‘She said…’ ‘He said…’: Cross Applications in NSW Apprehended Domestic Violence Order Proceedings

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Abstract

This thesis examines the use of cross applications in civil protection order proceedings in New South Wales (NSW) (known as Apprehended Domestic Violence Orders, ADVOs). A cross application takes place when one person in an existing or 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. The focus on cross applications provides a means to investigate the nature of men's and women's competing allegations about domestic violence, and to explore the way in which professionals working within the ADVO system approach, and seek to unravel, these competing claims. This thesis draws on the extensive debate within the sociological literature about 'what is domestic violence' and whether domestic violence is gendered in its perpetration. This debate has been paid scant attention in the legal literature. This thesis examines the assumptions underpinning the legal definitions and understandings of domestic violence in the civil protection order system, with reference to these theoretical debates about 'what is domestic violence' and 'what counts as domestic violence'. To do so it draws on empirical work: semi-structured in-depth interviews with women involved in cross applications and key professionals working in the field, documentary analysis of court files, and observations of court proceedings. The key contribution of this thesis to this literature is threefold: (1) it explores the question of gender perpetration through the investigation of official data (a data source little explored in debates about gender and domestic violence), (2) it combines qualitative and quantitative methods in a single study, and (3) it extends questions about the gendered perpetration of domestic violence to the legal arena (in particular the prime legal arena that responds to domestic violence in NSW, the ADVO system, a system ostensibly designed to better respond to domestic violence).

This thesis found that, like other studies in this field, the analysis of quantitative data alone reveals few differences between the types of violence men and women are alleged to use against their intimate partners. However when supplemented by qualitative data differences started to emerge particularly for men who lodged their application second in time. This qualitative analysis reveals not only that male second applicants appeared to make claims of a different nature, but that some men appeared to use the ADVO process to undermine women's claims for legal protection. The differences that emerged between men and women's alleged experiences of domestic violence resonated with feminist understandings of domestic violence that highlight its

function of control and the repetitive, cumulative environment in which violence is perpetrated by men against women.

While the study focussed on cross applications, its findings reveal a number of issues of concern for the ADVO system more broadly: its focus on incidents, the poor quality of complaint narratives, the brevity of court proceedings and the emphasis on settlement. These features undermine the progressive potential of the ADVO legislation to capture more than single incidents of largely physical violence. This was further compounded by the fact that while the professionals interviewed articulated broad definitions of domestic violence, this tended to be lost when responding to practice-orientated questions (here professionals returned to incident-based definitions). Perhaps more significantly the defining feature of domestic violence as a mechanism of control is not articulated in the NSW legislation, and hence (not unsurprisingly) was generally not articulated in the complaint narratives examined in this thesis. Yet control was the dominant way in which the women interviewed described their relationship with their former partner. The failure of complaint narratives to reflect the dimension of control, combined with the failure of key professionals to give sufficient emphasis to control in their practice under the ADVO legislation, an absence highlighted through the focus on cross applications, is an issue of concern for the ADVO system generally. This is important given the growing recognition in the research literature of the fundamental nature of control to the experience of domestic violence, particularly women's experiences of domestic violence.

Declaration

I hereby certify that this thesis is my own work and that any material written by another person has been duly acknowledged in the text. No part of this thesis has been accepted for the award of any degree at the University of Sydney or any other institution. The empirical work undertaken for this thesis (interviews, court file analysis and court observations) was approved by the University of Sydney Human Ethics Committee.

Acknowledgments

This thesis would not have been possible without those who generously gave their time to be interviewed. The women I interviewed often spent over two hours with me recounting their experience of violence, the impact of the cross application, and their experiences with the legal system. These interviews often brought up difficult experiences and I thank them for their generosity and good will in hoping that change might come about as a result of this research.

I also thank the many professionals (magistrates, police prosecutors, solicitors, Domestic Violence Liaison Officers, and coordinators of Women's Domestic Violence Court Assistance Schemes) who made time available to be interviewed within their busy workloads. I thank the local court staff who assisted me in locating files and made space available for me to examine those files. To all who assisted in recruiting participants: the Women's Domestic Violence Court Assistance Schemes, the Chief Magistrate of NSW, Legal Services (NSW Police) and the Domestic Violence Policy Unit (NSW Police).

Particular thanks must go to my supervisor, Professor Julie Stubbs. She is exceptionally knowledgeable in the field of domestic violence and legal responses. She consistently challenged me to produce better work and to be clearer about my arguments. I thank her for her time; not only talking about this work but other developments in the field. Julie was extremely supportive of my family and other demands that emerged during this thesis. She was probably horrified when I told her I was pregnant with my second child before I had submitted!

I wish to thank the staff of the Australian Domestic and Family Violence Clearinghouse who provided me with space, company and conversation during a large part of my thesis work.

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I have many friends and family members to thank who assisted me in juggling child care with my studies: my mother, my partner's mother Dorothy, my sister Megan and her family - all cared for my son, Atticus, on multiple occasions so that I could have extra time to complete my work. And my dear friend Kate who provided a shoulder and ear for my many PhD complaints and complications.

Finally, I do not know how to thank my partner, Gerard, enough for supporting me and our family throughout this PhD; his support was so extensive that I simply would have been unable to finish without him. He not only provided financial support, but an immense wealth of emotional support, encouragement and love. I acknowledge his frustrations about how it came to dominate our lives, particularly during this final year, as the unspoken presence that hung about, lurking behind every corner (not to mention literally in almost every room of the house). And thanks to Atticus for bringing me so much joy and insisting that playing together was just as (if not more) important than anything else.

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Abbreviations

ACT	Australian Capital Territory
ABS	Australian Bureau of Statistics
AIC	Australian Institute of Criminology
ALRC	Australian Law Reform Commission
ATSI	Aboriginal and Torres Strait Islanders
AVO	Apprehended Violence Order
ADVO	Apprehended Domestic Violence Order
APVO	Apprehended Personal Violence Order
BOCSAR	NSW Bureau of Crime Statistics and Research
CALD	Culturally and linguistically diverse
CDC	USA Centers for Disease Control and Prevention
CJC	Community Justice Centre
COPS	Computerised Operational Policing System
Cth	Commonwealth
CTS	Conflict Tactics Scales
DoCS	NSW Department of Community Services
DVLO	Domestic Violence Liaison Officer, NSW Police
FLA	*Family Law Act* 1975 (Cth)
FLO	Family Law Order
IO	Interim Order
LAC	Police Local Area Command
LGA	Local Government Area
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
PADV	Partnerships Against Domestic Violence
PINOP	Person in Need of Protection
TIO	Telephone Interim Order
USA	United States of America
VLRC	Victorian Law Reform Commission
WDVCAP	Women's Domestic Violence Court Assistance Program
WDVCAS	Women's Domestic Violence Court Assistance Scheme

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Legislation

New South Wales

Crimes Act 1900

Crimes Amendment (Apprehended Violence) Act 1999

Crimes Amendment (Apprehended Violence) Act 2006

Crimes (Apprehended Violence) Amendment Act 1989

Crimes (Domestic and Personal Violence) Act 2007

Crimes (Domestic Violence) Amendment Act 1993

Crimes (Domestic Violence) Amendment Act 1982

Crimes (Personal and Family Violence) Amendment Act 1987

Criminal Procedure Act 1986

Australian Capital Territory

Domestic Violence and Protection Orders Act 2008

Domestic Violence and Protection Orders Act 2001

Commonwealth

Family Law Act 1975

Family Law (Shared Parental Responsibility) Act 2006

Northern Territory

Domestic and Family Violence Act 2007

Queensland

Domestic and Family Violence Protection Act 1989

South Australia

Domestic Violence Act 1994 (SA)

Tasmania

Family Violence Act 2004

Victoria

Crimes (Family Violence) Act 1987

Family Violence Protection Act 2008

Western Australia

Restraining Orders Act 1997

1. Introduction

1. Olivia and John

In September 2002 the police attended a domestic violence[1] incident involving a de facto couple, Olivia and John. In response the police applied for a civil protection order, known in New South Wales (NSW) as an Apprehended Domestic Violence Order (ADVO),[2] to protect Olivia from John. **At the same time** they applied for an ADVO to protect John from Olivia. The text of the applications for both parties was exactly the same. It reads, in full:

> *Parties have been arguing with each other over the last 2 days. Yesterday both parties had assaulted each other. Tonight, around 5.30pm further assaults took place by both parties.* [John] *assaulted* [Olivia] *by throwing her against* [a] *wall, choking and hitting her.* [Olivia] *assaulted* [John] *by scratching him severely all over his body. Both parties charged with assault.*

This representation of the violence suggests that the use of violence is mutual – that at some level Olivia and John are as 'bad as each other' and hence require legal protection from each other for domestic violence.

Six days later both ADVO applications were listed before the Local Court. At court Olivia consented to an ADVO being made against her to protect John, without making any admissions[3] regarding the allegations contained in the complaint quoted above. This ADVO provided that Olivia must not intimidate, stalk, 'assault, molest, harass, threaten or otherwise interfere' with John for 12 months. If she was to contravene these terms she could be charged with a criminal offence and liable to a fine and/or imprisonment.[4]

On the same day at court, the ADVO application to protect Olivia from John was withdrawn as it transpired that she had obtained an ADVO against him some five months earlier. That ADVO protected Olivia for 12 months in similar terms to

[1] The different terminology used to describe domestic violence, and the rationale for using this term, are discussed later in this chapter.

[2] Civil protection orders have different names in different jurisdictions (protection order, restraining order, injunction). In NSW they are generically known as Apprehended Violence Orders (AVOs), of which there are two types: ADVOs for people who have a 'domestic relationship'; and Apprehended Personal Violence Orders (APVOs) where the parties have no such relationship (eg work colleagues and neighbours).

[3] At the time of the fieldwork this was *Crimes Act* 1900 (NSW) s562BA(2), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s78(2).

[4] *Crimes Act* 1900 (NSW) s562I, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s14.

the ADVO that Olivia consented to, outlined above. However, a further condition was added to Olivia's ADVO which prohibited John from entering or loitering around her home.

In addition to applying for mutual ADVOs, the police charged both parties with offences arising from the incident. John was charged with maliciously damaging or destroying property, assault occasioning actual bodily harm, two counts of common assault, and contravening an ADVO.[5] Olivia was charged with assault occasioning actual bodily harm, and maliciously damaging or destroying property.[6] The charge fact sheet for the offences allegedly perpetrated by John provides greater information about what took place during the incident:

> [John] *punched* [Olivia] *with his fist onto her left kidney area.* [He then] *commenced walking out of the bedroom, whilst he was doing so he punched the door causing damage to it.* [He] *woke the children and made them scream.*
>
> [Olivia] *ran towards* [John] *and grabbed him by his collar of his shirt and she … scratched him at this time.* [Olivia] *said, 'Why do you do this, why do the children have to put up with this. I am sick of you smashing my stuff and how do you like it.'* [Olivia] *walked up towards the stereo and pushed her foot on it causing it to crack.*
>
> [John] *grabbed* [Olivia] *with his two hands onto her shoulders and threw her to the ground.* [John] *had a tight grip* [on Olivia's] *neck causing her to not breath*[e]. [John] *released* [her] *neck and stepped away from* [her].
>
> [Olivia] *got up from the ground and said, 'are you trying to kill me?'* [and she verbally] *abused* [John].
>
> [John] *said, 'fuck you, you*['re]*, dead.' He grabbed* [Olivia] *and threw her onto the ground. He pushed* [her] *head back and forth onto the ground,*
>
> *whilst this was occurring* [Olivia] *was swinging her hands at him to protect herself.*
>
> [John] *leant over* [Olivia's] *body and started to head butt her onto the head area. …* [Olivia] *sustained lumps and bruises to her head and ear …* [John] *said, 'If DoCS take my kids, your*['re] *a dead cunt and get off the floor you fucker.' At this stage* [Olivia] *was vomiting blood from her mouth area and could not get up from the floor.* [John] *tried to wipe off the blood from the floor. He said, 'Get up like nothing has happened, get onto the lounge.'* [Olivia] *had trouble getting up from the ground.* [John] *grabbed a blanket and placed it onto* [Olivia's] *head and later placed his hands over the* [her] *mouth.*
>
> [Olivia] *tried to release herself from* [John], *whilst this was happening* [Olivia] *bit his finger for him to let go.* [John] *was screaming for* [Olivia] *to get her mouth of*[f] *his finger…*

[5] Respectively *Crimes Act* 1900 (NSW) ss195, 59, 61 and then *Crimes Act* 1900 (NSW) s562I, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s14.

[6] *Crimes Act* 1900 (NSW) ss59 and 195.

This second, more detailed, version of the incident also produced by the police provides quite a different account of the events that led the police to attend the residence. It indicates that John was utilising more serious, aggressive, frequent and repetitive violence against Olivia, than she used against him – indeed violence that caused injury. In comparison while we certainly see that Olivia used violence, it was exercised in direct response to what John was doing. We can sense Olivia's anger at John's violence against her and there is some sense of frustration that this is not the first time she has experienced violence directed at her and her belongings, nor the first time that the children have witnessed its occurrence. Indeed we know that some five months prior to this incident, there had been another incident that led the police to obtain an ADVO to protect Olivia.

Have Olivia and John both perpetrated domestic violence (albeit of varying degrees) simply because they have used violence against the other? Or has only one party (John) perpetrated domestic violence? If we take the latter approach, how should we understand Olivia's actions and behaviour? What makes domestic violence different from other acts of violence between intimate heterosexual partners?

I present Olivia and John's story – not for the numerous questions it raises about the police response – but rather for the way it illustrates that in order to understand the nature of domestic violence we need to know more than simply 'who did what to whom' and 'how many times', as is outlined briefly in the ADVO complaint narrative, before labels such as 'domestic violence', 'perpetrator' and 'victim' are deployed.

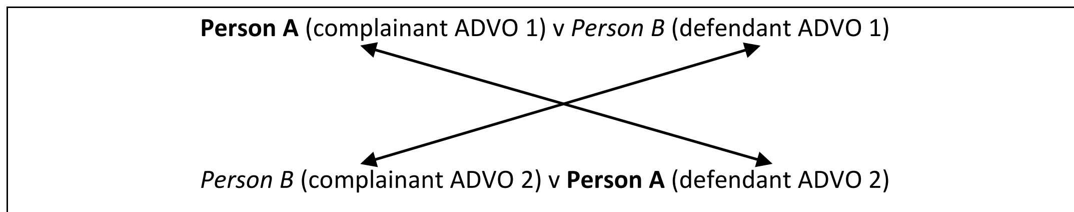
2. This thesis

This thesis examines the use of cross applications in NSW ADVO proceedings involving current or former intimate heterosexual partners.[7]

A cross application takes place when one person in a current/former intimate relationship, usually the woman, applies for an ADVO and sometime afterwards[8]

[7] The focus on heterosexual relationships is explained later in this chapter.

the defendant in that originating application, usually the man, seeks an ADVO against the first person.[9]



In a small number of cases both ADVO applications may be generated at the same time. In this thesis these are referred to as dual applications, and are a special category of cross application.[10] The case study of Olivia and John is an example of a dual application.

Lawyers and women's services in NSW have raised concerns about the incidence and nature of cross applications for over a decade.[11] Similar concerns have been raised in other Australian jurisdictions[12] and in other countries, particularly in the United States of America (USA).[13] There are no official statistics available on the incidence of cross applications in NSW; very little is known about when cross applications are lodged, whether there are differences in the types of allegations made by men and women, and how these competing allegations are resolved by the legal system. Two studies have focused on cross applications, both unpublished papers conducted by then undergraduate law students.[14] Cross

[8] The definition of a cross application is discussed later in this chapter.

[9] This gender breakdown is supported by the data gathered in this thesis, see *Chapter 6*.

[10] See *Chapter 8*.

[11] These concerns were raised with the author during her practice as a solicitor with the then Domestic Violence Advocacy Service, a NSW community legal centre, and with the various Women's Domestic Violence Court Assistance Schemes (WDVCASs) and others during the conduct of this research. This concern is also demonstrated by the Women's Legal Resources Centre (WLRC) preliminary research on this topic: *Cross Applications in Apprehended Violence Order Proceedings in Four Local Courts in NSW* (1999) unpublished paper. Copy on file with author. See also submissions to the NSW Ombudsman, *Domestic Violence: Improving Police Practice* (2006) at 21; and NSWLRC, *Apprehended Violence Orders* (2003) at [11.6]-[11.17].

[12] Victoria: Melinda Walker, 'Interpreting the Figures: Increases in Women's Violence or Just More Masculinist Legal Tactics?' (1995) 5 *Australian Feminist Law Journal* 123; and Anna Stewart, 'Who are the Respondents of Domestic Violence Protection Orders?' (2000) 33 *Australian and New Zealand Journal of Criminology* 77. Queensland: Queensland Domestic Violence Council, 'Cross Applications: The Protection Order Backlash' (1993) 6(4) *Shattering the Silence: Official Newsletter of the Domestic Violence Resource Centre* 1. Western Australia: Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008) at 35.

[13] In the USA the focus has been on mutual orders: see Elizabeth Topliffe, 'Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders are Not' (1992) 67 *Indiana Law Journal* 1039; Joan Zorza, 'What is Wrong with Mutual Orders of Protection?' (1999): <http://www.scvan.org/mutual_orders.html> (14 January 2009); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (1998) published in (1989) 15 *William Mitchell Law Review* 827 at 878-79; James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (1999) at 14; and Catherine Klein & Leslye Orloff, 'Protecting Battered Women: Latest Trends in Legal Relief' (1999) 10 *Women and Criminal Justice* 29 at 39-40.

[14] Juliet Dimond, *Legal Abuse as a Form of Domestic Violence: The Phenomenon of Protection Order Cross Applications* (1995) unpublished (copy on file with author); and WLRC, above n11.

applications have also emerged in research focusing on other aspects of the ADVO system.[15]

This limited research raises concern about the way in which cross applications, or the mutual orders that might result from them, may serve to: silence women's stories about domestic violence, trivialise women's experience of violence by failing to attribute blame, suggest that violence is mutual, ignore or discount the role of gender in understanding domestic violence, perpetuate the myth that women are as violent as men in their intimate relationships, and expose women to the risk of being charged with contravening the order made against them.[16] Cross applications may also be used in subsequent legal proceedings, for example family law proceedings concerning children, to discount women's concerns about violence and ongoing parenting.[17] Concern has also been expressed about the way in which a cross application may be deployed to continue to harass and intimidate a victim.[18]

Cross applications raise questions about men and women's use of violence in intimate relationships. The debate about whether men and women are equally violent in their relationships has long animated the sociological literature, but has been given little recognition in the legal literature.[19] This thesis seeks to examine the assumptions underpinning the legal definitions and understandings of domestic violence in the NSW ADVO system through the case study of cross applications, with reference to the theoretical debates about 'what is domestic violence' and 'what counts as domestic violence'. It draws on detailed empirical

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[15] In research on breaches of ADVOs: Hayley Katzen, *'How Do I Prove I saw his Shadow?' Responses to Breaches of Apprehended Violence Orders: A Consultation with Women and Police in the Richmond Local Area Command* (2000) at 42; and research on post-separation parenting arrangements: Miranda Kaye, Julie Stubbs & Julia Tolmie, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (2003) at 54-55.

[16] In Australia see Rosemary Hunter & Julie Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24 *Alternative Law Journal* 12 at 15-6; Helen Spowart & Rebecca Neil, 'Stop in the Name of Love' (1997) 22 *Alternative Law Journal* 81 at 84; Walker, above n12 at 125. In the USA see Topliffe, above n13 at 1061; Minnesota Supreme Court Task Force, above n13 at 879; Klein & Orloff, above n13 at 39; and Zorza, above n13; 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 at 24.

[17] Topliffe, above n13 at 1062-1064. See also Goodmark, 'Law is the Answer?', above n16 at 24.

[18] Spowart & Neil, above n16 at 84; Helena Barwick, Alison Gray & Roger Macky, *Domestic Violence Act 1995: Process Evaluation* (2000) at 58; and Department of the Attorney General, above n12 at 35.

[19] Michelle Dempsey, 'What Counts as Domestic Violence? A Conceptual Analysis' (2006) 12 *William and Mary Journal of Women and the Law* 301 at 305. Exceptions to this absence include the extensive work of Russell Dobash & Rebecca Dobash: eg see 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324; Russell Dobash, Rebecca Dobash, Margo Wilson & Martin Daly, 'The Myth of Sexual Symmetry in Marital Violence' (1992) 39 *Social Problems* 71. See also Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (2000) at 24-27; Linda Mills, *Insult to Injury: Rethinking our Responses to Intimate Abuse* (2003) at 67-84; and Demi Kurz, 'Battering and the Criminal Justice System: A Feminist View' in Eve Buzawa & Carl Buzawa (eds), *Domestic Violence: The Changing Criminal Justice Response* (1992).

work, involving semi-structured in-depth interviews with women involved in cross applications and key professionals working in the field, documentary analysis of court files, and observations of court proceedings.

How we look at and define domestic violence has important implications for how the legal system labels and responds to the violence women and men use in intimate relationships.[20] A common method of defining domestic violence is identifying and measuring the types of acts and behaviours that might form its constituent parts, and by reference to the types of relationships that might be considered 'domestic' (or familial). This thesis, drawing on feminist understandings of domestic violence, emphasises the contextual dimensions of violence that contribute, and provide meaning, to an act as *an act of domestic violence*. The multiple methods employed in this thesis, drawing on quantitative and qualitative data, highlights the limitations of some forms of quantitative information when presented devoid of the context in which the act 'counted' took place.

This thesis asks: Is it sufficient to label a person a 'perpetrator' of domestic violence simply on the basis that a person has used an act of violence against their intimate partner? Do we need to know whether there have been other acts of violence or abuse? Do we need to know about the meaning and impact of the violence? Is it important, or useful, to categorise different types of violence between intimate partners? Gender differences emerge across victimisation, perpetration and impact in response to such questions. These differences have been documented in other research and the call for context in understanding domestic violence has been extensive.[21] The contribution of this thesis is to explore the way these questions are posed (or not posed), in the primary legal avenue for protection from domestic violence in NSW, the ADVO system, and to examine how the competing claims men and women present about domestic violence are approached and resolved by professionals within that system.

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[20] Dobash & Dobash, 'Working on a Puzzle', above n19 at 324-25. See also Michael Johnson, 'Domestic Violence: It's Not About Gender – Or Is It?' (2005) 67 *Journal of Marriage and the Family* 1126 at 1129.

[21] See Dobash & Dobash, 'Working on a Puzzle', above n19; Russell Dobash & Rebecca Dobash, 'The Context-Specific Approach' in David Finkelhor, Richard Gelles, Gerald Hotaling & Murray Straus (eds), *The Dark Side of Families: Current Family Violence Research* (1983); Schneider, above n19 at 46-49; Deborah Tuerkheimer, 'Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence' (2004) 94 *Journal of Criminal Law and Criminology* 959 at 966; Martha McMahon & Ellen Pence, 'Making Social Change: Reflections on Individual and Institutional Advocacy with Women Arrested for Domestic Violence' (2003) 9 *Violence Against Women* 47 at 51-52; Susan Miller, *Victims as Offenders: The Paradox of Women's Violence in Relationships* (2005) at 10.

The remainder of this introduction is divided into three parts. First, I introduce the theoretical concerns and debates about gender and domestic violence that underpin this study. Many of these debates are reflected in community attitudes about domestic violence. Second, I provide an overview of the research setting of ADVOs in NSW. Here I introduce the empirical research undertaken in this thesis, the methodology and key limitations. I present a working definition(s) for the purpose of this thesis, and a rationale for the use of the term 'domestic violence'. Finally I outline the structure of this thesis.

3. An introduction to the concerns of this thesis

The problem of domestic violence has been the subject of extensive advocacy, research and government action over the last 30 years. In particular the women's movement in Australia, as in many other Western countries, has been active and successful in gaining political attention for the violence many women experience from their current/former male partners. This has led to the implementation of a wide range of measures to promote the safety of women and respond appropriately to male perpetrators. This understanding of domestic violence as primarily a problem of men's violence against women, is supported by extensive feminist research which conceptualises men's use of violence as an issue of 'power and control' or 'coercive control' reflective of, and made possible by, the unequal position of men and women in society. This does not mean that feminist research ignores the role of other factors in the occurrence and experience of domestic violence (such as race, class or sexual orientation), as is often claimed, but rather it takes the view that recognising domestic violence as a gendered harm 'allows us to begin to ask important questions about the construction of gender, the potential to transform damaging forms of masculinity associated with that violence and about social and cultural factors which permit men to resort to violence'.[22]

This view of domestic violence as a gendered harm is supported by official statistics:

[22] Julie Stubbs, 'Introduction' in Julie Stubbs (ed), *Women, Male Violence and the Law* (1994) at 4.

- Women were the victims in 71.1 per cent, and men were the offenders in 80.4 per cent, of the domestic assaults reported to NSW police (1997-2004).[23]

- Three quarters of intimate partner homicides involve men killing their current/former female partners.[24]

- Over 70 per cent of ADVO applications are made by, or on behalf of, women.[25]

- A 2005 study of hospital admissions in Western Australia found that 85 per cent of admissions due to domestic violence were for women.[26]

Other Australian studies have sought to measure the prevalence of violence against women.[27] In 2005 the Australian Bureau of Statistics (ABS) explored gender differences in the prevalence of violence (defined as actual and threatened physical and sexual violence).[28] This study examined violence from intimate partners, as well as from family members, other people known to the victim, and strangers. While men experienced more instances of violence in the broad context of their lives (primarily from other men), women were more likely to experience violence in the context of their intimate relationships (also from men): 31 per cent of the women who were physically assaulted in the past year were assaulted by a current/former partner, while only 4.4 per cent of men were assaulted by a current/former partner.[29] Women were three times more likely than men to have experienced violence from a former partner since the age of 15 (15% of women, 4.9% of men).[30]

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[23] Julie People, 'Trends and Patterns in Domestic Violence Assaults', *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice*, No 89, NSW Bureau of Crime Statistics and Research (2005) at 6.

[24] Jenny Mouzos & Catherine Rushforth, 'Family Homicide in Australia', *Trends and Issues in Crime and Justice*, No 255, Australian Institute of Criminology (2005) at 1.

[25] Local Courts NSW, *Apprehended Violence Statistics: Year 2005*, Table 1.2. Unpublished, copy on file with author. This figure has remained relatively stable over the last few years. The data compiled by Local Courts does not include the gender of the defendant. This information would be valuable, and it is collected in other jurisdictions: see Department of Justice Victoria, *Measuring Family Violence in Victoria: Victorian Family Violence Database (Volume 3): Seven Year Trend Analysis 1999-2006* (2008) at [6.2]-[6.4].

[26] Arem Gavin & Chris Gillam, *Hospital Admissions due to Intimate Partner Violence in Western Australian 1994-2003: Highlight Report* (2005) at 1.

[27] Jenny Mouzos & Toni Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004); and ABS, *Women's Safety Australia 1996*, Cat No. 4128.0 (1996).

[28] ABS, *Personal Safety Australia*, Cat No. 4906.0 (2005) at 5. Michael Flood has criticised this study: 'Violence Against Women and Men in Australia: What the Personal Safety Survey Can and Can't Tell Us' (2006) (Summer)(4) *DVIRC Quarterly* 3.

[29] ABS, 'Personal Safety', above n28 at 9.

[30] Ibid at 11.

Despite the profile that emerges from official data and various prevalence studies, there continues to be debate within the research community, as well as amongst the general community, about whether men and women are equally violent in their intimate relationships.

A. Debate about definitions and gender in the literature

i. Family violence and feminist research

In general terms the debate about gender and domestic violence in the literature is characterised by a schism between the largely USA-based, 'family violence' researchers (who see domestic violence as symmetrical in its occurrence, with men and women being equally likely to be perpetrators) and 'violence against women' or feminist researchers (who see domestic violence as asymmetrical, predominantly perpetrated by men against women).[31] The debate, often acrimonious, has continued in relatively similar terms for over 30 years. The debate reflects differences in the theoretical framework in which questions are asked (for family violence researchers this is in terms of conflict theory, whereas feminist researchers tend to view violence against women as a manifestation of women's subordinate status in society) and how definitions are made operational in research (methodological questions and decisions). The differences, both epistemological and political, centre on 'what counts'[32] and ultimately what is a 'social problem' worthy of attention.[33]

Family violence researchers typically use act-based survey instruments, most notably the Conflict Tactics Scales (CTS) developed by Murray Straus in the 1970s;[34] they have found that men and women use *physical violence* against their intimate partner at equal rates, and in some studies that women use physical

[31] This characterisation of the division in the research has been employed by others: see Rebecca Dobash & Russell Dobash, *Women, Violence and Social Change* (1992) at 258-84; Chris Atmore, *Men as Victims of Domestic Violence: Some Issues to Consider* (2001) at 4.

[32] Dobash & Dobash, 'Working on a Puzzle', above n19 at 324, 328.

[33] Domestic violence is widely seen as a social problem. Debate about gender perpetration challenges how the problem is perceived, the measures put in place to address it, and whether the current response (directed at men's violence) is appropriate: see Murray Straus, 'Physical Assaults by Wives: A Major Social Problem' and Demi Kurz, 'Physical Assaults by Husbands: A Major Social Problem' in Richard Gelles & Donileen Loseke (eds), *Current Controversies on Family Violence* (1993). See also Dobash & Dobash, 'Working on a Puzzle', above n19 at 325-326.

[34] Murray Straus, 'Measuring Conflict and Violence: The Conflict Tactics (CT) Scales' (1979) 40 *Journal of Marriage and the Family* 75. See also Murray Straus, Sherry Hamby, Sue Boney-McCoy & David Sugarman, 'The Revised Conflict Tactics Scales (CTS2): Development and Preliminary Psychometric Data' (1996) 17 *Journal of Family Issues* 283.

violence at even greater rates than men.[35] It is this symmetrical finding that is at the core of subsequent debates. In response feminist researchers have argued that it is not possible to simply count acts of violence devoid of the context in which they occur, and that if family violence researchers were more attuned to context they would find that women's use of violence, compared to that of men, is qualitatively and quantitatively different. Using largely qualitative research methods, feminist researchers have highlighted the multiple and varied acts and behaviours that some men use to exert power and control over women in intimate relationships.

Chapter 2 explores this division in the sociological research in detail.

The examination of cross applications in this thesis reflects these debates in three key ways. First it seeks to explore the competing claims made by men and women within a relationship by exploring the allegations each made when seeking a civil protection order. As noted by Heather Melton and Joanne Belknap, official data (in this thesis the use of court files) has been 'neglected in the debate over gender symmetry or asymmetry and thus is an important resource in an attempt to further investigate this issue'.[36] Second, by employing multiple methods in a single study, this thesis highlights the methodological debates by illustrating the limits of act-based methods when counterpoised with the in-depth and qualitative material gathered from the interviews and court files (*Chapters 7-9*). Finally this thesis investigates the link between the limits of counting-based methods and the incident driven approach of the legal system, much discussed in terms of the criminal justice system, but, as is suggested in this thesis, replicated in the civil protection order system.

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[35] Eg see the results of the National Family Violence Surveys (USA) (1975, 1985): Murray Straus, 'The National Family Violence Surveys' in Murray Straus & Richard Gelles (eds), *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* (1990); in Australia see Bruce Headey, Dorothy Scott & David de Vaus, 'Domestic Violence in Australia: Are Women and Men Equally Violent?' (1999) 2 *Australian Social Monitor* 57; in New Zealand see: David Fergusson, John Horwood & Elizabeth Ridder, 'Partner Violence and Mental Health Outcomes in a New Zealand Birth Cohort' (2005) 67 *Journal of Marriage and Family* 1103. See also Martin Fiebert, 'References Examining Assaults by Women on their Spouses or Male Partners: An Annotated Bibliography' (1997) 1 *Sexuality and Culture* 273, this has been updated see: <http://www.csulb.edu/~mfiebert/assault.htm> (14 January 2009); and John Archer, 'Sex Differences in Aggression Between Heterosexual Partners: A Meta-Analytic Review' (2000) 126 *Psychological Bulletin* 651.

[36] Heather Melton & Joanne Belknap, 'He Hits, She Hits: Assessing Gender Difference and Similarities in Officially Reported Intimate Partner Violence' (2003) 30 *Criminal Justice and Behaviour* 328 at 337.

ii. Different types of intimate partner violence?

There is growing interest in the proposition that the two groups of researchers are studying different types of domestic violence as a consequence of the differences inherent in the samples that they access (where family violence theorists use large-scale randomised samples, and feminist researchers tend to use small-scale samples obtained via women's refuges, police, courts or hospitals) and the different instruments they use to measure violence. Michael Johnson and colleagues have conducted the most notable work in this area.[37] Johnson argues that family violence theorists are examining 'situational couple violence' (a form of domestic violence that is likely to be isolated, minor and mutual in its perpetration, does not escalate and is not used to control the other person), while feminist researchers are examining 'intimate terrorism' (that is, the form of violence conjured by the term 'domestic violence'; this is largely perpetrated by men to exercise control over their female partners, it is repetitive and likely to escalate).

While I agree with Johnson that not all violence that takes place between intimate partners is 'domestic violence',[38] and this is a key contention for this thesis, I have a number of concerns with this model and its application. These concerns are explored in *Chapter 2*. Some of the concerns derive from the development of the typology as an 'answer' to the division in the sociological research, outlined above, and others relate to the role of the researcher in

[37] Michael Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57 *Journal of Marriage and the Family* 283; Michael Johnson & Kathleen Ferraro, 'Research on Domestic Violence in the 1990s: Making Distinctions' (2000) 62 *Journal of Marriage and the Family* 948; Michael Johnson & Janel Leone, 'The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey' (2005) 26 *Journal of Family Issues* 322; Johnson, ' It's not about Gender', above n20; Michael Johnson, 'Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence' (2006) 12 *Violence Against Women* 652; and Michael Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence* (2008). Johnson is not the only person to conduct work in this area, see also Janet Johnston & Linda Campbell, 'A Clinical Typology of Interparental Violence in Disputed Custody Divorces' (1993) 63 *American Journal of Orthopsychiatry* 190; Janet Johnston, 'A Child-Centered Approach to High-Conflict and Domestic-Violence Families: Differential Assessment and Interventions' (2006) 12 *Journal of Family Studies* 15; Suzanne Swan & David Snow, 'A Typology of Women's Use of Violence in Intimate Relationships' (2002) 8 *Violence Against Women* 286 and the related area of typologies of perpetrators: Amy Holtzworth-Munroe, 'A Typology of Men who are Violent toward their Female Partners: Making Sense of Heterogeneity in Husband Violence' (2000) 9 *Current Directions in Psychological Science* 140; Neil Jacobson & John Gottman, *When Men Batter Women: New Insights into Ending Abusive Relationships* (1998). In Australia see Kerrie James, Beth Seddon & Jac Brown, *'Using it' or 'Losing It': Men's Constructions of their Violence Towards Female Partners* (2002). Murray Straus himself distinguished between 'ordinary violence' and more serious forms of violence: 'Ordinary Violence, Child Abuse and Wife Beating: What do They Have in Common?' in Finkelhor et al (eds), above n21. For recent applications or interest in differentiation see: Nancy Ver Steegh 'Differentiating Types of Domestic Violence: Implications for Child Custody' (2005) 65 *Louisiana Law Review* 1379; Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu & Matthew Gray, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study* (2007); and Dempsey, above n19.

[38] See also Flood, 'Violence Against Men and Women in Australia', above n28; and Sue Osthoff, 'But, Gertrude, I Beg to Differ, a Hit is not a Hit is not a Hit' (2002) 8 *Violence Against Women* 1521.

identifying, valuing and naming acts as domestic violence (or as something else) – a criticism also levelled at CTS-based studies. Such approaches ignore the role of the victim and the perpetrator in interpreting, and providing meaning to, acts of violence and abuse. As Cavanagh and colleagues have argued, acts only have the 'potential' to be 'domestic violence'; it is through the interaction and negotiation of the relationship and its history that such acts attain their meaning for the victim and the perpetrator.[39]

For a variety of reasons inherent in the data collected in this thesis, it is not possible to test the relevancy of Johnson's typology to cross applications (the prime limitation is the lack of articulation of control in ADVO complaint narratives, the feature that differentiates Johnson's proposed categories). However, this growing research area is clearly related to the argument of this thesis that not all acts of violence between intimate relationships are acts of domestic violence, thus questions or issues that resonate with, or challenge Johnson's work are raised where relevant in this thesis.

iii. Women's use of violence against an intimate partner

The results of family violence research, and the work of Johnson, raise challenges about how the violence some women use in intimate relationships is characterised. Is it to be seen as 'domestic violence' and a social problem worthy of attention, or is women's use of violence of a different nature and quality to that of men's? While women are clearly capable of using violence, their use of violence against an intimate partner has been little explored until recently, except in relation to battered women who have killed their violent partners.[40] Since the early 2000s feminist research on women's use of non-lethal violence against their heterosexual intimate partners has intensified, demonstrated in the publication of three special issues of the international journal *Violence Against*

[39] Kate Cavanagh, Russel Dobash, Rebecca Dobash & Ruth Lewis, 'Remedial Work: Men's Strategic Responses to their Violence against Intimate Female Partners' (2001) 33 *Sociology* 695 at 698-99.

[40] Eg see, Schneider, above n19 ch 8; Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners Within the Australian Criminal Justice System* (PhD thesis, University of Tasmania, 2002); Rebecca Bradfield, 'Women Who Kill: Lack of Intent and Diminished Responsibility as the Other 'Defences' to Spousal Homicide' (2001-2002) 13 *Current Issues in Criminal Justice* 143; Julie Stubbs & Julia Tolmie, 'Defending Battered Women on Charges of Homicide: The Structural and Systemic Versus the Personal and Particular' in Wendy Chan, Dorothy Chunn & Robert Menzies (eds), *Women, Madness and the Law: A Feminist Reader* (2005); Julie Stubbs & Julia Tolmie, `Race, Gender and the Battered Woman Syndrome: An Australian Case Study' (1995) 8 *Canadian Journal of Women and Law* 122; Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16 *Criminal Law Review* 387.

Women in 2002-2003,[41] and one special issue of the international journal *Violence and Victims* in 2005.[42] In addition, numerous articles and books have been published on this topic.[43] A considerable amount of this work has investigated whether men and women have different motivations for using violence against an intimate partner. This research has indicated that there are multiple motivations for some women's use of violence; while self-defence tends to dominate, women also use violence to retaliate, seek revenge, exert (usually short-term) control, and in frustration or anger. A common theme of this research is that women's use of violence tends to be in the context of their own victimisation. This literature is explored in *Chapter 2*.

Looking at women's use of violence raises questions about how we think women respond to the violence that they experience. While research indicates that women actively respond to the violence that they experience in multiple, strategic ways, this is not widely recognised in popular conceptions of 'a victim of domestic violence' which tend to position victims as passive, submissive, downtrodden and unable to 'leave', often bringing into play the 'familiar binary categories'[44] of 'deserving' and 'undeserving' victims, and 'victim' versus 'agent'. Discussions about women's use of violence against an intimate partner raise numerous questions including what we think a victim should be like, and how a victim should respond or behave. It confronts the 'central tension within feminism' of a 'false dichotomy between women's victimisation and women's agency'.[45]

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[41] Vol 8(11-12); Vol 9(1).

[42] Vol 20(3).

[43] See Shamita Das Dasgupta, 'Just Like Men? A Critical View of Violence by Women' in Melanie Shepard & Ellen Pence (eds), *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (1999); Shamita das Dasgupta, 'A Framework for Understanding Women's use of Nonlethal Violence in Intimate Heterosexual Relationships' (2002) 8 *Violence Against Women* 1364; Kathleen Ferraro, *Neither Angels Nor Demons: Women, Crime and Victimization* (2006); Kevin Hamberger, 'Men's and Women's Use of Intimate Partner Violence in Clinical Samples: Toward a Gender Sensitive Analysis' (2005) 20 *Violence & Victims'* 131; Amy Holtzworth-Munroe, 'Commentary: Female Perpetration of Physical Aggression Against an Intimate Partner: A Controversial New Topic of Study' (2005) 20 *Violence and Victims* 251; Melton & Belknap, above n36; Miller, 'Victims as Offenders' above n21; and Susan Miller & Michelle Meloy, 'Women's Use of Force: Voices of Women Arrested for Domestic Violence' (2006) 12 *Violence Against Women* 89.

[44] Lee Fitzroy, 'Violent Women: Questions for Feminist Theory, Practice and Policy' (2001) 21 *Critical Social Policy* 7 at 11.

[45] Schneider, above n19 at 74.

The study of cross applications in cases where women are alleged to have used violence against their intimate partners raises these issues.[46] While some instances of women's use of violence may be self-defence (a defined legal response), other instances may more appropriately be seen as motivated by anger, frustration or retaliation. Certainly the professionals interviewed for this thesis struggled with what terminology to use to describe women who use violence in the context of their victimisation outside of the binary notions of victim and perpetrator.[47] Questions about women's use of violence and its appropriate characterisation are being explored in the USA in the context of women arrested for domestic violence offences.[48] However, it is important to consider that the civil protection order system has a different focus to the criminal system (which in so many ways is structured on discrete incidents), and hence asks different questions. Whereas the criminal law asks whether an offence has been committed, a civil protection order asks 'who needs protection?' It is suggested that the different nature of these questions means that competing claims about violence presented at the civil level may expose greater challenges to the legal system's understanding of domestic violence.

iv. Community attitudes and gender

Community attitude surveys also reflect conflicting views about the role of gender in the perpetration of domestic violence. Since the late 1980s there have been positive shifts in community attitudes about domestic violence, with various surveys documenting a broadening of people's understanding of the types of behaviours that constitute domestic violence, and a reduction in the proportion of people who adhere to myths about domestic violence.[49] However, the proportion of respondents who believe that domestic violence is primarily perpetrated by

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[46] Not every case examined in this thesis involved women using violence/abuse. A number of the women interviewed denied the allegations made against them, and in other cases challenged that the act/behaviour that they used was violent or abusive: see *Chapter 7*.

[47] See *Chapter 9*.

[48] See Miller, 'Victims as Offenders', above n21; Miller & Meloy, above n43; David Hirschel & Eve Buzawa, 'Understanding the Context of Dual Arrest with Directions for Future Research' (2002) 8 *Violence Against Women* 1449; and McMahon & Pence, above n21. See also Canada: Women Abuse Council of Toronto, *Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies* (2005); Melanie Crouch, 'Dual Arrests' (2003) 5(1) *Resolve News* 1.

[49] Four Australian studies reflect changes in community attitudes, while these studies are not entirely comparable they do indicate key shifts: Public Policy Research Centre, *Community Attitudes Towards Domestic Violence* (1988); Commonwealth, Office of the Status of Women (OSW), *Community Attitudes to Violence Against Women: Detailed Report* (1995); Cultural Perspectives, *Attitudes to Domestic and Family Violence in the Diverse Australian Community* (2000) and VicHealth, *Two Steps Forward, One Step Back: Community Attitudes to Violence Against Women: Progress and Challenges in Creating Safe and Healthy Environments: A Summary of Findings* (2006); and Natalie Taylor & Jenny Mouzos, *Community Attitudes to Violence Against Women Survey 2006: A Full Technical Report* (2006).

men against women has decreased, notwithstanding the research evidence to the contrary.

Two community attitude surveys document this negative trend: the 1995 federal survey conducted by ANOP Research Services for the Office of the Status of Women (Cth),[50] and the 2006 Victorian survey conducted by the Australian Institute of Criminology (AIC) for VicHealth.[51] In 1995, 50 per cent of respondents identified domestic violence as primarily perpetrated by men,[52] but this decreased to 40 per cent in 2006.[53] In 1995, only 9 per cent of respondents stated that men and women were equally likely to perpetrate domestic violence. In 2006 this increased to 20 per cent.[54] The 2006 survey also found that 'sizeable proportions also believed that the psychological and emotional harms are equal for both men and women'.[55] This led the 2006 survey to conclude:

> This suggests that there is a poor understanding that domestic violence is committed mainly by men against women and is frequently characterised by a persistent pattern of controlling and abusive behaviours.[56]

When reflecting on 'community attitudes', it is important to consider that these attitudes may also be held by victims and offenders, and by people involved in the operation of the legal system (magistrates, police, lawyers, support workers). As Justice Colleen Moore of the Family Court of Australia pointed out in relation to judges of the Family Court, 'it is likely that the attitude and perspective of judges is not markedly dissimilar to the attitude and perspective of the community generally'.[57]

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[50] OSW, above n49.

[51] VicHealth, above n49; and Taylor & Mouzos, above n49. While there are differences between the two surveys, the 2006 survey was specifically designed to provide some comparative data: see Taylor & Mouzos, above n49 at 3-7 see also 15-16.

[52]Taylor & Mouzos, above n49 at 49, Table 4.2.

[53] Ibid.

[54] Ibid.

[55] VicHealth, above n49 at 24. Between 24-39% of those surveyed agreed that emotional harms were suffered equally by men and women: Taylor & Mouzos, above n49, Table 4.3 at 56.

[56] VicHealth, above n49, at 24.

[57] Colleen Moore, 'A Judicial Perspective on Domestic Violence in Family Law' paper presented at *Challenging the Legal System's Response to Domestic Violence*, Brisbane 23-26 March 1994, cited in Jennifer Hickey & Stephen Cumines, *Apprehended Violence Orders: A Survey of Magistrates* (1999) at 8.

