, relatives or neighbours (55%), not legal professionals (Hoare and Jansson, 2008). Only 13% of victims told the police (13%), most saying they did not because the abuse was 'too trivial or not worth reporting'. Just over half (54%) of all victims suffered some injuries as a result of abuse and around one quarter (26%) of those sought medical help. The majority (81%) of those who sought medical help were asked the source of their injuries but almost a quarter (24%) did not reveal it. It is clear then that a lot of domestic abuse remains hidden from the view of agencies. The BCS does not indicate the proportion of victims who contacted solicitors about domestic abuse, but it would be a lower proportion than those contacting the police and medical services; the two agencies most often told about domestic abuse. Humphreys and Thiara (2002) highlight that there are many different 'routes to safety' for victims of domestic abuse, but women experiencing domestic abuse experience a range of practical and psychological difficulties in seeking help. These obstacles include the stigma attached to naming the abuse and fears that they will not believed. For those victims who contemplate using the civil route to protection, stigma and fear constitute potential obstacles, and are related to a number of factors that may influence their decision making:

5.2 Factors influencing victims who contemplate using civil law remedies

5.2.1 The role of solicitors

One of the key factors influencing victims' decisions regarding civil remedies, once they have decided to explore that option, is the advice that they receive from solicitors. Solicitors are important gatekeepers to the civil remedies for domestic violence (Burton, 2008). Under the pre FLA legislation researchers observed that solicitors often discouraged victims from seeking remedies (Radford, 1987; Barron, 1990). Some victims felt that their accounts of abuse were manipulated by their solicitors and that their concerns were not always taken seriously. Partly this was due to victims encountering solicitors who were unsympathetic to their claims, some

believing that the victim had a role in precipitating the violence. However, Radford observed that even 'good' solicitors might undermine their clients due to the pressure to construct a case that was legally relevant. Barron (1990) found that solicitors did not always properly inform clients about the remedies available and sometimes would not apply for protection orders unless their client was willing to initiate divorce proceedings. It is important that victims of domestic violence have a solicitor who is prepared to explain all the available options in language that is easily understood rather than inaccessible legal terminology. Victims are often find it difficult to talk to solicitors about the details of their relationship with a violent partner (Barron, 1990) so it is important that they have a solicitor who is knowledgeable about the dynamics of abuse. The process of seeking a civil remedy can feel disempowering for victims if they are excluded from discussions that take place between solicitors and outcomes are reached without the victim's active involvement. This might happen where solicitors agree between themselves that an undertaking should be used instead of an order. The use of undertakings in lieu of orders was a particular problem under the old (pre FLA) law (Kewley, 1996). This phenomenon did not disappear with the FLA despite provisions in the Act designed to discourage undertakings where a power of arrest would be appropriate for an order (Section 46 FLA). Just under half of the 60 service providers interviewed by Burton et al (2002) stated that solicitors were still keen to deal with cases by undertakings. The same research revealed varied attitudes amongst the judiciary regarding the acceptance of undertakings, which supports Edwards (2001) analysis. Many of the service providers interviewed by Burton et al (2002) commented that whether victims were able to access remedies under the FLA depended a great deal on the quality of legal advice they received. Respondents felt that it was crucial that victims got a solicitor who specialised in domestic violence because solicitors varied greatly in their the level of competence with the legislation and their skill in dealing with victims. For example, although the definition of non-molestation is open under the FLA and caselaw suggests that it encompasses a wide range of behaviour, some solicitors interpret it as only relevant to victims of physical abuse who have sustained physical injury. Victims of emotional abuse may therefore be incorrectly advised that they have no remedy. In some circumstances non specialist solicitors can do more harm than good either by giving inappropriate or inaccurate advice or by their insensitive treatment of victims. However it was noted that even specialists could improve their practice by being more flexible in the way that they deal with clients, for example meeting them outside the office in an environment in which the victim feels safer, more comfortable and better supported.