4. The research setting of this thesis

A. The protection order system in NSW

Civil protection orders were introduced in NSW, and many other jurisdictions, to address some of the key limitations of the criminal law in responding to domestic violence. They were a product of feminist activism and engagement with law reform focused on generating a more appropriate response to the particular harms suffered by women from their intimate partners.[58] Civil protection orders were seen as having many key advantages over the criminal law in terms of: accessibility, the lower standard of proof (that is, on the balance of probabilities), the provision of future protection beyond the notion of deterrence provided by the criminal law, the ability of women to commence and instruct their own legal action, and the way in which a civil procedure may ameliorate the reluctance many victims have about involving the criminal law and its associated features of punishment. However, it must also be remembered that civil protection orders were not seen as a replacement for the criminal law, rather they represent another legal option open to victims of domestic violence. In fact it is possible to have both an ADVO and criminal charges arising from the same incident.[59]

Civil protection order schemes have been particularly embraced in Australia.[60] In contrast, the USA emphasises criminal action, evidenced in the development of mandatory or pro arrest policies, while also making provision for state-based civil protection orders. This different emphasis is particularly well illustrated by the website for the NSW Police; while it is noted that domestic violence constitutes 'criminal behaviour',[61] the page detailing the 'police and the legal response' is confined entirely to ADVOs (there is no mention of criminal action except in relation to breach of an ADVO).[62]

While there have been continuing debates about the interplay between the civil protection order system and criminal responses to domestic violence in

[58] Rosemary Hunter, *Women's Experience in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence,* (SJD thesis, Stanford University, 2006) at 1.

[59] *Crimes Act* 1900 (NSW) s562O, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s81.

[60] Hunter, 'Women's Experience at Court', above n58, at 6; and Heather Douglas, 'Not a Crime Like Any Other: Sentencing Breaches of Domestic Violence Protection Orders' (2007) 31 *Criminal Law Journal* 1 at 4.

[61] <http://www.police.nsw.gov.au/community_issues/domestic__and__family_violence> (14 January 2009).

[62] <http://www.police.nsw.gov.au/community_issues/domestic__and__family_violence/police_and_the_legal_response> (14 January 2009).

Australia,[63] this is not the main concern of this thesis. These arguments are briefly canvassed in *Chapter 2*, however the prime reason for exploring these arguments is the contention that some of the main limitations of the criminal law find themselves reflected in the response of the ADVO system. In this way the ADVO system appears to replicate some of the problems it was intended to ameliorate.

ADVOs were first introduced in NSW in 1982.[64] The ADVO system is the most frequently relied on legal tool to provide protection to victims of domestic violence. For each calendar year 2002–2005 the number of ADVO applications has exceeded 31 000.[65] This figure includes all 'domestic relationships', and is not limited to intimate relationships.[66] While it is possible for acts of domestic violence to also be addressed via various criminal offences,[67] this is less common when compared to the number of ADVOs applications.[68]

The empirical work for this thesis was undertaken when the ADVO provisions were contained in a dedicated section of the *Crimes Act* 1900 (NSW), Part 15A. In 2008 these provisions were removed from the *Crimes Act* and placed in a new stand-alone Act to address domestic and personal violence protection orders.[69]

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[63] See Jocelyn Scutt, 'Going Backwards: Law Reform and Women Bashing' (1986) 9 *Women's Studies International Forum* 49; and Heather Douglas & Lee Godden, *The Decriminalisation of Domestic Violence* (2002) at i. Compare Julie Stubbs & Sandra Egger, *The Effectiveness of Protection Orders in Australian Jurisdictions* (1993) at 6.

[64] Civil protection orders are available in all Australian jurisdictions: *Domestic Violence and Protection Orders Act* 2001 (ACT); *Domestic and Family Violence Act* 2007 (NT); *Domestic and Family Violence Protection Act* 1989 (Qld); *Domestic Violence Act* 1994 (SA); *Family Violence Act* 2004 (Tas); *Crimes (Family Violence) Act* 1987 (Vic); and *Restraining Orders Act* 1997 (WA). New legislation was recently passed in Victoria and the ACT, see *Domestic Violence and Protection Orders Act* 2008 (ACT), commences 30 March 2009; and *Family Violence Protection Act* 2008 (Vic) (ss1, 2, 224 commenced 24 September 2008, ss3-223 on 8 December 2008, with ss225-232 yet to be proclaimed).

[65] See Local Courts NSW, *Apprehended Violence Statistics: Year 2002*, Table 1.2; Local Courts NSW, *Apprehended Violence Statistics: Year 2003*, Table 1.2; Local Courts NSW, *Apprehended Violence Statistics: Year 2004*, Table 1.2; and Local Courts NSW, '2005', above n25 Table 1.2 (all unpublished data, copy on file with author).

[66] Local Courts does not provide data on relationship type. The data collected for this thesis, and other research, indicates that most ADVOs are sought in intimate relationships: see *Chapter 6*. See Lily Trimboli & Roseanne Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (1997), Table 5 at 28; Ombudsman, above n11 at 5. This profile is also reflected in other jurisdictions: see Hunter, 'Women's Experience in Court', above n58 at 73; and Rosemary Wearing, *Monitoring the Impact of the Crimes (Family Violence) Act 1987* (1992) at 316.

[67] Eg *Crimes Act* 1900 (NSW) s61 common assault s61; s59 assault occasioning actual bodily harm s59; malicious damage ss195-196, 198-200; and various sexual offences ss61I-61P, 65A and 80A.

[68] At the time of the fieldwork NSW did not record whether an offence was a domestic violence offence; they were simply recorded as 'assault' and so on. The *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) introduced a mechanism whereby an offence may be recorded as a domestic violence offence. This should assist in data collection. BOCSAR publishes data on the number of domestic violence incidents *reported* to the police. This data indicates that for the years 2002-2007 over 25 000 domestic violence related assaults (across all domestic relationships) were reported to the police each year: search using the Specific Crime Tool (conducting a search of all offences, NSW and all premises) available on BOCSAR website: <http://bocd.lawlink.nsw.gov.au/bocd/cmd/crime/Init> (14 January 2009). Following a report to the police there is a process of attrition; this has been explored in the ACT: Natalie Taylor, *Analysis of Family Violence Incidents July 2003-June 2004: Final Report* (2006) at [2.9].

[69] *Crimes (Domestic and Personal Violence) Act* 2007 (NSW).

As a result, in this thesis I refer to the law as it was when the fieldwork was conducted and provide a footnote reference to the new provision.

i. Research on the ADVO system

Previous studies have investigated aspects of the ADVO system: for example, its effectiveness,[70] the attitudes of magistrates,[71] breaches of ADVOs,[72] and comparing the ADVO system to systems operating in other Australian jurisdictions.[73] The extent to which these studies have explored gender differences has generally been limited to noting the number of ADVO applications sought by women compared to men.

No study to date in Australia has explored the way in which the complaints made by women and men might differ in terms of content (what types of violence/abuse are alleged, the extent or duration of the alleged violence/abuse, whether multiple forms of violence/abuse are alleged, the sustaining of injuries, or whether violence/abuse is alleged to continue after separation). This thesis, in exploring cross applications, examines whether there are gender differences in these dimensions.

B. The Local Court setting

ADVOs are dealt with in the lowest tier of the NSW court hierarchy, the Local Court.[74] 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 to 20 per cent of their time is consumed by AVO matters, and of that work load, approximately two-thirds would involve domestic violence.[75]

There has been scant Australian research exploring the nature and understanding of domestic violence in the Local Court setting. To date most research that delves into the conceptual areas of definitions and understandings of domestic violence, and women's responses to violence, have focused on higher court

[70] Trimboli & Bonney, above n66.

[71] Hickey & Cumines, above n57.

[72] Katzen, above n15.

[73] Stubbs & Egger, above n63.

[74] In NSW the court system comprises the Local Court, the District Court and the Supreme Court. In other jurisdictions the Local Court may be known as the magistrates' court or court of summary jurisdiction.

[75] Hickey & Cumines, above n57 at 16. See also Hunter's findings in Victoria: 'Women's Experience at Court', above n58 at 60.

determinations, most often in the area of criminal law (often involving women who have killed their violent partner) or family law determinations. The emphasis on higher court and written determinations, fails to appreciate that the vast majority of matters are at some stage presented, if not finalised, in the lower court jurisdiction. For many people, across a range of legal actions, this is often the only jurisdiction with which they have contact.[76] The frequent use of the ADVO system means that it is in this civil system that most stories about domestic violence are told. It is here that the most 'ordinary', 'common', 'everyday' stories about domestic violence emerge.[77] Rosemary Hunter's recent dissertation, which focused on civil protection orders in the Magistrates' Court in Victoria, is a notable exception.[78] Hunter similarly emphasised the absence of research on the lowest court in responding to domestic violence.

5. Overview of methodology

A. The aims of the research

This thesis employs cross applications as a case study to explore the following interlinked research questions:

- Is women's use of violence different to that of men?
- Is a cross application indicative of 'mutual' violence?
- Does the ADVO system focus on incidents, rather than a contextual understanding of acts of violence/abuse, even though it was ostensibly designed to better capture and respond to the problem of domestic violence?
- Is a cross application more likely to be another method of harassment?

I have limited my focus to heterosexual relationships rather than all intimate partner relationships. This was defined to include current/former: spouses

[76] That this is the level of court that most people have contact with, led one former Chief Justice of the High Court to emphasise the importance of its 'performance': Anthony Mason, 'The Courts as Community Institutions' (1998) 9 *Public Law Review* 83 at 84.

[77] See similar comments by Ptacek, above n13 at 6.

[78] Hunter, 'Women's Experience in Court', above n58. Notable work on the nature of domestic violence allegations and judicial responses has been conducted in two lower courts in Massachusetts: Ptacek, above n13.

(marital); de facto partners (common law spouse); and non-cohabitating dating relationships (boyfriends/ girlfriends).[79]

This focus on heterosexual relationships is not to suggest that violence does not occur in same-sex relationships (or indeed a wide range of other relationships) - of course it does - but rather in recognition that understandings of violence in same-sex relationships may differ from theories about violence in heterosexual relationships.[80] In addition, no women in same-sex relationships volunteered to be interviewed,[81] and only one court file involved a same-sex relationship. This does not mean that I will not refer to research that concerns same-sex domestic violence. In many ways the lack of gender difference has meant that researchers examining lesbian and gay intimate violence have always needed to be attuned to who is using violence for the purposes of power and control and who is not.[82]

B. Definition of domestic violence adopted in this thesis

This thesis adopts a two-pronged approach to defining domestic violence within the context of the ADVO system. First is a definition that is informed by feminist understandings of domestic violence. This is captured in the definition adopted by the federal government's Partnerships Against Domestic Violence (PADV) program:

> Domestic violence is an abuse of power perpetrated mainly (but not only) by men against women in a relationship or after separation. It occurs when one partner attempts physically or psychologically to dominate and control the other. Domestic violence takes a number of forms. The most commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation. Many forms of domestic violence are against the law.[83]

What is significant about this definition, like other definitions adopted by feminist researchers, is the way that it connects acts with their function, that is, to

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[79] With the exception of excluding same-sex relationships, this is the definition in Linda Saltzman, Janet Fanslow, Pamela McMahon & Gene Shelley, *Intimate Partner Violence Surveillance: Uniform Definitions and Recommended Data Elements*, Version 1.0, Centers for Disease Control and Prevention (2002) at 11.

[80] See Dasgupta, 'Framework for Understanding', above n43 at 1369; Julia Perilla, Kim Frndak, Debbie Lillard & Cynthia East, 'A Working Analysis of Women's Use of Violence in the Context of Learning, Opportunity and Choice' (2003) 9 *Violence Against Women* 10 at 19-22; and the contributions in Kerry Lobel (ed), *Naming the Violence: Speaking Out About Lesbian Battering* (1986).

[81] One woman, who wanted to discuss her experience with a cross application arising from her lesbian relationship, contacted the researcher after the fieldwork was completed in mid 2008.

[82] Nancy Worcester, 'Women's Use of Force: Complexities and Challenges of Taking the Issue Seriously' (2002) 8 *Violence Against Women* 1390 at 1401.

[83] PADV was an initiative of the Australian Federal Government (1998-2005): <http://ofw.facs.gov.au/womens_safety_agenda/previous_initiatives/padv/index.htm> (14 January 2009).

exert 'power and control' or to 'dominate' the other person. This has also been referred to as 'coercive control'.[84]

The other critical definition adopted in this thesis is that relied on in the legislation providing for ADVOs. While 'domestic violence' is not defined per se, it is evident in the grounds on which an ADVO may be granted; the court may grant an order where it is satisfied, on the balance of probabilities, that a person 'fears', and that fear is 'reasonable':

- the commission of a 'personal violence offence'; or
- 'conduct amounting to harassment or molestation' that is 'sufficient to warrant the making of an order'. This does not have to involve 'actual or threatened violence to the person' and may be confined to property damage; or
- intimidation or stalking that is 'sufficient to warrant the making of an order'.[85]

This is a fairly broad definition of the types of behaviour that might warrant the attention of the law, however the only avenue through which the function of domestic violence might find itself articulated is in terms of 'fear'. I explore the usefulness of this criterion in *Chapter 2*, particularly given the absence of similar features in other jurisdictions, however in many key ways 'fear' is different to control and domination.

The two definitional frameworks are important, not only because this thesis focuses on the ADVO system, but also because it ultimately seeks to argue that there is an overriding approach and understanding about domestic violence that underpins the practice of the law.

i. A note on terminology

Various terms have been used to describe domestic violence (for example, family violence, spouse abuse, battering, wife abuse, and intimate partner violence). While the terms are often used interchangeably, they have particular political and

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[84] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007).

[85] *Crimes Act* 1900 (NSW) s562AE, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s16.

social implications, often intentional, about whether gender is seen as central to understanding the use of violence in intimate relationships.

For the purpose of this thesis I use the term 'domestic violence' (and, on occasion, intimate partner violence). This is the predominant language used in NSW, and until recently, in Australia generally.[86] While the use of 'domestic violence' in the NSW legislation refers to a wide range of relationships, in research it is generally used to denote violence between current/former intimate partners.[87]

The term 'domestic violence', while gender neutral, has also been more clearly aligned with a gendered understanding of intimate partner violence in Australia. In the USA 'battering' has been more closely aligned with a gender analysis. 'Battering' has not been preferred in Australia for its emphasis on physical forms of violence, and the way it places women victims (always) in a battered position. In the international arena, the term 'intimate partner violence' is increasingly preferred as 'domestic violence' is seen to encapsulate other forms of familial violence such as child and elder abuse.[88]

The term 'domestic violence' usefully distinguishes the theoretical approach of this thesis from that of the largely USA-based 'family violence' research. This is important given the different usage of the phrase 'family violence' in Australia.

In Australia, 'family violence' is the term often preferred by Aboriginal and Torres Strait Islander (ATSI) peoples. In the context of Aboriginal work around family violence, it is not only the recognition that violence might be exercised against a multitude of family members, but critically that violence against an intimate partner (most usually Aboriginal women) has reverberations throughout the family and community and hence any response to violence against Aboriginal women must be holistic, incorporating measures for men, women, children and the community. This expansive approach is said to better reflect the fact that in Aboriginal communities there is 'not a clear delineation between public and

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[86] Increasingly 'family violence' has been used alone, or in combination with domestic violence, often with the intention of incorporating Indigenous preference for 'family violence', see discussion below.

[87] Lesley Laing, *Progress, Trends and Challenges in Australian Responses to Domestic Violence* (2000) at 1.

[88] Claudia García-Moreno, Henrica Jansen, Mary Ellsberg, Lori Heise & Charlotte Watts, *WHO Multi-country Study on Women's Health and Domestic Violence Against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses* (2005) at 14.

private spheres'.[89] It has also been noted that, at least in Western Australia, 'within the Aboriginal community there is no agreement [that]…Aboriginal family violence is the same "*phenomenon*" as domestic violence in the wider community'.[90] It should be noted here that Aboriginal approaches to 'family violence' often differ from the white feminist framework that characterised early work in Australia on domestic violence. Within the Aboriginal conception of family violence, gender is but one of the factors to examine within the context of colonisation, dispossession, separation, and continuing disadvantage.[91] The focus on women as victims within white feminist frameworks is also seen to fail to recognise the many levels of interaction of race, gender and victimisation that cross gender and racial positions within domestic violence and responses (in particular the white feminist emphasis on criminal justice responses).[92]

While Indigenous preference for the term 'family violence' is widely acknowledged in Australia, it is worth noting that its use is not without debate. Some Aboriginal women activists and services have been outspoken about their preference for the term 'domestic violence' and the need to focus on the violence that Aboriginal women experience from their intimate male partners.[93]

C. Definition of a cross application

A cross application is not defined in the legislation and how they are understood and defined is open to some debate. That is to say that there is agreement, in the literature and in practice, that a cross application involves the same parties as the complainant and the defendant alternatively.[94] While generally the 'cross applicant' would be referred to as the person who made the application second in time; this is not necessarily the case, with some authors cautioning about 'first in'

[89] Janet Stanley, Adam Tomison & Julian Pocock, *Child Abuse and Neglect in Indigenous Australian Communities* (2003).

[90] Sue Gordon, Kay Hallahan & Darrell Henry, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) at 31. Emphasis in original.

[91] Ibid at 56-57; *Aboriginal and Torres Strait Islander Task Force on Violence* (2000), at xxxi, xxxiii; Audrey Bolger, *Aboriginal Women and Violence* (1991) at 29, 34-35 and 45; and Paul Memmott, Rachael Stacy, Catherine Chambers & Catherine Keys, *Violence in Indigenous Communities* (2001) at 10-23.

[92] Heather Nancarrow, *In Search of Justice in Domestic and Family Violence* (MA thesis, Griffith University, 2003) at 10.

[93] See Pam Greer & Lesley Laing, *Pathways to Safety: An Interview about Indigenous Family Violence with Pam Greer, Indigenous Training and Development Consultant* (2001); Gordon et al, above n90 at 29; and Dale Bagshaw, Donna Chung, Murray Couch, Sandra Lilburn & Ben Waldham, *Reshaping Responses to Domestic Violence: Executive Summary* (1999) at 43.

[94] See Dimond, above n14; WLRC, above n11; Douglas & Godden, above n63 at 28. At times this definition is merely implicit: see Toni Dick, 'Protection or Quid Pro Quo', paper presented at *Challenging the Legal System's Response to Domestic Violence*, Brisbane 23-26 March 1994, at 10-12.

approaches in determining who is the victim and who is not, or who is the more vexatious litigant and who is not (questions that arise in the label cross applicant).[95]

There are however differences of opinion when temporal connections between the first and second application are considered. While the literature is silent on this question, the professionals interviewed in this thesis presented an array of definitions dependant on time and incident variables. All the professionals agreed that applications that are listed *at the same time* are cross applications, however there was considerable disagreement about whether applications made some time apart should be identified as cross applications, or simply as 'fresh incidents'.[96]

I have taken a broad approach to the definition of 'cross application' for the purposes of this thesis. Thus I have not imposed any temporal limitations and I have included police dual applications.[97] The reason for this broad approach is twofold:

1. as an exploratory study it seemed beneficial to adopt a broad rather than a narrow definition; and
2. it complies with the approach advocated in this thesis of examining the full context of domestic violence rather than discrete incidents.

However, in practical terms it has been easier, particularly in terms of the court file sample, to identify cross applications made around the same time, rather than those that were made some time apart, and thus this sample is biased in this way. However, the interview sample redresses this bias somewhat; four of the women who participated in the interviews experienced the cross application after the finalisation of their own ADVO application (often when their former partner was charged with contravening the woman's ADVO, or where she had sought to extend her original ADVO).[98]

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[95] Dick, above n94 at 12.

[96] DVLO1, DVLO5, DVLO6, MAG4, PP1, PP2, PP3, WDVCAS3, WDVCAS5 would consider applications made some time apart as 'fresh incidents'. This raised interesting questions for MAG2, who generally would also see these as fresh incidents, yet '*technically it is a cross order, isn't it? Same parties, same piece of legislation*', thus she concluded '*maybe I should review* [my] *definition*'.

[97] One professional did not consider a police dual application a cross application: Informal interview with barrister 25 July 2007. Dual applications are discussed in *Chapter 8*.

[98] See Frances, Lillian, Louise, and Rosemary.

D. The empirical study

To explore cross applications detailed empirical work was undertaken. In summary, this thesis adopted a multi-method approach to collecting and analysing data (discussed in detail in *Chapter 3*), involving:

1. *In-depth semi-structured interviews*:
   - With women involved in cross applications (n=10[99])
   - With key professionals: magistrates (n=5); solicitors (n=6); police Domestic Violence Liaison Officers (DVLOs) (n=6); police prosecutors (n=5) and coordinators of Women's Domestic Violence Court Assistance Schemes (WDVCAS) (n=5).
2. *Documentary analysis of court files:* 78 cross applications involving 156 single ADVO applications were gathered from three Sydney courts over the period March 2002 – February 2003.
3. *Observations of local court proceedings* at two large Sydney local courts over 2006-2007. Seven list days were observed involving 73 ADVO mentions and two contested cross application hearings.[100]

The research was approved by the Human Ethics Committee, University of Sydney in two stages. The first stage involved interviews with women and the analysis of court files. The second stage involved interviews with key professionals.

E. Limitations

The methodological limitations of the data collected are detailed in *Chapter 3*. Here I briefly canvass three overriding limitations.

i. Lack of involvement of women from different backgrounds

No Aboriginal or Torres Strait Islander women were interviewed in this study and only one woman was born overseas. It would have been of great benefit to this research to explore: whether cross applications work differently for different groups of women; whether different, more subtle behaviours may fail to be

[99] Another woman was interviewed but was excluded because, while her former husband had sought an ADVO against her, she had decided not to seek her own ADVO despite being advised to do so by her solicitor and the WDVCAS.

[100] One of which settled on the day of the hearing.

accorded recognition as violence due to different cultural readings;[101] and whether women from different cultural backgrounds respond differently to the violence they experience.[102] There has been some suggestion from other jurisdictions that Aboriginal women may be more likely to fight back, and more likely to be penalised for taking those actions.[103]

ii. Lack of interviews with men

It was originally intended that this research would involve in-depth interviews with men involved in cross applications. Despite attempting several different methods of recruitment this did not eventuate. The recruitment methods and the limitations created by this absence are detailed in *Chapter 3*. The absence of men's voices, in the same way as provided through the interviews with women, is a gap in this research. However, the study is exploratory and some access to men's experiences is provided through the analysis of court files. Any future studies in this area should investigate the best methods for recruiting men.

iii. Geographical limitations

This study aims to examine a feature of the NSW ADVO system. While five women interviewed resided outside Sydney, most of the professionals interviewed and all the court files were sourced from Sydney. There may well be differences in the way in which cross applications are dealt with in other parts of NSW, thus the findings cannot be suggested to be representative (a problem further emphasised by the small sample size). The potential for geographical differences is also evident in the data gathered: for example the women who resided in rural areas spoke about the benefits of having the same magistrate deal with their cases, and other women and professionals spoke about the variability of magistrates between different courts.[104]

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[101] Dasgupta, 'Framework for Understanding', above n43 at 1371-72.

[102] Dasgupta, 'Just like Men', above n43 at 217.

[103] Eg see Nancarrow, above n92 at 67, who notes the increased incarceration of ATSI women in Queensland following the increased criminalisation of domestic violence. See also research which has found that African American women may use violence more often against their intimate partners: Carolyn West & Suzanna Rose, 'Dating Aggression among Low Income African American Youth: An Examination of Gender Differences and Antagonistic Beliefs' (2000) 6 *Violence Against Women* 470 at 488; and Vicki Moss, Carol Pitula, Jacquelyn Campbell & Lois Halstead, 'The Experience of Terminating an Abusive Relationship from an Anglo and African American Perspective: A Qualitative Descriptive Study' (1997) 18 *Issues in Mental Health Nursing* 433 at 447.

[104] See *Chapter 9*.

6. Structure of this thesis

This thesis is divided into ten chapters:

Chapter 1 (this introduction) introduces the key issues and concerns of this thesis, its definitional parameters, and the environment of the empirical study.

Chapter 2 explores the debates about the gender perpetration of domestic violence that have animated the sociological literature. This chapter explores work on typologies of domestic violence as a way to explain the disparate research findings. It considers the 'problem' of how we define or conceptualise women's use of violence against an intimate partner. The chapter then turns to the legal setting and asks what conception of domestic violence underpins the civil legal system's understanding of domestic violence.

Chapter 3 details the methodology and its limitations, and introduces the four components of the empirical research.

Chapter 4, drawing on the empirical data, provides an overview of the law, and its practice, in NSW to enable the reader to place the empirical findings in context.

Chapter 5 explores the violence and abuse experienced by the women interviewed. The women experienced multiple forms of violence and abuse alone, and in combination, before and after separation. This chapter highlights the way in which women described their relationships as controlling.

Chapter 6 profiles the nature and incidence of cross applications at the three court sites, and analyses the ADVO complaint narratives gathered in that court file sample. This chapter provides a useful counterpoint to *Chapter 5*. This chapter demonstrates the limitations of counting methods alone as a means to understand domestic violence (and competing claims).

Chapter 7 analyses the nature of the cross claim in detail. This chapter explores the qualitative material, where available, and in this way highlights three key areas of difference between women's allegations of domestic violence and the claims made by male second applicants. These areas concern the presence of

criminal charges, the making of allegations that appear to be unable to ground an ADVO, and the use of a lengthy ‘wounded narrative’.

Chapter 8 examines police dual applications, a special category of cross applications. While dual applications represent a small proportion of cross applications, they are a highly problematic category. Dual applications highlight the dominance of incident-based definitions of domestic violence held by police.

Chapter 9 analyses how cross applications are approached and resolved by key professionals working in the ADVO system. This chapter presents key areas of decision-making regarding cross applications: the making of interim orders, and the final disposition of applications. The chapter then turns to the conceptions of domestic violence held by key professionals.

Chapter 10 draws together the key findings and theoretical questions that guided and challenged this study, and highlights areas that require further research and investigation.

7. Summary

This chapter has introduced the key concerns of this thesis: the continuing debate in the literature and the general community about the gendered nature of domestic violence. It has introduced the setting for the thesis, the ADVO system, the Local Court and the limited knowledge that is currently available about cross applications and the possible resultant mutual orders. It has briefly outlined the aims and methods of this study. Finally, it has explained the decision to adopt the term ‘domestic violence’ in this thesis and some of the critical discussion about terminology in this field.

2. Conceptions of domestic violence

> Despite an assumed, almost self-evident core, ‘violence’ as a term is ambiguous and its usage is in many ways moulded by different people as well as by different social scientists to describe a whole range of events, feelings and harm....[105]

This chapter begins to explore what conception of domestic violence underpins the NSW ADVO system; this exploration is extended through the empirical analysis presented in *Chapters 4-9*. Central to this task is an examination of the debate that has raged between family violence and feminist researchers, introduced in *Chapter 1*, regarding whether the perpetration of domestic violence is gendered. The focus of this chapter is to explore the key differences in the definition and conception of domestic violence that typifies these two strands of research. These definitional or conceptual frameworks underpin how we understand men’s and women’s use of violence against an intimate partner and whether such acts should be labelled and responded to as domestic violence. This chapter examines these definitional and conceptual differences in order to ask questions of the civil protection order system, and cross applications in particular which, at face value, suggest gender equivalence and mutuality in the use of violence and abuse. As documented in *Chapters 5-8* this apparent gender equivalence is not sustained by the data analysed in this thesis. As noted in *Chapter 1*, the sociological debate has been paid scant attention within legal responses to domestic violence, yet it resonates with the legal system’s focus (particularly that of the criminal justice system) on discrete incidents of violence.

1. The competing sociological research

A. Family violence research: Conflict theory and discrete acts

Since 1975, when the first National Family Violence Survey (USA) was conducted,[106] there has been a growing body of research, referred to as ‘family

[105] Elizabeth Stanko, ‘Introduction’ in Elizabeth Stanko (ed), *The Meanings of Violence* (2000) at 2-3.

[106] There have been two National Family Violence Surveys: (1975) with one person in a married/cohabitating relationship in 2143 households; and (1985) with 6002 households: Straus, ‘The National Family Violence Surveys’ above n35 at 3-4.

violence research',[107] that has found that men and women are equally violent, and in some cases women are more violent, in their intimate relationships.[108] As noted in *Chapter 1*, many of these studies use the CTS,[109] or similar act-based instruments.[110] Straus and Gelles, for example, found in the 1985 National Survey that 12.4 per cent of cohabitating or married women reported using violence[111] against their male partner in the previous year, compared to 11.6 per cent of cohabitating or married men.[112] Furthermore, 4.8 per cent of the women who used violence reported using 'severe violence'[113] compared to 3.4 per cent of the men.[114]

The CTS is based on 'conflict theory', which is premised on the notion that conflict is 'an inevitable part of all human association', however, how people respond to conflict varies.[115] The opening paragraph to the administration of the CTS illustrates this emphasis:

> No matter how well a couple gets along, there are times when they disagree, get annoyed with the other person, want different things from each other, or just have spats or fights because they're in a bad mood, are tired, or for some other reason. Couples also have many different ways of trying to settle their differences. This is a list of things that might happen when you have differences...[116]

Thus the CTS seeks to measure the various 'conflict tactics' a person might use to resolve disputes: reasoning (for example, 'discussed [the] issue calmly'), verbal aggression (for example, 'insulted or swore'), and violence or physical aggression (for example, kicking, hitting or using a weapon).[117] Feminist

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[107] The focus on the 'family' is also important. Family violence theorists see domestic violence as part of a continuum of violence exercised between different family members. This does not mean different forms of family violence are approached as the same phenomenon, rather that there are common elements and connections across the different types: Murray Straus, 'Ordinary Violence', above n37 at 214-15.

[108] Michael Kimmel estimated that over 100 studies had reached this conclusion: '"Gender Symmetry" in Domestic Violence: A Substantive and Methodological Research Review' (2002) 8 *Violence Against Women* 1332 at 1333. See also Fiebert, above n35; and Archer, 'Sex Differences in Aggression', above n35.

[109] Straus, 'Measuring Conflict and Violence', above n34.

[110] Eg see the Family Interaction module of the International Social Science Survey Australia (IsssA) used in Headey et al, above n35.

[111] Defined as 'an act carried out with the intention, or perceived intention, of causing physical pain or injury to another person': Richard Gelles, 'Methodological Issues in the Study of Family Violence' in Straus & Gelles (eds), above n35 at 21.

[112] Murray Straus & Richard Gelles, 'How Violent Are American Families? Estimates from the National Family Violence Resurvey and Other Studies' in Straus & Gelles, above n35, Table 6.1, at 97.

[113] Defined as 'acts that have a relatively high probability of causing an injury': Gelles, 'Methodological Issues', above n111 at 16.

[114] Straus & Gelles, 'How Violent Are American Families', above n112 at 97.

[115] Straus et al, 'CTS2', above n34 at 284.

[116] Ibid at 310.

[117] Ibid.

researchers have criticised this focus on conflict, arguing that it ignores violence motivated by factors other than conflict, notably the 'control-instigated' violence experienced by many women.[118]

The CTS poses questions about these various 'conflict tactics' in a behaviourally specific format (for example, have you 'twisted [your] partner's arm or hair', '…pushed or shoved [your] partner'). This is both a strength (because it avoids contentious or ambiguous terms such as 'violence', 'abuse' or 'crime')[119] and a limitation (because the identification of a discrete act does not reveal anything about the context of that act at that time or within the relationship more broadly).[120] The CTS is generally administered to people in *intact* relationships,[121] and ideally a person provides responses about their own acts, *as well as* those perpetrated by their partner, during the previous year.[122]

The CTS originally concentrated on physical forms of violence,[123] which were assessed for severity (for example, shoving was designated as 'minor', and 'beating up' or using a weapon as 'severe'). This was expanded in the CTS2 to include sexual coercion and psychological aggression.[124] While these are welcome additions, the CTS2 still omits countless acts and behaviours that women (and some men) report as part of their experience of domestic violence.[125] It is in terms of physical violence that most claims about gender symmetry centre, where studies consistently find that men and women perpetrate

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[118] Walter DeKeseredy & Martin Schwartz, *Measuring the Extent of Woman Abuse in Intimate Heterosexual Relationships: A Critique of the Conflict Tactics Scale* (1988) at 2-3; Ferraro, above n43 at 40; and Kimmel, above n108 at 1341, 1342.

[119] Straus et al, 'CTS2', above n34 at 284, 285; and Gelles, 'Methodological Issues', above n111 at 19, 24. Compare Gayla Margolin, 'The Multiple Forms of Aggressiveness Between Marital Partners: How do we Identify Them? (1987) 13 *Journal of Marital and Family Therapy* 77 at 82 where she notes that even the CTSs specific questions are open to interpretation. Eg a couple in her study who indicated that they had 'kicked' each other revealed this was a playful activity engaged in in bed. The issue of interpretation has been a particular criticism levelled at crime surveys: see Patricia Tjaden &Nancy Thoennes, 'Prevalence and Consequences of Male-to-Female and Female-to-Male Intimate Partner Violence as Measured by the National Violence Against Women Survey' (2000) 6 *Violence Against Women* 142 at 157.

[120] See DeKeseredy & Schwartz, above n118 at 3-4; and Dobash & Dobash 'Working on a Puzzle', above n19 at 329-30.

[121] It does not ask about violence perpetrated by a *former* partner; an area where women report greater, and often more severe, victimisation: see Kimmel, above n108 at 1350-51.

[122] See discussion of the administration of the CTS in Murray Straus, 'Conflict Tactics Scales' in *Encyclopedia of Domestic Violence* (2007).

[123] See Straus' rationale for this focus: 'The Controversy over Domestic Violence by Women: A Methodological, Theoretical, and Sociology of Science Analysis' in Ximena Arriaga & Stuart Oskamp (eds), *Violence in Intimate Relationships* (1999) at 20-22.

[124] Straus et al, 'CTS2', above n34.

[125] DeKeseredy & Schwartz, above n118 at 2. See *Chapter 5* which details the broad experiences wide-ranging violence/abuse experienced by the women interviewed for this thesis.

physical violence at similar rates.[126] However it is important to note that gender symmetry has also been found in the use of psychological aggression,[127] and in some cases sexual aggression or coercion.[128] As mentioned above, these findings focus on the mere presence of the act/behaviour and not its context; thus behaviour that might be recorded as psychological aggression (for example, 'insulted or swore at my partner', 'shouted or yelled at my partner'[129]), might indeed be perpetrated by men and women at equal rates, but whether such behaviour should be labelled 'domestic violence' requires consideration of a range of contextual issues such as how that act functions in the relationship, what other acts/behaviours have been perpetrated, and so on.

To add some context the CTS2 incorporated questions about injuries,[130] in recognition that the *same* act may impact differently on the target dependent inter alia on whether the act was exercised by a man or a woman. Invariably studies that included such questions have found that, despite an equivalent use of physical violence, women were more likely than men to sustain injuries (often from minor acts) and to require medical treatment.[131] Questions were generally confined to physical injuries and did not take account of gender differences in psychological impact.[132]

Not only is the finding of symmetry in the use of physical violence contested, but also the accompanying finding of 'mutuality'. Jan Stets and Murray Straus, for example, found that in relationships where violence occurred this was perpetrated by both parties 'in about half of the cases', while in a quarter of the cases only the man used violence and in the remaining quarter only the woman

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[126] Suzanne Swan, Laura Gambone, Jennifer Caldwell, Tami Sullivan & David Snow, 'A Review of Research on Women's Use of Violence With Male Intimate Partners (2008) 23 *Violence & Victims* 301 at 302. Eg studies that have reached this conclusion: Straus, 'Physical Assaults by Wives', above n33 at 69; Headey et al, above n35 at 58; and Holly Orcutt, Marilyn Garcia & Scott Pickett, 'Female-perpetrated Intimate Partner Violence and Romantic Attachment Style in a College Student Sample' (2005) 20 *Violence Against Women* 287 at 291-292.

[127] Swan et al, 'Review of Research' above n126 at 303-04.

[128] See studies cited in Dobash & Dobash, 'Working on a Puzzle', above n19 at 327. Compare Swan et al, 'Review of Research', above n126 at 302-03 which found that men were much more likely to perpetrate sexual aggression.

[129] Straus et al, 'CTS2', above n34 at 308.

[130] Ibid at 205, 309.

[131] Swan et al, 'Review of Research', above n126 at 305.

[132] WHO, *Women's Mental Health: An Evidence Based Review* (2000) ch 4; and VicHealth, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence: A Summary of Findings* (2004) at 20-21.

used violence.[133] In an Australian study, relying on an act-based instrument similar to the CTS, Headey and colleagues found that 54 per cent of respondents who indicated that they had been physically assaulted also admitted assaulting their partner.[134] This led the authors to conclude that 'violence runs in couples'.[135] The use of the term 'mutual', and related terms such as 'bidirectional' or 'reciprocal',[136] suggest that the use of violence by both parties is equivalent, of the same import and consequences. However, in the absence of information about the context of usage such terms are misleading as they fail to reveal the motivation behind the acts or the way that the same acts may have different meanings and consequences in the relationship.

There have been many methodological and epistemological criticisms of CTS-based research and research reliant on similar act-based instruments. Some of these criticisms have been mentioned: the inadequacy of the theoretical framework of conflict;[137] the limited focus on physical acts of violence;[138] and that counting discrete acts fails to reveal anything about the context of the act (both at the time and more broadly).[139] In addition, as mentioned in *Chapter 1*, the CTS fails to consider that the meaning of a 'violent' or abusive act is generated and interpreted in the interactional setting.[140] That is to say that the CTS does not consider the way in which the people involved play a role in constructing and defining acts as violent or not.[141]

Other criticisms of the CTS include that it:

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[133] Jan Stets & Murray Straus, 'Gender Differences in Reporting Marital Violence and its Medical and Psychological Consequences', in Straus & Gelles, above n35 at 161.

[134] Headey et al, above n35 at 59.

[135] Ibid.

[136] Eg see, Raul Caetano, Sushasini Ramisetty-Mikler & Craig Field, 'Unidirectional and Bidirectional Intimate Partner Violence Among White, Black and Hispanic Couples in the United States' (2005) 20 *Violence & Victims* 393; Felicity Goodyear-Smith & Tannis Laidlaw, 'Aggressive Acts and Assaults in Intimate Relationships: Towards an Understanding of the Literature' (1999) 17 *Behavioural Sciences and the Law* 285.

[137] Ferraro, above n43 at 40; DeKeseredy & Schwartz, above n118 at 2-3; Dale Bagshaw & Donna Chung, *Women, Men and Domestic Violence* (2000) at 56; and Kersti Yllö, 'Through a Feminist Lens: Gender, Power and Violence' in Gelles & Loseke (eds), above n33 at 51-3.

[138] See above n125 and infra text.

[139] See Dobash & Dobash, 'Working on a Puzzle', above n19 at 327-328; Bagshaw & Chung, above n137 at 5-6; and DeKeseredy & Schwartz, above n118 at 2, 3-4.

[140] See John Baldwin, 'Research on the Criminal Courts' in Roy King & Emma Wincup (eds), *Doing Research on Crime and Justice* (2000) at 242.

[141] Cavanagh et al, above n39 at 699. See also Taylor & Mouzos, above n49 at 2; Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women Syndrome' (1993) 21 *Hofstra Law Review* 1191 at 1207. In relation to sexual violence see Liz Kelly, 'Journeying in Reverse: Possibilities and Problems in Feminist Research on Sexual Violence' in Lorraine Gelsthorpe & Allison Morris (eds), *Feminist Perspectives in Criminology* (1990) at 109.

- *Ranks acts in a hierarchical fashion* making assumptions that psychological abuse is less serious than physical violence, and that certain acts of physical violence are more serious and injurious than others. Such an approach ignores the research that indicates that many women report psychological abuse as the most damaging.[142]

- Ignores the *different meaning, and consequences, acts might have in different cultures*.[143]

- Is generally confined to *acts that have occurred in the past year* thus failing to consider the way in which an earlier act of violence may continue to maintain its power over time. As Kimmel states, 'this might capture some version of reality but does not capture an ongoing systematic pattern of abuse and violence over many years'.[144]

- *Assumes that men and women provide 'unbiased, reliable accounts of their own violent behaviour and that of their partner'*.[145] Research has indicated that men tend to deny, minimise and transfer blame for their violent acts; in comparison women appear to readily admit their own acts of violence.[146]

It is important to note that the criticisms levelled at the CTS, and similar act-based instruments, are not simply about quantitative versus qualitative methodologies, rather they address the underlying 'concept formation' of the research:[147] the questions that are asked, how researchers assess responses, and what researchers think responses reveal. Surveys using the CTS, and similar instruments, have played an important role in 'sensitizing the media, government officials, and members of the general public' about the scale and nature of domestic violence.[148] In this way, the CTS is a valuable tool. It is a reliable[149]

[142] DeKeseredy & Schwartz, above n118 at 2; Ferraro, above n43 at 16.

[143] Dasgupta, 'Framework for Understanding', above n43 at 1371-72.

[144] Kimmel, above n108 at 1341. See also Bagshaw & Chung, above n137 at 6.

[145] Dobash & Dobash, 'Working on a Puzzle', above n19 at 327.

[146] See Dobash et al, 'Myth of Sexual Symmetry', above n19; Kimmel, above n108 at 1344-46; and Miller & Meloy, above n43 at 105.

[147] Dobash & Dobash, 'Working on a Puzzle', above n19 at 332.

[148] DeKeseredy & Schwartz, above n118 at 1.

[149] The extent to which an 'indicator *consistently* comes up with the same measurement': David de Vaus, *Research Design in Social Research* (2001) at 29. Emphasis in original.

and valid[150] research instrument and remains the most widely used survey tool to measure the prevalence of domestic violence, and other forms of family violence.[151] Family violence and feminist researchers have both used the CTS in whole or in part.[152] However, like all measurement tools it has strengths and limitations, and, as the criticism detailed above has indicated, when considering the findings of act-based instruments we need to be attentive to whether they simply tell us about the *presence* of acts of physical violence (and on occasion other forms of violence and abuse) between intimate partners and not whether these acts form part of 'domestic violence'.

B. Feminist research: A continuum of violence and abuse to exert 'control'

In contrast to the approach of family violence researchers, feminist research has been engaged much more extensively (although not exclusively) with qualitative research methods[153] with generally small samples of women, often accessed via refuges, police, courts or hospitals. This research has highlighted other critical dimensions to the experience of domestic violence, notably the function of control, the broad range of acts and behaviours involved, and its repetition and frequency. Through this work, feminist researchers have found that women are the predominant victims of domestic violence (a view supported by official statistics[154]), and that women's use of violence is qualitatively and quantitatively different to that of men's.[155] Importantly these understandings of domestic violence have been drawn directly from women's experiences, and the meanings

[150] That a construct measures what it intended to measure: David de Vaus, *Surveys in Social Research* (1985) at 47. As de Vaus explains it is not the measure itself that is valid but rather the 'use to which the measure is put': at 47. The validity of the CTS has also been challenged: see Dobash et al, 'Myth of Sexual Symmetry', above n19 at 77-8; Russell Dobash, Rebecca Dobash, Kate Cavanagh & Ruth Lewis, 'Separate and Intersecting Realities: A Comparison on Men's and Women's Accounts of Violence Against Women' (1998) 4 *Violence Against Women* 382 at 385; Margolin, above n119 at 81-82; and Kurz, 'Physical Assaults by Husbands', above n33 at 94.

[151] Feraro, above n44 at 18.

[152] Eg feminist studies that have employed modified versions of the CTS: García-Moreno et al, above n88; and Tjaden & Thoennes, above n119.

[153] See discussion about the traditional preference for qualitative methods in feminist research and the increasing use of quantitative methods in Sue Griffiths & Jalna Hanmer, 'Feminist Quantitative Methodology: Evaluating Policing of Domestic Violence' in Tina Skinner, Marianne Hester & Ellen Malos (eds), *Researching Gender Violence: Feminist Methodology in Action* (2005).

[154] See *Chapter 1*.

[155] Dobash et al, 'Myth of Sexual Symmetry', above n19 at 72.

that women themselves ascribed to the acts and behaviours used against them (rather than the meanings ascribed by the researcher).[156]

Feminist(s) definitions of domestic violence extend beyond a focus on discrete incidents to include the *context* of the use of violence. This has three key dimensions:[157]

1. the repetitive, cumulative, patterned environment in which violence and abuse is exercised;

2. the function of the use of violence and abuse to exert power and control, or coercive control, over the victim; and

3. the broad contextual framework that connects the use of violence and abuse to the positions and privileges of men in comparison to women in society.[158] As noted in *Chapter 1*, this does not mean that feminist research fails to take account of intersecting factors such as race, class and sexuality, rather it emphasises the importance of recognising gender in any understanding of domestic violence.[159]

One device commonly used to depict 'power and control' is the 'wheel' developed by the Domestic Abuse Intervention Program, Duluth Minnesota USA.[160] This wheel was developed as a result of listening directly to women who had experienced domestic violence.[161] It illustrates the range of tools, tactics and

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[156] Yllö, 'Through a Feminist Lens', above n137 at 54. Eg see the development of the power and control wheel discussed below. See also Cavanagh et al, above n39 at 698-99.

[157] Some feminists have applied Urie Bronfenbrenner's ecological framework to explore domestic violence and women's use of violence. Bronfenbrenner developed this framework to explain child development through the interaction of four environmental levels: (1) the microsystem or individual/personal level; (2) the mesosystem which includes close settings such as the family; (3) the exosystem which includes work, the neighbourhood and government agencies; and (4) the macrosystem which is the level of culture and the broader society: see 'Toward and Experimental Ecology of Human Development' (1997) *American Psychologist* 513. For application of this framework to domestic violence see García-Moreno et al, above n88; Lori Heise, 'Violence Against Women: An Integrated, Ecological Framework' (1998) 4 *Violence Against Women* 262; Mark Fondacaro & Shelly Jackson, 'The Legal and Psychosocial Context of Family Violence: Toward a Social Ecological Analysis' (1999) 21 *Law & Policy* 91; Dasgupta, 'Framework for Understanding', above n43; and Mary Ann Dutton, Lisa Goodman & James Schmidt, *Development and Validation of a Coercive Control Measure for Intimate Partner Violence: Final Technical Report* (2005) at 6. The applicability of Bronfenbrenner's model is beyond this thesis: it is mentioned here to underscore the extent to which feminists engage with the contextual dimensions of domestic violence.

[158] Eg see Ptacek, above n13 at 9-10; Susan Schechter, 'A Framework for Understanding and Empowering Battered Women' in Martha Straus (ed), *Abuse and Victimization Across the Lifespan* (1988) at 243; Stark, above n84 at 5; Rebecca Dobash & Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* (1979); Kersti Yllö & Michelle Bograd (eds) *Feminist Perspectives on Wife Abuse* (1988); and Dasgupta, 'Framework for Understanding', above n43 at 1367-68.

[159] Stubbs, above n22; Schneider, above n19 at 62-65.

[160] See <http://www.duluth-model.org/documents/PhyVio.pdf> (26 January 2009). See also Ellen Pence & Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (1993).

[161] Ptacek, above n13 at 172. Reference omitted.

behaviours used by perpetrators against their current/former partners, including: coercion and threats, intimidation, economic abuse, male privilege, the use of children, isolation tactics, and emotional abuse. It also includes the way in which perpetrators minimise, deny and blame others, or external factors, for their use of violence.[162] The use of violence, physical and sexual, depicted as the rim of the wheel, operates as a powerful binding mechanism. These multiple and varied acts/behaviours are repeated, alone and in combination, to reinforce the coercive power of the perpetrator over the victim.

In another way James Ptacek uses the concept of 'social entrapment' to indicate the processes involved in domestic violence, and the powerful connections the use of violence and abuse to control women has on the availability and role of social and community institutions. As Ptacek states, 'social entrapment emphasizes the inescapably social dimension of women's vulnerability to men's violence, women's experience of violence, and women's ability to resist and escape'.[163]

The breadth of acts and behaviours (well illustrated in the power and control wheel) identified by feminist researchers as part of domestic violence has been critical in broadening societies' understanding of 'what counts as domestic violence'.[164] As Liz Kelly (who was particularly concerned with definitions of sexual violence) pointed out, feminist work has been crucial in resisting dominant, masculine concepts of what counts as violence and thus expanding definitions of violence.[165] Expanding our understanding of what is domestic violence is important as it impacts on what society interprets as normal behaviour and conversely, behaviour warranting attention.[166]

While the work of feminist researchers and advocates has considerably enhanced our understanding of domestic violence, areas of weakness remain concerning

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[162] See also Cavanagh et al, above n39. See *Chapter 7*.

[163] Ptacek, above n13 at 10.

[164] Eg see the broadened understanding of domestic violence documented in successive community attitude surveys: above n49.

[165] Liz Kelly, *Surviving Sexual Violence* (1988) at 27.

[166] Ibid.

how effectively the centrality of coercive control has been translated into understandings, and measurements, of domestic violence.[167]

Evan Stark, in his most recent book, argued that the domestic violence movement has stalled because it emphasised 'violence' and failed to articulate effectively the function of control.[168] So while control is invariably mentioned in feminist definitions of domestic violence,[169] and, in turn, the definitions adopted by many services and agencies,[170] Stark argues that control has not been translated beyond this definitional stance into research design or appropriate service responses (particularly legal responses). This means that services and legislation continue to respond to discrete acts of violence, despite often being the result of extensive feminist advocacy. This failure can be seen in the way that some researchers have failed to make connections between the function of control and the broad range of acts of violence and abuse emphasised by feminists as part of domestic violence. A good illustration of this problem is provided in Linda Mills' work. While Mills adopts a broad definition of domestic violence, she fails to connect the presence these acts/behaviours to the function of control, thus leading her to conclude that 'we have all experienced domestic violence', that it is 'part of all our lives'.[171] In this way Mills confuses acts that are hurtful, with acts that are part of domestic violence, and in so doing, depletes meaning from the phrase 'domestic violence'. This is not so different to the criticism levelled at family violence research for failing to examine acts of physical violence in context to determine whether they are employed as a tool to effect control, or for some other purpose (self-defence, protection, retaliation or anger).

Failing to emphasise the function of control has also left the language of 'abuse' open to be co-opted to address behaviours that the term 'domestic violence' was never intended to address. This argument has been made in different ways by

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[167] Another area of weakness is the extent to which sexual violence is recognised and responded to *as part of* domestic violence: see Melanie Randall, 'Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law' (2004) 23 *Saint Louis Public Law Review* 107 at 145; Diana Russell, 'Introduction' to *Rape in Marriage* (Revised ed, 1990) at xvii; Melanie Heenan, *'Just "Keeping the Peace": A Reluctance to Respond to Male Partner Violence'* (2004) at 1; and Kersti Yllö, 'The Silence Surrounding Sexual Violence: The Issue of Marital Rape and the Challenge it Poses for the Duluth Model' in Melanie Shepard & Ellen Pence (eds), *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (1999) at 225.

[168] Stark, above n84.

[169] Eg see the definition adopted in this thesis, *Chapter 1*.

[170] Eg see different agencies/services definitions in Paul Bullen, *Domestic Violence Interagency Guidelines: Working with the Legal System in Responding to Domestic Violence* (2003) at 190-91.

[171] Mills, above n19 at 23.

Dobash and Dobash (who point out that we need to be careful about conflating acts of violence and abuse as if they were the same thing with the same consequences),[172] and Michael Flood (who points out that some men have been able to successfully usurp the language of domestic violence to include hurtful and unfortunate acts, by 're-nam[ing] their…experiences of verbal conflict, name-calling, and stereotypically "nagging" as "verbal and emotional abuse"').[173]

The identification and measurement of 'coercive control' is an area of current research. Studies have varied in their approach; many have attempted to measure control within 'broader measures of psychological abuse, [which] are neither comprehensive nor internally consistent'.[174] It has only been in recent years that Evan Stark, and Mary Ann Dutton and colleagues have brought a 'more theoretical approach' to coercive control that moves away from merely listing the types of behaviours that might evidence its presence.[175] Dutton and colleagues, who define coercive control as 'a dynamic process linking a demand with a credible threatened negative consequence for non compliance',[176] have developed and validated[177] a tool to measure control. The tool is based on a conceptualisation of control as interacting with, and interdependent on, the existence of violence and abuse; control is not approached as a separate variable (as is characteristic of approaches that incorporate control under the rubric of 'psychological abuse' or isolation tactics). The tool devised by Dutton and colleagues has three interrelated scales: demands (for example, that a person maintains a certain appearance, or that a person limits their time outside the home);[178] coercion (for example, threatening a person if s/he reports the violence and abuse to the police or to others);[179] and surveillance (for example stalking, or

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[172] Dobash & Dobash, 'Working on a Puzzle', above n19 at 332, 334.

[173] Michael Flood, 'Deconstructing the Culture of Sexual Assault' paper presented at *Practice and Prevention: Contemporary Issues in Adult Sexual Assault in NSW* (2003) at 13. Available at <http://pandora.nla.gov.au/pan/39933/20040202-0000/www.lawlink.nsw.gov.au/cpd.nsf/files/flood.pdf/$FILE/flood.pdf> (26 January 2009).

[174] Mary Ann Dutton & Lisa Goodman, 'Coercion in Intimate Partner Violence: Towards a New Conceptualization' (2005) 11/12 *Sex Roles* 743-44.

[175] Johnson, 'Typology of Domestic Violence', above n37 at 14.

[176] Dutton et al, above n157 at 3.

[177] Ibid at 35 found 'strong support' for convergent validity and 'evidence' of predictive validity for the coercive control measure.

[178] Dutton et al, above n157 at 5.

[179] Ibid at 6.

monitoring travel away from the home).[180] It also measures the victim's response to these measures (for example, 'I did what my partner wanted').[181] Importantly Dutton and colleagues emphasise the role of context in understanding the meaning and function of these behaviours; without such context acts/behaviours such as 'threatening to leave your partner if he does not stop his violence' might be misinterpreted as control rather than a 'socially acceptable' threat.[182]

Work on 'coercive control', as a theoretical concept and as behaviour(s) to be measured, is of particular importance as the field continues to debate the gendered perpetration of domestic violence, a debate that has taken on a renewed focus as a consequence of the increasing arrest of women for domestic violence offences in the USA: Are these women engaging in domestic violence? Do they use violence for controlling purposes? How do we conceptualise, and respond to, women's use of violence against an intimate partner?

C. Women's use of violence

While many feminist researchers recognise that women are capable of violence,[183] women's use of violence in the domestic setting has, until recently, been neglected except in the context of lethal violence.[184] There are many reasons for this reticence. Examining women's use of intimate partner violence might: undermine women's access to specialist services, reinforce notions that violence is a relationship issue, blame women for the violence that they experience, and distract attention from the perpetrator of domestic violence by focusing on women who 'fight back'.[185]

In this section I explore two interrelated dimensions of research on women's use of violence: (1) gender differences in the context of, or motivations for, the use of domestic violence; and (2) recognition of the multiple and strategic ways that

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[180] Ibid at 7.

[181] Ibid.

[182] Dutton & Goodman, above n174 at 747.

[183] See Dasgupta, 'Framework for Understanding', above n43 at 1369; Osthoff, above n38 at 1524; Miller, 'Victims as Offenders' above n21 at ix, a4; Atmore, above n31 at 6; Michael Flood, 'The Debate over Men's Versus Women's Family Violence' paper *Australian Institute of Judicial Administration (AIJA) Family Violence Conference* (2006); and Joanne Belknap & Heather Melton, *Are Heterosexual Men also Victims of Intimate Partner Abuse?*, VAWNet Applied Research Forum (2005), available at <http://new.vawnet.org/Assoc_Files_VAWnet/AR_MaleVictims.pdf> (26 January 2009).

[184] Johnson & Ferraro, above n37 at 949. For references on women who kill their violent spouse/partner see above n40.

[185] Fitzroy, above n44 at 11. See also Osthoff, above n38 at 1522-23; Kurz, 'Physical Assaults by Husbands', above n33 at 99.

women respond to the violence they experience. These are important to the exploration of cross applications which not only raise gender differences in the use of intimate partner violence, but also illustrates the way that some women do indeed 'fight back', as a response strategy, against the violence they experience.

i. The context for using violence

One of the key criticisms feminist researchers have raised against the findings of family violence research has centred on the contention that much of the violence perpetrated by women recorded by the CTS would be acts of self-defence.[186] Self-defence is, however, a complex issue[187] with a particular legal meaning (evidenced by the profound difficulties women who kill their violent partners have in claiming this defence[188]). While self-defence might account for some women's use of violence, it fails to describe all women's use of violence against their intimate partner.[189] The complex and legal nature of self-defence led Johnson and Ferraro to prefer the phrase 'violent resistance' to describe women's use of violence in response to their own victimisation.[190]

Research has highlighted varied motivations for women's use of violence. Swan and colleagues, for example, in their study of 108 women who had used violence against their intimate partner in the previous six months,[191] found that women nominated multiple motivations including: self-defence (75%); retribution (to get even with their male partner for something he had done) (45%); and to exert 'control' (to get their partner to do something or refrain from doing something) (38%).[192] Susan Miller,[193] in her observations of women participating in a

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[186] See DeKeseredy & Schwartz, above n118 at 4; Bagshaw & Chung, above n137; and Kimmel, above n108 at 1354. Compare studies that have viewed self-defence in terms of initiation have found that women initiate at the same or greater rates than men: see Straus, 'The Controversy over Domestic Violence by Women' above n123 at 28.

[187] Dobash & Dobash, 'Working on a Puzzle', above n19 at 341. See also Dasgupta, 'Framework for Understanding', above n43 at 1372-73.

[188] See Australian Law Reform Commission (ALRC), *Equality Before the Law: Justice for Women* (1994) at [12.3]-[12.4]; Victorian Law Reform Commission (VLRC), *Defences to Homicide: Final Report* (2004), at 17, 27-30, 62-64; and Schneider above n19 at 31-33. See also the use of provocation (a partial defence) rather than self-defence (a complete defence) by women who have killed their violent partner: Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (2002) at 41-3.

[189] Dasgupta, 'Framework for Understanding' above n43 at 1372.

[190] Johnson & Ferraro, above n37 at 949.

[191] Assessed using the CTS physical abuse items: Suzanne Swan & David Snow, 'Behavioural and Psychological Differences Among Abused Women Who Use Violence in Intimate Relationships' (2003) 9 *Violence Against Women* 75 at 87.

[192] Ibid at 95. Control was assessed using the psychological maltreatment tool developed by Richard Tolman: 'The Validation of the Psychological Maltreatment of Women Inventory' (1999) 14 *Violence & Victims* 25. See also Dasgupta, 'Framework for Understanding', above n43 at 1378 who noted that when women use violence to exert control it tends to be focused on the 'immediate situation' (ie 'short term'), rather than to 'establish widespread authority' which tends to characterise men's use of violence.

[193] Miller, 'Victims as Offenders', above n21.

domestic violence offender program, characterised the women as having perpetrated three types of violent behaviour: defensive (65%),[194] 'frustration response' (an 'end of her rope' response) (30%)[195], and 'generalized violent behaviour' (where the woman was also violent towards others) (5%).[196] Poco Kernsmith, who surveyed 125 men and women participating in 'batterer intervention counselling' in Los Angeles,[197] found that the women were more likely than men to report 'using violence in response to previous abuse' rather than to exert power and control. No significant differences were found in the use of violence in self-defence, however, women were more likely than men to 'report using violence to get back at…or punish a partner'.[198]

Research in this field has also highlighted other reasons for women's use of violence, for example: to 'demand[] attention, express[] anger, escap[e] abuse, and punish[] the abuser';[199] and 'to stand up for themselves in an attempt to salvage their self-worth, to get their partners' attention, [and] to earn their partners' respect'.[200]

A common theme in this research is that, while not all women's violence can be characterised as self-defence, a woman's experience of victimisation was an 'important contextual factor' in understanding her motivation for using violence.[201] For example, in the study conducted by Swan and colleagues mentioned above, nearly all of the women (102/108) had experienced an act of physical or sexual violence in the previous year.[202] Thus, in a subsequent literature review, Swan and colleagues concluded that 'many domestically violent women – especially those who are involved with the criminal justice system – are not the sole perpetrators of violence'.[203]

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[194] Ibid at 120-25.

[195] Ibid at 116-20.

[196] Ibid at 113-16.

[197] Poco Kernsmith, 'Exerting Power or Striking Back: A Gendered Comparison of Motivations for Domestic Violence Perpetration', (2005) 20 *Violence & Victims* 173.

[198] Ibid at 179. See also Dobash & Dobash, 'Working on a Puzzle', above n19 at 342.

[199] Dasgupta, 'Framework for Understanding', above n43 at 1374.

[200] Leigh Goodmark, 'When is a Battered Woman not a Battered Woman: When She Fights Back' (2008) 20 *Yale Journal of Law and Feminism* 75 at 92. References omitted.

[201] Ibid.

[202] Suzanne Swan, Laura Gambone, Alice Fields, Tami Sullivan & David Snow, 'Women Who Use Violence in Intimate Relationships: The Role of Anger, Victimization, and Symptoms of Posttraumatic Stress and Depression' (2005) 20 *Violence & Victims* 267 at 273. See also Swan et al, 'Review of Research', above n126 at 306.

[203] Swan et al, 'Review of Research', above n126 at 306.

ii. Women's multiple and varied responses to violence

Women victims of domestic violence have traditionally been characterised as passive and submissive (powerfully depicted in Lenore Walker's work on the 'battered woman syndrome'[204]). The prospect that women use violence against their intimate partner directly challenges this perception and draws on the extensive debates about women's victimisation and agency.[205]

Research on women's agency has emphasised the multiple and strategic ways in which women respond to and negotiate the violence that they experience.[206] Mary Ann Dutton, for example, has identified that women respond to violence by drawing on personal measures (such as compliance, escape, resistance and defending oneself), informal measures (such as enlisting family and friends to assist), and formal measures (such as contacting the police or taking legal action).[207]

Some cultures may also be less proscriptive of women using violence, thus some groups of women may resort to using violence more often than others.[208] In addition, some groups of women may have fewer options. Some women, for example, have encountered poor responses from the police in the past, informed by race and gender, which may mean that contacting the police is not seen as an attractive or feasible option.[209] For these women violence may be identified as a useful, or perhaps the only, option to reduce or stop the violence.

Despite increasing recognition of women's varied responses to their victimisation, tension between viewing women victims as passive and submissive (and hence 'true' or 'genuine' victims) and as agents who may respond to domestic violence with violence (and hence not 'deserving' victims) remains. Research on women arrested for domestic violence offences in the USA

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[204] Lenore Walker, *The Battered Woman Syndrome* (1984).

[205] See Ferraro's discussion of the complex position faced by women who are both victimised and criminalised: above n43 at 14. See also Goodmark, 'When is a Battered Woman', above n200.

[206] See Dutton, above n141 at 1227-1228; Christine Littleton, 'Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women' (1989) *University of Chicago Legal Forum* 23 at 43; Jacqueline Campbell, Linda Rose, Joan Kub & Daphne Nedd, 'Voices of Strength and Resistance: A Contextual and Longitudinal Analysis of Women's Responses to Battering' (1998) 13 *Journal of Interpersonal Violence* 743, esp. 753-56.

[207] Dutton, above n141 at 1227-1228.

[208] Dasgupta, 'Framework for Understanding', above n43 at 1380.

[209] Eg see comments regarding African-American women's greater difficulty in gathering economic and support resources, and their greater reluctance to contact the police: Cris Sullivan & Maureen Rumptz, 'Adjustment and Needs of African-American Women who Utilized a Domestic Violence Shelter' (1994) 9 *Violence & Victims* 275 at 276. See also Goodmark, 'When is a Battered Woman', above n200 at 77, 96-105; and Miller, 'Victims as Offenders', above n21 at 35-36.

has highlighted not only gender differences in the perpetration of violence, but also how the arrest of some women is connected to idealised notions of who is a ‘true’ victim. As Susan Miller and Michelle Meloy explain:

> …although mandatory and/or pro arrest policies aim to eliminate discretion based on race, class, or even gender, it is possible that women who do not conform to gendered notions of a so-called pure or good victim (ie nice, delicate, passive), but rather are more ‘masculine’ (ie mouthy, aggressive toward police, drunk) are the ones who will continue to face arrest. When women use violence, they may evoke different reactions from authorities because their behaviour contradicts gender role assumptions of submissiveness.[210]

Binary categories such as ‘true’ versus ‘untrue’ (or ‘undeserving’) victims, and victim and perpetrator/offender,[211] are dominant within legal discourses and legal responses to domestic violence. As Miller and Meloy note:

> The need to dichotomize violent relationship constellations into victim and perpetrator categories is characteristic of an incident based criminal justice system, where a single act of violence committed by a woman can eclipse an entire history of victimization.[212]

Thus the legal system finds it hard to see women who use violence, or women who fight back, as victims of domestic violence.[213] The failure of the legal system, and family violence research, to examine the context of the use of discrete acts, has led to the deployment of the labels of victim and perpetrator by sole reference to a single act. Such an approach fails to appreciate the context of victimisation, and fails to describe accurately what is domestic violence (by reference to control), and what is not. This has meant that some women’s use of violence (and that of some men’s) may be inappropriately labelled as domestic violence, and as a result these women may be directed, as has been the case in the USA, to programs designed to address ‘domestic violence’, and in particular designed to address *men’s* use of domestic violence.[214] Note that this concern is not meant to suggest that some acts of violence (whether perpetrated by men or women) don’t warrant legal attention, but rather whether it is appropriate to respond with a ‘domestic violence’ response.

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[210] Miller & Meloy, above n43 at 95. References omitted.

[211] Ferraro, above n43 at 1.

[212] Miller & Meloy, above n43 at 92. See also Hirschel & Buzawa, above n48 at 1458.

[213] Goodmark, ‘When is a Battered Woman’, above n200 at 77. See also discussion in Ferraro, above n43 Ch2.

[214] Dasgupta, ‘Framework for Understanding’, above n43 at 1366; Miller, ‘Victims as Offenders’, above n21 at 11-12; and Osthoff, above n38 at 1526.

D. Different types of intimate partner violence

Since the mid 1980s an increasing number of researchers have explored the notion that there are different types of domestic violence.[215] Michael Johnson and colleagues have conducted the most extensive work in this area.[216] This work has been designed to explain the different findings regarding gender symmetry, and to guide appropriate responses. Johnson, with Kathleen Ferraro, posited that there are four types of domestic violence[217] characterised by the presence (or absence) of control:[218]

- *Intimate terrorism* (previously termed 'patriarchal terrorism'). This is the form of violence conjured by the term 'domestic violence'. It is characterised by coercive control and is likely to involve frequent, serious violence that escalates over time. It is predominantly perpetrated by men against women.

- *Situational couple violence* (previously termed 'common couple violence'). This type of violence tends to be incident, or situation, specific. It is not characterised by control and is not a pattern of behaviour, rather it tends to be focused on a specific argument. According to Johnson and Ferraro situational couple violence is generally infrequent, involves less serious acts of violence, does not escalate, and is perpetrated by both men and women generally on a mutual basis.[219]

- *Violent resistance.* This describes the use of violence by a person in response to their experience of *intimate terrorism,* and as noted above, is preferred to the more restrictive concept of self-defence. This form of violence is perpetrated almost entirely by women.

- *Mutual violent control.* This describes those situations where both partners use violence to control the other and hence can be viewed as 'two intimate terrorists battling for control'. Johnson and Ferraro note that this form of violence is 'rare' and little is known about it.[220]

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[215] See above n37.
[216] See above n37.
[217] This expands on Johnson's earlier work: Johnson, 'Patriarchal Terrorism', above n37.
[218] Johnson, 'It's Not About Gender', above n20 at 1126.
[219] Johnson & Ferraro, above n37 at 949.
[220] Ibid at 950.

Applying this typology, Johnson argues that family violence researchers and feminist researchers have reached different conclusions regarding the symmetry of domestic violence because the samples relied upon are 'biased' towards capturing different types of domestic violence. Johnson argues that family violence researchers capture 'situational couple violence' because the sample relied upon (randomised population surveys), while assumed to produce unbiased results, are in fact biased by the 'rate of refusal'.[221] Johnson suggests that victims of intimate terrorism are likely to refuse to participate in such surveys due to fear and the possible presence of the perpetrator at the time of the survey.[222] In turn, Johnson argues that feminist research, reliant on small samples frequently derived from the police, courts, refuges and so on (which are likely to involve the most serious cases), are biased towards capturing cases of 'intimate terrorism'.

This work on different types of domestic violence is important. It underscores the argument of this thesis that not all acts of violence perpetrated by an intimate partner are acts of domestic violence; that we need to know more about the context of perpetration before such labels can be deployed. Hence Johnson's work, which draws on feminist work that has always emphasised coercive control as integral to the definition of what is domestic violence and what is not, is attractive.[223] However, whether a formalised typology is necessary, implying some kind of scientific validity, is open to question. While the applicability of Johnson's model (or indeed that proposed by other researchers) is beyond the data gathered in this thesis (as noted in *Chapter 1*), it represents an important underlying theme and development in the research literature. For these reasons, I highlight my concerns with its formulation and application, and in later chapters raise questions, where relevant, about its role and applicability in the context of cross applications. As Johnson himself recognises, this work on differentiation is in its 'infancy' and requires further investigation.[224]

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[221] Johnson estimates that the refusal rate for the National Family Violence Surveys was 40%: Johnson, 'Typology of Domestic Violence', above n37 at 18.

[222] It is not clear why randomised population surveys do not capture at least some cases of intimate terrorism (or indeed all types of domestic violence), given that these factors may not be operative for all victims of intimate terrorism, and the fact that the very rationale for random probability sampling is to capture a representative sample of the population. I thank Julie Stubbs for raising this point with me in discussions on my work.

[223] Johnson, 'Typology of Domestic Violence', above n37 ch 1.

[224] Ibid at 72.

i. Concerns with Johnson's typology

I have four main concerns with Johnson's typology and its potential usage.

First, Johnson appears to rely on sample bias as the sole explanation for the different findings regarding gender symmetry. This approach sidesteps whether the contradictory results stem from the concept formation underlying the respective research (outlined above). In this way Johnson bypasses the substantive critiques and debates that have flown in both directions over the last 30 years, which involve much more than simply the inaccurate labeling of acts as domestic violence, and instead go to the core of the formation of the research questions and instruments themselves.

Second, while Johnson emphasises control as characteristic of intimate terrorism, his typology continues to emphasise physical violence. As Johnson explains, 'this is after all, a framework for identifying types of intimate partner *violence*'.[225] For Johnson, control is a factor that assists in the delineation of types of intimate partner violence, rather than a critical component of domestic violence. In his most recent book Johnson provides an example of a woman who experienced many tactics of control throughout her relationship, but did not experience physical violence until after separation. Johnson views this case as '*incipient* intimate terrorism' rather than simply 'intimate terrorism',[226] despite the fact that the woman stated that her former husband:

> …controlled her every move, humiliated her at every opportunity, controlled the money and gave her a carefully monitored allowance, intimidated her with fierce outbursts of anger, and quite explicitly threatened her, including telling her in detail what he would do to her and her father if she ever tried to leave him. She said she knew what he was capable of and she lived her life in a state of constant terror.[227]

This approach privileges the researcher's assessment of the meaning of violence, as opposed to the person to whom the act was directed (the woman herself referred to her former husband as an intimate terrorist). Thus Johnson appears to assume that the meaning of violence is 'readily discernable' from the data he draws on.[228] Like the criticism levelled at CTS-based research, Johnson fails to

[225] Ibid at 46. Emphasis in original.
[226] Ibid. Emphasis added.
[227] Ibid.
[228] Kaye et al, above n15 at 14.

consider the way that the meaning of violence is highly contextual and often only discernable to the person to whom the act is directed.[229]

Third, Johnson's most recent discussion of his typology raises questions about 'situational couple violence' and the definitional parameters of this, the largest category. While situational couple violence is generally defined as minor, infrequent and situationally-based, it may also include acts that are: serious, cause injury, attract legal intervention, are repeated and increase in severity over time.[230] Thus Johnson notes that even this type of domestic violence can be asymmetric in its perpetration and consequences, with men causing more injuries and generating fear.[231] The presence of these features would appear to raise great caution about this category, suggesting perhaps that some of these cases have been miscategorised as 'situational couple violence' and instead bear greater similarities to 'intimate terrorism'.

Fourth, the application of Johnson's typology, particularly in the legal setting, needs to be carefully considered given the way in which some of the categories may inadvertently reinforce recurrent myths about domestic violence. Situational couple violence, for example, may inadvertently reflect ideas that domestic violence is a relationship issue, involves minor or trivial matters, that women are equally involved in violence, and hence that much of this form of violence does not warrant the attention of the law. In turn, intimate terrorism may be used to reinforce ideas about 'true' and 'genuine' victims involving the most serious and visible cases of violence, as compared to 'untrue' or 'undeserving' victims who might also use violence against their partner. I don't mean to suggest that Johnson intends to reinforce such myths, rather that consideration needs to be given to the way in which the use of the proposed typologies may in fact do so. Research by Edna Erez and Tammy King illustrates this concern.[232] Erez and King surveyed 62 defence and prosecution attorneys in Ohio about the most common and successful defence strategies in domestic violence criminal cases. The strategies thus identified were: that the (male) defendant was acting in self-

[229] Ibid.

[230] Johnson, 'Typology of Domestic Violence', above n37 at 21, 62.

[231] Johnson, 'It's Not About Gender', above n20 at 1129.

[232] Edna Erez & Tammy King, 'Patriarchal Terrorism or Common Couple Violence: Attorney's views of Prosecuting and Defending Women Batterers' (2000) *Domestic Violence: Global Responses* 207.

defence or that the woman had 'exaggerated the incident and was making a "big deal" out of nothing'.[233] The attorneys surveyed also noted that most defendants sought to explain their behaviour by blaming the victim for either initiating the incident or provoking him.[234] The authors concluded:

> The study suggests that attorneys' discourse of woman battering reflects batterers' accounts of battering and portrays intimate violence that reaches the court, by and large, as common couple violence. Victims' battering experiences, which are likely to reflect patriarchal terrorism, are denied, minimized, or at best referred to as a few 'true' or 'real' cases of domestic violence.[235]

Thus Erez and King found that while the work of these lawyers was more likely to involve intimate terrorism (as they deal with cases that had come to the attention of the criminal law), the lawyers instead viewed the cases as involving situational couple violence by relying on long-standing perceptions of domestic violence as trivial, minor and mutual. This highlights the way in which Johnson's typology may coalesce with the common 'excuses' or explanations the law has (always) offered for men's violence against women (one-off, minor, mutual). This risk, that the category of situational couple violence may be used to dismiss the extent of violence perpetrated against women by their intimate partners,[236] must be considered in future work on the development of typologies or other methods of differentiating between types of domestic violence.

Work on different types of domestic violence, and work on identifying coercive control, is important as the field continues to grapple with competing research findings regarding gender perpetration, and increasing questions about women's use of violence against an intimate partner. In both areas work has only been recent, and many questions remain. This thesis seeks to add to this field by exploring one area where men and women present competing claims about domestic violence; cross applications within the NSW ADVO system.

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[233] Ibid at 213. See also Table 1 at 214.

[234] Ibid at 215.

[235] Ibid at 224, see also 208-09.

[236] See Rae Kaspiew, *Mothers, Fathers and Parents: The Construction of Parenthood in Contemporary Family Law Decision Making* (PhD thesis, University of Melbourne, 2005) at 127-128.

2. Conceptions of domestic violence in the civil protection order system

This sociological debate has many parallels with feminist critiques of the way the criminal justice system addresses the harms suffered by women, particularly its emphasis on incidents, the primacy of physical assault, the failure to recognise the gendered nature of many harms suffered by women, and the inability to address the cumulative experience of domestic violence.[237] As Demi Kurz has argued, the criminal law replicates the conception of domestic violence underlying family violence research.[238] A question for this thesis is whether these criticisms of the criminal justice system also play out in the civil protection order system, a system ostensibly designed to respond more appropriately to domestic violence.[239]

A. The development of civil protection orders

Many western countries have implemented civil, or quasi-criminal, protection order systems to provide future protection to victims of domestic violence. These systems were implemented from the 1970s in the USA[240] and the UK,[241] and in Australia from the 1980s.[242] Civil protection order systems were a direct response to the inadequacies of the criminal law to address the harms experienced by women in their intimate relationships highlighted by feminist academics and advocates.[243] The criticisms of the criminal law have been broad-ranging and include doctrinal issues, its rules and procedures (particularly rules of evidence, notions of corroboration and credibility), and its implementation.[244] In this section I highlight the key progressions provided by civil protection orders (at face value) in addressing domestic violence when compared to the response provided by the criminal law, and hence seek to draw attention to the ways in

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[237] See Stark, above n84 at 10; Ptacek, above n13 at 8-9; Tuerkheimer, above n21.

[238] Kurz, 'Battering and the Criminal Justice System', above n19 at 32.

[239] Hunter posed a similar question in her research on the protection order system in Victoria and the federal family law system: 'Women's Experience in Court', above n58 at 2.

[240] First introduced in Pennsylvania in 1976: Ptacek, above n13 at 48.

[241] Mandy Burton, *Legal Responses to Domestic Violence* (2008) at 11-12.

[242] NSW was the first Australian jurisdiction to introduce civil protection orders, *Crimes (Domestic Violence) Amendment Act* 1982 (NSW), following the *Report of the New South Wales Task Force on Domestic Violence to the Honourable NK Wran QC, MP, Premier of NSW* (1981). Before this amendment the only recourse available was the 'keep the peace' provision: then *Crimes Act* 1900 (NSW) s547.

[243] Hunter, 'Women's Experience at Court', above n58 at 1.

[244] Eg see Tuerkheimer, above n21 at 971-74; Hunter, 'Women's Experience in Court' above n58 at 44-57; Eve Buzawa & Carl Buzawa, *Domestic Violence: The Criminal Justice Response* (3rd ed, 2002); and Schneider, above n19 esp ch 7.

which civil protection orders provide scope to better capture the cumulative and varied experience of violence and abuse that comprises domestic violence.

i. Beyond acts of (largely) physical violence

Like family violence research, the criminal law tends to focus almost exclusively on discrete acts of 'violence' to the exclusion of the varied acts of violence and abuse prominent in feminist definitions of domestic violence.[245] Thus, a great deal of what women describe as violence and abuse is not captured by the criminal law.[246] One of the effects of this emphasis on 'violence' is that domestic violence is portrayed as 'extraordinary' rather than as a commonplace event in the lives of many women.[247] Critically the emphasis and response to acts of 'violence' has also meant that any appreciation of, let alone response to, coercive control has been absent from criminal justice responses.[248] As Evan Stark describes, the visibility of physical violence and injuries has left obscured the many mechanisms of 'personal entrapment' that characterise domestic violence (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, making demands about the way she cooks, dresses and engages in sex).[249]

It has only been in recent years that some jurisdictions have recognised other forms of domestic violence as criminal offences. The most notable and widespread of these is stalking. Other jurisdictions, such as Tasmania, have recently introduced offences of emotional and economic abuse.[250] This has been subject to some criticism,[251] and there have been no prosecutions to date.[252]

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[245] Hirschel & Buzawa, above n48 at 1457; Carolyn Hartley & Roxann Ryan, *Prosecution Strategies in Domestic Violence Felonies: Telling the Story of Domestic Violence: Executive Summary* (1998) at 1-2; and Goodmark, 'Law is the Answer?', above n16 at 29. See also Tuerkheimer, above n21.

[246] Rosanna Langer, 'Male Domestic Abuse: The Continuing Contrast Between Women's Experiences and Juridical Responses' (1995) 10 *Canadian Journal of Law and Society* 65 at 81. See also at 87.

[247] See ibid at 87; Schneider, above n19 at 66-67; and Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation (1991) 90 *Michigan Law Review* 1, at 2-3.

[248] In response to this absence some theorists have proposed changes to the criminal law: see Tuerkheimer, above n21; Alafair Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2007) 75 *George Washington Law Review* 552; Stark, above n84 at 382-84.

[249] Stark, above n84 at 15. See also Ferraro above n43 at 16.

[250] *Family Violence Act* 2004 (Tas) ss 8-9.

[251] urbis, *Review of the Family Violence Act 2004 (Tas)*, (2008) at 8, 11-12.

[252] Email communication Sergeant Debbie Williams, Coordinator Safe at Home (10 November 2008).

In contrast civil protection orders generally address a range of behaviours beyond physical violence.[253] While the NSW ADVO scheme was initially limited to acts of physical violence, sexual violence and property damage, this quickly expanded to include harassment or molestation.[254] Over time it was clarified that harassment and molestation could be directed at a person's property and did not have to involve actual violence to the person.[255] In 1993 stalking and intimidation were included as grounds for an ADVO.[256] 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 that can provide important context to the understanding and appreciation of the acts as acts of domestic violence. This is particularly the case after 2006 when it was made clear that the court may have reference to any 'pattern of behaviour' in determining whether conduct amounts to intimidation.[257]

ii. 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 a single incident (although they may be charged with multiple offences). Thus the prosecution of a criminal offence for an act of domestic violence represents a 'fleeting snapshot of an ongoing relationship, a snapshot that may not accurately reflect the dynamics of the ongoing relationship'.[258] 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 Hunter notes:

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[253] In Tasmania a protection order may be granted on the basis of economic and emotional abuse: see *Family Violence Act* 2004 (Tas), s7 and 16. Economic abuse is also a ground in the NT: *Domestic and Family Violence Act* 2007 (NT) s5(e); and intimidation includes 'any conduct that has the effect of unreasonably controlling the person or causes the person mental harm': s6(1)(c). Harming pets is included in the ACT: *Domestic Violence and Protection Orders Act* 2001 (ACT) s9(1)(f)-(g), this has remained the same in the new legislation which commences 30 March 2009, see *Domestic Violence and Protection Orders Act* 2008 (ACT) s13. In WA 'ongoing behaviour that is intimidating, offensive or emotionally abusive towards the person' is included in the definition of domestic/family violence: *Restraining Orders Act* 1997 (WA) s6(1)(d). The new legislation in Victoria (see above n64 for commencement details) defines 'family violence' as including emotional or psychological abuse, coercive behaviour, or behaviour that 'controls or dominates…and causes…fear': *Family Violence Protection Act* 2008 (Vic) s5.

[254] *Crimes (Domestic Violence) Amendment Act* 1982 (NSW), Schedule 1, s2 amending s547AA(1) of the *Crimes Act 1900*. 'Molestation' is not defined. See discussion of what amounts to molestation in the UK: Burton, above n241 at 15.

[255] *Crimes (Apprehended Violence) Amendment Act* 1989 (NSW), Schedule 1, s(6) amending s562B *Crimes Act 1900*.

[256] *Crimes (Domestic Violence) Amendment Act* 1993 (NSW). 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'. See amendments made to this provision below n393.

[257] Now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s7(2).

[258] Hirschel & Buzawa, above n48 at 1457; and Tuerkheimer, above n21 at 973.

> Regarded in isolation, much abusive and threatening behaviour can be explained away, given a benign interpretation, or made to appear innocuous. The decontextualized examination of disaggregated incidents can leave a case in shreds.[259]

Thus the minor nature of the presenting crime is emphasised, rather than its evidence of a 'serious' pattern of behaviour.[260]

In the USA this focus on discrete incidents has recently attracted heightened criticism in research on the increasing arrest of women for domestic related assaults as a result of mandatory or pro-arrest policies. Commenting on this increase, Meda Chesney-Lind notes that the criminal law and its actors (such as the police) 'mimic the same errors' that can be found in family violence research, by adopting a process that 'de-contextualizes' the abuse, removing consideration of meaning and motive.[261]

In contrast, civil protection order systems generally ask for some account of the violence beyond a single incident (although, as will be seen in *Chapter 6,* incidents still dominate practice in NSW). In this way, protection order systems are not, at face value, incident-based, in the same way as criminal actions. While incidents are certainly mentioned in civil protection orders there is generally space to accompany those incidents with reference to past events, and acts outside the criminal law but having some import in the experience of domestic violence.

In addition, a distinctive feature of the NSW ADVO system is the linkage between the types of incidents that might ground an ADVO and their impact on the victim, the generation of fear.[262] The requirement for fear arguably provides scope to bring into play notions of control, or at the very least 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

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[259] Hunter, 'Women's Experience in Court', above n58 at 54.

[260] This may emerge at the point of sentencing, where prior acts that resulted in a conviction may be taken into account (but not those that were not been reported, not prosecuted or did not result in conviction).

[261] Meda Chesney-Lind, 'Criminalizing Victimization: The Unintended Consequences of Pro-arrest Policies for Girls and Women' (2002) 2 *Criminology and Public Policy* 81 at 86.

[262] By *Crimes (Personal and Family Violence) Amendment Act* 1987 (NSW). Prior to this time an AVO was granted on the basis of reasonable 'apprehension' that certain acts would occur. Three other Australian jurisdictions also include fear or a similar criterion: *Domestic Violence Act* 1994 (SA) s4(2); *Domestic and Family Violence Act* 2007 (NT) s18; and *Restraining Orders Act* 1997 (WA) s11A. See also *Family Law Act* 1975 (Cth) s4.

than how they operate in the relationship.[263] 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?'). The presence of fear is one area in which research exploring questions of the symmetry of domestic violence has found significant asymmetrical results, with women much more likely than men to report being in fear.[264]

iii. A lesser standard of proof

Civil protection orders, by adopting the civil standard of proof (on the balance of probabilities), recognise the immense difficulties faced by some women in successfully pursuing a criminal action (where the standard of proof is beyond reasonable doubt). In this way civil protection orders recognise that many acts of domestic violence occur in private, with few, if any witnesses or other forms of corroborating evidence.

iv. The provision of future protection

The future protection provided by the criminal law is limited to the extent that punishment may deter such behaviour. In comparison civil protection orders place conditions on the defendant's behaviour not only in respect of criminal offences (for example in NSW 'not to assault', 'not to stalk or intimidate'), but also on the extent to which the defendant can come into contact with the victim. In this way, because civil protection orders prohibit behaviour and limit contact, the scope of an ADVO once made can address a range of opportunities for harassment, verbal abuse and so on that would otherwise evade legal apprehension (for example phoning a person and verbally abusing them becomes a breach of an ADVO, and hence a criminal offence, if that ADVO prohibited telephone contact).[265] In this way, while the grounds to seek a protection order

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[263] Hunter, 'Women's Experience in Court', above n58 at 64. Hunter was referring to *Crimes (Family Violence) Act* 1987 (Vic) s4. Repetition has remained in the new Victorian legislation (see above n64 for commencement details), however, it is arguable that the breadth of its definition of 'family violence' may provide a different approach to the granting of orders: see *Family Violence Protection Act* 2008 (Vic) s5. Other Australian jurisdictions also rely on repetition: *Family Violence Act* 2004 (Tas) s16(1); *Domestic and Family Violence Protection Act* 1989 (Qld) s20(1). The ACT simply requires that a domestic violence offence has taken place: *Domestic Violence and Protection Orders Act* 2001 (ACT) s40(1).

[264] Eg see Swan et al, 'Review of Research', above n126 at 308; Kevin Hamberger & Clare Guse, 'Men's and Women's Use of Intimate Partner Violence in Clinical Samples' (2002) 8 *Violence Against Women* 1301 at 1316; Dasgupta, 'Just Like Men?', above n43 at 209-210; Kris Henning & Lynette Feder, 'A Comparison of Men and Women Arrested for Domestic Violence: Who Presents the Greater Threat?' (2004) 19 *Journal of Family Violence* 69 at 75, 78; Melton & Belknap, above n36 at 342-343. See also Headey et al, above n35 at 59.

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

might not encompass the full range of behaviours that women complain about as part of domestic violence, the actual terms of an ADVO, once made, may in fact address the opportunity for such acts to be perpetrated.

v. A guiding statement

Another key feature of the NSW ADVO system that distinguishes it from the criminal law is that the legislation providing for such orders has an objects statement and statement of parliamentary recognition.[266] The object of the ADVO legislation is to ensure the safety and protection of people experiencing domestic violence, to reduce and prevent domestic violence, and to 'enact provisions …consistent with certain principles underlying the Declaration on the Elimination of Violence Against Women'.[267] The statement of what parliament recognises goes further; it recognises: that domestic violence 'in all its forms, is unacceptable behaviour; that it is 'predominantly perpetrated by men against women and children'; and that it 'occurs in all sectors of the community'.[268] This statement of parliamentary recognition, rather than the objects clause, continues to be the site where more progressive statements about domestic violence are articulated; for example in 2006 seven new clauses were added to this statement including, 'that domestic violence extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years'.[269]

It is interesting to note that Hunter laments the absence of such an 'interpretative framework' in the Victorian legislation, suggesting that it leaves magistrates 'unconstrained in invoking their own beliefs and assumptions about domestic violence'.[270] Given the brevity of ADVO procedures,[271] something that Hunter also noted in the Victorian context,[272] I would suggest that this interpretative framework, which has been in place in NSW for over eight years appears to have

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[266] By *Crimes Amendment (Apprehended Violence) Act* 1999 (NSW).

[267] *Crimes Act* 1900 (NSW) s562AC(1)(c), now *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s(9)(1)(d).

[268] *Crimes Act* 1900 (NSW) s562AC(3), now *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s(9)(3).

[269] *Crimes Amendment (Apprehended Violence) Act* 2006 (NSW).

[270] Hunter, 'Women's Experience in Court', above n58 at 64. See also Hunter & Stubbs, above n16 at 12. The new Victorian legislation (see above n64 for commencement details), the *Family Violence Protection Act* 2008 (Vic) does contain a preamble and purpose statement (s1) that has a number of similarities to NSW. Other Australian jurisdictions also have guiding statements, however they tend to be limited: *Family Violence Act 2004* (Tas) s3; *Domestic Violence and Protection Orders Act* 2001 (ACT) s5-6, the new legislation has retained this provision *Domestic Violence and Protection Orders Act* 2008 (ACT) s6 (commencement 30 March 2009); and *Domestic and Family Violence Act* 2007 (NT) s3.

[271] See *Chapter 4*.

[272] Hunter, 'Women's Experience in Court', above n58 at 100-104.

made little difference to ADVO processes or procedure, if indeed it is reflected on at all.