To get a real sense of the problems some victims encounter, it is worthwhile quoting directly from a victim who responded to the WNC consultation with survivors. The WNC (2003) reported many women felt let down by their solicitors, citing the following case study: 'When I left my ex and went to a solicitor I found out that I was expecting. The solicitor said that because of this I should go back. I felt devastated. I did not know what to do. If I tried to claim anything I would not get the house. I changed my solicitor but he made me look like I was not telling the truth. When we first went to court I felt like a villain. They came prepared and we were not. There were lots of injunctions and he kept breaking them. My next solicitor said they were closing the case. Now I am with another one.'(WNC, 2003, p.14). Four different solicitors and still no indication that this particular victim managed to find a 'good' one.

Victims who use specialist advocacy services sometimes find it easier to get a good service from solicitors. Hester and Westmarland (2005) found that close links with good family law solicitors within specialist projects enhanced the use of civil remedies. Humphreys and Thiara (2002) surveyed a group of women using WAFE outreach services, which mainly comprised telephone support/ information and advocacy to get help with accessing services from other agencies. Victims thought that advocacy was useful in putting them in touch with solicitors who specialised in domestic violence and for managing their relationship with their solicitor. Victims used the advocacy service to chase up solicitors and ensure that the case was progressing properly. Humphreys and Thiara (2002) note a dilemma in using advocacy services to prompt solicitors; if the solicitor responds to the advocate but not the victim the victim may feel continued disempowerment. Whilst it is helpful for solicitors to have good working relationships with other professionals providing services to victims of domestic violence, solicitors need to respond appropriately to their clients as well as their advocates.

At the same time as praising the trend to specialisation in the criminal justice system, the HASC (2008) noted that there are a large number of untrained lawyers responding to domestic violence in the civil justice system. The Committee seems to implicitly endorse the view that there is a need to shift towards domestic violence specialists in the civil justice system. The research reviewed in this section suggests it would be helpful if solicitors doing FLA work were specially trained and involved in local multi agency networks or groups providing a range of services to victims of domestic violence. The public funding arrangements could perhaps be used to encourage specialisation and multi agency engagement.

5.2.2 Perceptions about the efficacy of non-molestation orders

Some victims may not apply for non-molestation orders because they do not think that they will work. They may have applied for an order in the past and not gained any benefit from it. In one study 13% of women who used civil protection orders said that they were no help and the abuse continued (Humphreys and Thiara, 2002), however three quarters of the women gained some benefit; either stating that the abuse stopped or they felt more protected and the abuse lessened. Another study of refuge and WAFE outreach services found that just over half of 202 respondents felt that non-molestation orders did offer protection, whilst around a quarter said that they did not and the remainder did not know (Barron, 2002). The view that orders are ‘not worth the paper they are written on’, first highlighted by Barron (1990), was therefore still held by a significant proportion of service providers five years after the implementation of the FLA. Barron (2002) found that some service providers tended not to recommend the use of protection orders because of lack of confidence in their success, even though the majority thought that the FLA had improved protection. Some stated that orders would only be helpful if they were rigorously enforced and/or if the perpetrator had respect for the law and law enforcement. As yet there is no research examining the efficacy of non-molestation orders in England and Wales (Paradine and Wilkinson, 2004), so it is difficult to assess whether perceptions they are not effective are well founded. The perception that orders are not useful cannot account for a decline in applications for non-molestation orders unless the concerns about efficacy have grown over time. There is no empirical evidence that these concerns are more prevalent than they used to be.