B. Criticisms of civil protection order systems

From the outset there have been criticisms of civil protection order systems. Jocelyn Scutt, one of the earliest critics in Australia, argued that civil protection orders undermined the criminal response by not responding to an assault as an assault at the outset. Scutt argued that this reinforced police arguments that they had no power to act in domestic assaults, it allowed earlier acts of domestic violence to go unpunished, and it suggested that domestic violence was a civil (that is private) rather than a criminal matter.[273] Julie Stubbs and Sandra Egger responded to Scutt's contentions by stating that:

> The argument that domestic violence has been decriminalised is overstated, and is at odds with the explicit dual focus of policy development in most [Australian] jurisdictions where both criminal sanctions and protection orders are promoted as complementary responses to domestic violence. The argument also denies the extent to which changes in police policies and enforcement practices have been achieved by means other than law reform.[274]

While Julie Stubbs, in early research in NSW, found that protection orders were not being used instead of criminal prosecutions,[275] recent research in Queensland suggests that the Queensland civil protection order system has 'trumped the operation of the *Criminal Code*'.[276] However, the question of the value of civil protection order systems is not as simple as determining how it relates to, or replaces, criminal prosecutions. In many ways the debate about the pros and cons of the protection order system vis-à-vis the criminal law has subsided – they are both seen as crucial and play an important complementary role. However there are a number of aspects of the civil protection order system and its interrelationship with the criminal justice system that continue to reflect some of the concerns expressed by Scutt. They are: the continuing high rate of withdrawal of ADVO applications,[277] the lack of action on breaches,[278] and the

[273] Scutt, above n63.

[274] Stubbs & Egger, above n63 at 6.

[275] Julie Stubbs, 'Domestic Violence Reforms in NSW: Police and Practice' in Suzanne Hatty (ed), *National Conference on Domestic Violence* (1986) cited in Graycar & Morgan, 'Hidden Gender', above n63 at 318.

[276] Douglas & Godden, above n63 at i.

[277] See *Chapter 4*.

[278] See Katzen, above n15; NSWLRC, 'AVOs', above n11 at [10.15]-[[10-24]; and Ombudsman, above n11 at [3.3].

gap between the number of ADVO applications and the number of domestic violence related criminal proceedings.

i. The implementation problem

Many criticisms of civil protection order systems centre on what has been termed the 'implementation problem'.[279] This is a problem that dogs much feminist engagement with law reform.[280] The problem of implementation charts the gap between the law as written and its practical application.[281] Hunter has canvassed the reasons why feminist law reform efforts encounter implementation problems.[282] One reason is the gap between the intent of the reform and the prevailing legal culture, where, as Hunter argues, feminist measures may always be seen as radical in that they aim to disrupt existing structures. Another reason concerns the way in which 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.[283]

As Hunter notes 'we should expect implementation problems'.[284] However the drive for new laws, rather than addressing implementation problems, continues.[285] The most recent review of the ADVO system by the NSW Law Reform Commission (NSWLRC)[286] and the subsequent government response illustrates this approach. In its report the NSWLRC noted that many submissions commented that 'the main problems [with the legislation] lie with its implementation and interpretation',[287] yet we have continued to see legislation introduced or amended that does little to address this fundamental issue.[288]

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[279] Hunter, 'Women's Experience in Court', above n58 at 7. See also Burton, above n241 at 36, 45.

[280] See Reg Graycar & Jenny Morgan, 'Law Reform: What's in it for Women?' (2005) 23 *Windsor Yearbook of Access to Justice* 393; Schneider, above n19 at 109-110; and McMahon & Pence, above n21 at 47-48.

[281] Ruth Busch, Neville Robertson & Hilary Lapsley, 'The Gap: Battered Women's Experience of the Justice System in New Zealand' (1995) 8 *Canadian Journal of Women and the Law* 190.

[282] Hunter, 'Women's Experience in Court', above n58 at 7-13.

[283] 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* (1989); Margaret Thornton, 'Feminism and the Contradictions of Law Reform' (1991) 19 *International Journal of the Sociology of Law* 453.

[284] Hunter, 'Women's Experience in Court', above n58 at 12.

[285] Hunter suggests that feminist legal scholars in Australia 'have placed a heavy emphasis on doctrinal revision…largely ignor[ing] issues of implementation': Ibid at 13.

[286] NSWLRC, 'AVOs', above n11.

[287] Ibid at [3.2].

[288] The ADVO legislation has been amended twice since the NSWLRC reported in 2003: *Crimes Amendment (Apprehended Violence) Act* 2006 and *Crimes (Domestic and Personal Violence) Act* 2007.

This thesis has as its focus the law in action, rather than the doctrinal representations of what the law is.[289] This focus redirects attention to the critical problem of implementation, rather than simply continuing to tinker at the edges of law reform. This does not mean that feminist engagement with law reform is not fruitful (clearly it has been enormously fruitful, if also frustrating), rather that the artificial division between doctrine and implementation must be considered – that the law on the books does not exist without the law in practice (and vice versa).

The empirical chapters that follow (*Chapters 4-9*) engage with the question of how the ADVO system is implemented through a specific focus on cross applications. They examine and highlight features of the ADVO system that militate against its more progressive elements, such as:

- the limited nature of the complaint narrative (as detailed in *Chapter 4*, complaints tend to be brief, focus on single incidents, emphasise physical violence, and often fail to make reference to the legislative requirement of fear),
- the continuing focus on incidents in practice, and
- the limited capacity of magistrates to hear and reflect on information about domestic violence as a consequence of the constraints of the work environment.

The problem of implementation refocuses attention on the messages and understandings of domestic violence that are conveyed via the key legal players (police, legal representatives and magistrates) who work within the legal system. The work of James Ptacek on judicial demeanour in civil protection order proceedings has been illuminating in this regard.[290] For many women it is not so much whether they were successful in obtaining an order (although this is important) but how they were responded to, listened to, and validated through that process.

[289] Most ADVOs are dealt with in the Local Court and there are few higher court decisions. Recently some Local Court decisions have been made available at <http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll_caselaw.nsf/pages/cl_index> (26 January 2009). This is not comprehensive, and even here few decisions concern ADVOs. Hunter also found few higher court decisions in Victoria: ‘Women’s Experience in Court’, above n58 at 69.

[290] Ptacek, above n13.

Whether the criminal law is able to take on more progressive, cumulative understandings of domestic violence has been questioned. Susan Miller for example, articulates this problem:

> The criminal justice system is by its very nature incident-driven. It is difficult to imagine the possibility of such an entrenched manner of operation to really change and look beyond dichotomous thinking (did the person break the law or not) to a more contextualized approach.[291]

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.[292] This thesis' focus on 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 domestic violence that underscore the implementation of the legislation are more pronounced and challenging.

3. Summary

The issues raised in this chapter are complex and subject to detailed (and continuing) debate. These issues have critical import in the study of cross applications that is the focus of this thesis. First, cross applications, at a general level, reflect the debate on gender symmetry by requiring an examination of the competing claims made by men and women. In addition the methods used in this multi-method study provide an active illustration of the research debate by demonstrating the limits of act-based measures alone (*Chapters 6-7*) in indicating the presence of 'domestic violence', and in turn the value of qualitative information that provides crucial meaning to the way in which acts are understood. Second, the original research undertaken for this thesis explores whether men and women seek protection orders arising from the same or different acts or behaviours, and the combination, patterning and context of the use of violence. This data makes a contribution to the broader literature on women's and men's use of domestic violence. Third, the cases gathered in this study evidence women engaging in a wide range of behaviours that sit

[291] Miller, 'Victims as Offenders', above n21 at 131.

[292] See above n248.

uncomfortably with idealised notions of victims of domestic violence. Analysing those behaviours offers the opportunity to consider the way in which acts and behaviours are given meaning from the context of usage, in both an individual and broad sense.

The second part of this chapter commenced the exploration of the way in which the civil protection order system might, through its design and practice, reproduce specific aspects of the sociological debate (for example the reliance on incidents as indicators of domestic violence, the extent to which the context of acts is taken into account, and the extent to which the civil protection order system responds to acts/behaviours beyond physical violence). The legal system, and research on that system, has largely ignored the sociological debate, yet the criticisms of the criminal law has many resemblances to the feminist critique of family violence research. A question for this thesis, explored through the empirical data that follows (*Chapters 4-9*) is whether the potentially progressive elements of the various civil protection order systems has been harnessed, or instead the civil law has retained the criminal law's focus on discrete incidents. How domestic violence is understood in the civil protection order system is crucial to how the law approaches men's and women's competing claims about domestic violence. Looking at the debates in the sociological literature provides an important lens in examining current legal responses. Data derived from the civil protection order system can also inform this sociological debate.[293] This exploration of what understanding of domestic violence underpins the civil protection order system is continued, and expanded upon, in the detailed investigation of cross applications in the NSW ADVO system that follows in subsequent chapters. The next chapter details the methodology adopted for this empirical study.

[293] Melton & Belknap, above n36 at 337.

3. Methodology

This chapter details the methodology employed to undertake the empirical component of this thesis. In summary, this thesis employed a mixed-method approach informed by feminist research practices. Qualitative data was gathered through in-depth interviews with women and key professionals, the analysis of complaint narratives for ADVOs, and through the observation of court proceedings. Quantitative data was primarily gathered through the analysis of court files.

The first part of this chapter introduces the methodology adopted in this thesis: it canvasses the insights and approaches of feminist research practices, and explores the complexities of undertaking 'sensitive research' and the reflexivity required of the researcher. This is followed by the detailed description of the samples used in this research, the process of analysis, and the key limitations of the research.

1. Approaches and concerns

A. A multi-method inquiry informed by feminist research practices

> It is our contention that if the aim is to better understand and explain any social issue, then the use of different methods with their respective strengths and weaknesses provides a more fruitful approach than relying solely upon a single data collection technique.[294]

This thesis adopted a multi-method approach to collecting and analysing data, using different sources of information and different approaches to the collection and analysis of that data. This incorporated:

1. In-depth semi-structured interviews with women involved in cross applications;

[294] Ruth Lewis, Rebecca Dobash, Russell Dobash & Kate Cavanagh, 'Researching Homicide: Methodological Issues in the Exploration of Lethal Violence' in Raymond Lee & Elizabeth Stanko (eds), *Researching Violence: Essays on Methodology and Measurement* (2003) at 50.

2. In-depth semi-structured interviews with key professionals who deal with cross applications [magistrates, solicitors, police prosecutors, Domestic Violence Liaison Officers (DVLOs), and WDVCAS coordinators];
3. Documentary analysis of court files; and
4. Observations of Local Court proceedings.

These methods of data collection were selected because they operated to elicit key information, which could be supplemented, enhanced, or tested by data from one of the other sources.[295] In-depth interviewing, for example, allowed for the gathering of rich, narrative data, while the documentary analysis of court files provided a useful way to gather quantitative data and limited qualitative data, from a larger sample. The documentary analysis, then, provided a way to put the detailed experiences of women within the larger context of the legal practice environment,[296] where the stories presented by the women 'give life to the statistics, and [in turn] the statistics tell us that the stories are not idiosyncratic or aberrational'.[297]

Multiple methods assist in shedding greater light on the issue being examined and provide a process of triangulation that allows greater confidence in findings when they are reported across different data sources.[298] The use of multiple methods also provides a mechanism through which a researcher can attempt to address the various limitations of a particular data source and method with another,[299] providing for a 'more comprehensive picture' of the topic being investigated.[300]

i. Feminist research practice

'What makes research feminist?' has been debated extensively in the research literature. Responses, which have varied over time, have centred on: who conducts the research, the topic of the research, the aims of the research, whom it

[295] Ibid at 49-65.

[296] Shulamit Reinharz, *Feminist Methods in Social Research* (1992) at 213.

[297] Deborah Hensler, 'Studying Gender Bias in the Courts: Stories and Statistics' (1993) 45 *Stanford Law Review* 2187 at 2193. See also Andrea Fontana & James Frey, 'The Interview: From Structured Questions to Negotiated Text' in Norman Denzin & Yvonna Lincoln (eds), *Collecting and Interpreting Qualitative Materials* (2nd ed, 2003) at 99.

[298] Miller, 'Victims as Offenders', above n21 at 39. See Norman Denzin, *The Research Act in Sociology* (1997) at 310; and Reinharz, above n296 Ch 11.

[299] Lewis et al, above n294 at 62.

[300] Ibid at 51.

is about, its purpose, the processes adopted, and the role or positioning of the people who participate in the research, particularly in relation to the researcher.[301] Until recently it was de rigueur to state that feminist research was qualitative research, now there is increasing emphasis placed on the appropriate use of both quantitative and qualitative research methods. There is, then, no agreed upon definition or approach that marks research as 'feminist'.[302]

This thesis evidences feminist research practices and concerns in the following ways:

- It is concerned with exploring women's experience of violence and the multiple ways in which women might respond to that violence, in order to improve our understanding of women's experience of domestic violence.
- It is concerned with improving legal responses to domestic violence in an environment where there continues to be questions raised about whether domestic violence is a gendered phenomenon.
- It adopts a multi-method approach to enable a process of exploring women's and men's stories about violence within the context of competing claims presented in ADVO cross applications. The use of multiple methods provides scope to investigate in-depth women's use of the ADVO system in a manner that would not be captured through the analysis of documents, or interviews alone.
- Women chose to participate in this research, often expressing the hope that their contribution would assist others by improving practice and by increasing knowledge in the area of domestic violence and cross applications.

A key component of this research was the conduct of in-depth interviews with women involved in cross applications (as well as in-depth interviews with key professionals). The process of interviewing, and particularly the positioning of researcher and researched, has been a dominant concern within feminist analysis

[301] Lorraine Gelsthorpe, 'Feminist Methodologies in Criminology: A New Approach or Old Wine in New Bottles?' in Lorraine Gelsthorpe & Allison Morris (eds), *Feminist Perspectives in Criminology* (1990) at 89.
[302] Patricia Maguire, *Doing Participatory Research: A Feminist Approach* (1987) at 74.

of research methodologies. Ann Oakley,[303] and Liz Stanley and Sue Wise[304] were early commentators on the need to conduct research without the hierarchical positioning of researcher and researched, and aspired to put in place methods that produced a more interactive process. Whether this ideal is possible has been questioned; I agree with Lisa Maher, reflecting on her ethnography of women drug users in New York, that you can never eliminate all the disparities in positioning between researcher and researched that might be generated by the choice of the topic, the background and experiences of participants, who holds knowledge about the topic, who can walk away from the situation, and decisions about how the research is written up or presented (no matter how collaborative processes might be).[305] This does not mean that research and knowledge hierarchies are accepted, but rather that we need to identify them, question them and be conscious of the ways in which they operate.

In-depth interviewing has a number of benefits in exploring a sensitive and hidden area such as domestic violence, and it has been used extensively in studies of violence against women.[306] It provides a critical way to explore context and meaning, and to 'give voice' to women's experiences of violence. These aspects of the experiences of violence are unable to be captured through quantitative methods. This does not mean that quantitative methods are not valuable in researching violence against women; as noted in *Chapter 2*, research employing quantitative methods has provided, and continues to provide, crucial information about the nature and prevalence of domestic violence. Increasingly, researchers have been combining qualitative and quantitative methods in order to capture different dimensions of domestic violence, to enhance strengths of certain methods, and counter weaknesses of others.

ii. Conducting sensitive research

Researching domestic violence involves researching a 'sensitive topic'. Raymond Lee and Clare Renzetti define a 'sensitive topic' as

[303] Ann Oakley, 'Interviewing Women: A Contradiction in Terms' in Helen Roberts (ed), *Doing Feminist Research* (1981).

[304] Liz Stanley & Sue Wise, *Breaking Out: Feminist Consciousness and Feminist Research* (1983).

[305] Lisa Maher, *Sexed Work: Gender, Race, and Resistance in a Brooklyn Drug Market* (1997) at 229-32.

[306] Lewis et al, above n294 at 51.

> [O]ne which potentially poses for those involved a substantial threat, the emergence of which renders problematic for the researcher and/or the researched the collection, holding and/or dissemination of research data.[307]

Sensitive research may raise ethical, methodological or technical issues for those conducting the research and for those participating in it.[308] There are a range of ethical considerations in conducting research on domestic violence. These include: how to access research participants, how to ensure safety, appropriate ways to ask questions about personal and traumatic topics, making decisions about the extent to probe responses, negotiating on-going contact if required, and providing appropriate referrals where required. In addition there are concerns about the extent to which the researcher is affected by the stories s/he is told. It is also important to consider that research participants also make decisions about their engagement with research on a sensitive topic: making decisions not only to participate but also the extent of their participation.

Perhaps the requests for continuing legal information by some participants raised the most troubling positioning for me as a researcher – to what extent does the researcher influence responses to interview questions, or impact on the process the participant is engaged in, by providing answers to these types of questions? Many participants knew that I had been a solicitor who worked in the area of domestic violence (I provided information about my background and interest in the topic of cross applications when asked) and this knowledge often led people to ask for legal advice. I referred the person either back to the police or to a legal representative, while also providing pointers about the types of questions or issues they should raise when talking to those professionals.

B. An exploratory study

This is an exploratory study. As a PhD research project there are obvious resource limitations that determine factors such as sample size, the process of recruitment, and the extent to which participants from different backgrounds can be included. Small samples have been gathered across the professional groups, often relying on passive snowball methods of recruitment or targeted recruitment. While these approaches have limitations (see below), they provide a

[307] Raymond Lee & Clare Renzetti, 'The Problems of Researching Sensitive Topics: An Overview and Introduction' (1990) 33 *American Behavioral Scientist* 510 at 512.

[308] Elizabeth Stanko & Raymond Lee, 'Introduction: Methodological Reflections' in Lee & Stanko (eds), above n294 at 2.

means to access those professionals who have particular experience in the field of study and thus provide a useful insight into potential directions for future research.

C. Grounded theory analysis

Like many qualitative studies this thesis adopted a grounded theory[309] approach to investigate the qualitative material gathered from the interviews, court files and observations. There is some debate about what grounded theory is and the extent to which researchers actually practice its tenets.[310] For instance, to what extent does coding 'emerge' from the data rather than being shaped by the knowledge that the researcher brings to the topic? Despite many differences in practice and debates about what is grounded theory, this thesis, in the analysis of the in-depth interviews, has been attuned to coding topics raised in the narrative, examining relationships (and differences) between topics, and identifying ideas that emerge directly from the data. Many topics have been developed 'in vivo', that is, in the language of the interview participants. The process of grounded theory is also encouraged by the use of computer programs like NVivo7, used here for the analysis of the interviews with key professionals, which was specifically designed with grounded theory in mind.

2. Introduction to the samples

A. Women involved in cross applications

Ten (10) women involved in cross applications participated in semi-structured, in-depth interviews for this thesis.[311] The interviews were predominantly conducted over November 2002 – October 2003, with one being conducted in April 2008.[312]

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[309] Barney Glaser & Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (1967); Anselm Strauss & Juliet Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (1990).

[310] See Kathy Charmaz, 'Grounded Theory: Objectivist and Constructivist Methods' in Denzin & Lincoln (eds), 'Handbook', above n150.

[311] Another woman was interviewed but was excluded from the study, see above n99.

[312] This woman contacted the researcher after a newspaper article mentioned this research: Jordan Baker, 'Women Pushed to the Brink', *Sydney Morning Herald* (23-24 February 2008) at 31. This woman was interviewed as she had a different experience to that of the other women interviewed, lodging her ADVO second in time and was subsequently found guilty of contravening the ADVO made against her.

i. Recruitment

Women were recruited for the study via the network of WDVCASs. WDVCASs operate in many Local Courts in NSW, and were selected to assist with recruitment as they come in contact with, and provide support to, many women seeking ADVOs. WDVCASs also assist women defendants in ADVO applications where they are also victims of domestic violence.[313] Given the relatively small number of cross applications compared to ADVO applications generally,[314] this was identified as the most efficient means of contacting women involved in cross applications.

Utilising the WDVCAS network also provided a safe way in which to make contact with women who satisfied the selection criteria[315] (that the person had been a party to a cross application involving a current/former intimate partner,[316] and that cross application had been lodged ideally, but not exclusively, within six months of the original application[317]). Recruitment through a WDVCAS meant that the women were already in contact with a support service. This was important as the interview may have brought to the surface issues that the women had not thought about or discussed for some time, if at all, for which they may have required further assistance or counselling.

It was made clear that the other party involved in the cross application would not be interviewed. The reason for this was twofold: to ensure the safety of the interview participant, and to ensure that the person felt that they were able to be open and honest in their answers knowing that the interviewer was not going to interview the other party and compare responses.[318]

After being provided with the 'Participant Information Sheet' by the WDVCAS, a woman could elect to contact the researcher directly. Eight of the ten women

[313] Email communication Julie Stewart, Policy Officer, WDVCAP, NSW Legal Aid Commission (8 December 2008).

[314] See *Chapter 6*.

[315] The Participant Information Sheet is reproduced in Appendix 1.

[316] Initially this included heterosexual and homosexual relationships. The rationale for the limitation to heterosexual relationships is discussed in *Chapter 1*.

[317] This time frame was included in the Participant Information Sheet to ensure some proximity between the applications to be compared.

[318] This means that a detailed comparison of shared accounts such as that undertaken by Dobash & Dobash in 'Working on a Puzzle', above n19, was not possible. However the Dobash's sample comprised men who had been convicted of a criminal offence relating to their current/former female partner and hence features of the criminal justice system that provide some measure of protection, supervision and deterrence were in place. No such environment existed in the present study, thus shared narratives were not examined in interviews. However, it was possible to examine shared narratives in the competing ADVO complaint narratives (see Chapter 7).

interviewed were recruited via this method. One other woman was recruited after her solicitor provided her with information about the research project,[319] and the tenth contacted the researcher directly following a newspaper article that mentioned the research project.[320] In this way the women interviewed selected their involvement. Self-selection is important in a sensitive area of research such as domestic violence which is frequently hidden from public view and which is stigmatised in a range of ways.[321] However, self-selection means that the experiences of the women interviewed are not necessarily representative of all women involved in cross applications. These interviews are supplemented by other data sources relied on in this thesis.

ii. The interview

The in-depth interviews followed a semi-structured interview schedule.[322] This schedule was pilot-tested. The semi-structured format provided scope for the gathering of some comparative information across interviews while also retaining flexibility to pursue areas of concern and interest to the interview participant, and to adjust the order of topics as the interview proceeded.[323] The key advantage of the semi-structured interview process was that it provided space for each woman to articulate in her own words her experience of violence, and her experience of the cross application and the legal process.

Prior to commencing the interview women participants were told about the general structure and nature of the interview. The women were reminded that they did not have to participate in the interview, did not have to answer any questions they did not feel comfortable answering, and could stop the interview at any time.[324] They were also asked whether they had any questions or concerns before the interview commenced.

[319] This solicitor became aware of the research project as a result of the letter to the editor submitted by the author, 'ADVO Researcher Seeks Interviews', *Law Society Journal of NSW* (July 2003) at 6. This solicitor was also interviewed.

[320] See above n312.

[321] Kaye et al, above n15 at 18.

[322] See Appendix 2.

[323] See Mary Ellsberg & Lori Heise, *Researching Violence Against Women: A Practical Guide for Researchers and Activists* (2005) at 130-131; Alan Bryman, *Social Research Methods* (2001) at 314-15; Lesley Noaks & Emma Wincup, *Criminological Research: Understanding Qualitative Methods* (2004) at 79. The requirement for flexibility was clearly demonstrated in the only interview conducted with a man (see discussion of recruitment of male participants below); at first I attempted to follow the interview schedule, however it became clear that this man simply wanted to recount his story almost as a monologue. As a consequence I followed his lead and abandoned the schedule and relied on occasional prompts to ensure coverage of key areas.

[324] See Appendix 3 for the Consent to be Interviewed form.

While most interviews took approximately two hours, some were considerably longer often interrupted by lunch and, on occasion, discussions continued after the interview.

The interview schedule sought to provide multiple opportunities for disclosure and recall.[325] It commenced with demographic questions, and a general question about how the woman would describe her relationship (and conversely how she thought her current/former partner would describe the relationship). This was followed by a focus on her ADVO application, and the cross application. The schedule then returned to questions about the experience of violence; when violence first commenced, what was the worst thing that happened to her, what was the most common, and how frequently violence occurred.[326] This approach was intended to elicit greater disclosure as trust and comfort levels were established as well as enabling multiple opportunities for recall. This approach left it open to women to describe and nominate certain events and to ascribe their own meaning to the violence and abuse they experienced, rather than answering questions based on a rigid list of specific types of violence. This means that some women may have volunteered information about certain acts, such as sexual assaults, while others may not have defined various coercive sexual relations as assaults (or as domestic violence).[327] It also allowed women to describe acts that they found to be abusive or controlling that do not fit neatly within traditional categories of violence.

Six interviews were conducted face-to-face and four were conducted over the telephone. Face-to-face interviews were generally conducted at a support service close to where the woman resided. Two women were interviewed in their homes. All but one interview was tape-recorded with the consent of the participant and

[325] See Martin Schwartz, 'Methodological Issues in the Use of Survey Data for Measuring and Characterizing Violence Against Women' (2000) 6 *Violence Against Women* 815 at 820 where he discusses the importance of asking similar questions in different ways at different times during an interview. Schwartz points out the usefulness of 'open-ended questions…as they increase the opportunity to build researcher-respondent rapport, allow respondents to qualify responses…and reduce the hierarchical nature of traditional survey research': at 820-821, references omitted. See also Walter DeKeseredy, 'Current Controversies on Defining Nonlethal Violence Against Women in Intimate Heterosexual Relationships' (2000) 6 *Violence Against Women* 728 at 741.

[326] These types of questions were formulated by Dobash and Dobash: 'The Context-Specific Approach' above n21 at 267-268. See also the inclusion of general questions about how the woman would describe her relationship: at 267.

[327] Kelly, 'Surviving Sexual Violence', above n165 at 10.

transcribed in full.[328] Extensive notes were taken for the interview that was not tape-recorded.

The in-depth interviews with women were analysed and coded for themes in Word.

The women interviewed for this research, who are quoted extensively in this thesis, are referred to by a pseudonym, rather than a code number, to retain the sense that the experience and story is that of a person. There is a risk that this is lost when people are referred to by numerical codes.

iii. Profile

Over half of the women interviewed were in their mid 30s. Six were aged 32-38, three were aged 40-50 and one woman was in her early 20s. At the time of the interview, five lived in Sydney, and five lived in rural or coastal areas of NSW.

Seven women had been married to the perpetrator, one had been in a de facto relationship and for two the perpetrator was a non-cohabitating boyfriend.

All but two relationships (which were for less than one year) had been of lengthy duration: two for eight years, three for ten-12 years, two for 14-15 years and one over 20 years.

Seven women had children with the perpetrator. Three had three children, and four had two children. For all but one of these women, whose children were adults, the children were dependent and resided with the mother.

At the time of the interview all the women had ended their relationship with the perpetrator. For six women this was the first, and final, separation. Three women had previously separated on one occasion. The remaining woman had separated over 15 times from the perpetrator, initiated variously by her and the perpetrator. At the time of the interview one woman had been separated for eight months, one for 18 months, five women had been separated for around two years, one had been separated for four years, another for over five years and one for nearly eight years. All these women detailed continuing experiences of violence and abuse despite the length of separation.

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[328] This was conducted by a professional transcriber.

With the exception of one woman, who was born in a non-English speaking country, all were born in Australia. There were no women from ATSI backgrounds interviewed in this research. The absence of women from different cultural backgrounds is a limitation of this research.[329]

The nature of the violence experienced by the women interviewed was extensive and complex. It is explored in detail in *Chapter 5*. All experienced some form of physical violence, many on multiple occasions. Four women spoke of sexual assaults. With one exception, all women had threats issued against them or towards people close to them. All women interviewed experienced other forms of abuse including verbal abuse, damage to property, phone and SMS messages, stalking, isolation from family and friends, and the use of children to further harass or intimidate the woman.

This was the first ADVO application for five women and all were accompanied by a cross application. The remaining five had applied for more than one ADVO, not all of which had been subject to a cross application; for three this was their second ADVO application, and two had sought multiple ADVOs.

B. Men involved in cross applications

It was originally planned that a sample of men involved in cross applications would be interviewed for this thesis. Several recruitment methods were used in an attempt to achieve this. Unlike women involved in ADVO applications, men do not have the same formal support organisations that could be accessed by the researcher to facilitate recruitment.

The first method of recruitment involved contacting clerks of selected Local Courts and asking them to distribute the Participant Information Sheet to men involved in private cross applications.[330] Men could then initiate contact with the researcher. This garnered no responses.

Solicitors interviewed for this research were also asked to pass on information about this research to any clients they had who had been involved in cross

[329] See *Chapter 1*.

[330] See Appendix 1.

applications. As a result one solicitor referred a woman involved in a cross application to the researcher. No men were recruited via this method.

In 2006 men's or fathers' rights groups were contacted to facilitate recruitment. One fathers' rights group, of their own accord, listed the research project on their website.[331] As a result two men made contact with the researcher. Both of these men resided in another Australian jurisdiction. It was decided that they would be interviewed, given that the primary issues explored in this thesis are not so much concerned with specific jurisdictional issues, but rather conceptual or definitional issues that have applicability across jurisdictions. One of these men was interviewed via the telephone. Arrangements to interview the second man by telephone fell through and he ended up expressing a strong preference for a face-to-face interview and tentative arrangements were made to interview him when he next visited Sydney. Contact with this man eventually ceased and he did not recontact the researcher to make arrangements for the interview.

The final method of recruitment involved attending court on an ADVO list day and approaching men involved in cross applications and providing them with information about the research. This was a very time consuming method of recruitment; it depended not only on a cross application being listed, but the parties attending court, and the man being willing to participate. No male participants were recruited via this method. While this was very time consuming, this time was utilised to conduct court observations (see below).

The interview with the single male participant has been excluded from this study, as it represents only one male experience from another jurisdiction.

Similar difficulties in recruiting men were encountered by Clare Connelly and Kate Cavanagh in their study of protection orders in Scotland (indeed, like the present study, they were not successful in recruiting any men for their study).[332] Connelly and Cavanagh noted that this difficulty was created by the absence of

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[331] Dads in Distress <http://www.dadsindistress.asn.au/printversion/printversionnews_2006_01.html> (8 February 2009).

[332] Clare Connelly & 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 at 265.

male support services and the small number of men applying for protection orders, which meant that there was also a smaller pool of potential interviewees.[333]

While this thesis would be stronger if men had been interviewed, the limits of engaging, or continuing with recruitment methods, as a sole researcher without additional funding, meant that it was not possible to do so. The types of violence and other acts that form the content of men's cross applications was able to be captured via two secondary methods: (1) from the examination of court files; and (2) asking women in their interviews about the nature of the complaint made against them. In some interviews with professionals, views about men and the nature of their complaints were also gathered.

C. Key professionals with experience with ADVOs and cross applications

Five groups of key professionals were interviewed: NSW Local Court magistrates, solicitors, police prosecutors, NSW Police DVLOs, and coordinators of WDVCASs. Small samples from each professional group were interviewed. This was due to the constraints of a PhD research project and the nature of an exploratory project. Thus the analysis of interviews with key professionals is not representative, but rather presents the view of selected individuals who work within targeted professional occupations. In fact the variability of some responses within the same professional group provides a good illustration of the range of views and attitudes held within a single profession. This form of purposive sampling, while not representative, is an efficient means of gathering the views of experienced practitioners from across the spectrum of professionals working in the field.[334]

A semi-structured interview schedule was developed to interview the professionals.[335] The interview followed a similar format for all groups, with variations to take account of the different work performed by the different groups. It was divided into five sections: (1) work experience; (2) understanding

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[333] There are far fewer applications in Scotland (123 over the seven month period studied) compared to NSW (over 30 000 each year). The numbers of male applicants in Scotland was therefore very small (3) compared to the potential pool in NSW.

[334] See Michael Maxfield & Earl Babbie, *Research Methods for Criminal Justice and Criminology* (5th ed, 2008) at 235.

[335] See Appendix 4.

of domestic violence; (3) cross applications in the work setting; (4) outcomes of cross applications; and (5) recommendations.

The in-depth interviews with professionals were analysed using NVivo7. An initial analysis identifying main themes was conducted in Word to allow for a process of familiarisation with the data prior to coding within NVivo7. This familiarisation process was also employed to offset the 'drive' to code within NVivo7 which risks losing sight of not only the individual interview but also its place and relationship to other interviews and data samples.

i. Magistrates

Five magistrates of the NSW Local Court were interviewed. Magistrates were recruited via an email from the Chief Magistrate, forwarded to all NSW magistrates, informing them about the research and inviting them to contact the researcher. Few magistrates responded to the first email and a second email was sent. Given the slow response, the initial magistrates interviewed were asked to invite their colleagues to participate, that is, a passive snowball method was used.

John Baldwin in his research on the criminal courts in the UK notes the general reluctance of members of the judiciary to participate in empirical research projects (although he suggests that lay members of the magistracy are not necessarily so disinclined).[336] Baldwin also noted the negative impact that previous research which has had an 'unpopular reception' may have on attempts to recruit professionals for subsequent research projects.[337] In 1999 the NSW Judicial Commission conducted a survey of magistrates about AVOs and domestic violence.[338] The results of this survey were poorly received by magistrates (although perhaps it is more accurate to say that the media coverage generated by the publication of the report was poorly received[339]). This experience may have meant that magistrates were disinclined to volunteer to participate in another study about domestic violence.

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[336] Baldwin, above n140 at 248.

[337] Ibid at 250-254.

[338] Hickey & Cumines, above n57.

[339] See Cindy Wockner, 'Nagged into it', *The Daily Telegraph* (30 August 1999) at 1; Linda Doherty, 'Fury over Dinosaur Magistrate', *The Sydney Morning Herald* (31 August 1999) at 5.

There were frequently time constraints on these interviews, which meant that it was necessary to edit the interview schedule to fit the time that was available.

The five magistrates interviewed represented a broad range of experience within the magistracy; one had been a magistrate for 28 years, one for 14 years, two had between six and seven years experience and one had recently been appointed. Three of the magistrates were women and two were men. All magistrates interviewed presided over courts in Sydney, but many had worked in courts in other parts of NSW. All interviews were conducted face-to-face, tape-recorded and transcribed.

ii. Solicitors

Five solicitors were interviewed, three men and two women.[340] Two solicitors were in private practice in rural NSW, two worked for community legal centres, and the remaining solicitor worked for the NSW Legal Aid Commission. Four solicitors were recruited via a letter to the editor published in the *Law Society Journal of NSW*.[341] The remaining solicitor was known to the researcher and was selected for her extensive experience with ADVOs.

All the solicitors had been in practice for over five years, with three having been in practice for over ten years. The extent of their practice in the area of domestic violence (including the broad spectrum of legal matters this might entail) varied; for one solicitor 100 per cent of her work was domestic violence related, three estimated that between 15 and 50 per cent of their workload concerned domestic violence, while the remaining solicitor estimated that only six to seven per cent of his work concerned domestic violence.

With one exception all interviews were conducted face-to-face, tape-recorded and transcribed. For the interview conducted via the telephone the reception was so poor that tape-recording for transcription purposes was not possible, instead extensive notes were taken.

[340] The researcher met with another solicitor, however, an interview was not conducted as he simply wanted to discuss a case he handled in 1991 and had no recent experience with ADVOs.

[341] Above n319.

iii. Police Prosecutors

Five police prosecutors were interviewed. Recruitment was facilitated by an officer of the Legal Branch, NSW Police, who advised that the best method of recruitment was a targeted approach. The officer of the Legal Branch selected five prosecutors who worked in the three metropolitan courts where the court files had been gathered for this research. All the interviews with police prosecutors were conducted in 2006. After completing these interviews a further five questions arising from the interviews were asked via email. Only two prosectors answered these additional questions.[342]

I also requested that the officer in the Legal Branch forward a general email to all prosecutors inviting them to participate in this research. This garnered no volunteers.

There are obviously issues concerning the representativeness of the prosecutors specifically targeted by the officer of the Legal Branch to participate in the research, as the legal officer clearly performed a gate-keeping role. In addition the 'voluntariness' of the interview process was compromised: at least one of the participants gave the impression that she felt compelled to participate. PP4 appeared very reluctant and partially hostile during the interview. On multiple occasions she stated that she had little, if any, experience with cross applications despite indicating that 50 per cent of her work concerned domestic violence. Her responses to questions tended to be either affirmative or negative (yes/no) without elaboration, or that she did not have any experience or knowledge of the area.

Two of the prosecutors had been in this role for over ten years, one for nine years, and two for less than five years. Three were male and two female. All estimated that over 20 per cent of the workload would, to some extent, involve matters concerning domestic violence. Three prosecutors estimated that at least half of their work concerned domestic violence.

All interviews were conducted face-to-face and, with the exception of PP4, all interviews were tape-recorded and transcribed in full. PP4 did not want to be recorded and, as a result, extensive notes were taken.

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[342] PP2 and PP5.

iv. Domestic Violence Liaison Officers

Six DVLOs were interviewed. Initially recruitment was sought via an email forwarded by the Domestic Violence Policy Officer, NSW Police to all DVLOs inviting them to make contact with the researcher. This garnered few responses and a follow-up email was sent. Two DVLOs were recruited via this method. A further two DVLOs were selected via a passive snowball method. The remaining two DVLOs had prior contact with the researcher and were invited to participate in this current research project (a convenience sample).

Interviews were conducted with DVLOs over 2005-2006. All the DVLOs interviewed were women.[343] Three of the DVLOs had been a police officer for less than three years, two between 7 and 9 years, and one for 28 years,[344] and the duration of appointment as a DVLO varied; two had been a DVLO for under one year, one for 18 months, two for between three and four years and one for eight or nine years.[345] All were currently stationed in a Local Area Command (LAC) in Sydney, and none had experience outside the metropolitan area (although they had been stationed in other LACs in Sydney). All the DVLOs interviewed were employed as DVLOs on a full-time basis. This meant that all their work was related to domestic violence, with the exception of one DVLO who also performed some general duties work as a result of her station being short-staffed. All interviews were conducted face-to-face, tape-recorded and transcribed.

v. Women's Domestic Violence Court Assistance Scheme coordinators

Five coordinators of WDVCASs were interviewed.

WDVCASs are funded by the NSW Legal Aid Commission to provide support and information to women involved in ADVO matters at various NSW Local Courts. The coordinator position is funded, and the support workers are generally seconded from local services (for example, from refuges, family support services and women's health services). A small number of WDVCASs have additional

[343] Women comprise 75.8% of DVLO positions in NSW (at 31 August 2006): email communication Gregory Urch, Acting Sergeant, Project Officer, Domestic & Family Violence NSW Police (20 September 2007). Compare women comprise only 25.5% of all staff positions (sworn and unsworn staff): NSW Police, *Annual Report 2005-2006* at 19. It was suggested by interview participants, that the DVLO position is attractive to women with family responsibilities as the position generally works business hours.

[344] The average length of a DVLOs service as a police officer is 12.7 years (at 31 August 2006): email communication with Urch, above n343.

[345] The average length of service as a DVLO is 2.6 years (at 31 August 2006): ibid.

funded positions reflecting the demand for their service and the profile of their clients [for example, some employ an Indigenous worker, or a culturally and linguistically diverse (CALD) worker]

All the WDVCAS coordinators interviewed were women. One had been a coordinator for two-and-a-half years, two for over four years, and the remaining two for over seven years. Two WDVCAS coordinators worked in rural areas, the remainder worked in Sydney. One of the WDVCAS coordinators currently working in Sydney had previous experience in the same role in a rural area. All the work of WDVCAS coordinators is related to domestic violence. Four interviews were conducted face-to-face and one over the telephone. All were tape-recorded and transcribed.

D. The documentary component

A documentary analysis was conducted of court files collected for a 12 month period (March 2002 – February 2003) at three large Sydney Local Courts (CourtA, CourtB and CourtC). These three courts were selected because they process a high level of ADVOs each year and are regularly placed in the top ten Local Courts for ADVO workload. In 2002, when the cases that comprised the court files were determined, the three courts dealt with between 915 and 1152 applications each.[346] A year was selected as the sampling period to eliminate the effects of possible peaks and troughs in the use of the ADVO system as a result of holidays, special events and so on.[347]

Seventy-eight (78) complete cross applications[348] were identified in the court file analysis, representing a total of 156 individual applications. Ten of these complete cross applications were made on exactly the same date ('dual applications'), the remaining 68 were made on different dates. A further seven 'incomplete' cross applications were identified. 'Incomplete' cross applications refers to the situation where only one, or 'half', of the applications was located, however it was clear from the text of the complaint that there had been an earlier ADVO application by the defendant against the person now seeking an ADVO

[346] Local Courts NSW, '2002', above n65, Table 2.2.

[347] See Rochelle Braaf & Robyn Gilbert, *Domestic Violence Incident Peaks: Seasonal Factors, Calendar Events and Sporting Matches* (2007).

[348] Cross applications in which a full, or paired, set of complaints was located.

(whether or not that original application resulted in a final ADVO).[349] These types of cross applications were the most difficult to identify as they were dependent on the complaint actually making some reference to the earlier ADVO complaint or order. Therefore it must be acknowledged that the identification of cases within this category is far from comprehensive.

Each cross application has been given a code number identifying the court and the applications (for example, CourtA-1); where it is not clear from the text which application is being discussed greater identification has been provided [for example, CourtA-1 (Private M 2nd) indicates that the application being discussed is the private male application second in time].

i. Profile of location of the courts studied

Table 3.2 provides an overview of the profile of the Local Government Areas (LGA) in which the three courts where court files were gathered are located.[350]

Table 3.1: Profile of Local Government Areas for court file sample

	LGA (CourtA)	LGA (CourtB)	LGA (CourtC)	Australia
Median age	32	32	37	37
Indigenous population	2.6%	2.4%	0.6%	2.3%
Population born overseas	34.3%	20.5%	16.5%	22.2%
Rate of unemployment	6.8%	5.3%	2.9%	5.2%
Median household income ($ per week)	1105	1147	1374	1027

According to the 2006 Socio-Economic Indexes for Areas (SEIFA) Index of Social Disadvantage,[351] CourtA and CourtB are ranked within the top 15 areas of Sydney for disadvantage, while CourtC is located within the 15 areas with lowest disadvantage.

[349] Other complaints were identified that made reference to the other person also having alleged that they had been violent or abusive. These were excluded unless they made specific reference to an ADVO against the applicant.

[350] Data gathered from the 2006 Census using the QuickStats tool available of the ABS website searching location: <http://www.censusdata.abs.gov.au/ABSNavigation/prenav/LocationSearch?ReadForm&prenavtabname=Location%20Search&&&navmapdisplayed=true&textversion=false&collection=Census&period=2006&producttype=&method=&productlabel=&breadcrumb=L&topic=&> (8 February 2009).

[351] SEIFA weighs a range of factors to assess disadvantage (income level, unemployment, educational attainment, skilled/unskilled occupations, and other variables that reflect disadvantage). The rankings noted in the text are derived from the Local Government website for CourtA.

ii. Nature of an ADVO court file

Court files were examined to gather quantitative and qualitative information about the nature of cross applications.

Court files contain documents, generally produced by the police and court, which provide the information necessary to process and determine an ADVO application. ADVO court files are generally small (the vast majority would be less than ten pages in length, with many being considerably shorter). While a file may be up to ten pages it is important to note that the actual text of the complaint is very short; almost half of the complaint narratives examined in this study were less than ten lines in length.[352] A file generally includes: a cover page generated for court administration purposes (this indicates the magistrate, whether the parties are represented and the outcome of each court appearance), a copy of the ADVO application (this contains information about the parties, their relationship, the nature of the complaint and the orders sought), a copy of the affidavit of service, and any interim orders that may have been made. Very few court files contain information in addition to this. Occasionally there may be letters written by the parties to the court (for example requesting an adjournment or withdrawal, or that their address be kept confidential), pieces of evidence, and other material. If there were criminal charges associated with the ADVO, sometimes the charge fact sheet is appended to the court file, however, this was rare and only occurred for two cases in the court file sample.[353]

iii. Information gathered from the court files

A data collection sheet was developed to gather quantitative data from the court files.[354] This recorded such matters as: whether the man or the woman was the first in time, the type of ADVO (that is, a private or police application), the contents of the complaint (was there a history of violence, was the complaint confined to a single incident, the types of acts/behaviour alleged, fears held), whether the parties had legal representation, how the applications were dealt with by the court, and whether there were any related legal proceedings.

[352] See *Chapter 4*.

[353] CourtA-6 (Olivia and John) and CourtC-17.

[354] See Appendix 5.

The quantitative data gathered from the court files was analysed through the use of a Microsoft Access database created for this research. Most of the questions posed in the data collection sheet required a yes/no response and were coded as such.

The data collection sheet also enabled the recording of additional comments or matters of interest, for example: whether either party sustained injuries, there were any related family or criminal law proceedings, either party had sought a previous ADVO, the woman was pregnant in any incident detailed in her complaint, and whether one of the parties was trying to leave or separate.

iv. The nature of documentary analysis

Documentary analysis, like all methods of data collection, possesses a number of limitations, particularly relating to the process of production. Questions need to be asked about who is the author (and conversely who is not the author), for what purpose the document has been produced, under what conditions the document has been produced, what information has been selected for inclusion and alternatively omission, what is the meaning of the document (or parts of the document), and how is the document to be read and understood (are different readings and meanings possible).[355]

These considerations are particularly pertinent for court files and police records which have been produced and compiled for a particular purpose, for example a criminal charge, or in this case an ADVO complaint. The 'particular purpose' often means that an ADVO complaint does not necessarily contain information beyond what is deemed necessary to achieve that purpose. ADVO complaints are generated in two ways; via the police or via the chamber magistrate (referred to as a private complaint). In both instances victims of domestic violence generally provide some account of what has been happening to them and it is translated into an ADVO complaint. For some police initiated complaints this may take place at the scene of an incident, where there may be a number of competing priorities for the police officer charged with writing the complaint, for example, arresting the perpetrator and providing assistance to the victim. Thus the resultant complaint for an urgent TIO may be very short and only detail the presenting

[355] See discussion in Bryman, above n323 at 302; and Victor Jupp, 'Documents and Critical Research' in Roger Sapsford & Victor Jupp (eds), *Data Collection and Analysis* (1996) at 303.

incident. In other situations victims may attend the police station or attend the chamber magistrate's office and request an ADVO. In these instances greater time may be available to generate a more detailed account of the violence that has been alleged to have been experienced by the complainant.

Other studies that have examined police or court records, for example the study by Rebecca Dobash and Russell Dobash[356] concerning domestic homicide, found that while police records do not contain 'elaborate information', particularly when compared to in-depth interviews, police records nevertheless contain 'some account of the source of the argument, form of physical attack, injuries received, presence of witnesses and the response of the police'.[357] The same cannot be said for many of the cases examined in this study of cross applications. The astounding lack of detail in many complaints, and the inclusion of irrelevant and inadmissible evidence, must be commented upon, not only as creating limitations for this component of the research, but also in terms of the ADVO process itself. The way in which complaints for ADVOs are crafted, the story that they tell (and the story that they fail to tell) about domestic violence, is of particular importance to whether a case proceeds and particularly how cross applicants assess their prospects and are themselves assessed by various key professionals as they enter the court system. The quality of the complaint narrative and its production is discussed in detail in *Chapter 4*.

v. Limitations specific to the study of cross applications

A number of limitations in the documentary component were specific to cross applications. While NSW Local Courts have a computer record of the names of parties involved in a case, its number and its final resolution there is no computerised system by which cross applications can be identified. As a result it was necessary to rely on, count, and review the paper court files held by the various Local Courts. This created a number of limitations:

- There is a bias towards cross applications that were eventually listed together. It was virtually impossible to locate a cross complaint that was made some time after the original complaint (a small number of these types of cross

[356] Rebecca Dobash & Russell Dobash, 'The Nature and Antecedents of Violent Events' (1984) 24 *British Journal of Criminology* 269.
[357] Ibid at 272. See also Lewis et al, above n294.

complaints were located but this was achieved through an ad hoc process rather than systematically) as I was reliant on linking names that appeared on the court list and this was most obviously, and easily, achieved when the cases were listed on the same day.

- Only the court files for the ADVO list day were examined. While most ADVOs are listed on that day, not all are; some may be listed on other days because they are urgent matters, or have been listed with related criminal charges, or for other reasons such as a simple error in listing or the availability of parties.
- The paper nature of the court files necessitated manual counting; this frequently required tracking a complaint over a lengthy time period (some complaints took over nine months to resolve). Following and recording paperwork in this manner obviously creates room for error.
- Many details were missing from ADVO applications (for example not all complaints were dated, service affidavits were not always attached to court files, the age of the parties and the relationship type was often absent, incorrect or partial). For this reason I have not noted the relationship type or age of the parties in the analysis of the court file sample in subsequent chapters as there were too many errors or missing data.

While there are multiple limitations associated with the documentary component of the study, the data was not available in any other format or accessible via any other method that might have alleviated these limitations.

E. The observation component

As noted above, I initially observed court proceedings as a method of recruiting male applicants involved in cross applications. While this was ultimately unsuccessful, the observations themselves began to highlight other dimensions of the ADVO process that were striking and had potentially key implications for cross applications and understandings of domestic violence in the legal setting; for example: the virtual absence of any discussion about domestic violence; the brevity of proceedings; and the way in which some of the matters that are expressed in cross applications also have some articulation, on occasion, in general ADVO matters. For this reason court observations were incorporated into

the research strategy. I developed a data sheet to record details[358] including: the gender of the complainant and defendant, the nature of the application (police or private), whether an interpreter was required, whether the parties were represented, the demeanour of the magistrate,[359] and whether there was any discussion, via comments, submissions or evidence about the nature of the violence alleged.

As will be discussed in *Chapter 4*, the brevity of proceedings and the tendency for these proceedings to concentrate on procedural, rather than substantive, issues meant that frequently these details could not be identified or recorded.

Observations were conducted at two courts (CourtC[360] and CourtD) from the end of 2006 to early 2007. Both of these courts are busy Sydney metropolitan courts. A total of 73 ADVO mentions were observed, and two hearings (however one of these settled on the date of the hearing).

Court observations ceased once the point of saturation had been reached;[361] that is, the point where no new themes or issues emerged. In the end what was significant about the court proceedings observed was the speed of the process and what was absent from the process – the lack of any substantive articulation about domestic violence, or indeed any comment at all. See *Chapter 4*.

3. Summary

This chapter has detailed the methodology employed in this thesis. It is a multi-method inquiry, gathering qualitative and quantitative data through four main sources: in-depth semi-structured interviews with women, in-depth semi-structured interviews with key professionals, documentary analysis of court files, and court observations. In many ways the quantitative analysis of the court files usefully highlights the limitations of a counting approach devoid of context when it is counterpoised with the qualitative material gathered from the court files and the in-depth interviews. In this way it demonstrates in practical terms many of

[358] See Appendix 6. This data-sheet was used for court observations from 18 October 2006, prior to this time field notes were taken.

[359] Following Ptacek's work: above n13.

[360] Court files were also examined at this location; hence the court has been identified by the same code.

[361] Strauss & Corbin, above n309 at 212. Theoretical saturation is where, for the category identified, no new concepts are emerging, the category observed is well-developed (or not extending further), and the relationship between categories is 'well established and validated'.

the debates about definitions explored in *Chapter 2*. As noted by Denzin and Lincoln qualitative research that utilises multiple methods in a single study is a 'strategy that adds rigor, breadth, complexity, richness, and depth to any inquiry'.[362] The next chapter provides an outline of the legal environment of this study and *Chapters 5-9* present the findings of the empirical study.

[362] Norman Denzin & Yvonna Lincoln, 'Introduction: The Discipline and Practice of Qualitative Research' in Denzin & Lincoln (eds), 'Collecting and Interpreting', above n297 at 8.

4. The legal environment of this study

This chapter provides an overview of the legislation relating to ADVOs and its practice in order to place the empirical analysis in *Chapters 5-9* in context. It also draws on that empirical data (particularly the interviews with key professionals, the court file data, and court observations) to analyse or make comments about legal practice. The chapter highlights two key areas of concern: the inadequate nature of many ADVO complaint narratives; and the institutional setting of the Local Court which means that cases are dealt with in very brief proceedings and settlement is emphasised. These two facets are integral to the story that is told (or not told) about domestic violence, and therefore critical to how competing claims made by men and women in cross applications are approached and dealt with. This analysis demonstrates how issues that arise for ADVOs generally, take on a more concentrated focus in cross applications.

1. Overview of the ADVO legislation

At the time of the fieldwork (2002-06), the legislation governing ADVOs was contained in a dedicated section of the *Crimes Act* 1900 (NSW), Part 15A.[363]

A. Two types of orders

There are two types of protection orders in NSW: (1) ADVOs for people who have some domestic or familial relationship, and (2) APVOs where the people have no such relationship, for example neighbours or work colleagues.[364] In essence the two orders, and the procedures under which they are obtained, are largely the same. The main differences are:

[363] This has since been replaced by a stand-alone Act: *Crimes (Domestic and Personal Violence) Act* 2007 (NSW). Few substantive changes were made to the law. As explained in *Chapter 1* footnote references are provided to the law at the time of the fieldwork, the new provision and any changes to the law if relevant.

[364] At the time of the fieldwork ADVOs and APVOs were separated in two divisions of Part 15A. While the new Act still provides for the two types of orders, they have not been similarly delineated.

- ***Statement of objects.*** In 1999 a statement of objects was inserted to guide the ADVO provisions.[365] A similar guiding statement was not introduced for APVOs until 2006.[366]

- ***Role of the police.*** The police have a strong legislative obligation to apply for ADVOs,[367] and have no similar obligation in relation to APVOs.

- ***Discretion to refuse to issue process.*** An authorised justice (usually the chamber magistrate) has no discretion to refuse to commence proceedings for an ADVO application, but does have such discretion in relation to APVO complaints. Thus while a chamber magistrate may refuse to accept a complaint for an APVO, s/he must accept *all* applications for ADVOs regardless of the content and nature of the allegations made.[368]

- ***Referral of cases to mediation***. Generally ADVO matters are not considered appropriate for mediation,[369] whereas APVOs, with some limitations, are. Thus APVO cases may be referred to mediation at various stages in the complaint process.[370]

- ***Costs provisions***. ADVO applicants enjoy considerable protection from costs orders if their applications are unsuccessful.[371] This is not the case for APVOs, where costs may be awarded where the court considers it 'just and reasonable'.[372]

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[365] By the *Crimes Amendment (Apprehended Violence) Act* 1999 (NSW). This was expanded by the *Crimes Amendment (Apprehended Violence) Act* 2006 (NSW) s562I, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s9(3)(d). Minor semantic changes were made by the new Act. See discussion in *Chapter 2*.

[366] By the *Crimes Amendment (Apprehended Violence) Act* 2006 (NSW).

[367] *Crimes Act* 1900 (NSW) s562C(3)-(3A), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s49.

[368] It is interesting to note that one authorised justice at CourtC made a notation on some cross applications that it was a '*****CROSS APPLICATION*****': see CourtC-1 (Private W 2nd); CourtC-14 (Private M 2nd); CourtC-25 (Private M 2nd); and CourtC-29 (Private M 2nd).

[369] Cases where there is a 'fear of violence' are generally not considered appropriate for mediation: see <http://www.lawlink.nsw.gov.au/lawlink/community_justice_centres/ll_cjc.nsf/pages/CJC_faqs#h2> (24 January 2009). However some cases involving ADVOs are mediated by the CJC: see NSWLRC, *Mediation and Community Justice Centres: An Empirical Study* (2004) at [3.6]. One case in the court file sample was mediated: CourtC-18.

[370] *Crimes Act* 1900 (NSW) s562AK(5)(d), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) ss21 and 53(4)(b). In 2005 the chamber magistrate referred 12.8% of APVO applicants to the CJC: Local Courts NSW, '2005', above n25, Table 1.3.

[371] *Crimes Act* 1900 (NSW) s562N. Costs may only be awarded in a private ADVO application where the court is satisfied that the complaint was 'frivolous and vexatious': s562N(2); or in a police application where it is satisfied 'that the police officer made the complaint knowing it contained matter that was false or misleading in a material particular': s562N(3). Now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s99(3)-(4).

[372] In accordance with the *Criminal Procedure Act* 1986 (NSW), Div 4, Part 2 of Ch 4, see *Crimes Act* 1900 (NSW) s562N(1), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s99.

While not part of the legislation, the other key difference between ADVOs and APVOs is the availability of legal aid. Legal aid, subject to a means test, is available to complainants in ADVO matters, but it is generally not available to defendants in ADVO matters or complainants and defendants in APVO matters.[373]

B. Commencement

The ADVO system is initiated via the making of a complaint. A complaint may be made by the police on behalf of a person (often referred to as the 'person in need of protection' or PINOP), or by the person themselves to an authorised justice (usually the chamber magistrate at the Local Court), this is known as a 'private complaint'.[374] Both methods of commencing an application are dealt with in the same way and result in the same orders, where granted.

The police in NSW initiate over 70 per cent of ADVOs. This is a consequence of the strong legislative obligation placed on police to do so,[375] and stands in marked contrast to other Australian jurisdictions.[376] It is worth noting that, while the NSW obligation requiring police action is certainly strong, it is not without discretion.[377]

When the police attend an incident, they may also seek an urgent protection order if required. When the fieldwork was undertaken this was known as a Telephone

[373] At the time of the fieldwork this policy was less than clear in relation to cross applications; aid was only available to a defendant in a cross application if that application was lodged within three months of the original application. Thus running the risk of facilitating a 'first-in-first-served' approach: Legal Aid Commission of NSW, *Legal Aid Policies* (2006) at [7.1(a)(iv)-(v)]. In March 2008 this policy changed now aid is available to ADVO defendants where Legal Aid is 'satisfied that the defendant …is a victim of domestic violence': Legal Aid NSW, Criminal Law Matters Guidelines at [1.9.2] available at <http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=755&cid=993&link=Guideline|criminal_law|9#paragraph_11465> (23 January 2009).

[374] *Crimes Act* 1900 (NSW) s562C(1), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s48(2).

[375] *Crimes Act* 1900 (NSW) s562C(3)-(3A), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s49. The new Act provides additional guidance regarding the police discretion not to apply for an ADVO.

[376] Other Australian jurisdictions do not have a similar obligation and this absence is reflected in the statistics: in Victoria only 24% of intervention orders in 2002-03 were police applications: VLRC, *Review of Family Violence Laws: Consultation Paper* (2004) at [7.39]. A new Victorian Police Code of Conduct has seen the number of orders sought by the police increase markedly: Victorian Community Council Against Violence, above n25 at 17. Research conducted in Queensland in 2001 found that 46% of protection orders were sought by the police: Douglas & Godden, above n63 at 19. In the ACT police may apply for protection orders and have an obligation to apply for emergency orders in certain circumstances: see *Domestic Violence and Protection Orders Act* 2001 (ACT) s11 generally and Part 7 for emergency orders. While police involvement in protection order applications has been encouraged in Australia, overseas jurisdictions have debated the desirability of such 'third-party' applications: see Cathy Humphries & Miranda Kaye, 'Third Party Applications for Protection Orders: Opportunities, Ambiguities and Traps' (1997) 19 *Journal of Social Welfare and Family Law* 403; and Burton, above n241 at 47-52.

[377] *Crimes Act* 1900 (NSW) s562C(3)-(3A), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s49.

Interim Order (TIO).[378] TIOs provide the police with a mechanism to obtain an urgent order by telephoning[379] a magistrate when the incident occurs outside court hours or an impracticable distance from court. TIOs are temporary, at the time of the fieldwork lasting up to 14 days,[380] during which time the parties are required to attend court for the order to be dealt with like any other application.

There are many recognised advantages of the police obligation in NSW.[381] These include:

- representation by the police prosecutor,[382]
- greater insulation against a costs order,[383]
- the symbolic function of the police acting for a victim of domestic violence (reinforcing the message that domestic violence is a 'crime'), and
- reinforcing to police that domestic violence is part of their work.[384]

There may, however, still be a variety of reasons why a person may choose to initiate a private application. These include: a previous (or current) poor response from the police, the desire not to involve the police, and the benefits of instructing one's own legal representative and hence retaining greater control over the proceedings.[385]

i. Who can apply for an ADVO?

A person who is, or has been, in a 'domestic relationship' with the perpetrator may apply for an ADVO. 'Domestic relationship' is defined broadly and includes current/former intimate partner relationships (the focus of this thesis[386]),

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[378] Now known as 'provisional orders': *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) Part 7, which also expanded the circumstances and methods under which the police may apply for such orders.

[379] This may now be performed via 'telephone, facsimile or other communication device': *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s25(1).

[380] Now 28 days: *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s32.

[381] Hunter & Stubbs, above n16 at 15.

[382] While this is a benefit it is important to note that some women in the present study were critical of the representation provided by police prosecutors: *Chapter 9*.

[383] *Crimes Act* 1900 (NSW) s562N, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s99(4).

[384] See submissions in NSWLRC, 'AVOs', above n11 at [6.32]-[6.33].

[385] See ibid, at [6.34]; Kaye et al, above n15 at 51.

[386] See *Chapter 1*.

relatives,[387] people living in the same residential facility, and those involved in dependent care relationships.[388]

C. Grounds on which a court may make an ADVO

The *Crimes Act* provides reasonably expansive grounds for the making of an ADVO. In many ways this operates as a pseudo-definition of 'domestic violence' which is not specifically defined in the Act.

A court may grant an ADVO where satisfied on the balance of probabilities that the complainant has 'reasonable grounds to fear and in fact fears'[389] that the defendant will:

- commit a 'personal violence offence'[390] (largely concerned with acts of physical violence, sexual violence, property damage and stalking), or
- harass or molest the complainant, being behaviour which 'in the opinion of the court, is sufficient to warrant the making of the order'. Such behaviour need not involve 'actual or threatened violence to the person' and may be limited to actual or threatened damage to property,[391] or
- stalk or intimidate the complainant or a person the complainant has a domestic relationship with, 'being conduct that, in the opinion of the court, is sufficient to warrant the making of the order'.[392]

The *Crimes Act* also provides some definitions (albeit circular) for some of these terms:

> **Intimidation** means:
> (a) conduct amounting to harassment or molestation; or
> (b) the making of repeated telephone calls; or

[387] Defined in *Crimes Act* 1900 (NSW) s4(6), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s6.

[388] *Crimes Act* 1900 (NSW) s562A(3), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s5. The new Act clarifies that living in the same household does not include people residing in a correctional facility or detention centre. It also recognises ATSI extended family or kinship systems.

[389] If the PINOP is under 16 years of age, or suffers from an 'appreciably below average intelligence function', the court does not need to be satisfied that the person holds these fears: *Crimes Act* 1900 (NSW) s562AE(2). In 2006 this was extended to enable the court to make an ADVO where a person states that they are not in fear but 'in the opinion of the court (i) the person has been subject at any time to conduct by the defendant amounting to a personal violence offence, and (ii) there is reasonable likelihood that the defendant may commit a personal violence offence against the person, and (iii) the making of the order is necessary in the circumstances to protect the person from further violence': now *Crimes (Domestic and Family Violence) Act* 2007 (NSW) s16(2)(c).

[390] *Crimes Act* 1900 (NSW) s4(1), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s4.

[391] *Crimes Act* 1900 (NSW) s562AE(3). The new Act incorporates harassment and molestation as part of intimidation: *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s7(1)(a).

[392] *Crimes Act* 1900 (NSW) s562AE(1), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s16(1)(b).

> (c) any conduct that causes a reasonable apprehension of injury to a person with whom he or she has a domestic relationship, or of violence or damage to any person or property.[393]
>
> ….
>
> **Stalking** means the following of a person about or the watching or frequenting of the vicinity of or an approach to a person's place of residence, business or work or any place that a person frequents for the purpose of any social or leisure activity.[394]

It is arguable that the absence of an exclusive definition is beneficial to complainants as it allows scope to possibly complain about, and be provided with redress for, a wide range of different behaviours that a perpetrator may engage in (particularly those that might amount to harassment or intimidation). This, of course, depends on legal representatives listening to their clients, and reflecting these stories in their court advocacy.[395] MAG2 reflected on the potential of the legislation to encompass a broad range of behaviours:

> *…it's a really interesting piece of legislation and only decades later will it show what an extraordinary piece of legislation it was ... like sometimes you'll read a complaint and you'll think 'oh there's just not much in that', ... then you take a proper look at 15A and you think, 'actually that is – that's harassment' ...*

Given that most ADVO cases settle in some way,[396] the way in which 'fear' is considered by the court rarely comes to the fore. Rather the only information about 'fear' is the way that it is incorporated in complaint narratives, or adduced via evidence (where this takes place). One case in the court file sample was determined following a hearing on the question of 'fear'.[397] The magistrate in that case dismissed the woman's ADVO application on the basis that the fear asserted could no longer be considered reasonable because the last incident of violence had occurred some seven months prior. Here fear was assessed in terms of an incident framework informed by gaps between events, rather than within the context of the relationship or the role of violence in the relationship, for instance the way that episodic violence may generate ongoing fear. Such an

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[393] *Crimes Act* 1900 (NSW) s562A(1), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s7. In 2006 'repeated telephone calls' was replaced with a subsection that makes specific reference to new technologies (eg SMS messages and email). More importantly a provision was added which provides that the court may have regard to 'any pattern of violence' in determining whether conduct amounts to intimidation.

[394] *Crimes Act* 1900 (NSW) s562A(1), now *Crimes (Domestic and Family Violence) Act* 2007 (NSW) s8. Like for intimidation, above n393, this provision makes reference to a 'pattern of violence' to assist the court in determining whether conduct amounts to stalking.

[395] See Nan Seuffert, 'Locating Lawyering: Power, Dialogue and Narrative' (1996) 18 *Sydney Law Review* 523; Nan Seuffert, 'Lawyering and Domestic Violence: A Feminist Integration of Experiences, Theories and Practices' in Stubbs (ed), above n22.

[396] See discussion later in this chapter.

[397] CourtC-30. This case is analysed as a case study, Brenda and Joel, in *Chapter 8*.

approach to 'fear' fails to harness its potential to be an informative tool in understanding allegations of domestic violence. Perhaps unsurprisingly following this dismissal the man withdrew his ADVO application.

2. The complaint narrative

An application for an ADVO contains a 'complaint' that outlines why the person is seeking an ADVO. Complaints, then, generally contain some information about past acts of violence and abuse, the most recent incident(s), and the impact of the alleged acts/behaviour on the complainant (usually by reference to fear).[398]

Few studies have explored the narrative of protection order complaints. Recent work by James Ptacek,[399] Shonna Trinch and Susan Berk-Seligson[400] and Alesha Durfee[401] in different parts of the USA are notable exceptions. No study of the NSW ADVO system has analysed complaint narratives, rather they have tended to interview complainants about the incident(s) that led to the ADVO application.[402]

Alesha Durfee conducted a qualitative analysis of protection order petitions as part of her study of the role of status characteristics (race, gender, class, age and socio-economic status) on access to the protection order system in Washington State, USA.[403] While there are many jurisdictional differences between Durfee's study and the present study, her comments about narratives, legal discourse, and the likelihood of success for certain claimants, have clear resonance for NSW.

Durfee explores the way that Washington State's civil protection order system places an over-reliance on the individual's narrative:

[398] NSW Police, *Domestic Violence: Policy and Standing Operating Procedures* (SOPS) (2000) provides that a complaint should include a 'history of the relationship', 'details of the most recent incident as well as any past history of violence, including harassment, threats, stalking', and 'the victim's fears regarding further harassment or violence from the defendant': at [4.1]

[399] Ptacek, above n13, ch 4. Ptacek examined a random sample of 100 protection orders lodged in two lower courts in Massachusetts. He analysed the affidavits lodged by the women for the types of violence/abuse alleged to have been used by the defendant and the strategies/motivations underpinning these tactics.

[400] Shonna Trinch & Susan Berk-Seligson, 'Narrating in Protective Order Interviews: A Source of Interactional Trouble' (2002) 31 *Language in Society* 383; and Shonna Trinch, *Latina's Narratives of Domestic Abuse: Discrepant Versions of Violence* (2003).

[401] Alesha Durfee, *Domestic Violence in the Civil Court System* (PhD dissertation, University of Washington 2004).

[402] Eg see Trimboli & Bonney, above n66; and Julie Stubbs & Diane Powell, *Domestic Violence: Impact of Legal Reform*, NSW BOCSAR (1989).

[403] Durfee, above n401.

> The protection order process…, more than any other aspect of the justice system accessed by domestic violence victims is structured around the written language of victims and abusers. In most other arenas, various actors within the justice system paraphrase or shape the narratives of victims and/or abusers to meet the formal procedural requirements or conform to informal norms of legal communication….In contrast, most evidence presented during the course of protection order proceedings is directly constructed by victims and/or abusers. [404]

Durfee found that those petitioners (or complainants) who were able to present their story within a recognised legal discourse and structure were more likely to be successful. Hence those people who had legal assistance to draft the petition were more likely to be successful than those who did not. This was because the events detailed in the petition were more likely to fit statutory requirements, were less likely to include irrelevant information, and adopted an ‘over-arching structure situating individual acts of violence within a larger framework’.[405] Durfee also found that those narratives that satisfied societal conceptions of domestic violence (for example, if the victim fits within notions of an ‘ideal’ victim, or the acts complained of are ‘real’ domestic violence) are more likely to be successful.[406]

The role of the chamber magistrate or the police in constructing the complaint narrative for an ADVO is different to the role of the legal representative/advocate explored in the studies by Durfee,[407] and Trinch and Berk-Seligson.[408] In these studies lawyers or paralegals played an important role in translating or performing ‘repair work’ on the stories told by people seeking protection.[409] That is, that the lawyers or paralegals, representing the complainant’s interests, were engaged in a process of translating the woman’s story into a ‘legally and linguistically adequate account of domestic violence capable of resulting in a protective order’.[410] Police and chamber magistrates do not have an advocacy role to present the complainant’s story in the ‘best light’ for legal determination.

[404] Ibid at 110.

[405] Ibid at 122.

[406] Ibid at 111. See also John Conley and William O’Barr’s work on unrepresented litigants in a small claims jurisdiction: John Conley & William O’Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (1990); and William O’Barr & John Conley, ‘Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives’ in Judith Levi & Anne Walker (eds), *Language in the Judicial Process* (1990).

[407] Above n401.

[408] Above n400.

[409] Trinch & Berk-Seligson, above n400 at 384.

[410] Ibid.

The writing of complaints in NSW is of a different nature, in that complaints are written by either a police officer or a chamber magistrate – and hence are indeed ‘paraphrased’ or ‘shape[d] by’ these professionals.[411] Thus the police and the chamber magistrate play a crucial role in the process of gaining protection. The critical role of the chamber magistrate as the first point of contact is obviously reflected in legislative developments in NSW. The removal of the discretion to refuse to issue process[412] clearly recognises the pivotal nature of this position and the potential to perform a ‘gate keeping’ or ‘filtering’ role. Yet this discretion is only one aspect of this role – the actual writing of the complaint is also critical to the manner in which cases are received and assessed in court. As the Victorian Law Reform Commission (VLRC) pointed out in its review of the Victorian protection order system:

> [the interview with the registrar] influences the scope of the application, what information is included in it, what is provided to the magistrate, and what terms and conditions the person requests to have imposed.[413]

In this way Hunter places the registrar or chamber magistrate as the ‘ultimate author’ of the complaint, with the:

> [p]ower to rewrite the applicant’s story, to highlight or 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.[414]

Similarly WDVCAS3 explains 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.

Rather than the chamber magistrate or police officer being the ‘ultimate author’ of the complaint narrative, the nature of the complaints gathered in the court file sample suggest a mixed approach to the production of the narrative. This means that the work of Durfee and Hunter both have relevance to the analysis of complaint narratives. Certainly a great deal depends on the chamber magistrate and the police officer; whether they have a good understanding of domestic

[411] Durfee, above n401 at 110.

[412] By the *Crimes Amendment (Apprehended Violence Orders) Act* 1996 (NSW).

[413] VLRC, ‘Consultation Paper’, above n376 at [7.22].

[414] Hunter, ‘Women’s Experience in Court’, above n58 at 130.

violence, whether they are approachable and non-judgmental, the types of questions that they ask and the responses that they provide. At the same time, for at least some complaints gathered in the court file sample, there appeared to be little mediation between what the victim said and the text produced in the complaint. For these complaints it appeared that the police or the chamber magistrate simply adopted an approach of 'tell me what has been happening'[415] and this has been reproduced (appearing almost verbatim). This assessment was confirmed by MAG2:

> *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.*[416]

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 lens of what the law requires; in this context it might be argued that the lack of legal involvement, or directive involvement, in the writing of complaints may serve to enhance or facilitate access to the legal process.[417] My concern with the poor quality of complaint narratives, however, is not so much about the way legal discourse may silence women's stories, rather there seems to have been little attention paid to eliciting, and documenting, information that the law requires at a basic level.

Many complaints analysed for this thesis were clearly inadequate; by and large they focused on a single incident, there was often too little information, too little detail, and/or a considerable amount of irrelevant information. This is different to the limitations of the police documents examined by Dobash and Dobash concerning criminal offences where they noted that police or court records contained a 'summary…of the violent event necessary for their own purposes

[415] Compare the petition form in Durfee's study asked about: 'the most recent incident or threat of violence and date', 'history of threats and violence', 'violence or threats towards the children', 'injuries treated by a doctor', and 'the use of weapons or objects': above n401 at 121. While these questions might be criticised for the narrow focus on certain types of acts of violence/abuse, it is suggested that providing some guiding framework may elicit more information of relevance to granting a protection order.

[416] Informal interview with barrister, above n97, also referred to complaint narratives as a 'stream of consciousness'.

[417] Durfee, above n401 at 111.

[that is sufficient to support a criminal charge]'.[418] In this thesis many complaints examined were, not merely a summarised account of events, but often lacked sufficient information to support an ADVO. The following two complaints illustrate these concerns; they fail to specify any of the acts and behaviour that took place and employ 'code' terms for violence:

> *The defendant and the PINOP have been married since* [date]. *The* [defendant] *has an issue with alcohol and this has caused several problems including an eviction from a previous address. The couple are constantly the subject of domestic altercations, in the past the defendant has sometimes been* [the] *PINOP.....*[419]

> *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.*[420]

This assessment that many complaints are of poor quality was confirmed in the interviews with key professionals.[421] MAG4 described the quality of complaints as '*atrocious*' with complaints generally being just '*bare bones…with very little information*' resulting in a '*wonderful story which says nothing*'. MAG3 noted the variability of complaints, with some being incredibly detailed, while others are '*a load of absolutely incomprehensible garbage*'. Police prosecutors were similarly scathing:

> *…there's not enough put in the actual allegation itself to get the order. Say for example, … a 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' but the actual* [complaint] *itself is…confined to a very small time frame. That's probably the biggest problem*.[422]

While both DVLOs and police prosecutors made critical comments about the standard of complaints written by police, they invariably asserted that there had

[418] Dobash & Dobash, 'Nature and Antecedents', above n356 at 283.

[419] CourtC-32 (Police M 1st).

[420] CourtC-30 (Police dual application).

[421] 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*'.

[422] PP1. See also PP3.

been improvements in recent years as a result of the training provided to general duties officers.[423]

While the ADVO complaint form does not ask about the most recent incident, invariably this is what complaints centre on, and is what the court is most interested in.[424] As has been noted in other research, the 'most recent incident' is generally not the first incident, nor is it necessarily the most serious.[425] In Durfee's study, the form completed by petitioners specifically asked about the most recent incident. Durfee notes that this is often one of the more trivial events, yet because it is the most recent, it is the most 'raw' and as a result petitioners often expend a considerable amount of time detailing this event, and leave other stronger examples brief and lacking in detail.[426] 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 is 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 in a TIO application), but it still needs to be understood in context for an adequate account of the domestic violence (and the presenting incident) to be intelligible to the court.

References to 'fear' in ADVO complaints appear to be included in a routine and habitual manner, frequently as a bald statement to conclude a complaint without any reasoning or thematic connection to the victim's experience.[427] The following complaint illustrates this approach:

> *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*.**[428]

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[423] See DVLO3, DVLO4 and PP1.

[424] Elizabeth Goss & Monica Neville, *Apprehended Violence Orders: A Guide to Legal Practice in NSW* (2003) at 20.

[425] 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 Stubbs (ed), above n22 at 106-107; Durfee, above n401 at 120; Hunter & Stubbs, above n16 at 14 discussion of a 'trigger' event. See also *Chapter 5* where few of the women interviewed reported incidents to the police during their relationship.

[426] Durfee, above n401 at 40-41, 120.

[427] Ibid at 126.

[428] CourtC–1 (Police M 1st). Emphasis added. In the final sentence there appears to be some confusion about who is the defendant and PINOP.

Durfee notes in her research that those narratives (usually produced with the assistance of lawyers) that provided some thematic structure and connection between events and its impact (such as the creation of fear), were more likely to be persuasive. Some of the complaints gathered in the court file sample did provide these types of thematic connections, for example:

> *The victim states that there have been problems since the relationship started. The victim further states that she has been assaulted by the defendant on numerous times over the marriage ... The assaults have consisted mainly of pushing, hitting and having objects thrown at her. Recently the victim and defendant separated, with the defendant moving out of the family home….The defendant has since moved back in the family home. The victim now fears for her safety while the two reside in the same house, due to the assaults in the past. The victim also states that the defendant has become more aggressive and threatening of late.*[429]

The routine or habitual reference to 'fear' also has repercussions in the court setting. This was revealed by MAG3 who discussed a case where she refused an ADVO sought by the police. On the completion of the case the defence sought costs against the police. As noted above, the police have extensive protection against the awarding of costs; it is only possible to be awarded costs against the police 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'.[430]

> [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 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]…[431]

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

Complaints for ADVOs are brief. Of the 156 individual complaints that form the court file sample, approximately 47 per cent were between one and ten lines in length (with just under half of these being less than five lines), approximately 36

[429] CourtC–7 (Police W 1st).

[430] *Crimes Act* 1900 (NSW) s562N, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s99(4).

[431] MAG3.

per cent were between 11 and 20 lines, approximately 11 per cent were between 21 and 30 lines and approximately 5 per cent were over 30 lines in length. Those complaints generated by the police as a TIO were the briefest complaints examined.

The text of a complaint is not restricted to a particular length, but invariably the complaint narratives fit within the space provided on the institutional form that commences the process. As PP3 argued:

> *... the complaints on roneoed forms are only half a page so authors tend to restrict themselves to that, for that reason subconsciously or consciously. Um some restrict it to that size.*[432]

It is possible for the complaint to be appended to the form, however this is rare.[433]

While most magistrates allow complainants to provide evidence in addition to those matters specified in the complaint, some do not. As PP2 noted '*some magistrates hold you to that bloody complaint*'. This may be a particular issue in busy courts with high workloads. MAG4 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*'.

While some of the problems with complaint narratives are a product of the purpose for which they are produced, and the conditions of production, this is not always the case. The quality of some complaints is so poor I would suggest that it makes it difficult, not merely for research purposes, but more critically for the legal system to make decisions as required by the legislation governing ADVOs.[434] The lack of attention paid to the complaint process also suggests a lack of attention and seriousness accorded to allegations about domestic violence. DVLO1 also linked the quality of complaints to general duties police officer's 'lack of effort' in responding to domestic violence incidents that do not involve charges:

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[432] PP3.

[433] See the lengthy complaints lodged by a small number of male second applicants: *Chapter 7*.

[434] See similar conclusion in the family law setting: Moloney et al, above n37 at 119.

> *AVOs don't require a* [police] *brief…that's why police treat them so off-handly, because they don't need to make any effort – they just apply for the AVO and maybe get a statement from her. If you're lucky you'll get a statement from the cop and that's it. They don't make any effort.*

DVLO1, however, contented that while there may be problems with the quality of complaint narratives '*in the end*' they '*serve their purpose*'.[435] That is to say, DVLO1 asserted that if the purpose is to obtain an ADVO then, by and large, the complaint narratives satisfy this goal.[436] Durfee also noted that while many petitions in her study were vague and lacking in detail the petitioners were still successful in obtaining orders. Durfee, however, points out that concerns with the adequacy of complaint narratives and their fit with legislative requirements are important in 'border cases' (that is, cases that are contested, allege incidents that do not neatly fit the legal requirements, or where there is no corroborative evidence); in a border case an inadequate complaint may mean that the petitioner/complainant is less likely to be successful.[437] The complaint narrative, then, is of particular importance in cases involving competing claims, where not only is the substance of the complaint important to the court asked to make a determination, but it is also important to the people involved in cross claims and their assessment of their likelihood of success.

3. Before the Local Court

As noted in *Chapter 1* ADVOs occupy a great deal of the time of the Local Court.[438] 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*

[435] Email communication (9 August 2005).

[436] However one must question this proposition when 43.1% of ADVO applications were withdrawn/dismissed in 2005: Local Courts NSW, '2005', above n65 Table 1.4.

[437] Durfee, above n401 at 135-136.

[438] See Hickey & Cumines, above n57 at 16. Other courts also deal with ADVOs: the Children's Court (when the defendant is under 18 years of age) and the District Court (when AVOs are appealed or involve more serious criminal charges).

> [on] ... *given that if you've got 80 matters in a five-hour day how many minutes is that per matter? Not very many.*[439]

It is also important to reflect on the wide array of matters that the Local Court deals with beyond AVOs, for example the full range of criminal matters (whether or not they remain in that court[440]), traffic matters, council matters, civil cases up to a certain financial amount, environmental cases, a small number of family law cases. MAG4, a recent appointee to the bench, reflected on this breadth of work:

> *The first thing that just about everybody says is I just can't believe the range of sorts of things that come before the court, you know. I mean you get your tree preservation orders, your dividing fences, your common assault, committals, your AVO lists, your – everything. You know, you feel as though everything is – is strange and new.*

The increased use of protection orders has exacerbated the workload in the lower courts; a problem not isolated to NSW. Hunter notes that intervention orders had become a 'substantial component' of the work of the Victorian Magistrates' Court without 'additional resources' having been provided to the court to process these applications.[441] As a result, Hunter argues that intervention orders 'tend to be dealt with in similar, routinized, ways to other matters'.[442] 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'.[443] Baldwin, in his work on criminal courts, notes that while there are a series of rights that are often held out in the administration of the law (for example, the presumption of innocence, the right to a fair trial, the right to trial by jury, and the burden of proof) that 'these rights are translated in practice into pale shadows in the great majority of cases heard in the criminal courts'.[444] This gap certainly appears evident in the empirical work undertaken in this thesis, and will be the subject of further discussion in *Chapter 9*, suffice to state here that it accords with the

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[439] See also MAG2.

[440] The Local Court deals with summary offences, some indictable offences where the defendant pleads guilty or consents to it being dealt with summarily, and committal proceedings.

[441] Hunter, 'Women's Experience in Court', above n58 at 60.

[442] Ibid at 61. See also Marc Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974-1975) 9 *Law and Society Review* 95 at 121.

[443] Baldwin, above n140 at 244.

[444] Ibid.

findings of Pat Carlen and Doreen McBarnet that the gap may be greater in magistrates' courts.[445]

A. Coming before the court

When an ADVO application comes before the Local Court it is dealt with on a 'list' or 'mention' day. This is a day concerned with short, procedural matters: Is the ADVO still sought? Is an adjournment required? Are interim orders (IOs) sought? Is the matter contested? If so, how much time needs to be set aside?

Most NSW Local Courts have a dedicated list day(s) to deal with AVO matters. While this is a dedicated day, other types of matters may also be listed (for example, fresh criminal charges, APVOs and other matters). The allocation of a dedicated day assists in providing ADVO complainants, at some courts, with access to the WDVCASs,[446] a safe room, a dedicated courtroom and, at some courts, a dedicated prosecutor.

Most ADVOs are resolved at a mention. This does not mean that cases are necessarily resolved on the first day at court (many will be adjourned numerous times for various reasons[447]), but that few are resolved following a hearing. One of the magistrates interviewed expressed a distaste for ADVO hearings:

> *I work on a principle that I don't want to hear any domestic violence matter from the point of view of ... a true hearing where there is um evidence tendered and cross-examination on that evidence. As I have indicated parties that can enter into conflict over the most minor of matters which end up out of all proportion. Now there are persons with expertise in dispute resolution and the Community Justice Centre is one of those persons. If one can get the combatants to go to those people with the expertise they are probably far better off than doing battle in the court environment because ultimately down the track somewhere those persons will most probably have to live or may have to live in the same environment so if someone can resolve the problem rather than the courts clinically – and clinically listen to the evidence, dissecting it and coming to a determination I think it's far better.*[448]

While I would not suggest that this view is held by all, or even most, magistrates, the civil process itself emphasises settlement and consent.[449] The emphasis on

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[445] Pat Carlen, *Magistrates' Justice* (1976); and Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (1983) at 138-140. See also the discussion of 'summary justice' in Andrew Sanders & Richard Young, *Criminal Justice* (2nd ed, 2000) at 483-549.

[446] For detailed information about the WDVCASs see *Chapter 3*.

[447] Eg to effect service, enable the defendant to obtain legal advice, explore settlement, await the finalisation of related criminal charges, or because of illness.

[448] MAG4.

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

negotiation, settlement and consent in the ADVO process takes place within the context of the limited time and resource demands of the Local Court, the cost of legal proceedings, and the way in which the likelihood of success is cast for complainants. Marc Galanter in his work on the way that the 'basic architecture' of the legal system impacts on the use and limits of the law as a method of achieving 'redistributive change' (that is the way facets of the law and its operation coincide to inhibit reform) points out that those legal arenas with limited resources and more cases than can be adjudicated, emphasise and promote settlement.[450] This is a description that well fits the Local Court and its increasing load of cases, including ADVOs, without additional resources.

Also of interest is the way in which this emphasis on consent might interweave with, and reinforce, the notion that the magistrates' court deals with 'triviality'; that is "minor offences", "everyday offences", "the most ordinary cases", "humdrum events".'[451] This may be a particular concern for ADVOs which tend to be surrounded by an aura of triviality reflected in comments such as that they waste the court's time, that ADVOs are just a piece of paper and so on. Andrew Sanders and Richard Young have argued that the high level of guilty pleas in the magistrates' courts in the United Kingdom 'fuels' 'the ideology of triviality', yet when the substance of the charges are examined they are far from trivial or minor matters, and the decisions magistrates are required to make are of significant import.[452] The same concerns can be raised in respect of the ADVO process where the high level of settlement undermines the nature of the allegations contained in many complaints, the responsibility of the perpetrator, and the significance of making an order. Instead settlement appears as a mode of private ordering, rather than a method by which domestic violence is addressed in the public arena of the court.

Concern has been expressed about the impact of private ordering on women in a number of different legal areas, as well as specifically in the context of civil

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Hunter, 'Consent in Violent Relationships' in Rosemary Hunter & Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (2007) at 160.

[450] Galanter, above n442 at 95 and 121.

[451] McBarnet, above n445 at 143.

[452] Sanders & Young, above n445 at 488.

protection orders.[453] The emphasis on settlement, particularly via consent orders is discussed later in this chapter, and in *Chapter 9* where it is argued that the emphasis on settlement takes on a heightened role in cross applications.[454]

For professionals involved in the legal system a mention day tends to be seen as unproblematic; it is, after all, a procedural day. Two women interviewed in this thesis highlighted the disparity between their experience of their cases and the procedural way in which it was approached by professionals at court. Keira was told by the police '[it is] *just a mention, don't worry about it.'*[455] Frances described finding the process:

> *... really frustrating because you can't say anything and they just sort of sit there, read it and know what's happening and they don't want to have any idea like um and I know it'd take forever if everybody went up there and spoke, but ...there's this massive big lead up to this one little hearing and none of that can come across*.

As has been mentioned, magistrates commonly face substantial case lists on an ADVO mention day and this places constraints on the time that can be allocated to each case. However, even taking account of these resource and time constraints, the brevity of matters is worthy of note. Court observations undertaken for this thesis found that most ADVO matters are dealt with in three minutes or less. 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.[456] Like the present study, Hunter found that most matters were dealt with in three minutes, with the exception of contested hearings. In the present study those ADVO applications that were accompanied by criminal charges took longer, up to 15 minutes, particularly where an early guilty plea was entered and the issue of sentencing was determined that day.

[453] In family law see: Marcia Neave, 'Resolving the Dilemma of Difference: A Critique of "The Role of Private Ordering in Family Law"' (1994) 44 *University of Toronto Law Review* 97. This has been a particular focus in work on mediation and family law proceedings involving violence, see: Hilary Astor, 'Swimming Against the Tide: Keeping Violent Men Out of Mediation' in Stubbs (ed), above n22 at 147-73. In relation to civil protection orders see Hunter, 'Consent in Violent Relationships', above n449 at 158-60.

[454] See *Chapter 9*.

[455] Keira.

[456] Hunter, 'Women's Experience in Court', above n58 at 100-127.

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.[457] In a similar way MAG4 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.*[458]

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'.[459] This has been documented in other jurisdictions.[460]

It is not simply the brevity of matters that is of concern, but what that brevity means – what statements and messages are not conveyed because of the lack of time and the 'routinized' process of 'getting through' the list.[461] In my observation of 73 ADVO cases in three Sydney courts it was rare for there to be any comment about the types of violence/abuse experienced, how the victim felt as a consequence of the alleged violence/abuse, how the defendant responded to the allegations, or any comments from the magistrate about the allegations.[462] 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.[463]

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

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[457] Ibid at 112-13.

[458] MAG4. See also MAG2, MAG5.

[459] Hunter, 'Women's Experience in Court', above n58 at 101.

[460] Eg in Pennsylvania: Edward Gondolf, Joyce McWilliams, Barbara Hart & Jane Stuehling, 'Court Response to Petitions for Civil Protection Orders' (1994) 9 *Journal of Interpersonal Violence* 503 at 513; and comment by an interview participant from a USA nationwide survey, Kit Kinports & 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 at 209, see also recommendation for additional resources at 210.

[461] See references above n442.

[462] Comments of this nature tended to be made only when there were associated criminal charges for which the defendant plead guilty and the magistrate was determining sentence, or in the small number of cases in which additional evidence was heard to determine whether to grant an IO.

[463] Ptacek, above n13 at 157-58.

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. At CourtC a male 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.[464] 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 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 man's responsibility.

Thirdly, the creation of a public record within the Local Court setting could challenge common misconceptions about what constitutes domestic violence. As discussed in *Chapters 5-6*, what is experienced by women and what is documented in ADVO complaints does not all centre on 'serious' forms of physical violence (although these are present in many complaints), but rather the far more common and arguably more encompassing picture of multiple tactics, that alone might appear minor and trivial, but when viewed cumulatively are more indicative of 'coercive control'.[465]

Finally, absent an adequate understanding of the violence and the fears of the complainant, it is unlikely that an appropriate order can be tailor-made to meet the circumstances of the complainant.

i. The making of interim orders

If an ADVO application is to be adjourned the court will usually be asked to determine whether an IO should be granted (or continued). In making this decision the court is simply required to be satisfied that it is 'necessary or

[464] Observation CourtC (18 October 2006).