5.2.3 The costs of obtaining an order

The costs of obtaining civil orders have been reported as a barrier to obtaining protection under the FLA (Edwards, 2001). It is envitable that some ceiling has to be placed on the financial eligibility criteria as limitless resources cannot be devoted to legal aid, family or otherwise. 'Dispensing justice is an expensive state service which has to compete with other, arguably equally important human needs' like health and education (Sanders, 2001 p.22). Whether the level of eligibility for public funding is pitched correctly is a matter beyond the scope of this review, but it is clear that some victims do not meet the financial eligibility criteria but nevertheless state that they have insufficient accessible financial resources to pursue a civil remedy. Humphreys and Thiara (2002), for example, found that 8% of the women in their study said that the process of obtaining an order was too expensive.

Edwards noted that revised criteria for public funding, coinciding with the introduction of the FLA, may have made it more difficult for victims of domestic abuse to obtain orders. This was a view echoed by the service providers in Burton et al's study (2002). Edwards highlighted the 'requirement' (not in fact absolute) for a warning letter to be sent, and also noted the criteria 'appear to be partly informed by an underlying presumption that civil protection is only necessary where criminal law remedies are not available' (Edwards, 2001 p.200). The LSC have consistently argued that there is a misperception that funding is difficult to obtain where criminal law proceedings could be instituted, however the perception has lingered. Hester et al (2008) found that professionals were uncertain whether any reduction in applications for non molestation orders could be directly attributed to the DVCVA or a reduction in the number of people eligible for legal aid; 'Some legal advisors in particularly attributed a decrease in applications to the difficulties in obtaining legal aid. It was generally perceived by solicitors what where criminal proceedings are in hand, it is impossible to obtain public funding for the costs of a civil application.' (p.21). The Funding Code does not state that it is 'impossible' to obtain public funding when criminal proceedings are in progress. The Code encourages consideration of the criminal route it but makes provision for funding in cases where there is 'good reason' not to pursue it or the police have not provided adequate assistance. There appears to be a gap between the letter of the Code and the perception about its operation. This may be enough to partially account for a reduction in applications for non-molestation orders.

It is difficult to see what more can be done to address this, other than to try to ensure that specialist solicitors, who are properly trained on the Funding Code, as well as the legislation deal with domestic violence work. Solicitors should not be advising clients that funding is impossible to obtain, they should be concentrating their efforts on making a case for why legal representation should be granted for making an order or for committal proceedings in situations where the police have either not been informed for good reason or have not taken action.

Conclusion

The Family Law Act 1996 has been generally welcomed by victims of domestic abuse and the professionals working with them as increasing the level of protection available. However applications for non-molestation orders have decreased, more or less consistently (with some fluctuation at the beginning) since the FLA came into force. The reasons why fewer victims are seeking orders are unclear, but it is most likely to be a combination of factors rather than a single legal or societal development. Legal developments which may have contributed to a decline in applications for non-molestation are the enhanced enforcement provisions in both the FLA and the DVCVA. Whilst it seems counterintuitive that such 'improvements' would contribute to a downturn, it is possible that they made orders more difficult to obtain or pressurise victims into using a route that either they do not want or find ineffective because of the criminal justice agencies response.

This review has highlighted that victims' help seeking behaviour is influenced by a range of factors, not all of which are related to their perceptions about the relevance or potential usefulness of the legal process. Many victims do not even consider the legal system, so the idea that they would be 'encouraged' or 'put off' by changes to legal criteria, the attitudes of legal personnel or the availability of funding seems strange. Nevertheless for those who do wish to use civil remedies, or could be encouraged to do so, some improvements could be made. These include a greater level of specialisation in the civil justice system to ensure that those operating the FLA are well informed about the legal framework, the funding criteria and most importantly, the dynamics of domestic abuse and how to respond sympathetically and appropriately to victims. It is possible that specialisation could help to reverse the downward trend in applications for non-molestation orders under the FLA and may even mitigate some of the impact of the DVCVA, if this has precipitated a further more pronounced downturn in applications. The impact of the DVCVA will need to be kept under review as there is, as yet, limited empirical evidence on how the criminal justice agencies are responding to breaches and what the long term impact of this will be upon victims' help seeking behaviour.

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