[465] See Stark, above n84; and Evan Stark, 'Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58 *Albany Law Review* 973.

appropriate to do so in the circumstances'.[466] The NSWLRC notes that this provision 'provides little or no guidance to the court on how to exercise the power'.[467]

An IO may be made ex parte,[468] by consent (without or without admissions),[469] or on the basis of evidence or submissions.[470] Once an IO is made it may be continued on subsequent appearances or it may be revoked.

The unreported decision of *Smart v Johnson* in 1998,[471] which considered whether a contested IO can be made without giving both parties an opportunity to give evidence and conduct reasonable cross examination, is important here. In that case Justice Dunford held that it was a denial of natural justice to grant an IO without doing so. However Dunford made it clear that such a hearing was focused on whether an IO was 'necessary or appropriate' not whether the complaint was proven on the balance of probabilities. The NSWLRC notes that some magistrates follow this decision 'strictly';[472] that is to say, if the defendant contests the making of an IO, the magistrate will allocate time, generally that afternoon to conduct a hearing. For many parties the thought of having to wait all day at court can 'encourage' negotiation.

There is no official data available on the making of IOs, and no other study on the NSW ADVO system has examined IOs in the Local Court. However, the NSWLRC in its recent review of the ADVO system, received submissions from key professionals working in this field (including community legal centres, women's support groups, solicitors, and magistrates) who were critical about practice in this area.[473]

The making of an IO is obviously important to complainants – without an IO, they have no protection until the finalisation of their ADVO application.[474] Where an ADVO is contested this can be a considerable period of time,

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[466] *Crimes Act* 1900 (NSW) s562BB(1), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s22(1).

[467] NSWLRC, 'AVOs', above n11 at [7.25].

[468] *Crimes Act* 1900 (NSW) s562BB(2), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s22(3).

[469] *Crimes Act* 1900 (NSW) s562BA.

[470] In some cases this is confined to a simple (re)confirmation on oath that the complaint is true and correct.

[471] *Smart v Johnson* (Unreported, NSW Supreme Court, Dunford J, 8 Oct 1998).

[472] NSWLRC, 'AVOs', above n11 at [7.32]. See MAG5.

[473] Ibid at [7.27]-[7.30].

[474] Unless the defendant was present in court, an IO must be served to be enforceable.

particularly in some Sydney courts where a person can wait over six months for a hearing date.

There are alternatives to IOs that are little used in the Local Court. The most significant is the ability to impose bail conditions on an ADVO defendant even if there are no related criminal proceedings.[475] Unlike the making of undertakings, which is the other alternative, bail conditions possess some level of repercussion if they are breached. While not of the same strength as an IO (if an IO is breached it is a criminal offence) a breach of bail can require the defendant to reappear before court and have bail reviewed. Bail is not preferred to IOs for reasons relating to its relative lack of strength and the fact that victims are rarely provided with a copy of bail conditions, unlike the case with IOs. However bail is an alternative that can afford some level of protection, unlike undertakings. There are no statistics available on the use of bail as an alternative to IOs in the Local Court of NSW.

ii. The resolution of ADVOs in the Local Court

An ADVO application may be finalised in the Local Court in a number of ways:

- An *ADVO may be made on a final basis* after a defended hearing, an ex parte hearing, or by consent with or without the defendant admitting to the allegations contained in the complaint.[476] The vast majority of ADVOs are made by consent without admissions.

- At any time during the court process, a complainant may *withdraw* the application. In some situations an ADVO is withdrawn in exchange for undertakings. An undertaking is a promise to the court, generally in the same terms as the order that was sought. An undertaking has no legal effect.[477]

- After a hearing (whether defended or ex parte) a magistrate may *dismiss the application*. An ADVO may also be dismissed where the person seeking the ADVO fails to attend court to continue with the application. In practice many

[475] *Crimes Act* 1900 (NSW) s562L, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s83.

[476] *Crimes Act* 1900 (NSW) s562BA, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s78.

[477] While there are no repercussions for the breach of an undertaking; the giving of an undertaking, and the legal processes involved may, for some defendants, be effective in preventing or reducing the occurrence of violence. See Kate and Keira whose cross applications were resolved this way and at the time of the interview had not experienced any further violence/abuse: *Chapter 9*.

> ADVOs that are withdrawn are marked 'withdrawn and dismissed' by the court.

In 2005, 55 per cent of ADVO applications were granted, 43.1 per cent were withdrawn/dismissed, only 1.9 per cent were dismissed after a contested hearing.[478]

The resolution of ADVO complaints by consent, the most popular way of resolving ADVO applications generally, warrants further exploration.[479] The legislation makes it clear that the court may grant consent orders without being satisfied of the matters alleged in the complaint; it also states that the court is not to conduct a hearing unless it is 'in the interests of justice to do so'.[480] Very few, if any, hearings are conducted into the making of consent orders, and there was even some suggestion by other professionals (notably not magistrates), that magistrates barely read, or address, the complaints that are resolved by consent.[481] As one prosecutor explained:

> *Ah you've always got to be satisfied that one* [an ADVO] *is warranted, but ... where the people have consented, ... Bear in mind that the court has a lot of other work and we've got to manage our time. If someone's consenting and they're knowing what it's all about, that seems to be totally unnecessary to drag a matter out.*[482]

Hunter has argued that the notion of 'consent' in domestic violence proceedings is problematic.[483] 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, it fails to provide a public record of forum in which the woman's story is affirmed, and the

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[478] Local Courts NSW, '2005', above n65, Table 1.4.

[479] There is no data available on *how* orders are resolved. The only NSW study that has documented mode of resolution found that 77.6% of cases were resolved by consent, and 22% by ex parte determinations. However the study excluded hearings because of researcher unavailability: Trimboli & Bonney, above n66 at 37.

[480] *Crimes Act* 1900 (NSW) s562BA(3)(b), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s78(3).

[481] DVLO3, PP2 and PP5.

[482] PP5.

[483] See Hunter, 'Having Her Day in Court', above n449. See also Hilary Astor, 'Domestic Violence and Mediation' (1990) 1 *Australian Dispute Resolution Journal* 143.

man's actions are not clearly denounced.[484] Consent makes the "problem" of violence disappear from view'.[485]

Hunter notes the 'encouragement' given to defendants to consent to orders – this encouragement is evident on two dimensions: the attractiveness of consenting without admissions; and the prospect of finalising the matter that day with little, if any legal costs. In the Victorian context, Hunter notes that defendants are often persuaded by a clerk outside the courtroom to consent to a protection order; if this encouragement has proved unsuccessful then the magistrate in court will also suggest to the defendant the benefits of consent:

> …the Magistrate will sometimes repeat the options [already articulated by the clerk] …, with strong encouragement for the defendant to consent without admitting the allegations. Consenting saves considerable time for the defendant and for the court, and it also spares the Magistrate from having to listen to all the details of the alleged violence.[486]

Hunter suggests that if the police were more involved in protection order applications in Victoria there may be less consent without admissions, as 'police support for the complainant's allegations would render consent without admitting those allegations much less of an option'.[487] This has certainly not transpired in NSW where the police have been actively involved in ADVO applications for a long time, and to a greater extent, than Victoria.[488]

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.[489] In this way the practice of consent in civil protection order proceedings is different to settlement processes in other types of civil actions.[490] While the NSW legislation casts the making of consent orders as requiring some decision on the part of both parties, 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, many victims express dissatisfaction with the fact

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[484] Hunter, 'Having Her Day in Court', above n449 at 66-7.
[485] Ibid at 67.
[486] Ibid at 64.
[487] Ibid.
[488] See comparative police data above n376.
[489] Hunter, 'Women's Experience in Court', above n58 at 120.
[490] Hunter 'Consent in Violent Relationships' above n449 at 162.

that the defendant can 'consent without admissions'. 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.[491] 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*. 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.[492] 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…on a grand scale'.[493]

There is great pressure to generate consent outcomes.[494] One magistrate colourfully depicted her powers of persuasion in garnering consent orders:

> *I love consent without admission and I can sell it* [like] *ice to Eskimos in terms of by consent without admissions.*[495]

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 MAG3 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 'yeah but I want to make a statement', you know 'I've got it all written out here' and started reading it out. And I said, 'well hang on a sec, you know you're consenting without*

[491] Eg see professional's comments about consent without admissions in Hunter's study: ibid at 120, and by the women interviewed, at 121-122.

[492] Ibid at 122-123.

[493] Ibid at 123.

[494] See also Dick, above n94.

[495] MAG2. See also WDVCAS4.

admission – you know it's not a matter of – I don't need to know anything about these circumstances… you're agreeing to orders being made against you and…' - 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', you know… 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].[496]

4. Summary

This chapter has provided an introduction to the law and practice of ADVOs in the Local Court environment. It has noted that most ADVO complaints are initiated by the police, most are made on behalf of women, and that just over half result in a final order. The benefits of civil protection order systems such as ease of access, low cost, speedy relief are evident in this discussion; however, the chapter has highlighted key problematic features with the system as it is currently practised: the poor quality of many ADVOs complaint narratives, the brevity of court proceedings, the workload of the courts, and the emphasis on consent and settlement. This means that little attention is actually focused on the problem of domestic violence – rather there appears to be an administrative imperative to 'get through the list' – it is suggested that this has repercussions for the understanding of domestic violence that is reflected in ADVO proceedings, something that is clearly highlighted through the case study exploration of cross applications. *Chapters 5-9* turns to exploring in detail the empirical data of this study and extends many of these themes raised in this chapter.

[496] MAG3.

5. Women's experiences of violence: The interview sample

This chapter focuses on the interview sample with women (n=10) involved in ADVO cross applications. The purpose of this chapter is to highlight the many dimensions of women's experiences of domestic violence that are not captured through the 'snapshot' approach evident in their ADVO complaint narratives. Through this discussion the controlling aspect of the use of violence and other behaviours becomes clear. This resonates with Evan Stark's recent work where he explains that coercive control is exercised through the deployment of (often tried and tested) different 'technologies', including the use of violence, intimidation, isolation and control.[497]

In this chapter I commence with the women's discussions of the way that the violence and abuse they experienced formed an environment of 'control'. It is only after discussing this important context that I turn to a more conventional list style approach in order to document the extent and range of violence and abuse experienced by these women. I then return to the issue of control by exploring a range of acts or behaviours that the women interviewed experienced that illustrate a 'poor fit' with conventional ways in which domestic violence might be identified. The final section of the chapter examines the way in which these experiences of violence are narrowed in the complaint narrative for the ADVO(s) each woman sought.

1. Experience of intimate partner violence

A. Control

The women I interviewed emphasised the use of control against them in their relationships. 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'

[497] Stark, above n84 at 241.

was actively volunteered by the women to describe the violence that they experienced and the intent of the perpetrator. Half of the women made specific reference to control.[498]

Frances provides an excellent illustration of the way that control characterised her experience of violence: '… *looking back ... it was ... just a full on controlling sort of relationship I suppose'*. When asked what she meant by 'controlling', Frances explained:

> *You know at the time you think you're doing it for the good of the family and all the rest of it but it was basically, yeah um, you know, he would never um, he would never socialise with my friends, it would always – you know, I had to see my friends on my own, um he'd you know, he'd be – he'd basically control when and where I worked or um he wouldn't look after the kids if I ever needed to do anything, um so I was basically, you know, tied to the house ... Um so yeah ... any money that we spent was basically what ... he wanted it to be spent on ... It was always ... his things.*

I asked Frances how often her former husband would behave in these ways:

> *Um gee I don't know. Um I suppose some of it was like always there, I mean, I knew I had to be home at a certain time or um, you know, if I wasn't home to answer the phone or whatever. Um and yeah any time he wanted to do something or have his own way or something and I didn't agree with it you'd know – there'd be a blow up and he'd end up, you know, smashing something…*

Frances nominated the constant control as the 'worst' thing her former husband did to her:

> *…Just the constant, um need to be controlling what I'm doing, like or um even now he'd ring up and he'd go 'you have to talk to me'…and it's only recently that I've said… 'well no I don't' and hung up. But it – it, you know, he had this thing and somehow made me (laughter), stupid me, – to yeah do whatever he felt – you know, he'd tell me 'this is what you have to do' and I would do it. …* [A]*nd I just ... became a non-person, I think, which is what I sort of struggle with now, finding out who I am…*

Rosemary, who was married to her former husband for 21 years and experienced many different forms of violence and abuse, reported that her former husband's control had a similar sustained impact:

> *…well* [I'm] *just finding it hard to get out in the real world again. And – and trust – you know, trying to find trust. …*[B]*ecause he was – he was a controller and he – he had to make all the decisions so I'm having troubles, you know, making the right decisions because he had to have the say, he had to have … control of everything.*

For others control was implicit in the limits placed on their social and economic freedom (for example some women were prevented from having contact with

[498] Frances, Kate, Keira, Megan and Rosemary.

friends and family,[499] or engaging in paid work,[500] their time outside the home was monitored,[501] they were required to seek permission to do things,[502] and one woman was prevented from speaking in her first language[503]). Lillian, who was married to her former husband for over 15 years and has two children with him, felt that her former husband viewed her as a possession:

> [the relationship was] *one-sided (laughter). Does that make sense? Um as long as I did what I was told I was okay …that's when the abuse and violence came into it or physical violence – it just got worse over the years. I mean it was sort of manipulated game playing and I wasn't allowed to do this, wasn't allowed to do that, um I never los*[t] *contact with my family,* [but] *I lost all my friends, um I wasn't allowed to go out, um I was allowed to work as long as it was on his grounds. Um yeah, that sort of thing huh….* [He was] *very over protective…I was more of a possession to him than anything else.*

Lillian nominated the way he sought to '*isolate me from the world*' as the worst thing he did to her. To capture the controlling nature of the relationship and the pervasiveness of violence and abuse it is useful to quote Lillian at length; here she described the first time she experienced violence from her former husband:

> *Um I'd say that* [it was at my birthday party] *and ...some … guy came up and talked to me and gave me a kiss …*[and Bill[504]] *went right off his head, um and made accusations that I was trying to get onto him and things like that… At that stage…there was no physical* [violence]*, more the, you know, 'I was doing wrong'.* [That] *I shouldn't …*[have] *let him come up and kiss me for my birthday.* [A year later they started living together. It was at this time that Bill first used physical violence against her] *…he started going off, just because I wouldn't … make him a cup of tea. Um anyway he had his hands around my throat ah I remember quite clearly screaming out and … a pillow going over my face. Um I remember him saying … 'you go tell your dad and youse are both dead'. …that was my main fear…*[that he would] *hurt my loved ones before he'd actually kill me. …He presents very well … when everyone was there um he was nice as pie, soon as everyone left that was it. Dinner wasn't right I'd wear the plate, ah throw it across the table, tea wasn't hot enough or not cold enough, not enough sugar, he'd just throw it. Towards the end it got that bad – I mean he'd break things, he'd break jewellery or … anything that I liked. Um when that … wasn't getting to me, wasn't upsetting me, that's when the physical, I mean full-on black eyes. Before it was just pulling my hair out or bruises… um in the last 12 months before I left it started getting really bad. I had some whopping black eyes ….*

The identification of control as the defining feature of the use of violence and abuse in the relationship was almost completely absent from the ADVO

[499] Frances, Lillian, and Marcella.

[500] Frances and Marcella.

[501] Marcella.

[502] Kate and Marcella.

[503] Marcella.

[504] A pseudonym.

complaint narratives examined in this study. None of the ADVO complaints for the women interviewed mentioned control, nor did any mention any restrictions placed on their ability to conduct their lives. The only complaint that suggested the presence of control was the one made by Rosemary which referred to a 'pattern of behaviour'. While 'control' is not grounds for seeking an ADVO, and hence its absence from complaint narratives might be understandable, I suggest that the failure to convey this characteristic of what otherwise appear to be discrete acts means that ADVO complaint narratives are unable to move beyond a narrow incident focus in their portrayal of 'what is domestic violence'.

While control is arguably implicit in the statements about being 'fearful', such statements, as argued in *Chapter 4*, appear to be inserted as a routine way to conclude a complaint rather than providing a connection between, or a framework in which to understand, the perpetration of violence in the relationship. Control may also be implicit in complaints where the complainant alleges that the defendant has placed restrictions on their social and economic freedoms. As was noted in *Chapter 2* the recognition of 'power and control' or 'coercive control' is critical to understanding the gendered dimensions of violence perpetrated in an intimate context. Evan Stark argues that it is 'coercive control', rather than 'violence', that must be brought to the fore in our understanding of, and response to, domestic violence.[505] Thus the emphasis on 'violence' has led to an emphasis on the visible and that which is assumed to be 'serious', rather than an appreciation of the way in which the more common, 'minor' forms of violence and abuse accumulate within an environment of control that inhibits the freedom and choice of women.[506]

B. The generation of fear

...it's when it starts affecting your life...[507]

Six women spoke about being scared, fearful or simply not knowing 'what would happen next'.[508] Research comparing men's and women's use of violence in intimate relationships has found that there is a clear gender difference in the

[505] Stark, above n84.
[506] Ibid at 14-5.
[507] Kate.
[508] Chloe, Kate, Keira, Lillian, Marcella and Rosemary.

extent to which acts of violence generate fear; where it is women who are more likely than men to report being fearful of their partners.[509]

Rosemary spoke a great deal in her interview about being scared and feeling '*trapped…I felt like a hostage…waiting to be freed*'.[510] She highlighted the lasting impact of having been threatened with a gun during her marriage:

> *I was waiting for him, like a time bomb to hit you know. It was like laying there and waiting for something to really badly happen, you know. I was waiting for him to come in with a gun and do something to me …* [Rosemary goes on to describe the incident that led to the final separation]. *… he just come at me, … and laid into me … smacked me around the head and threw me on the floor and put his knee between my legs and really hurt me and grabbed me wherever he could… and I'm saying a prayer under my breath to hold my temper back because I was – I was really ready to go right off and I thought well I'm just going to put myself into more danger with him because he – his eye – the evilness in his eyes just really was scary…*[511]

These comments reflect the research of Mary Ann Dutton where she found that many women report feeling in a 'state of siege' never knowing when the next act of violence will take place.[512]

Marcella indicated her level of fear by the fact that, near the end of her marriage, she asked a friend to call her each day '*to be sure that I'm still okay, that I'm alive*'. Fear is also evidenced by the fact that during the relationship Marcella sought safety at a women's refuge.

C. The clarity provided by 'looking back'

> *…maybe I was in love…I just couldn't see anything wrong* [at the time].[513]

A number of women pointed out that it was only in retrospect that they were able to identify and name their experience as domestic violence.[514] Liz Kelly, in her work on the continuum of sexual violence, has noted that women may not necessarily have a name for their experiences, or be able to identify it as violence or abuse at the time that it occurs, and that it is only over time that they are able

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[509] See references above n264.

[510] See also Chloe, Janet and Marcella.

[511] Chloe also spoke about seeing '*the hatred in his eyes*' during an incident when she realised that he could '*kill her*'. See also Dutton, above n141 fn 95 at 1209; Dasgupta, 'Just Like Men?', above n43 at 203.

[512] Dutton, above n141 at 1208.

[513] Marcella.

[514] Chloe, Frances, Keira, Lillian and Marcella.

to recognise what took place and to identify it as abuse.[515] Keira explained this process of recognition:

> [At the time there] *didn't seem anything wrong to me, maybe in hindsight um it was a bit controlling. Um particularly financially, um and there had been incidences looking back where I go 'mmm that potentially could have been exceptionally violent', um it was just fortunate that people walked in the room or – or I was able to stop that from happening but I didn't realise that until you know six months after.*

Keira reflected that, despite having professional knowledge about domestic violence having worked in the field, she still did not recognise her experience as domestic violence when it occurred:

> *I guess it was probably one of the hardest things to accept that no matter how much I knew about DV that it wasn't until it came to the crunch that I could see a lot of things that happened…it's a lot easier to see when you're outside looking in.*

Frances also stated that she was unable to identify the extent of controlling behaviour until after her marriage had ended. This was despite the fact that she first experienced violence one year into her marriage and this violence included physical assault, property damage, and restrictions on her ability to contact friends, to work and to access financial resources.

Two women stated that they originally held the view that domestic violence only involved physical violence, and hence the term did not apply to them.[516] It was only through their contact with specialist domestic violence services and literature that their knowledge about domestic violence, and their own experiences, expanded.[517] As Lillian explained:

> …what does the term domestic violence mean to you?
>
> *Um now or before?*
>
> Well you can talk about both if you want.
>
> *OK, before domestic violence to me was that um a very physical abuse. Um but now looking back and after continuous counselling* [it] *started way in the beginning when we just sort of going out together and that was verbally, emotional, the known game plan, um the whole thing of um keeping me from everyone.*

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[515] Kelly, 'Surviving Sexual Violence', above n165 at 119 and 121.

[516] Chloe, Frances and Lillian. See Mahoney's discussion of some women's resistance to see themselves or their experience as one of a 'battered woman': above n246 at 8-9.

[517] This knowledge developed through contact with specialist services appeared to be trivialised in an ADVO in the court file sample: CourtB-13 (Private W 2nd). The woman had been given a pamphlet about domestic violence from a specialist service and it appears that she indicated to the chamber magistrate that she had experienced the forms of violence/abuse identified in that pamphlet. The chamber magistrate then drafted the complaint in such as way that the pamphlet is characterised as having been suggestive to the woman, rather than informative.

D. Repetition, frequency and cumulative environments

A number of the women spoke about long experiences of violence; during the relationship and, for many, for a considerable period after separation.[518] Four women had lengthy relationships (from eight to 21 years) and all stated that the violence commenced early in the relationship, and continued throughout.[519] None of these women made a report to the police until after separation.

In contrast to the act-based approach of CTS research, one of the defining features of feminist research is that domestic violence is characterised by multiple forms of violence and abuse often perpetrated over lengthy periods of time and with varying degrees of frequency and repetition.[520] Reflecting this, domestic violence has been described as the '*quintessential repeat crime*'.[521] While individual violent and abusive acts can be identified, they also interact with each other and provide a multi-layered meaning to each successive act. Evan Stark argues that it is this repetition and frequency of often 'minor' forms of violence 'that distinguishes coercive control'.[522] Other research has also noted that the duration and frequency of women's experiences of violence and abuse in their intimate relationships provides a marked contrast to men's experiences.[523]

The repeated, frequent use of multiple forms of violent and abusive behaviour is clearly demonstrated in the sample of women interviewed in this research. Every woman complained that they had experienced multiple forms of violent, abusive and controlling behaviours. The types of acts perpetrated often changed after separation due to the loss of, or reduction in, face-to-face contact, but continued nevertheless.[524]

The frequency and repetition of violence used against the women interviewed varied. Liz Kelly also found considerable variation in her research and noted that for some women physical violence was used fairly regularly (weekly or monthly)

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[518] Eight women still experienced violence/abuse two or more years after separation..

[519] Frances, Janet, Lillian and Rosemary. Eg Janet experienced violence within the first couple of months of her 11 year marriage.

[520] See discussion of feminist definitions of domestic violence in *Chapter 2*. See also Kelly 'Surviving Sexual Violence', above n165 at 126.

[521] Richard Felson & Alison Cares, 'Gender and Seriousness of Assaults on Intimate Partners and Other Victims' (2005) 67 *Journal of Marriage and the Family* 1182 at 1183 emphasis in original.

[522] Stark, above n84 at 243-244.

[523] Tjaden & Thoennes, above n119 at 152.

[524] Kaye et al, above n15 at 35-37.

but for others there were long gaps (often a year or more) between acts of physical violence (although other forms of abuse may have been deployed during that time).[525]

Three of the women interviewed in this study reported an increase in frequency and seriousness over time.[526] Janet indicated that *'…at first it was only every two or three weeks then it got more frequent'*.[527] It is worth noting Janet's assessment of frequency, where every two or three weeks must also be identified as frequent. Lillian noted that for two or three days her husband would be '*as nice as pie and then just absolutely schizophrenic*'. For Lillian the violence and abuse increased in severity and frequency during the last year of her relationship, coinciding with her husband's increased use of alcohol and other drugs.[528] For Rosemary violence took place approximately once a month; however this varied '*sometimes it would be more often and sometimes there'd be a bit of a gap*'. Chloe's experience of violence was initially less frequent than the other women interviewed, approximately once every six months, with a '*nice time*' between the violent events. However, over time the perpetration of violence increased to once every month.

Other women spoke of a sustained frequency and repetition throughout the relationship. Marcella said that violence and abuse was '*a day-to-day occurrence…part of the normal … life with him*'. While Frances stated that she felt that the violence had increased in frequency and seriousness over time, she also noted that to some extent it was '*always there*'. This resonates with Evan Stark's work where he notes that for some women the frequency and repetition of violence becomes part of 'routine behaviour that resembles other routine events such as eating, sleeping, or going to the toilet'.[529]

E. Forms of violence – a multiple, cumulative experience

> [P]*hysical* [violence]*… is easily detectable because you can see it from the outside. You can see it with your eyes the fact of domestic violence with physical abuse. … but you*

[525] Kelly, 'Surviving Sexual Violence', above n165 at 129.

[526] Chloe, Janet and Lillian. See also Frances discussed at the end of this section.

[527] Janet.

[528] While this man's drug use intensified the violence he used against Lillian, it is important to note that she had been experiencing violence, often very severe, throughout the 15 year relationship.

[529] Stark, above n84 at 244. See also Dobash & Dobash, 'The Nature and Antecedents', above n356 at 272-73 where they note that many violent incidents do not have a start or finish, but 'instead…form an integral part of a continuing relationship'. See also at 283.

> *can't necessary* [see other forms of abuse] *you can't really see it, that's why it's hard* [to identify it as part of domestic violence].[530]

In this part of the chapter I outline the different forms of violence and abuse experienced by the women interviewed. It is important to note that women were not specifically asked about the types of violence that they experienced – rather they were asked multiple questions that enabled a picture of the experience of violence and abuse to be gathered.[531] This means that just because a woman did not mention a form of violence in her interview does not mean that it did not take place; there are a range of reasons why she may have not spoken about it. This needs to be borne in mind when considering the following discussion.

i. Physical violence

Most women experienced actual or threatened physical violence. This included being hit,[532] punched,[533] kicked,[534] pushed,[535] grabbed,[536] attacked with a knife,[537] threatened with a gun,[538] thrown against a wall[539] or onto the floor,[540] shoved in the back,[541] choked or strangled,[542] and had their hair pulled.[543] One woman had boiling water poured on her.[544] Two women had their former husband drive at them in his car. In one case this happened when she had a child in the car[545] and for the other it took place soon after he had been convicted of breaching her ADVO.[546] Two women experienced physical violence when they were pregnant.[547]

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[530] Marcella.

[531] See *Chapter 3*.

[532] Frances, Janet, Louise, Marcella and Rosemary.

[533] Lillian.

[534] Janet and Lillian.

[535] Chloe, Keira and Marcella.

[536] Louise and Marcella.

[537] Janet.

[538] Lillian and Rosemary.

[539] Lillian.

[540] Rosemary.

[541] Keira (when she refused to have sex).

[542] Janet and Lillian.

[543] Chloe, Janet, Lillian and Marcella.

[544] Janet.

[545] Lillian.

[546] Frances.

[547] Janet and Marcella. Pregnancy is a high-risk time for women to experience domestic violence. For many it is often the first time that they experience violence: Angela Taft, *Violence against Women in Pregnancy and after Childbirth: Current Knowledge and Issues in Heath Care Responses* (2002) at 1.

Two women described being involved in a siege-style incident. Lillian and her children had moved in with a relative when her former husband came and barricaded them in the house with a 'shotgun'. Frances was also locked in her house by her former husband; he destroyed furniture, disconnected the phone, and threatened to burn the house down with her in it.

While some of these incidents were reported to the police and resulted in charges and ADVO applications,[548] many were not.

As a result of this violence four women reported that they sustained injuries. Injuries included: a '*swollen head*',[549] being unable to move afterwards or feeling paralysed,[550] bruises,[551] black eyes,[552] having to use crutches following a '*karate kick…*[that] *sent me straight for a wall*',[553] a wound to the head,[554] broken ribs,[555] hair pulled out,[556] and '*pains in my head*' after being '*belted*' around the head.[557] Some visited doctors to have their injuries attended to. One woman stated that during these doctor's visits she '*covered*' for her husband.[558]

However, it is important to note that not one woman interviewed nominated an act of physical violence as the 'worst' form of violence experienced.

ii. Sexual violence

Four women reported that they had been '*sexually assaulted*' or '*raped*' by their former partner,[559] all of whom stated that this was the 'worst' thing that happened to them. In addition to being sexually assaulted, Keira also reported that her former partner would get angry, '*uptight*' or '*shitty*' towards her when she refused to have sex. Marcella described being coerced to perform sexual acts that '*I did not like…I would be forced to do in a manner that he would like and if*

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[548] Eg Lillian and Frances's siege incidents led to police action (ADVO and criminal charges) against their former partner.
[549] Marcella.
[550] Marcella.
[551] Marcella.
[552] Lillian.
[553] Lillian.
[554] Lillian.
[555] Chloe.
[556] Chloe.
[557] Rosemary.
[558] Marcella.
[559] Keira, Janet, Marcella and Megan.

I don't I get hit or pushed sometimes'. Megan described the rape as a way of '*letting me know who was boss*'.

iii. Threats and intimidation

Seven women experienced threats or similar intimidating behaviour. This included threats to harm or kill the woman[560] or people close to her,[561] threats to use weapons,[562] and threats to burn or damage property.[563] Two women received bullets in their post-box.[564] In both instances it was not possible to say with certainty that the bullet was the result of their former husband's actions, however, from their point of view 'who else could it have been'. Stark describes these as 'anonymous' acts of violence 'whose authorship is never in doubt'.[565] That is to say, from the woman's experience there was no other person who could have perpetrated these acts other than their former partner.

Four women received death threats pre and post separation.[566] Janet said she received '*a lot of death threats*'. For two women these threats were conveyed via their children, one of whom was six at the time.[567]

iv. Verbal and emotional abuse

Many women spoke of being verbally and emotionally abused.[568] This included name-calling,[569] put-downs,[570] comments about their sexual performance,[571] physical appearance,[572] the standard of their mothering[573] or household duties,[574] and accusations that the woman was having affairs.[575]

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[560] Frances, Janet, Lillian and Rosemary.
[561] Lillian and Kate.
[562] Rosemary.
[563] Frances.
[564] Chloe and Marcella.
[565] Stark, above n84 at 254.
[566] Frances, Janet, Lillian and Rosemary.
[567] Janet and Rosemary.
[568] Chloe and Janet did not specify the nature of this verbal abuse.
[569] Lillian, Louise, Marcella and Megan.
[570] Louise and Megan.
[571] Marcella and Megan.
[572] Louise.
[573] Louise and Marcella.
[574] Lillian and Louise.
[575] Lillian.

Louise nominated the '*mental abuse*' as the 'worst' thing her former husband did to her.[576] She highlighted the longstanding impact this form of abuse had and explained that:

> *…I lost all my confidence, even to get in the car and drive. I just felt, I didn't want to go out anywhere… I just wasn't myself at all and it was just from – from him constantly putting me down and – anything that I did wasn't right. Like even…just the meal that I cooked it was never – it was never right, you know what I mean, like, I couldn't do anything right.*

The experience of verbal and emotional abuse continued to have an impact on the women after separation (for example on their self-esteem and emotional well-being). For many they continued to experience verbal abuse after separation, often in the context of post separation parenting arrangements (see discussion below).

v. Stalking

Three women complained of behaviour that amounted to stalking. Lillian's former husband would drive past her house, throw objects at her house, and yell abuse and threats at her from the driveway. Janet, who had set up a new home in another location, was followed to that new location within a week.

The main complaint leading to Marcella's second ADVO application was the constant presence of her former husband in the vicinity of her house and workplace. As she states '*there was no month that I would not see him*.' Marcella made a number of reports to the police about these 'appearances' as a breach of her ADVO. The police never took formal action as they interpreted these 'appearances' as '*coincidences*' or the man's right to be in a '*public place*'. In contradistinction to this interpretation Marcella stated that it was '*systematic intimidation*'.

vi. Financial abuse

Two women complained about financial abuse, albeit in different ways. For one it was the lack of access to financial resources, for the other it was the continual use of her money. Marcella explained that she was not permitted to handle the money she earned. Her former husband refused to allow her to have her own bank account, '*everything was in his name*'. Keira complained that during her

[576] Numerous studies have documented that many women nominate emotional/psychological abuse as the 'worst' or most damaging act/behaviour perpetrated by their violent partner: see references above n142.

relationship they always used her money and that her former partner would get angry when she was unable, or refused, to do so.

vii. Property damage or destruction

Five women complained about damage to their own or joint property. This included: the removal of the woman's personal property,[577] thrown objects,[578] deliberate damage to objects including objects of special importance to the woman,[579] damage to the front door of the woman's house,[580] broken windows,[581] and damage to or interference with the woman's car.[582]

Like the 'anonymous' threats discussed earlier, it was not always possible for the women to definitively state that the damage was caused by their former partner; however for these women the 'authorship was never in doubt'.[583] Keira explained this 'authorship' in the context of the slashing of her car tyres, once at her work and later at her home address:

> *There are very few people who know where I live and where I would park my car at* [work] *... it probably indicated very strongly that someone was actually following* [me] *um because I was only at* [work] *for about half-a-day um and they slashed exactly the same tyres…*[584]

Frances experienced multiple incidents of property damage, including damage caused by her former husband's attempts to break into her house after separation. In response Frances purchased a '*guard dog…to stop him being able to come to the house and he's still on at the kids – "got to get rid of that dog", "got to get rid of that dog". Um he doesn't want any obstacles in the way of being able to get in if he wants to…*'

viii. Violence towards others

Four women reported that their former partner directed actual or threatened violence towards people close to them.[585] Kate's former husband assaulted her

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[577] Marcella.

[578] Lillian.

[579] Chloe, Frances and Lillian.

[580] Chloe, Frances and Lillian.

[581] Frances.

[582] Chloe, Frances, Keira and Lillian.

[583] Stark, above n84 at 254. See also above n565 and infra text.

[584] See also Lillian.

[585] Janet, Kate, Keira and Lillian.

new partner, threatened to burn his house down, and regularly drove along his residential street.

For Janet, the event that led to her most recent ADVO application involved her former husband attempting to pull her stepmother out of a car, '*to attack her, and she had to – she locked the car door and he had his face up against the window and stuff like that, verbally abusing …*[her]'. Janet also reported that her former husband had been found guilty of assaulting her 17 year old son from a previous relationship for which her was placed on a good behaviour bond and ordered to attend an anger management program.

Lillian stated that '…*anyone that came with me* [to court] *or got involved with me…was harassed and more trouble was started up*' as a result she stopped asking people to accompany her to court.[586]

ix. Former partner threatened self-harm

Two women spoke about actual or threatened self-harm by their former partners.[587] Threats to self-harm or to commit suicide by the perpetrator are identified in the 'Power and Control Wheel', discussed in *Chapter 2*, as a tactic of control and coercion.[588] Lillian provided a disturbing example that took place in front of one of their children who was around five or six years of age:

> *…um there was one night that, three-o-clock in the morning he came home from the pub and um heaved me out of bed wanting his dinner and* [the children] *were asleep in their beds and he grabbed a pair of scissors and started stabbing himself with them, yelling out that I was stabbing him and* [their son woke up and came into the room]…[son] *was standing there saying 'no daddy, you're stabbing yourself',* [her former husband] *just told him that he was a 'lying little blah, blah, blah and go back to bed, you don't know what you're on about'.*

x. Is it violence?

A number of the women detailed acts that they found to be abusive that do not fit within conventional lists of acts of violence or abuse. These acts would therefore not be captured by an act-specific survey like the CTS discussed in *Chapter 2*.

[586] See also Keira.

[587] Keira and Lillian.

[588] See above n160. Threats to commit suicide by the perpetrator are also invariably included in risk assessment tools: eg see the Victorian *Family Violence Risk Assessment and Risk Management: Supporting an Integrated Family Violence Service System* (2008) at 54. See also Jacquelyn Campbell, Nancy Glass, Phyllis Sharps, Kathryn Laughon & Tina Bloom, 'Intimate Partner Homicide: Review and Implications of Research and Policy' (2007) 8 *Trauma, Violence and Abuse* 246 at 261.

During her relationship Marcella's husband forced her to watch news stories about violence against women:

> *...he would call me – he would make me listen to that sort of report in the news and if I don't come and sit next to him in the – in the lounge room he would be very angry at me.*[589]

Keira worked with her former partner and once the relationship ended, he constantly emailed her about trivial work issues, questioned the quality of her work, queried the hours she worked, accessed her email account without her permission, and threatened not to sign her time sheets.

After separation Kate was pursued by acts that might be interpreted as 'displays of love'. For example, her former husband placed a sign on every telegraph pole along her street stating that he loved her and wanted her back. There were also numerous emails, SMS messages and telephone calls to this effect. This behaviour culminated in more obvious acts of violence, particularly against her new partner. Kate reflected that when she decided to end the relationship she '*knew it wouldn't be easy*' and that he '*wouldn't give up*'.

Three women stated that their former partner had reported them to various agencies either to discredit them or to cause them to be investigated.[590] These women were reported to the NSW Department of Community Services (DoCS),[591] rental or accommodation agencies,[592] the police,[593] mental health services,[594] schools,[595] Centrelink,[596] and their workplace.[597] As Lillian stated:

> *I've had numerous complaints go in everywhere...I've had complaints with my real estate, I've had complaints go to the children's school, I've had complaints go into my workplace, I've had* [Centrelink]*...notified I have partners living with me, um I've had full investigation done and it's all proven clear.*

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[589] A similar story was recounted in Kaye et al, above n15 at 51.

[590] SOL5 also mentioned this practice.

[591] Janet and Marcella.

[592] Lillian and Marcella.

[593] Janet and Marcella.

[594] Janet.

[595] Lillian.

[596] Lillian.

[597] Lillian.

This type of harassing behaviour, which does not fit easily within conventional understandings of what is domestic violence, has been reported in other research.[598]

F. Violence continuing after separation

As has been discussed in many other studies, women and those who assist them are constantly subject to the refrain 'why doesn't she leave?',[599] yet many women do effect separation and the violence continues.[600] A range of studies have indicated that one of the key gender differences in the perpetration of violence is the extent to which it continues after separation, with women much more likely to experience violence from their former male partners.[601] One of the ironies of the emphasis on leaving is the fact that the time of separation is a particularly dangerous time for women victims of domestic violence.[602]

Recognising the violence that continues after separation is key to illuminating how violence is exercised as a method of control. Martha Mahoney has argued that 'separation assault' should be specifically named:

> …by emphasizing the urgent control moves that seek to prevent the woman from ending the relationship, the concept of separation assault raises questions that inevitably focus additional attention on the ongoing struggle for power and control in the relationship.[603]

A number of the women interviewed spoke about violence that continued for a long time after separation.[604] Frances, who was still experiencing violence two years after separation, speaks eloquently about her surprise at this:

> *I would never have thought that it would have continued after we'd broken up. Like I would have thought that – especially since he started it, that that would have the end and we'd sort of go on our own merry way and I never expected it to get um – I suppose I found it worse in a way – in some ways because I felt that I was away from it now and I suppose I knew what it was then, because I – I'd been educated on it and therefore I*

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598 Kaye et al, above n15 at 35. See also Doreen in Stark, above n84 at 233.

599 See Kate Cavanagh, 'Understanding Women's Responses to Domestic Violence' (2003) 2 *Qualitative Social Work* 229 at 232. See also Goldfarb, above n265.

600 See Mahoney, above n247. See also Kaye et al, above n15 at 35-37.

601 Bagshaw & Chung, above n137 at 11; Dasgupta, 'Just Like Men?', above n43 at 201; and Atmore, above n31 at 43.

602 See Dutton, above n141 at 1212; Rebecca Dobash, Russell Dobash, Kate Cavanagh & Juanjo Medina-Ariza, 'Lethal and Nonlethal Violence Against an Intimate Female Partner: Comparing Male Murders to Nonlethal Abusers' (2007) 13 *Violence Against Women* 329 at 343-44. See also the rates of intimate homicide in Australia: Mouzos & Rushforth, above n24 at 2 found that one-quarter of intimate partner homicides occurred when the relationship had ended, and of these victims 84% were women; and Alison Wallace, *Homicide: The Social Reality* (1986) at 99: where almost half (46%) of the women were killed by their intimate partner after separation or during the process of separation.

603 Mahoney, above n247 at 7.

604 Frances, Janet, Keira, Lillian, Louise and Rosemary.

> *wouldn't stand for it either anymore and to have it keep going, going, going, going um yeah, I never expected anything... like that to happen.*

Similarly Keira reflected on the disparity between the length of her relationship and the continuation of violence post separation: '*I mean the 18 months…*[since separation is] *double the time of our relationship, um that's a hard thing to cop, like you can cop it for a couple of months I think and so "OK now get over it".'*

Likewise Janet, who had been separated from her husband for six years at the time of the interview, was still experiencing abuse. This was the second time Janet had separated from her husband. In her interview she described how after the first attempt at separation, he had harassed her with telephone calls and threats, and as a result she returned to the relationship to '*stop that happening*'.

While for some women the continuing opportunity for violence was the ongoing contact between the children and their father, this was not always the case. Two women, who did not have children with the perpetrator, also experienced violence after separation.[605]

The types of violence experienced after separation reflect the types of violence and abuse experienced while the relationship was intact, and included: multiple telephone calls, SMS messages and emails, stalking, verbal abuse, property damage and threats. For some women the violence following separation constituted multiple breaches of their ADVO (not all of which were reported to the police).[606] For Frances, these breaches involved '*harassing phone calls*', attempts to break into her house, '*smashing the window*', coming to her mother's house when she was there, property damage, and following her around a party all night and back to her house where '*we had this blow up in the middle of the front lawn*'. Frances's former husband has been convicted of four offences of contravening her ADVO and as a result he has been fined, subjected to an 18 month good behaviour bond, a 12 month good behaviour bond, and a community service order.

The extent of ongoing harassment and violence against Lillian since separation is quite extraordinary:

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[605] Kate and Keira.

[606] See also Frances.

> [From] *2001 to 2002* [something happened] *every day (laughter). Um anything from 109 phone calls, anything to driving up here throwing fire crackers in my yard and everything … if he sees me it's the ongoing harassment. …*[T]*he last lot of* [breach] *charges was* [2002] *ah it was…there was threats um there was something like 17 phone messages just on my answering machine threatening me that he was going to blow me away and he was outside my house etcetera.*

Lillian's former husband lodged his cross application at the same time he was charged with the breaches mentioned above.

i. Pursuing contact via the telephone and other media

Many women complained about ongoing telephone contact and the use of other media to contact them (for example, SMS messages and emails).[607] Contact was pursued at the woman's home and workplace,[608] often at all times of the day and night.[609] As Janet explained:

> *…just the harassment with the phone calls…ringing up constant*[ly] *– 'who's there?' Abusing down the phone line and hang up and he's straight back into it again. And sometimes they just go on for all hours…*

In the end Janet disconnected her landline and now only uses a mobile phone. Similarly Lillian stated, '*I had calls until three o'clock in the morning, four o'clock in the morning. I'd pull the phone out...*'[610]

Three women received messages that purported to be declarations of love from their former partners.[611] This was sometimes extensive. Keira reported that:

> *Um in the beginning, um he probably text messaged me 20 to 30 times a day.*
>
> And what sort of things did he say …?
>
> *Um 'I love you', 'I miss you', 'I need you', 'I can't live without you', um just that sort of stuff.*

Lillian reported that she still receives these 'love' messages two years after separation, and after her former husband has been charged with multiple offences, including contravention of her ADVO. Frances said that she now reports:

> *Everything from a silly little message like 'kiss, kiss, kiss' or …messages he sent at Christmas. I mean they say 'it's harmless'. I mean on Valentine's Day he sent a message*

[607] Chloe, Frances, Kate, Keira, Lillian, Louise, Megan and Rosemary.

[608] Kate.

[609] Frances and Janet.

[610] See also Lillian quoted above.

[611] Kate, Keira and Lillian.

saying …'happy Valentine's Day to my darling wife'. Um our wedding anniversary … he rang up my daughter trying to find out where I was going to be to send me flowers.

Other research has noted the way in which these continuing declarations of love may be misinterpreted by the legal system and others, yet the women receiving them experience them as a continuation of the control evident in the relationship.[612] Lillian, quoted above, alluded to this different interpretation: '*I mean they* [various professionals] *say "It's harmless"*', but clearly this is not how she experienced these messages evidenced by the fact that she reported these acts to the police. Kate similarly interprets the 'love' messages she received as evidence of her former husband's inability to accept that the relationship had ended.

ii. Breaches around contact with children

A number of women complained about what they saw as breaches of their ADVO at the time of contact between the father and the children. Similar accounts of violence and abuse at this time has been reported in other research.[613] When incidents take place at changeover women often find it difficult for these acts to be acknowledged, or responded to, as a breach of their ADVO, rather the acts tend to be seen by the police as 'family matters'.[614]

Louise stated that her ADVO would be breached when:

> *…he was picking up the kids – he'd just stand out the front and abuse me about different things. …he was coming up and um bashing on the window so hard he almost broke it, every time he picked the children up.*[615]

Marcella made a statement to the police,[616] complaining that when her former husband returned the children from contact he dropped them off in her residential street rather than at the location specified in the Family Law Order (FLO). This was not a breach of the ADVO as her former husband was outside the exclusion zone around her residential address. However, Marcella viewed this 'minor' non-

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[612] Busch, 'Don't Throw Bouquets at me…', above n425; and Busch et al, 'The Gap', above n281 at 196.

[613] Kaye et al, above n15 at 119-121; Kathryn Rendell, Zoe Rathus & Angela Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family* (2000). Similar findings have been reported in other jurisdictions: Linda Neilson, *Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association, Law for the Futures Fund* (2001), at 62. Available at <http://www.unbf.ca/arts/CFVR/documents/spousal-abuse.pdf> (27 January 2009); Lorraine Radford, Marianne Hester, Julie Humphries & Kandy-Sue Woodfield, 'For the Sake of the Children: The Law, Domestic Violence and Child Contact in England' (1997) 20 *Women's Studies International Forum* 471, at 477; and Lorraine Radford & Marianne Hester, *Mothering Through Domestic Violence* (2006) at 91-95.

[614] Hayley Katzen, 'It's a Family Matter, Not a Police Matter: The Enforcement of Protection Orders' (2000) 14 *Australian Journal of Family Law* 119.

[615] Louise.

[616] Marcella provided a copy of this statement to the researcher.

compliance with the FLO through the spectrum of her past experiences of violence – and thus as *intentional* non-compliance, intimidation and a breach of her ADVO. In her statement to the police Marcella states how this non-compliance made her feel: '*I felt intimidated and horrible. I didn't know what to do,* [he] *is not suppose*[d] *to drop the children off in our street'*.[617]

Usually Lillian made sure she was not at home when changeover took place but on one occasion she came outside to the car to give her children an umbrella and '*he started yelling and there was a match, a screaming match then. I said I'm calling the police*'.

Frances's FLO provided that her former husband can telephone to speak with the children but not with her:

> *So the children speak to him, but he chooses* [to]*…ring me at another time and* [when he does speak with the children he says] *'put your mother on, put your mother on' and then I said 'just say no'…and then other times when he does actually phone me he starts off with a very tiny issue about the kids and then goes into something else. So basically I refused to talk to him at all because he goes into some huge big screaming and shouting matches and 'you've got to do this, you should be doing this, blah, blah, blah'.*

G. The presence of children

In recent years extensive research has documented the detrimental impact that witnessing intimate partner violence, or living in a household where it takes place, has on children.[618] The high rate of children witnessing violence has been reported in the literature.[619] While women were not specifically asked in this study about whether children had been present when violence was perpetrated against them, six reported instances when this took place.[620] This involved the children:

- Being present when acts of physical violence were perpetrated.[621]

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[617] Louise also complained about regular non-compliance, such as returning the children late, as just '*wear*[ing] *you down*'.

[618] Anne Blanchard, 'Violence in Families: The Effect on Children' (1993) 34 *Family Matters* 31; Robbie Rossman, 'Longer Term Effects of Children's Exposure to Domestic Violence' in Sandra Graham-Bermann & Jeffrey Edleson (eds), *Domestic Violence in the Lives of Children: The Future of Research, Intervention, and Social Policy* (2002); David Woolfe, Claire Crooks, Vivian Lee, Alexandra McIntyre-Smith & Peter Jaffe, 'The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique' (2003) 6 *Clinical Child and Family Psychology Review* 171; and Lesley Laing, *Children, Young People and Domestic Violence* (2000).

[619] In the study by Kaye et al, 62.5% of women interviewed reported that their children had directly witnessed violence: above n15 at 28. See also Moloney et al, above n37 at [5.2.5]; Ferraro, above n43 at 32-35.

[620] Frances, Janet, Lillian, Louise, Marcella and Rosemary.

[621] See Lillian's disturbing account, detailed above, of the incident where her former husband stabbed himself in front of their son.

- Being present when other forms of abuse, particularly verbal or emotional abuse, were used against the woman.[622] This verbal abuse would then be repeated by the child against the mother.[623]

- Being used to convey messages of violence.[624] After separation, Janet's former husband would use the children to convey threats to kill her. One death threat was made via their six year old daughter. Janet states that she reported this to the police and it '*was just put down as a breach of the AVO*'.[625]

At least two fathers sought, or threatened to obtain, residence of the children.[626] In Janet's case her former husband sought residence of the same child he used to convey the death threat mentioned above. In the case of Lillian, who was subject to severe violence including a siege where her former husband had a gun, her former husband threatened '*that he was going to take the kids off me and he was going to take them away or things like that*'.

2. Seeking protection – a narrowing depiction of domestic violence

In this final section I analyse the women's ADVO applications. The ten women interviewed had sought 12 ADVOs that were accompanied by a cross application.[627] All but one of the women lodged their application(s) first.[628] Nine of these ADVOs were initiated by the police (it is unclear whether these applications involved urgent TIOs). All the applications lodged against these women were privately initiated.

While some women attended the interview with copies of their ADVO applications, the application made against them, and the resultant orders, not all

[622] Frances, Louise and Marcella.

[623] Marcella.

[624] Frances, Janet and Rosemary. Most of these children were under ten years of age, with one aged 17.

[625] This does not mean that it was actioned as a breach.

[626] At the time of the fieldwork, the FLA referred to the 'resident' parent as the one with the primary care of the children, and the 'contact' parent as the non-resident parent. This has since changed. The FLA now speaks of where the children live, and spending time with the other parent: by virtue of the *Family Law (Shared Parental Responsibility) Act* 2006 (Cth).

[627] Some women had sought previous ADVOs not accompanied by a cross application. These are not included in this discussion. Eg Janet had applied for four or five ADVOs, and only one of these was subject to a cross application.

[628] The exception was Megan.

did and in these circumstances the women summarised the general contents of the applications. It appears that people who are involved in cross applications are likely to be involved in multiple litigation (for example criminal, civil, and family law actions emerged in the interviews) and this creates a situation where women may find it difficult to retain all the paperwork and may be confused about what took place when, and in what legal process.[629] I attempted to assist in clarifying this with my knowledge of the ADVO process; however this was not always possible.

In a number of interviews there was a clear difference between the way in which the violence experienced was documented in the complaint for the ADVO and the way in which the women described their relationship and the violence perpetrated against them. I present some of these differences here and do so with the purpose of indicating the narrow picture provided by the ADVO complaint process. However, I recognise that these additional matters may not have been raised by the woman with the police or the chamber magistrate, nor may the woman have been asked about acts of violence in addition to the presenting incident. The purpose of this section is not simply to highlight features that are missing, but rather to demonstrate limitations in the way in which domestic violence is captured in the complaint process and to ask questions about possible ways that the complaint process might capture the experience of domestic violence more adequately.

None of the complaints for the ten women mentioned control, although 'fear' and concerns about 'safety' were included in the narratives.

A. Single incident the main focus of the complaint

For six women, their ADVO complaint centred on a single incident.[630] All of these were police complaints. While many of these incidents were of sufficient seriousness to support the making of an ADVO, and did so in all but one case,[631] they failed to capture the full experience of domestic violence.

[629] Kaye et al, above n15 at 39. See also Burton, above n241 at 128.

[630] Chloe, Frances, Janet, Kate, Lillian and Louise.

[631] Kate was the exception. Her ADVO, and the cross application, were resolved via mutual withdrawal.

For the two women involved in siege-style incidents this incident formed the sole subject of their ADVO complaint.[632] In her interview Lillian detailed extensive violence and control throughout her lengthy relationship which included multiple physical assaults, attempted strangulation, verbal abuse, isolating tactics, threats against her and people close to her, constant telephone calls and messages and stalking. Frances also experienced multiple forms of violence: physical abuse, property damage, verbal abuse, threats and since separation harassing telephone calls, unwanted attendances at her home, and property damage. Like Lillian, her police ADVO complaint only mentioned the siege. In Lillian's case her former husband was also charged as a result of this incident. It is not clear from Frances's interview if charges were laid in her case.

These incidents are clearly serious, and it may seem a trifling point to assert that no other aspects of their experience of violence were documented in the complaint narrative. Nonetheless the fact that the incidents were part of a pattern of repeated violence seems a relevant consideration for the court in considering the woman's safety. My concern rests with the focus on incidents, and the fact that many women, unlike Frances and Lillian, do not experience violence on this scale. The focus on discrete incidents means that the multiple and repetitive environment of violence and abuse is not conveyed in the complaint narrative. Such information is important to convey the full experience of violence and abuse and to provide a connective framework through which to appreciate acts that might otherwise be viewed as 'minor' or 'trivial' when viewed in isolation.[633]

The focus on incidents also enables defence or counter stories to be raised that suggest that the behaviour was taken out of context. This may be a particular problem if the incident took place at, or concerned, 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.[634] The documentation of multiple incidents prevents such stories of thwarted romance from taking a dominant role

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[632] Frances and Lillian.

[633] See Stark, above n84 at 14-5.

[634] See Busch, 'Don't Throw Bouquets at me…', above n425; and Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell no Tales, Tales are Told About Them' (1997) 21 *Melbourne University Law Review* 237.

in the interpretation of events. This can be critical in other legal proceedings, such as subsequent family law proceedings. It is also critical in cases where there are competing claims about the perpetration of violence, as indicated by the presence of a cross application. Cases of this kind fit within Durfee's notion of a 'border case',[635] that is those cases that are complex, contested, or the allegations present an awkward fit with the legislation or notions of a 'real' victim. Such cases risk being unsuccessful. 'Border cases' emphasise the critical importance of complaint narratives that convey the experience of violence beyond the most recent incident, that make connections to the legislation, and provide thematic connection to the creation of fear.

Kate's complaint also referred primarily to a single incident in which her former husband followed her and her new partner on a weekend away. This culminated in her former husband assaulting her new partner. The complaint also referred to the numerous messages of 'love' that he had sent to her and displayed in her street. This is a good example of the type of complaint that risks being reinterpreted as simply a man finding it 'understandably' difficult to come to terms with the end of his marriage. While Kate said that there were no specific acts of violence during her relationship, there was a level of control where she had to seek his permission to do things, and she '*knew his triggers*'. This police complaint and the cross complaint were resolved via mutual withdrawal, thus providing Kate with no future protection.

Louise experienced a single incident of physical violence at the end of her eight year marriage and it was this incident that was the sole subject of her ADVO complaint. For her it was also '*the last straw*' after repeated verbal abuse, emotional abuse and property damage during the relationship which continued after separation. Her ADVO was contested, with the main argument presented by the defence being that Louise was not '*in fear*' of her former husband. While the full subject and range of the hearing is not known in her case, a focus on single incidents absent any context provides scope for defence arguments that an ADVO is unwarranted.

[635] Durfee, above n401 at 135-136. See *Chapter 4*.

B. Beyond a single incident

For four women their ADVO complaint sought to capture more than a single incident.[636] One was a police complaint and three were private applications.

While there are problems with the narrative, and brevity, of Rosemary's complaint, it does attempt to capture multiple dimensions of the experience of domestic violence:

> *The parties were married for 21 years and separated on* [date]. *There is an ongoing property dispute. On* [date] *I went up to* [location] *and took my car, which he had previously seized and driven up to* [location] *unregistered. I had previously paid the registration so I could make the return drive. On Sunday night* [date] *he said to my daughter on the phone 'Your mother's dead either way, and your brother's going to gaol and your mother's going to gaol for breaking and entering'. Previously he has threatened me with a firearm, which I know he still has, unlicenced. Last year he sent me a card with the message 'RIP' and other written abuse in it. When he kicked me out last year he threatened to kill me and kicked me and smacked me around the head and threw me onto the floor. There has been a pattern of verbal and physical abuse from the Defendant since we were married. ...*

While it is arguable that the opening sentences regarding an '*ongoing property dispute*' are irrelevant and position the complaint as one having a basis for conflict, the text that follows assists in placing at the forefront the reasons why this creates a situation of ongoing fear for Rosemary. Unlike the text of many complaints,[637] in addition to detailing the most recent incident, this complaint referred to specific dates as well as providing a general picture of the violence perpetrated throughout the relationship. It is worth noting that Rosemary was accompanied on her visit to the chamber magistrate by a worker from a women's centre and it is possible that this worker assisted her in telling her story to the chamber magistrate, prompting her about matters that would be relevant to the complaint.[638]

Similarly Marcella's complaint made reference to the fact that she has had previous ADVOs against her former husband and multiple incidents that have taken place since separation. While not as detailed as Rosemary's complaint, it did refer to more than one incident of violence/abuse and linked these to her assessment of fear and safety. Keira's is the only police complaint that went

[636] Keira, Marcella, Megan and Rosemary.

[637] See *Chapter 4*.

[638] Eg WDVCAS2 described how she often performed this role.

beyond a single incident. This complaint referred to a sexual assault and a range of intimidating behaviours that Keira experienced, including those that she could not necessarily confirm were perpetrated by her former partner.

3. 'Another way of hurting me': the cross application as violence and abuse

Generally the women interviewed identified the cross complaint as another form of abuse, '*harassment*'[639], '*a breach of his AVO*',[640] '*another way of trying to ... get at me ... and upset me*',[641] or '*hurt me*'.[642] Thus the cross complaint was seen as a continuation of the abuse that the woman had already experienced. Kate indicated that her former husband '*threatened*' to apply for a cross application after he was served with her ADVO if she did not withdraw. As Janet noted there was '*nothing*' in her former partner's complaint about being '*fearful*' of her.[643] This provides another example of an act that does not fit within conventional definitions or lists of 'what is an act of violence and abuse?'

While many of the professionals interviewed did not view cross applications favourably, few spoke about the cross applications in a manner that linked it to the continuation of violence. Exceptions to this included:

> …[it] *is generally just another way for him to exert that control or to harass her.*[644]
>
> [cross applications are a form of] *legal harassment.*[645]
>
> *I see it* [cross applications] *as another form of violence.*[646]

The literature on mutual protection orders from the USA does not focus on this conception of the cross complaint as abuse. This may be due to the fact that the problem of mutual orders in the USA centres on judges initiating orders without a formal application. However, Joan Zorza notes the potential use of a resultant mutual order as 'another tool' to further 'harass' a victim by reporting her to the

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[639] Louise, Marcella and Rosemary.

[640] Louise.

[641] Louise. See also Keira.

[642] Janet.

[643] See also Frances and Lillian.

[644] DVLO1.

[645] WDVCAS4. See also WDVCAS1.

[646] WDVCAS2. See also SOL1.

police.[647] The use of the legal system as a means to continue control has also been commented on in the family law arena.[648]

As a final comment it is worth briefly turning to what the women interviewed hoped their ADVO applications would achieve, and how that was countered by the cross application. All women in some way mentioned that they hoped that their ADVO application would stop or reduce the violence or abuse that they had been experiencing. Louise stated that she hoped her ADVO would '*just…settle things down…keep him under control a little bit*'. A few women spoke about how they hoped the ADVO would signal the end of the relationship and that this would stop the violence and abuse that they had experienced since separation.[649] For example Janet hoped her former husband would accept '*that the marriage was finished. And I was still hoping that everything would stop, um so the abuse, the phone calls, all of that type of thing but it didn't ….*' Olivia similarly stated: '*…at the time I was just hoping that he would just go away and leave us alone, I suppose.* [That] *it would stop him coming back and doing anything else to us.'* In this vein, Janet notes that the cross application countered these aims: '*I was trying to do something for myself by getting an AVO and it just seemed like it was not going to happen and he was the one that's going to win again. And that really upset me*.'

4. Summary

This chapter has focused on the broad experience of domestic violence revealed through the interview sample. Women in these interviews described these experiences in response to general questions: How would you describe your relationship? What led you to apply for your ADVO? When did you first experience violence in your relationship? What was the most common form of violence/abuse? What was the worst act perpetrated against you? I highlight the format of the questions to demonstrate that it was the women themselves who actively defined their experiences and were not constrained by specific categories or acts. While this approach might mean that not all acts of violence/abuse experienced by the women were noted (as might be the case if specific questions

[647] Zorza, above n13 at 4.

[648] See Kaspiew, above n236 at 128-29, 141.

[649] Frances, Keira, Janet and Lillian.

about each type of violence were asked), the format provided space for the women to describe their experience in their own words and to include acts/behaviours that might otherwise not be mentioned because they do not neatly fit notions of what constitutes violence/abuse.

This chapter has highlighted the multiple, cumulative experience of violence and abuse in the lives of the women interviewed. This picture is confirmed in other research that notes that the salient features of domestic violence are control, repetition, and the use of different forms of violence, abuse and control tactics.[650] The dimension of control, so prominent in women's discussions of their experience of domestic violence, was lost in the production of the ADVO complaint which largely provided a 'snapshot' of single incidents. While many of these incidents were of sufficient seriousness to support the making of an ADVO, for others the incidents when viewed on their own appear minor and trivial. The complaint narratives examined (confirmed in the analysis presented in *Chapter 6*) typically omit factors that have been found to be critical in comparing men's and women's experiences of domestic violence. This can have implications for other legal proceedings, and a negative impact when negotiating with a cross application. This is particularly the case when we consider that cross applications represent an example of a 'border case' as described by Durfee, and hence a more complex case where the quality of the complaint narrative performs a more critical function (*Chapter 4*). The next chapter turns to a detailed examination of the contents of the cross applications gathered in the court file sample. That chapter highlights the incident dimensions of these complaints and the lack of reference to a context of history of violence that is evident in women's detailed discussions of their experience of domestic violence. Together *Chapters 5-6* demonstrate the inadequacy of the complaint narratives that form cross applications to not only assist in differentiating between the claims made by men and women, but also in revealing the experience and function of domestic violence beyond incidents alone.

[650] See *Chapter 2*.

6. A quantitative examination of cross applications

This chapter presents quantitative data arising from the court file sample. It provides a general profile of the court file sample: How many cross applications were there as a proportion of intimate ADVO applications? Is the male or female applicant more likely to be first in time? Which applications are the police more likely to have initiated? This is followed by a detailed analysis of the allegations men and women made about violence/abuse in their competing ADVO applications: Are there differences between first and second applicants, men and women, in terms of the duration of the experience of violence (that is, the history of violence), the types of violence alleged to have been perpetrated (physical, sexual, threats and other forms of abuse), and the presence of fear?

The key contribution of this chapter is the use of official data (that is, court files generated for ADVO cross complaints) as one method to explore the debates about the gendered perpetration of domestic violence (see *Chapter 2*). As noted in *Chapter 1*, official data has been 'neglected' in the debate regarding the symmetry of the perpetration of domestic violence.[651] This chapter uses official data to explore these debates and also illustrates the limitations of one of the methods grounding one side of this debate; that is, simply counting discrete acts of violence/abuse as an indicator of domestic violence.

1. Introduction to cross applications in the court file sample

A. How many cross applications?

No official data exists on the incidence of cross applications in NSW.[652] However, there has been a perception by workers in the sector that cross applications were increasing and that they represented a significant minority of matters coming before the Local Court.[653]

[651] Melton & Belknap, above n36 at 337.

[652] This lack of data is not restricted to NSW: Victorian Community Council Against Violence, above n25 at 14.

[653] See above n11. In Victoria see Walker, above n12 at 123. Similar anecdotal concern was raised in Queensland, however Douglas and Godden found it to be unsupported: above n63 at 28-29.

The data collected from the court files at the three court sites indicates that the number of cross applications as a proportion of intimate ADVOs is small, ranging from five to 11 per cent.[654] This finding is supported by the view expressed by key professionals in their interviews. However, many professionals also noted that while the incidence was small, cases involving cross applications tended to be more complicated and time consuming than single applications.[655]

In order to examine cross applications before the NSW Local Court, court files were sampled over a 12 month period.[656] Seventy-eight (78) 'complete' cross applications[657] were identified at the three courts over March 2002 - February 2003. This represents a total of 156 individual applications. Some cross applications were accompanied by applications made against other people (for example, a person's new partner, children or other family members).[658] Most cross applications were initiated on different dates (68/78), however a small number (10) were made on exactly the same date (these are referred to as 'dual applications' and are discussed in *Chapter 8*). In addition to the 78 complete cross applications, a further seven (7) 'incomplete' cross applications[659] were identified. Given the comparative focus of this thesis, being concerned with differences between the complaints lodged by men and women, the material presented in this thesis concentrates on complete (including dual applications) cross applications, rather than incomplete ones.

i. As a proportion of intimate ADVO applications

Court recording practices make it necessary to compare the number of *appearances* of cross applications to the number of *appearances* of intimate ADVO applications, rather than the number of actual cases. While some cases may be resolved at the first mention date, an ADVO may involve numerous court appearances before being finalised.

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[654] See Table 6.1.

[655] DVLO1, DVLO4, PP1, PP2, PP3, PP5, SOL3 and WDVCAS3.

[656] See *Chapter 3*.

[657] See definition above n348. The limitations of the court file recording process created a bias towards complete cross applications in the court file sample: *Chapter 3*.

[658] These additional applications are not discussed in this thesis. Additional applications were made in eight cases in the court file sample. Six were private applications overwhelmingly made by men who were second in time (CourtA-4, CourtA-5, CourtB-13, CourtB-22, CourtC-4 and CourtC-28). These were all resolved via withdrawal or dismissal. The remaining two cases were different: in one (CourtA-1B) the police made the additional applications, and in the other both parties (CourtB-35), as well as other relatives, made multiple applications. Two cases in the interview sample involved additional applications: Kate's former husband applied for an ADVO against her sister; and in Janet's case the police applied for an ADVO to protect her mother.

[659] See definition above n349 and infra text

To estimate the proportion of intimate ADVO applications involving cross applications in an average month, I sampled one list day per month over the year at the three court sites; that is 12 list days at each court over the 12 months, and recorded the number of ADVO applications and the relationship between the parties involved in the applications. The results for the three courts are largely similar (Table 6.1) with the number of intimate cross applications as a proportion of intimate ADVOs being small at all three courts. The result for CourtC was, however, slightly higher than for the other two courts:

- **CourtA**: 24 cross applications (complete, partial or incomplete) were identified, involving 71 appearances of one or both cases over the year. Thus for a given month there were approximately 6 court appearances of cross applications involving current/former intimate partners. It is estimated that 7.7 per cent of intimate ADVO applications per month involved a cross application.[660]

- **CourtB:** 38 cross applications were identified, involving 134 appearances of one or both cases over the year. Thus for a given month there were approximately 12 court appearances of cross applications involving current/former intimate partners. It is estimated that 6.7 per cent of intimate ADVO applications per month involved a cross application.[661]

- **CourtC:** 32 cross applications were identified,[662] involving 107 appearances of one or both cases over the year. Thus for a given month there were approximately 9 court appearances of cross applications involving current/former intimate partners. It is estimated that 11.1 per cent of intimate ADVO applications per month involved a cross application.[663]

[660] This would decrease to 7% if all the cases where the relationship was unknown involved intimate relationships.

[661] This would decrease to 5% if all the cases where the relationship was unknown involved intimate relationships.

[662] One cross application at CourtC involved a homosexual couple and was excluded from the sample. See rationale for the focus on heterosexual relationships in *Chapter 1*.

[663] This would decrease to 7% (and more comparable to the other courts examined) if all the cases where the relationship was unknown involved intimate relationships.

Table 6.1: Incidence of cross applications per month at the three court sites

	CourtA	CourtB	CourtC
Number of ADVO appearances each month	112	285	145
Type of relationship for all ADVOs	• 78 former/current intimate partners* • 26 relatives • 1 'other' relationship** • 8 unable to be determined	• 179 former/ current intimate partners* • 57 relatives • 3 'other' relationship** • 38 unable to be determined	• 81 former/current intimate partners • 26 relatives • 3 'other' relationship** • 44 unable to be determined
Number of cross application appearances involving current/former intimate partners (where the relationship is known)	6 (7.7%)	12 (6.7%)	9 (11.1%)

* Intimate partner includes spouses, de facto partners, boy/girlfriend including same-sex partners (not necessary to have cohabitated).
** 'other' relationship includes people who lived in the same household and those in carer relationships.

B. Who was the first in time?

In both the interview sample and the court file sample, men were much more likely to lodge their ADVO application second in time. In the interview sample all but one[664] of the women was first in time (the originating complainant) and the man was second (the cross complainant). Similarly, in the court file sample, in those cases where there was some time gap between the originating complaint and the cross complaint (n=68), a majority of originating applicants were women (76.5%). See Table 6.2.

Table 6.2: Gender first and second applicants

1st applicant (n=68)		2nd applicant (n=68)	
Female	**52** (76.5%)	**Male**	**52** (76.5%)
Male	**16** (23.5%)	**Female**	**16** (23.5%)

While who was the first to apply might be a useful indicator of who requires protection, this is not always the case. Simply because someone applies first does not necessarily mean that they are more likely to be the victim than the person

[664] Megan.

who is second in time.[665] When discussing recommendations for addressing cross applications, professionals cautioned against a 'first in' approach.[666]

C. Police involvement

As was explained in *Chapter 4*, ADVO applications may be initiated in two ways, via the police or via a private complaint.

Eight of the women interviewed had the police initiate an ADVO on their behalf, while the remaining two sought private applications.[667] All of the cross applications lodged against these women were private applications.

The court sample reflects a similar pattern, with police more likely to have made applications on behalf of women, whether they were the originating or cross applicant. As demonstrated by Table 6.3, a majority of first applications were made by the police (70.6%, n=48) and almost half (43.8%, 21/48) of these were TIOs. This is comparable to the number of ADVOs sought by the police generally: in 2002 (the year the court file work was undertaken) the police applied for 77 per cent of all ADVOs.[668]

Table 6.3: Types of applications

	1st applicant (n=68)			2nd applicant (n=68)		
	Female (52)	**Male (16)**	**TOTAL**	**Female (16)**	**Male (52)**	**TOTAL**
Total police applications	**38** *(73.1% of F 1st)*	**10** *(62.5% of M 1st)*	**48**	**3** *(18.8% of F 2nd)*	**5** *(9.6% of M 2nd)*	**8**
Police application (not TIO)	20	7		2	3	
Police application TIO	18	3		1	2	
Private application	**14** *(26.9% of F 1st)*	**6** *(37.5% of M 1st)*	**20**	**13** *(81.3% of F 2nd)*	**47** *(90.4% of M 2nd)*	**60**

By contrast, most second applications were private applications (88.2%, n=60); only eight were police initiated (11.8%), three of which were TIOs.[669] This much

[665] See Dick, above n94 at 12; NSWLRC, 'AVOs', above n11 at [11.11]. Research in the USA has also found that some men contact the police first because they have greater knowledge of the criminal justice system: Susan Miller, 'The Paradox of Women Arrested for Domestic Violence' (2001) 7 *Violence Against Women* 1339 at 1354-55.

[666] MAG2, MAG3, MAG5, SOL2, SOL3, SOL5, SOL6 and WDVCAS3.

[667] Megan and Rosemary.

[668] Local Courts of NSW, '2002', above n65, Table 2.3.

[669] Because the division between first and second applicants is a paired observation it is not possible to test whether there was any statistical significance between these groups, or between women first applicants and male second applicants (and vice versa). It is however possible to conduct chi-square analysis in terms of gender within these two groups (men and women first applicants; and men and women second applicants). These results are noted in the text.

lower level of police participation in second ADVO applications may suggest that a cross complaint is more likely to be retaliatory or, at the very least, less likely to have involved an incident that attracted police attention.

When we look at gender differences, we find that the female first applicants are slightly more likely to be police applications than the male first applicants (73% compared to 63%), but this does not reach statistical significance ($\chi^2 = 0.67$, $p>0.05$). Similarly in terms of second applicants, female applicants were more likely to be police applications (19% compared to 10%) but again this does not reach statistical significance ($\chi^2 = 0.96$, $p>0.05$).

The greater involvement of the police in ADVO applications made by first applicants, and for women who are both first and second applicants, may lend support to the contention that the type of violence experienced by women is more serious and that their need for a protection order is greater.[670] This perception of seriousness is also supported by the number of applications made by police that warranted the urgent protection of a TIO. However, a more adequate test of any apparent gender relationship requires a larger sample size than was possible in the present study.

2. Comparison of the content of allegations made in cross applications

A. History of domestic violence

In the court file sample references to past experiences of violence (reported and unreported) were commonly noted in complaint narratives by the phrase 'there has been a history of domestic violence' without any further information.[671] Often this 'history' was articulated in such a way that it implicated both parties, or at the very least, failed to specify who the perpetrator was. For example:

> *Their (sic) is a long history of domestics between both parties and orders have been in place in the past.*[672]

[670] There is a perception that police initiated ADVOs involve more serious matters: NSWLRC, 'AVOs', above n11 at [3.8].

[671] Eg see CourtA-19 (Police M 2nd), CourtC-15 (Police W 1st), CourtC-19 (Police M 2nd), CourtC-24 (Police W 1st) and CourtC-29 (Police W 1st).

[672] CourtB-34 (Police M 2nd).

> *There has been animosity between the parties for 15 months. There has been a history of violence between the parties during the relationship.*[673]

Some complaint narratives did not use explicit terms such as 'violence', but rather used 'code' terms for violence such as 'disputes', 'problems', 'animosity' or 'volatility', despite the fact that this legal arena is specifically concerned with violence in relationships. The use of such terms is problematic given that such 'code' terms are vague and cast the occurrence of violence within a framework of conflict or relationship difficulties.[674] This is illustrated by the following examples:

> *The PINOP and the* [defendant] *have been in a domestic relationship for the past 4 months. During this time both have been involved in numerous domestic disputes.*[675]

> *In the recent past there have been ongoing problems with the marriage.*[676]

Ruth Busch and colleagues in their study on police responses to breaches of protection orders in New Zealand[677] noted that the police reduce and filter the stories of women when writing statements. They quoted a police statement produced for Esther which, like the complaint narratives quoted above, referred to a history of violence in a way that implicated both parties even where the evidence and events suggested otherwise:

> The day before she finally left him Fred assaulted her on and off for hours. She called the police and told them, according to her statement, that she had been pushed against walls, knocked around the head repeatedly with his open hands and fists, her arms had been twisted up behind her back, and that he had threatened her with a butcher's knife …. Police comments on the file about the incident read: 'There has been a long standing feud between these two…'.[678]

The court file sample also included two curiously worded references to a history of violence which pose a number of questions about the way in which victims and defendants are viewed. These complaints appeared to suggest that the

[673] CourtC-17 (Private W 2nd). See also CourtB-24 (Police W 1st), CourtC-15 (Police W 1st), CourtC-24 (Police W 1st), and CourtC-29 (Police W 1st).

[674] This is reinforced when complaint narratives situate the presenting incident within a 'conflict setting' (eg regarding children or property). Eg see Rosemary's ADVO complaint quoted in *Chapter 5*.

[675] CourtC-5 (Police M 1st).

[676] CourtC-11 (Private M 1st).

[677] Busch et al, 'The Gap', above n281.

[678] Ibid at 195.

designation of victim or defendant is changeable and rests on the perpetration of incidents alone:[679]

> *There is a history of domestic violence between the victim and the defendant and as a result there is an enforceable AVO in place taken out by the defendant as the PINOP and the victim as the defendant.*[680]
>
> *The parties have a history of domestic violence with the protected person being the subject of a current order for the protection of the defendant.*[681]

Not all complaints were so vague. The following complaint, for example, indicated the direction and experience of the violence, but still lacked detail about what that past entailed:

> [the PINOP] *has claimed that there is a history of domestic violence between the parties. There have been previous AVO's (sic) taken out for the protection of the protected person.*[682]

Two cases made more detailed references to a history of violence:

> *The PINOP reports a history of the defendant making threats that he was going to have acid thrown in her face and have her killed.*[683]
>
> *The defendant has a history of intimidating the applicant… This history involves: …refusing* [to let] *the applicant … leave his home. The defendant has hidden keys and threatened the applicant to make her stay.*[684]

The court file sample was investigated to see whether there were any differences in documentation of a history of violence between first and second applicants, and between men and women. Studies comparing men and women arrested for domestic violence in the USA under mandatory or pro arrest policies have found a difference in this regard; with it being far more likely that this was the woman's first arrest for domestic violence.[685]

Cases were coded as having raised a 'history' if there was simply a statement to this effect, if prior incidents were mentioned, if a previous ADVO was

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[679] This shifting status between victim and perpetrator also emerged in discussions about dual applications, see *Chapter 8*.

[680] CourtC-19 (Private M 2nd).

[681] CourtA-19 (Police M 2nd).

[682] CourtA-1B (Police W). See also CourtA-14 (Police W), CourtB-26 (Police W), and CourtC-12 (Private W 1st).

[683] CourtB-22 (Police W 1st).

[684] CourtB-7 (Private W 1st). Marcella and Rosemary's complaint narratives made similar contextual connections.

[685] See Amy Busch & Mindy Rosenberg, 'Comparing Women and Men Arrested for Domestic Violence: A Preliminary Report' (2004) 19 *Journal of Family Violence* 49 at 53; Margaret Martin, 'Double Your Trouble: Dual Arrest in Family Violence' (1997) 12 *Journal of Family Violence* 139 at 150; Henning & Feder, 'Who Presents the Greater Threat?', above n264 at 78; Lynette Feder & Kris Henning, 'A Comparison of Male and Female Dually Arrested Domestic Violence Offenders' (2005) 20 *Violence and Victims* 153, at 166.

mentioned (whether or not it was a cross application), or where ‘code’ terms for violence (mentioned above) were used in the complaint narrative.

In the court file sample, complaints made by first applicants were more likely to make some reference to a history of domestic violence (61.8%), compared to the second applicants (32.4%) (see Table 6.4).

Table 6.4: History of violence mentioned in complaint narrative

1st applicant (68)		2nd applicant (68)	
Female	32/52 *(61.5% of F 1st)*	**Male**	14/52 *(26.9% of M 2nd)*
Male	10/16 *(62.5% of M 1st)*	**Female**	8/16 *(50% of F 2nd)*
Total	**42/68** *(61.8% of all 1st)*	**Total**	**22/68** *(32.4% of all 2nd)*

In terms of gender, the percentage of male and female first applicants who mentioned a history of violence was almost the same (and the small difference did not reach statistical significance, $\chi^2 = 0.0003$, $p>0.05$). Women as second applicants were more likely than male second applicants to mention a history of violence. Fifty per cent of female second applicants mentioned a history of violence, compared to 26.9 per cent of male second applicants (this did not reach statistical significance, $\chi^2 = 2.93$, $p>0.05$).

B. Types of violence alleged

Each complaint narrative was analysed for the types of violence and abuse alleged therein.[686] This was conducted in two stages: the first was a ‘broad brush’ approach which noted whether the complaints alleged any of the four main types of violence and abuse: physical, sexual, threats, and other forms of abuse (verbal, emotional or psychological, financial, damage to property, stalking and harassment). The second stage attempted to investigate these broad categories further by noting the different types of acts alleged within each of the categories. This was not always possible given the poor quality of many complaint narratives (see *Chapter 4*).

[686] Only acts alleged to have been perpetrated by one partner against the other have been recorded. Acts allegedly perpetrated by third parties or towards third parties have been excluded.

In addition, because complaints form part of a legal process, it may be that 'other' forms of abuse (that is, those not defined as criminal offences) are less likely to be noted or emphasised given that, on their own, they may not be sufficient to ground an ADVO.[687]

It must be remembered that the tables and discussion presented in this chapter record only those acts mentioned in the complaint narrative. As has been noted in the context of in-depth interviews in *Chapter 5,* a complaint may only document a limited number of acts and thus does not necessarily document all forms of violence experienced. Like the complaints for the women interviewed, many of the complaints in the court file sample, particularly those initiated by the police, focused on a single incident. Of the 68 applications made on different dates, 20 complaints (18 of which were police initiated) for first applicants were confined to a single incident, and six second applicants (all privately initiated) were similarly limited. For the ten dual applications, eight (all police initiated) referred to a single incident. This means that 43.6 per cent of cases in the court file sample described a single incident. This limited focus prevents any exploration of gender differences in frequency, repetition and duration of domestic violence in this sample. It also draws attention to the way in which the ADVO system continues to replicate the criminal law's focus on discrete incidents, as discussed in *Chapter 2*.

It is important to note that the tables and discussion in this chapter simply indicate whether a person has experienced a certain form of violence, not how many times a person experienced that form of violence. That is to say, if a person provided three examples of physical assaults, this was recorded as physical assault 'yes'.[688] Thus what is recorded presents a 'very conservative' estimate of the types of violence experienced,[689] as there is no attempt to record the actual occurrence of separate acts of violence nor its outcome or severity. The data contained in the court files did not lend itself to this type of analysis – which would be highly flawed if it was attempted due to the limited nature of the complaint narrative.

[687] Hunter & Stubbs, above n16 at 13.

[688] However, if the complaint provided details about what types of acts formed the three instances of physical violence (eg hit, punch, push) these have been analysed in Table 6.6.

[689] A similar approach was adopted in Dobash & Dobash, 'The Nature and Antecedents', above n356 at 275.

By counting types of violence used, my approach is open to similar criticisms as those directed at CTS-style research explored in *Chapter 2* (namely, counting acts without context). However, unlike the CTS research, I do not rely on this tabulation alone to reach conclusions, but rather use it as one method of gathering data about cross applications and the competing stories about domestic violence contained therein.

In conducting this broadbrush count of types of violence I have taken the allegations and self-interpretations of the acts at face value (that is to say, if a person nominated an act as an assault or a threat they have been coded as such). This approach has been adopted because it is simply not possible to assess the veracity of the allegations contained in a complaint without further information. In this way, I am not presenting the allegations of acts of violence as true or objective. Rather I recognise that any account is a partial representation of events as certain acts may be included and others excluded.[690] The role of the police officer or chamber magistrate in 'translating' the events into a complaint, discussed in *Chapter 4*, must also be noted as integral to the way in which some events are detailed and others are not.

This approach of simply coding acts as described and asserted by applicants creates a number of difficulties. In particular, in a small number of cases some applicants sought to characterise acts or behaviours as harassing, threatening or verbally abusive, in a questionable manner. These cases are explored in *Chapter 7*. These questionable cases raise queries about the appropriateness of labelling hurtful or unfortunate acts as domestic violence (as discussed in *Chapter 2*). In the context of cross applications they also raise questions about the way in which the legal process may be harnessed to complain about hurtful acts that are not the intended purview of the legislation, and instead allow the legislation to be manipulated for adverse purposes.

i. The allegations of violence and abuse revealed in the court files

First applicants were more likely than second applicants to allege each form of violence (except sexual violence where only one first applicant and two second

[690] See discussion of realist versus narrative approaches to analysing interviews and text: David Silverman, 'Analyzing Talk and Text' in Denzin & Lincoln (eds), 'Collecting and Interpreting' above n297 at 343, 348-349; see also discussion of needing to take account of the production and purposes of documents: Ian Hodder 'The Interpretation of Documents and Material Culture' in Denzin & Lincoln (eds), 'Collecting and Interpreting' above n297 at 156-157.

applicants alleged this form of violence) (see Table 6.5). Almost 68 per cent of first applicants alleged that they had suffered an act of physical violence, compared to 50 per cent of second applicants. Just over 55 per cent of first applicants alleged that they were threatened in some way, compared to 44 per cent of second applicants. In terms of 'other' forms of violence, almost 68 per cent of first applicants made an allegation of this kind, compared to just over 38 per cent of second applicants.

Male first applicants raised more allegations about physical violence and other forms of abuse than women, however this difference did not reach statistical significance (physical violence $\chi^2 = 1.81$, $p>0.05$, other forms of abuse $\chi^2 = 0.54$, $p>0.05$). This needs to be considered with caution due to the small size of the male first applicant group, and the fact that the table simply records the form of violence alleged, not its repetition or frequency of usage.

Women second applicants were more likely to raise all types of allegations compared to male second applicants, and there was greater disparity between men and women in this group than for first applicants. Importantly it was here that some differences between men and women reached statistical significance; more women second applicants than men raised allegations about physical violence and other forms of abuse (physical violence: $\chi^2 = 5.24$, df = 1, $p<0.05$; other forms of abuse: $\chi^2 = 16.47$, df = 1, $p<0.05$). Differences in allegations about threats did not reach statistical significance ($\chi^2 = 0.27$, df = 1, $p>0.05$). These findings begin to suggest that the complaints made by male second applicants were of a different nature. This will be built upon as the quantitative analysis continues and through the qualitative analysis presented in *Chapter 7*.

As noted above, very few complaints alleged sexual violence.[691] Only two women[692] and one man[693] made this type of allegation. The absence of sexual violence from these court records is worthy of some comment (and further

[691] In the interview sample Keira, Janet, Megan and Marcella reported that they had been sexually assaulted, two of whom (Keira and Megan) mentioned this assault in their ADVO complaint.

[692] CourtA-1B (Police W 1st), and CourtB-13 (Private W 2nd). In another case sexual assault was not alleged in the ADVO application but was mentioned in a letter appended to the court file: CourtA-16 (Police W 1st).

[693] CourtC-7 (Private M 2nd).

investigation).[694] At first glance it may seem surprising given research on women's experiences of domestic violence that documents the coexistence of sexual and physical forms of violence (or indeed other forms of violence/abuse and control).[695] At the same time its absence is unsurprising as it depends on whether the person has recognised an event as a sexually coercive or violent one.[696] There are also questions related to raising such an allegation in the protection order arena: will the making of such a serious allegation create a more adversarial process? Will it anger the defendant? Can such a serious allegation be supported in any way?

Table 6.5: Types of violence alleged in complaint narratives

	1st applicant (68)			**2nd applicant (68)**		
	Female (52)	**Male (16)**	**TOTAL**	**Female (16)**	**Male (52)**	**TOTAL**
Physical violence	33 *(63.5% F 1st)*	13 *(81.3% M 1st)*	**46** *(67.7%)*	12 *(75% F 2nd)*	22 *(42.3% M 2nd)*	**34** *(50%)*
Sexual violence	1	--	**1**	1	1	**2**
Threats	31 *(59.6% F 1st)*	7 *(43.8% M 1st)*	**38** *(55.9%)*	8 *(50% F 2nd)*	22 *(42.3% M 2nd)*	**30** *(44.1%)*
Other *(verbal, harassment, stalking, damage to property, emotional/ psychological, financial, social)*	34 *(65.4% F 1st)*	12 *(75% M 1st)*	**46** *(67.7%)*	**13*** *(81.3% F 2nd)*	**13*** *(25% M 2nd)*	**26*** *(38.2%)*

* Twelve cases were removed from the 'other' category for 2nd applicants (one female and 11 male) as there are questions about the characterisation of the acts as 'abuse' and this was the only 'other' form of abuse alleged. See discussion in *Chapter 7*.

In the end however, it must be noted that this table tells us little about the experience of violence. Like the various criticisms levelled at CTS-based research outlined in *Chapter 2*, Table 6.5 is unable to tell us anything other than that men and women both alleged that they had been subjected to a variety of acts of violence/abuse from their current/former intimate partners.

However, the data documented in this table adds to the picture that is starting to emerge about the way in which first applicants are distinguished from second applicants, particularly male second applicants. For example, first applicants

[694] A similar (and similarly troubling) absence was found in family court files: Moloney et al, above n37 Table 5.2 at 68. See also Alesha Durfee, 'The Gendered Paradox of Victimization and Agency in Protection Order Filings' in Venessa Garcia & Janice Clifford (eds), *Female Victims of Crime: Reality Reconsidered* (forthcoming, 2010).

[695] See García-Moreno et al, above n88 at 32; Kelly, 'Surviving Sexual Violence', above n165 at 53, 127-32.

[696] See Kelly, 'Surviving Sexual Violence', above n165 at 84-85, 112 and ch6.

were more likely than second applicants to complain about a history of violence, and to allege all forms of violence; in turn women second applicants were more likely than male second applicants to allege physical forms of violence and other forms of abuse (these two differences between second applicants reached statistical significance). Other differences between male and female second applicants were revealed that did not reach statistical significance, for example in terms of the extent to which they referred to past experiences of domestic violence. This is suggestive of another area of difference between men and women as second applicants that requires further investigation with a larger sample. This is explored below and in the qualitative analysis in *Chapter 7*.

ii. Forms of physical violence alleged

The broad categories of allegations documented in Table 6.5, were investigated further to see whether they were any differences between first and second applicants, and between men and women, about the specific types of acts or behaviours perpetrated.

Of the 68 cross applications made on different dates (136 individual applications), 81 people (46 first and 35 second applicants) alleged that they had experienced at least one form of physical violence from the alleged perpetrator.

In four cases the complainant, all women, did not identify what form the physical violence took.[697] In the remaining 77 cases the person nominated a form(s) of physical violence. These were coded, with some amendments, using the CDC definition of the types of acts that constitute physical violence.[698] The categories used were: scratching, pushing, shoving, throwing, grabbing, biting, choking, shaking, poking, hair pulling, slapping, punching, hitting, burning, use of weapon, use of restraints or own body against the other person. I have combined the categories 'hit' and 'slap', as it is not clear why these are classified as different forms of physical violence, and it would appear that the term 'slap' tends to used to describe a woman's, and not a man's, act of hitting.[699] During the coding process I removed those CDC items that were not alleged in the

[697] CourtA-11 (Private W 1st), CourtB-35 (Police W 1st), CourtC-2 (Private W 2nd), and CourtC-17 (Private W 2nd).

[698] Saltzman et al, above n79 at 11-12.

[699] The National Violence Against Women Survey using a modified version of the CTS also combined 'hit or slapped': Tjaden & Thoennes, above n119 at 148.

ADVO complaints studied.[700] Some additional items, absent from the CDC list but which emerged with some regularity in the court file sample, were also added (spitting, throwing an object at the person, dragging or pulling a person along the ground, twisting arms,[701] pinning a person against the wall, and kneeing a person in the groin). An 'other' category was also included for those physical acts that were more unusual and hence tended to be mentioned in a single complaint.

If a complaint alleged the threatened use of a weapon/object *and* that weapon/object was present this was coded as 'use of weapon/object', whereas if the weapon/object *was not present* this was coded as a 'threat'. I also recorded separately the *actual use* of a weapon/object and the *threatened use* of a weapon/object, despite some instances of the later being considered an 'assault' under the *Crimes Act.*[702]

Table 6.6: Forms of physical violence

	1st applicant (46/68)		2nd applicant (34/68)	
	Female (33/52 alleged physical violence)*	**Male** (13/16)	**Female** (12/16)*	**Male** (22/52)
Pushing	16	4	2	5
Punching	9	3	2	5
Grabbing	8	2	3	3
Hitting or slapping	6	2	5	6
Choking	4	--	1	1
Pulling hair	3	--	1	--
Throw object	3	2	1	3
Kicking	--	2	1	3
Spitting	1	--	1	--
Scratching	--	2	1	4
Biting	--	2	1	1
Burning	--	--	1	--
Use of weapon/object	--	2	--	3
Use of weapon/object to threaten when present	--	1	1	4
Use of restraints/ own body against another	--	--	--	1
Knee groin	--	1	--	3
Dragging or pulling body along	3	--	1	--
Twisting arms	2	--	--	--
Pinning against wall	1	--	1	--
Other	7	1	1	4

*Three women first applicants and one woman second applicant did not specify the form of the alleged physical violence.

[700] Shoving, throwing, shaking and poking were removed.

[701] This was also added to the CTS2: Straus et al, 'CTS2', above n34 at 308.

[702] See Judicial Commission of NSW, *Criminal Trials Court Bench Book*, at [5-010]. Available at <http://www.judcom.nsw.gov.au/benchbks/criminal/internet_main.html> (3 February 2009).

As was the case in Table 6.5, Table 6.6 does not tell us a great deal other than that men and women both alleged that a wide range of physical acts were used against them by their current/former intimate partner. Some gender differences, however, appeared to emerge when looking at the types of physical acts used by men and women.

Both men and women made allegations that they had been pushed, punched, grabbed, hit or slapped, or had an object thrown at them.

Men were more likely than women to allege that they had been kicked, bitten, and threatened with a weapon/object. Only men alleged that a weapon/object had actually been used against them. This included knives,[703] a tomato stake,[704] a shoe,[705] and a stapler and a piece of wood.[706] Thus two allegations involved the use of a conventional weapon, and the remaining three involved objects that appeared to be 'on hand' at the time. Men also predominated in alleging that women had threatened to use a weapon/object against them when that object was present.[707] This allegation was primarily concerned with being threatened with a knife.[708] The only woman who made this type of allegation alleged that her former husband had attached a piece of wood to a rope and swung it around in a threatening manner.[709] Only men alleged that they had been kneed in the groin and scratched. It is suggested that these acts are more likely to be defensive, rather than offensive, in nature.[710]

In turn only women alleged that they had been spat at, had their hair pulled, were burnt, dragged or pulled along the ground, had their arms twisted and had been pinned against a wall or door. In addition women were more likely than men to allege being choked or strangled.

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[703] CourtA-19 (Police M 2nd), and CourtB-22 (Private M 2nd).

[704] CourtC-17 (Police M 1st). This is the only case where the court file indicated that the person had been charged in connection to the use of a weapon (AOABH, to which the woman pled guilty). This case is discussed in *Chapter 7*.

[705] CourtB-12 (Private M 1st).

[706] CourtB-26 (Private M 2nd).

[707] Five men and one woman made this allegation.

[708] CourtB-25 (Private M 1st), CourtA-14 (Police M 2nd), CourtA-15B (Private M 2nd), CourtB-3 (Private M 2nd), and CourtB-9 (Private M 2nd).

[709] CourtB-20 (Private W 2nd).

[710] See Mary Finn, Brenda Blackwell, Loretta Stalans, Sheila Studdard & Laura Dugan, 'Dual Arrest Decisions in Domestic Violence Cases: The Influence of Departmental Policies ' (2004) 5 *Crime & Delinquency* 565 at 571.

While the data in this area is limited and must be approached with caution, it is interesting to note that these gender differences bear similarities to the differences found by Heather Melton and Joanne Belknap in their research on men and women charged with misdemeanour domestic violence offences.[711] Melton and Belknap found that female defendants:

> were significantly more likely than male defendants to be reported as hitting the victim with an object…throwing an object at the victim…striking the victim with a vehicle and biting the victim… [and that] male defendants were significantly more likely to be reported as shoving or pushing the victim…grabbing or dragging the victim…pulling the victim's hair…physically restraining the victim…strangling the victim… and preventing the victim from calling 911.[712]

Melton and Belknap also found that while it was more likely that women were alleged to have used weapons, there was no gender difference in terms of the use of conventional weapons, but there was a difference in the use of 'available household items'.[713] This led Melton and Belknap to suggest that rather than women's use of weapons suggesting a greater seriousness in their behaviour, instead it may be 'a means of "levelling the playing field" once abuse has been perpetrated against them'.[714]

Allegations concerning 'other' forms of physical violence also highlighted areas of potential gender difference. Melton and Belknap noted in their study that male defendants were more likely to perpetrate acts that were 'more unusual (using unusual weapons or involving an unusual situation) than their female counterparts'.[715] It is important to look at these forms of physical violence as they indicate the variety of acts that are perpetrated beyond the more typical forms of physical violence. In so doing they assist in conveying a more complete picture of the way in which some people use acts to demean and control their victims.

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[711] Melton & Belknap, above n36.

[712] Ibid at 339.

[713] Ibid at 344. See also Henning & Feder, 'Who Presents the Greater Threat?', above n264 at 75; Feder & Henning, 'A Comparison', above n685 at 163; Miller, 'Paradox of Women Arrested', above n665 at 1365; Busch & Rosenberg, above n685 at 53; and Debra Houry, Sudha Reddy & Constance Parramore, 'Characteristics of Victims Coarrested for Intimate Partner Violence' (2006) 21 *Journal of Interpersonal Violence* 1483, at 1486, 1489.

[714] Ibid at 344. See also Dasgupta, 'Just Like Men?', above n43 at 204-05; Miller, 'Victims as Offenders', above n21 at 74; and Busch & Rosenberg, above n685 at 53. That men tend to use their own bodies and women use weapons is also reflected in homicide data: 80% of women used a knife or similar instrument to kill their partner, in 22% of cases men used their own hands to beat their (former) partner to death, no women killed in the same way: Megan Davies & Jenny Mouzos, *Homicide in Australia: 2005-06 National Homicide Monitoring Program Annual Report* (2007) at 25.

[715] Melton & Belknap, above n36 at 342.

Eight first applicants (seven women and one man) alleged other forms of behaviour that do not neatly fit within traditional conceptions of physical violence. Their allegations included: being physically nudged;[716] having a bread and butter knife waved under her throat and the butter spread across her cheeks;[717] having her head forced onto a stove top;[718] wrestling;[719] bashing the woman's head against a vehicle;[720] lifting the woman off the ground causing bruises to her arms;[721] kneeling on the woman's stomach when she was seven months pregnant;[722] and forcing his fingers into her eyes.[723] The only male in this group alleged that his former partner had elbowed and kicked him in his sleep.[724]

Five second applicants (four men and one woman) made allegations about other forms of physical behaviour. The allegations made by the men included: being sprayed with 'insecticide and stain remover in an attempt to poison him';[725] barged past the man knocking him 'off balance';[726] stepped on his foot with the heel of her shoe;[727] and 'lash[ed] out' at the man while holding keys in her hand causing a laceration.[728] The woman alleged that her former partner had yelled in her ear and pinched her.[729]

C. Threats

Threats were coded in terms of whether they were specified (threats to kill or harm the victim, to kill or harm others, to harm property including pets, and threats to commit suicide or to self-harm) or unspecified. As explained above, I have coded all acts that were described as 'threats' in the complaint narratives. There are, however, a small number of complaints in which I suggest that this characterisation is questionable. That is to say that it is open to question whether

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[716] CourtC-8 (Police W 1st).
[717] CourtC-8 (Police W 1st).
[718] CourtC-13 (Police W 1st).
[719] CourtC-22 (Police W 1st).
[720] CourtC-24 (Police W 1st).
[721] CourtC-29 (Police W 1st).
[722] CourtB-9 (Police W 1st).
[723] CourtB-15 (Private W 1st).
[724] CourtB-25 (Private M 1st). While these actions have been coded in Table 6.6, the characterisation of these acts as 'violence' or as acts that might ground an ADVO is questionable. See *Chapter 7*.
[725] CourtA-16 (Private M 2nd).
[726] CourtC-8 (Private M 2nd).
[727] CourtB-7 (Private M 2nd).
[728] CourtB-32B (Private M 2nd).
[729] CourtB-25 (Private W 2nd).

they are simply unfortunate comments said in anger, such as '*you're dead you bastard*'.[730] Only men alleged threats that were questionable, and while they have been coded in this chapter as threats, they are the subject of further discussion in *Chapter 7*.

As is indicated in Table 6.7, 38 first applicants alleged that they had been threatened in some way (31 women and seven men). In six cases the threat was unspecified. Most of the threats alleged related to the defendant threatening to kill or harm the victim. Both men and women first applicants experienced similar rates of these kinds of threats. A small number of women first applicants also experienced threats to harm their pets or their property. Women first applicants also alleged a small number of threats to kill people close to them as well as threats by the perpetrator to commit suicide. No male first applicant made similar allegations. For all types of threats the numbers were small and must be considered with caution.

Table 6.7: Types of threats

	1st applicant [38/68 made allegation of threat(s)]		**2nd applicant [30/68 made allegations of threat(s)]**	
	Female (31/52)	**Male (7/16)**	**Female (8/16)**	**Male (22/52)**
Threat not specified	3 *(10%)*	3 *(42.9%)*	1 *(12.5%)*	1 *(4.6%)*
THREAT SPECIFIED (% indicate of the number who specified the type of threat): **Threats concerning the victim**				
To kill victim	15 *(53.6% F 1st who specified)*	2 *(50% M 1st who specified)*	1 *(14.3% F 2nd who specified)*	7 *(33.3% M 2ndwho specified)*
To harm victim	15 *(53.6%)*	2 *(50%)*	6 *(85.7%)*	13 *(61.9%*
To harm property of victim	2 *(7.1%*	0	1 *(14.3%)*	2 *(9.5%)*
To harm pet of victim	1 *(3.6%)*	0	0	0
Threats concerning others related to the victim				
To kill others	3 *(10.7%)*	0	0	1 *(4.8%)*
To harm others	0	0	2 *(28.6%)*	0
Threats to engage in self-harm				
Suicide	2 *(7.1%)*	0	0	1 *(4.8%)*
Other self-harm	0	0	0	1 *(4.8%)*

[730] CourtC-12 (Private M 2nd).

Heather Melton and Joanne Belknap in their study of domestic violence charge cases found a gender difference in the issuance of threats, with men being 'significantly more likely than female defendants to be reported as making threats to the victim'.[731] In the current study both men and women received a wide range of threats. There is a tentative suggestion in the data presented in Table 6.7 that more women alleged that they were subject to different types of threats (including threats to kill), with men appearing to be more likely to allege one type of threat. However, this suggestion requires further investigation, as the sample relied on in this thesis that not only alleged that a threat had been made but also specified its type was very small. This is an important area for further investigation as the issuance of threats may be indicative of the presence of a coercive environment.

Significantly Melton and Belknap also found a gender difference in the context in which threats were issued. In that study, when men issued threats against their female partners it was often about 'what would happen' if she called the police or told anyone about the violence/abuse. None of the threats issued by women against their current/former intimate partners revealed this type of coercive context.[732] This resonates with James Ptacek's work on the strategies of batterers as revealed in women's affidavits for protection orders in Massachusetts. Ptacek documented multiple strategies deployed by men to prevent the woman reporting the violence, proceeding with legal action, or to prevent her from effecting separation.[733]

The complaints involving cross applications were investigated to see whether there was any indication of the context in which threats were issued and whether this reveals any gender difference. Given the brevity and lack of detail contained in many complaint narratives, it is not surprising that frequently no context was provided. Table 6.8 details the context and timing (pre or post separation) of the threats alleged in the cross applications. While the numbers are very small, it is worth noting that only women first applicants mentioned that they received

[731] Melton & Belknap, above n36 at 339.

[732] Ibid at 341.

[733] Ptacek, above n13 at 84-85 (retaliation and coercion concerning court and police actions) and 79-82 (separation assault).

threats during their relationship about reporting violence to the police or telling others about it.[734] The following complaint illustrates this type of threat:

> *... The defendant threatened the PINOP that, 'I'll bash you again if you say anything to anyone. I'll take the kids away. I'll kill you'.*[735]

Four women first applicants alleged they were threatened at the time of separation, when discussing separation, or to return to the relationship. For all of these women the threat was issued as a means of preventing separation and was either a threat to kill or harm the woman:[736]

> *...Prior to the separation the defendant threatened: 'I (sic) you ever leave me I'll kill you' and the defendant has threatened the children of the parties.*[737]

By contrast the single male complaint, which could potentially fall into this category, was of an entirely different nature; he alleged that his former spouse threatened to '*ruin*' him at the time of separation by seeking an ADVO against him and taking his property.[738] This threat was not aimed at preventing the separation, rather it was the consequence of separation; the woman is alleged to have stated to the man *'that's it. It's over. I am going to ruin you*'.

Only men alleged that women threatened to use the legal system against them, particularly by obtaining an ADVO.[739] This bears similarities to the way that some men characterised women obtaining an ADVO and/or reporting breaches as forms of harassment or intimidation. These types of characterisations are explored in *Chapter 7*.

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[734] CourtB-35 (Police W 1st), CourtC-23 (Police W 1st), and CourtC-25 (Police W 1st). See also CourtB-7 (Private W 1st) where the woman alleged that the man '*boasted* [to her that]*...he always has revenge on people who have taken AVOs out* [against him]'.

[735] CourtB-35 (Police W 1st). See also CourtC-23 (Police W 1st), and CourtC-25 (Police W 1st).

[736] See CourtA-16 (Police W 1st) threat to kill when she broached the subject of getting a divorce; CourtB-7 (Private W 1st) threat to harm when she requested that he leave her alone; CourtB-21 (Private W 1st) threat to kill if she ever left him; and CourtC-3 (Police W 1st) threat to '*bash*' her if she didn't return to the relationship.

[737] CourtB-21 (Private W 1st).

[738] CourtC-26 (Private M 2nd).

[739] CourtC-26 (Private M 2nd) defendant alleged to have threatened '*...just wait and see! I am going to take out an AVO*'; CourtA-16 (Private M 2nd) '*The defendant has also threatened to have the complainant arrested by the police, by making false statements*'; and CourtB-25 (Private M 1st) alleged the woman sent a SMS message: '*Time for another AVO and to call the Department of Immigration*'.

The focus on post separation events is unsurprising in the context of protection order litigation,[740] however it is notable that only first applicants reported a number of threats pre and post separation.

Table 6.8: Context of threats

	1st applicant [39/68 made allegation of threat(s)]		**2nd applicant [30/68 made allegations of threat(s)]**	
	Female (31/52)*	**Male (7/16)**	**Female (8/16)**	**Male (22/52)*** **
No context provided or context unclear	*17*	*6*	*5*	*14*
Context of the issuance of threat				
To prevent reporting to police/others	3	--	--	--
Trying to separate/ during separation	3	--	--	1****
Trying to get to return to relationship	1	--	--	--
Family law – children**	3	--	--	4
Family law – property	--	1	--	--
Jealousy about a new partner/affair	--	--	--	2
Other	5	--	3	2
Time when threat issued				
Pre Separation	6	2	1	1
Trying to separate/ during separation	1	1	--	1
Post Separation	22	4	7	17
Unclear	3	--	--	4

* One woman first applicant provided specific details about two threats, pre and post separation. As a result this column totals 32 rather than 31.
** Threats made when determining parenting arrangements for children post separation, as well as threats at the time of changeover, are included here.
***One male second applicant provided specific details about two threats issued post separation. As a result this column totals 23 rather than 22.
****While this threat is coded here see discussion in text about the different nature of this man's allegation.

One area in which there appeared to be some congruence was for threats made in relation to arrangements regarding children after separation. Three female first applicants and four male second applicants nominated or implied that this was the context or motivation for the threat made against them. While the numbers here are very small and the information provided scant, there appears to be a slightly different nature in the types of threats issued by men and women in this context. The threats alleged to have been issued by women included: a threat to

[740] All of the cross applications gathered in this study (court file and interview samples) involved parties who had separated (some under the one roof). A preponderance of separated relationships was also found in Ptacek's study in Massachusetts where only 35% of women were still in a relationship with the defendant: above n13 at 72.

'*come and burn you in the home*' if the man went to the Family Court asking for a property settlement;[741] a threat to prevent any contact with the child(ren); [742] a threat to '*Quick kids here's our chance, let's run did (sic) over'* when the mother collected the children following the father's contact time.[743] In contrast the threats alleged to have been issued by men were all threats to kill the woman to gain custody of the children.[744] In CourtB-17 the woman, who has custody of the two children and contact changeover takes place at her home, included the following allegation in her complaint:

> … *the offender approached the* [woman] *in the foyer area* [of the Family Court following a counselling session] *and stated 'If I can't have the fuck'n kids, you won't be having them, I'll shoot ya first'. The* [woman] *did not reply, collected her children and returned home.*
>
> *Since that date, on each access visit, the offender has made similar threats … On* [date] *he called out 'you're dead'. He later returned and said 'You won't have the boys, because I'll shoot ya, I'm getting the shits with the court'. As a result of these comments, the* [woman] *fears for her safety and requires an apprehended violence order.*[745]

This is an area that requires further research and examination.

D. Other forms of abuse

When looking at other forms of abuse more distinct differences emerge. The complaints made by women, as first and second applicants, included allegations across the broad spectrum of acts/behaviours described here as 'other' forms of abuse. This is consistent with research that details the 'constellation of abuse' experienced by women victims of domestic violence;[746] that women rarely experience only one form of violence,[747] and that 'other' forms of abuse play a role in the function of domestic violence as a means of control (see *Chapter 2*).

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[741] CourtA–9 (Private M 2nd) this is the only allegation in the complaint.

[742] CourtC-14 (Private M 2nd) this is the only allegation in the complaint; and CourtB-19 (Police M 2nd).

[743] CourtB-11 (Private M 2nd). The man also alleged that the woman had: punched him in the chest when they were arguing, made '*false comments*' about him, and harassed him (unspecified).

[744] CourtB–6 (Police W 1st), CourtB-17 (Police W 1st), and CourtB-35 (Police W 1st).

[745] CourtB-17 (Police W 1st).

[746] See Dobash & Dobash, 'Working on a Puzzle', above n19 at 343 where the authors note that men did not allege the same acts of intimidation or coercion 'associated with the "constellation of abuse"' that were integral to women's experiences of male violence and abuse. See *Chapter 2*.

[747] See Rebecca Dobash & Russell Dobash, 'Violent Men and Violent Contexts' in Rebecca Dobash & Russell Dobash (eds), *Rethinking Violence Against Women* (1998) at 155-156 commenting on the range of behaviours used by violent men against their female partners. See also Kelly's discussion of sexual violence and its coexistence with other forms of domestic violence: 'Surviving Sexual Violence', above n165 at 127-31. In Melton and Belknap's study of men and women arrested for domestic violence they also found that men were more likely to use multiple acts in an incident, whereas women rarely used more than one or two actions: above n36 at 342. See also Busch & Rosenberg, above n685 at 55.

Forty-six first applicants (34 women and 12 men) and 26 second applicants (13 women and 13 men) alleged that they had been subject to other forms of abuse (verbal abuse, harassment, stalking, property damage, emotional/psychological abuse, financial abuse, and social abuse/isolation) (see Table 6.9). As noted above, complaints were coded in a generous fashion; however in a number of cases, all second applicants, the characterisation of certain actions as abusive (particularly those sought to be described as harassment) was highly questionable.[748] These cases are discussed in *Chapter 7*.

While the numbers are very small, it is notable that only women alleged behaviour that can be characterised as tactics of isolation.

Table 6.9: Other forms of abuse

	1st applicants (68)			2nd applicants (68)		
	Female (34/ 52)	**Male (12/16)**	**TOTAL**	**Female (13*/16)**	**Male (13*/ 52)**	**TOTAL**
Verbal abuse	23 *(67.7% of female 1st applicants who alleged 'other' abuse)*	5 *(41.7% of male 1st applicants who alleged 'other' abuse)*	**28**	8 *(61.5% of female 2nd applicants who alleged 'other' abuse)*	5 *(38.5% of male 2nd applicants who alleged 'other' abuse)*	**13**
Harassment	18 *(52.9%)*	5 *(41.7%)*	**23**	9 *(69.2%)*	11 *(84.6%)*	**20**
Stalking	6 *(17.7%)*	1 *(8.3%)*	**7**	2 *(15.4%)*	1 *(7.7%)*	**3**
Damage to property	10 *(29.4%)*	4 *(33.3%)*	**14**	1 *(7.7%)*	4 *(30.8%)*	**5**
Emotional or psychological	8 *(23.5%)*	0	**8**	4 *(30.8%)*	2 *(15.4%)*	**6**
Financial	1 *(2.9%)*	0	**1**	2 *(15.4%)*	1 *(7.7%)*	**3**
Social	3 *(8.8%)*	0	**3**	3 *(24.0%)*	0	**3**
Other*	0	0	**0**	2 *(15.4%)*	0	**2**

* Twelve cases (one woman second applicant and 11 male second applicants) have been excluded from the 'other' category as there are questions about their characterisation of the act/behaviour as 'abuse', and this was the only allegation of other forms of abuse made in the complaint.

It is interesting to note the extent to which some complainants, particularly women, nominated other forms of abuse in a legal arena where, with the exception of property damage and stalking, these acts are not crimes and it is unlikely that such forms of abuse would, on their own, ground an ADVO. 'Other' forms of abuse did not figure prominently for male second applicants.

[748] Twelve cases (all made by second applicants) fit this profile and are discussed in *Chapter 7*.

The only areas in which male second applicants appeared to make greater allegations concerned harassment and property damage.

E. Fear

Finally, the complaint narratives were investigated for reference to 'fears' or 'apprehensions' held by each complainant regarding the behaviour of the person they were seeking an ADVO against. To obtain an ADVO the legislation requires that the person seeking the ADVO 'has reasonable grounds to fear and in fact fears' the commission of certain acts and behaviours.[749] That is to say that the making of an ADVO is not simply reliant on the presence of certain acts/behaviours, but that there must be this additional component of fear. In many complaint narratives fear or apprehension was not specifically mentioned, and in those where it was it was often included as a routine way of concluding the complaint.[750] In conducting this analysis I recognise that many applicants may well still be fearful even when the complaint did not specifically refer to fear, and in some cases this might be assumed from the contents of the complaint. However, in this analysis if there was no specific mention of fear in the complaint this has been coded as 'no fear' regardless of the contents of the complaint. This analysis thus represents a conservative indication of the presence of fear. Table 6.10 indicates that women, as first and second applicants were more likely than male applicants to make specific reference to fear than male applicants. In relation to first applicants this apparent gender difference did not reach statistical significance ($\chi^2 = 1.58$, df = 1, $p>0.05$); however the difference between male and female second applicants was statistically significant ($\chi^2 = 5.89$, df = 1, $p<0.05$). This is consistent with the growing picture of male second applicants' complaints being of a different nature and quality than those made by male and female first applicants, and female second applicants.

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[749] *Crimes Act* 1900 (NSW) s562AE, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s16.

[750] A similar routine approach was documented in relation to references to 'a history of violence'.

Table 6.10: Fear

	1st applicants		2nd applicants	
	Female (52)	Male (16)	Female (16)	Male (52)**
Fear mentioned in the complaint	29* (55.8% W 1st)	6 (37.5% M 1st)	11 (68.8% F 2nd)	18** (34.6% M 2nd)
Fear not mentioned in the complaint	23 (44.2%)	10 (62.5%)	5 (31.3%)	34** (61.5%)

* In 9 of these cases fear was articulated as the fears held by the police for the victim.
** Two other men mentioned 'fears' however these were fears that the woman would cause him to breach his ADVO or provoke him in some way. These have been excluded and instead coded as 'fear not mentioned'.

This finding replicates other studies where women were more likely than men to state that they feared their current/former intimate partner.[751] This should be investigated further through interviews with people seeking ADVOs, as it is troubling that more complaint narratives did not make reference to this attribute given that it is a legislative requirement for granting an ADVO, and the fact that the generation of fear is one area where consistent, and statistically significant differences in the experience of domestic violence is found between men and women. Like the presence and function of control, to which the generation of fear is linked, fear may be an important criterion in different types of domestic violence.

3. Summary

This chapter has provided quantitative information about the profile and nature of cross applications gathered in the court file sample.

It is estimated that the number of cross applications, as a proportion of intimate partner ADVOs, is small. The professionals interviewed agreed with this estimation but noted that these cases tended to be more complex and time consuming. The court file sample indicated that the majority of first applicants were women and that first applications were more likely to have been initiated by the police (implying a greater level of seriousness); in contrast second applicants were more likely to be men lodging private applications.

[751] Kevin Hamberger & Clare Guse, 'Men's and Women's Use of Intimate Partner Violence in Clinical Samples' (2002) 8 *Violence Against Women* 1301 at 1316; Bagshaw & Chung, above n137 at 11; Miller, 'Victims as Offenders', above n21 at 20; Melton & Belknap, above n36 at 342-43; Feder & Henning, 'A Comparison', above n685 at 163, 166; Jennifer Lanhinrichsen-Rohling, Peter Neidig & George Thorn, 'Violent Marriages: Gender Differences in Levels of Current Violence and Past Abuse' (1995) 10 *Journal of Family Violence* 159 at 171; Barbara Morse, 'Beyond the Conflict Tactics Scale: Assessing Gender Differences in Partner Violence' (1995) 10 *Violence and Victims* 251 at 268.

The remainder of the chapter explored whether there were quantitative differences between the types of allegations made by first and second applicants, and between men and women. The brevity of complaint narratives, and the resultant lack of detail, meant that frequently it was not possible to say anything beyond that both men and women alleged that their current/former partner had perpetrated a wide range of different forms of acts/behaviour against them.

Thus this chapter demonstrated not only the limitations of methods that simply count acts of violence, but also the limitations of approaches that focus on incidents rather than context, and that focus on violence to the exclusion of other acts of coercive control. The chapter then reflects the theoretical and methodological discussion in *Chapter 2* which outlined the debates, within the largely sociological literature, on conceptions of domestic violence. Like Melton and Belknap, the findings detailed in this chapter indicate that the:

> …differences revealed in quantitative data were not that drastic – both men and women used some serious actions, displaying no significant differences with most of the actions – examining the qualitative data showed a different picture.[752]

Thus taking a quantitative approach provides a 'bare bones' measure of domestic violence.[753]

That said, some areas of the data presented in this chapter do appear to build a picture of some gender difference; this is particularly in relation to male second applicants. These applicants appear to make allegations of a different nature to men and women first applicants, and to women second applicants. In general first applicants, men and women raised allegations across the broad spectrum of categories of violence. While some small differences were found between men and women first applicants, none of these reached statistical significance. However, areas of statistical significance were found between men and women second applicants: more women second applicants than men alleged physical violence, other forms of abuse and fear. Other areas examined such as a history of domestic violence and the use of threats did not reach statistical significance; however they were in the same direction as those differences that were found, thus suggesting further areas of gender difference between men and women

[752] Melton & Belknap, above n36 at 343.

[753] Ibid at 346.

second applicants. A larger sample is required to test this proposition. The different nature of the complaints made by male second applicants is explored in the next chapter, which undertakes a qualitative examination of the complaint narratives. That chapter further emphasises the critical importance of context in assessing the meaning of violence by exploring in-depth the narrative content of the originating complaint and the cross complaint (as a pair).

7. A qualitative examination of cross applications

> [Q]uantitative research that asks … Who did what to whom how many times? These studies consistently show few, if any, gender differences in intimate violence…What these studies miss, indeed what they cannot measure given the nature of the methodology – is the context, motive, and meaning underlying each violent event…[754]

In this chapter I build on the picture commenced in *Chapter 6* by exploring in detail qualitative differences evident in the cross applications gathered in the court file sample and the interviews with women. Few of the differences between men and women that emerged in *Chapter 6* were statistically significant, leading to the conclusion that an approach centred on counting, devoid of context, was unable to reveal much about gender differences in the use of violence beyond simply 'who did what to whom'. The purpose of this chapter is to look beyond incidents, to examine other factors that can assist in differentiating the nature and occurrence of violence/abuse between intimate partners. I do this by looking more closely at the 'paired' narratives – that is, examining *together* the woman's and the man's complaints.[755] Given the limitations of the complaint process[756] this in-depth exploration was not always possible. Where it was possible, key differences emerged in three areas, where it was, by and large, men who:

- were subject to associated criminal charges at the time the cross application was lodged;
- made complaints that sought to characterise acts/behaviour as violence in a questionable manner, or made complaints that did not appear to contain allegations that could ground an ADVO; or
- sought to position themselves within a 'wounded' narrative.

[754] Claire Renzetti, 'Editor's Introduction' (1997) 3 *Violence Against Women* 459, at 459.

[755] See the emphasis Dobash & Dobash place on examining shared narratives and the reason why this was not undertaken for the interview sample in this thesis, above n318. It was however possible in terms of the court file sample.

[756] See *Chapter 4*.

1. The presence of criminal charges

In the interview sample and the court file sample men (primarily second applicants) were more likely than women to be subject to criminal charges at the same time as the cross application.

In the court file sample, 22 people were subject to criminal charges (involving a total of 62 charges). See Table 7.1. Seventeen men[757] and five women were charged[758] (three women were subject to charges at the same time as their former partner). Most people were charged with one offence; however seven men (two of whom were charged with 11 offences) and four women were charged with multiple offences. While most charges related to acts perpetrated against an intimate partner, a person known to the intimate partner, or to property, not all did.[759] The number of charges that involved contravening an ADVO is notable; eight men, all second applicants, were charged with this offence with three being subject to multiple breach charges.[760] No women were charged with contravening an ADVO. This suggests a different quality to the behaviour of male second applicants; that these men were engaged in a repetitive pattern of behaviour. USA research exploring the difference between men and women arrested for domestic violence offences also found that men were more likely to have been arrested previously for domestic violence,[761] including breaching a protection order.[762]

[757] CourtA-1A, CourtA-1B, CourtA-3, CourtA-4, CourtA-6 (dual arrest), CourtA-19, CourtB-7, CourtB-9, CourtB-10, CourtB-11, CourtB-20 (both charged), CourtB-22, CourtB-26, CourtB-34 (both charged), CourtC-2, CourtC-13, and CourtC-28. 'Dual arrest' indicates that both parties were arrested in the same incident; 'both charged' indicates that it is unclear whether the charges arose out of the same incident or separate incidents.

[758] CourtA-6 (dual arrest), CourtB-20 (both charged), CourtB-34 (both charged), CourtB-35, and CourtC-17. In another case a man, charged by the police, laid a private information for common assault against his former partner and her father: CourtC-28.

[759] Eg the woman in CourtB-34 was charged with resisting an officer in the execution of his/her duty [*Crimes Act* 1900 (NSW) s59] and using offensive language in a public place [*Summary Offences Act* 1988 (NSW) s4A]; all acts she allegedly performed to prevent, or protest about, the arrest of her former partner.

[760] CourtA-1B, CourtA-4, CourtA-6, CourtB-7 (three charges), CourtB-10 (three charges), CourtB-26, CourtB-34, and CourtC-2 (three charges).

[761] Martin, above n685 at 150; Busch & Rosenberg, above n685 at 53, 54.

[762] See Henning & Feder, 'Who Presents the Greater Threat?', above n264 at 75.

Table 7.1: Presence of criminal charges

	1st applicant (68)		2nd applicant (68)		Dual application (10)	
	Female (1/52)	Male (3/16)	Female (3/16)	Male (11/52)	Female (1/10)	Male (3/10)
1 charge	--	2	1	6	--	2
2-3 charges	1	--	2	3	1	--
4-5	--	--	--	--	--	1
6-7	--	1	--	--	--	--
8-9	--	--	--	--	--	--
10-11	--	--	--	2	--	--

In many cases the results of these charges are unknown; they were either transferred to another court or determined after the finalisation of the fieldwork.[763] Eight charges did not proceed and were withdrawn at court. The result is known for 20 charges (half were dismissed and half resulted in a finding of guilt). Three men and one woman were found guilty of various offences.[764]

Little is known about the nature and context of the events that led to these charges from the data examined for this thesis; in only two cases was the charge fact sheet appended to the ADVO court file. One is the case of Olivia and John, quoted at length in *Chapter 1* and explored further in *Chapter 8*. The other is CourtC-17. In this case the woman was charged with malicious damage[765] and malicious wounding[766] to which she pled guilty at the first opportunity. At the same time the police sought a TIO to protect her de facto partner. This TIO reads in full:

> *The parties have been in a relationship for about four years. Today the parties have become involved in an argument relating to the wish of the defendant to move out. The victim has taken some personal belongings of the defendant and would not return them. The defendant has chased he (sic) around parts of the property, as well as assaulting him with a tomato stake by hitting him over the head. On return inside the laptop computer of the victim has been trashed by the defendant and consequent to a physical altercation between the parties the victim has been stabbed in the arm with the jagged stake. The victim then fled the premises and defendant contacted the Police. Defendant shall be charged with matters arising.*

---

[763] The result for 34 charges (involving eight people) is not known.

[764] In CourtA-6 the man was found guilty of maliciously destroying or damaging property, AOABH, two counts of common assault, and contravene ADVO; in CourtC-17 the woman plead guilty to malicious damage and malicious wounding; in both CourtB-7 and CourtB-10 the men were charged with three contravene ADVO offences and were both found guilty of one offence each (the remaining charges were withdrawn).

[765] Malicious damage causing less than $2000 damage: *Crimes Act* 1900 (NSW) s195A.

[766] *Crimes Act* 1900 (NSW) s35A.

Even this complaint makes some reference to the woman perpetrating violence in the context of her attempts to separate. The charge fact sheet provides additional detail about this context:

> *... Over the past couple of years, the defendant* [the woman] *and victim* [the man] *have been having a number of domestic problems, with the defendant accusing the victim of stalking her and not letting her leave him.*
>
> ...[after locating a suitable property the defendant took the victim to inspect the property]
>
> *When the defendant and the victim returned home, the victim told the defendant she wasn't to move out of the home. The defendant (sic) went to the victim's (sic) bag and took out her mobile phone and bankcards so she wouldn't have any money to move out of home. As a consequence, the defendant grabbed the victim's mobile telephone and threw it onto the pavement at the front of the house. When this happened, the victim grabbed a cordless telephone in the house and hit the defendant with the telephone on her arm and hands.*
>
> *The victim then held the defendant up against a wall.*
>
> *The defendant moved away from the victim and went into the laundry where she picked up a mop. The victim followed her and took the mop off* [her]. *The victim went into the kitchen and picked up a kitchen knife.*
>
> *When the defendant saw this, she ran into the backyard and held the family dog in front of her. The defendant then picked up a tomato stake which the dog had been chewing on. The defendant hit the victim* [on] *the head with the tomato stake causing the stake to split in half.*
>
> *The defendant ran into the garage. The victim followed her, however, the defendant stated that the victim wasn't holding the knife at that time. The defendant dropped the half of the tomato stake she was holding. In the garage, the defendant picked up the victim's work laptop and threatened to throw it on the ground if the victim did not return her bankcards. The defendant then threw this computer onto the ground.*
>
> *Both the victim and the defendant began hitting each other around their faces with their open hands. While this was happening, the defendant has picked up the broken tomato stake and stabbed the victim in his left forearm area with the stake. As a consequence part of the stake has pierced the victim's lower forearm and protruded from the other side. ....*
>
> *The defendant was arrested and cautioned at the scene where she made admissions to the assault and damage to the computer. ..In the* [recorded police] *interview, the defendant made admissions to stabbing the victim stating she just wanted him to leave her alone.*

The woman lodged a cross application 17 days later. This cross application did not address the above detailed incident, instead it alleged that there was '*a history of violence between the parties*', including physical assault (two assaults were reported to the police), verbal abuse, derogatory comments, and the removal of her belongings.

This case is particularly interesting because while the woman most certainly used violence against her partner, we need to ask whether her acts should be defined as 'domestic violence'. In this I want to draw a distinction between civil and criminal proceedings (where the civil proceeding is concerned with 'who needs protection' or 'who is in fear', and the criminal proceeding is concerned with whether an offence took place). The police fact sheet reveals that the man used violence and threatening behaviour towards the woman and was actively preventing her from leaving the relationship, and in response she damaged his property and assaulted him with the tomato stake.[767] There are two separate legal questions here. The first concerns who requires protection from domestic violence in the form of an ADVO. Here I would suggest that the woman's acts do not warrant the making of an ADVO against her (as a legal action designed to address domestic violence), and indeed both ADVO applications were resolved via mutual withdrawal. The second concerns whether the acts perpetrated by the woman should result in a criminal charge. Here I agree that given the nature of the woman's act and the injury sustained, the police were not best placed to exercise discretion regarding whether to charge her with malicious wounding (however there are pertinent questions about why her legal representative did not raise self-defence).[768] Thus I seek to highlight that while an act might not require a domestic violence response, this does not mean that it might not attract another legal response. This returns to the questions raised in *Chapter 1* about whether it is possible for a person to perpetrate an act of violence against a person with whom they have a domestic relationship and not label it domestic violence. This case provides a useful example of a woman's use of violence that might sit within notions of self-defence (as I suggest should have been argued), or retaliation or anger in the context of her own victimisation, rather than domestic violence since she did not appear to be using coercive control, but rather used violence to escape the relationship.

The interviews with women provided further context to understanding the presence of charges against male second applicants. First there was a difference in the timing of the cross application. The nature of the court file sample created

[767] The photographs appended to the court file indicated that the injury sustained was quite severe.

[768] There is some suggestion in the research that women are more likely to admit to their actions and to 'plead guilty rather than go to trial': McMahon & Pence, above n21 at 52.

a bias towards cross applications initiated at the same time as the originating complaint;[769] the interview sample was not biased in this way and three of the ten women interviewed had been subject to a cross application lodged a considerable period of time after their own ADVO had been granted.[770] In all three cases the cross complaint was made after the man had been charged with contravening the woman's ADVO,[771] and the presence of the charge appeared to be a motivating factor behind the decision to make the cross application. Both Frances and Louise identified the cross application as a way of 'blaming' them for the violence, or justifying the use of violence against them. The narrative of the cross applications lodged against these women all centred on their alleged (mis)use of their ADVO. These complaints are discussed in the following section.

2. A questionable characterisation

In the interview sample and the court file sample there was a small category of complaints that raise concerns about whether the behaviour alleged therein should be described as domestic violence and hence warrant the making of an ADVO. In the interview sample these complaints were made by male second applicants, and one male first applicant. In the court file sample, 18 of these cases were made by male second applicants,[772] and one was made by a female second applicant.[773] In categorising complaints as questionable, I have adopted a conservative approach. I have not included those complaints that are simply vague, brief and without detail, rather I have defined as questionable those complaints that do not appear to address the legislative requirements.[774]

Questions about the characterisation of certain acts as violence or abuse arise mainly with respect to behaviours sought to be described as 'harassment', 'verbal abuse' or 'threats'. For example, the ADVO complaint lodged against Megan

[769] See *Chapter 3*.

[770] Louise (the cross complaint was lodged 6-8 weeks after her ADVO was finalised); Lillian (the cross complaint was lodged when she sought to extend her ADVO); and Frances (two cross complaints were lodged after her first ADVO was finalised, it is unclear how much later the first cross complaint was made, the second cross complaint was made almost two years later).

[771] Lillian and Frances. In Hayley Katzen's study of ADVO breaches, one of the three women who were subject to a cross application, had this lodged at the same time the man was charged with a breach: above n15 at 42.

[772] CourtA-10, CourtB-5, CourtB-6, CourtB-10, CourtB-11, CourtB-17, CourtB-21, CourtB-29, CourtB-33, CourtC-3, CourtC-4, CourtC-12, CourtC-13, CourtC-14, CourtC-15, CourtC-24, CourtC-28, and CourtC-29. Note that some of these questionable acts/behaviours were accompanied by allegations of other acts/behaviour that may ground an ADVO, see discussion below.

[773] CourtC-20.

[774] See *Chapter 6*.

sought to describe a letter she had written to her former partner's parents as 'harassment'. Megan explained that she wrote this letter to inform his parents about their son's treatment of women, and concluded, '*I just don't think writing to his parents was…automatically harassment*'. These complaints question whether some acts that might be hurtful or unfortunate constitute domestic violence. In *Chapter 2* I drew attention to some of the risks of a broad definition of domestic violence, most clearly demonstrated in the work of Linda Mills who adopts such a wide-ranging definition that she concludes that 'we have all experienced intimate violence'.[775] As argued in *Chapter 2* this type of conclusion is a result of the failure to ask whether the different acts (whether physical violence, or verbal abuse and so on) are used to exert control over the other person. The risk of this failure is perhaps most clear when we discuss other forms of violence, that is violence and abuse that is not physical, where physical violence starts from an almost assumed position of domestic violence. That is to say, when we examine other forms of abuse that can so closely resemble hurtful or unfortunate acts, the importance of examining the function of the act (is it for controlling purposes or not?) comes to the fore.

Three types of questionable complaints were identified in this study, those:

- that appeared to raise no allegations that could ground an ADVO;
- that mixed questionable acts with acts that could ground an ADVO; and
- that centre on women's 'misuse' of their ADVOs.

A. Complaints that contain no allegations to ground an ADVO

Ten cases (two from the interview sample[776] and eight from the court file sample[777]) reveal cross applications lodged by men that appeared to contain no grounds to support the making of an ADVO. One of the key professionals interviewed, WDVCAS3, provided an example of this type of complaint where the second applicant failed to establish fear, notwithstanding that this was a requirement of the legislation:

[775] Mills, above n19 at 23.

[776] Rosemary and Marcella.

[777] See CourtA-10, CourtB-5, CourtB-10, CourtC-3, CourtC-4, Court C-10, CourtC-24 and CourtC-29.

> *We had* [a case] *a couple of weeks ago where he talked about…it was over contact* [with the children]. *The police were called, there was an argument about contact and ...he tried to slam the door I think while she was driving off, or something around that. His complaint was 'she yelled at me and told me I couldn't see the children and she drove off'. ...It was as vague as that. There was no element of fear in it, but* [when you read her complaint by the police]*...not only was that incident scary for her, it would have been scary for the children as well.*

Both Rosemary and Marcella were subject to cross applications of this nature.[778] The cross application lodged against Marcella contained two allegations: an abusive gesture, and a 'threat'. However when the text of the complaint is read in full, questions might be raised about the appropriate way to view the allegations and whether they should be interpreted as 'abusive'. They appear more likely to be 'hurtful' acts rather than acts of domestic violence, and certainly don't appear to have any connection to fear:

> *The complainant has received a complaint and summons issued against him involving the present defendant, and refutes the matters complained of. In addition, he complains of the following matters since cross-orders between the parties expired… The situation has been reasonable until recently. On …* [date], *at the commencement of a contact period, the defendant said 'you're dead you bastard'. On* [date], *at start of another contact period, the defendant made rude gestures at the complainant.*

The fact that there was a previous ADVO (also a cross application) made to protect this man, suggests that there were previous acts/behaviour that could provide a foundation for an ADVO (and provide some context to the matters outlined in the current complaint). This is a generous reading, as on the whole this must be viewed as a weak complaint, since the threat appears more akin to a 'throw away' phrase, particularly given that the only other specific allegation was 'rude gestures'. Certainly fear is absent from this complaint. According to Marcella one of the magistrates that dealt with the application raised similar questions:

> *The Magistrate ...was sort of – he was talking in my favour, trying to um he was trying to question the validity or the substance of the claims* [made by my former husband] *like ah he 'would have not shook his bat' or something* [like that] *because of that remark* ['you're dead you bastard']. ... [the magistrate] *was sort of saying that ... assuming that it was said, it was just not really something that was putting him in danger at all.*

Marcella's complaint alleged stalking, a history of violence, and intimidating acts that she says could only have been performed by her former husband.[779] The two

[778] The cross complaint lodged against Rosemary is discussed in *Chapter 9*.

[779] See discussion of 'anonymous acts' in *Chapter 5*.

complaints were adjourned for hearing. On the day of the hearing these complaints were settled via the making of mutual orders.[780]

Eight complaints made by male second applicants in the court file sample complained about behaviour that was described as 'harassment'. One of these complaint narratives read:

> *There has been an ongoing dispute between the ... (PINOP) and the defendant in relation to the access arrangements ... to the children .... On* [date] *the PINOP attended the defendant's residence for the purpose of collecting the children for access. The PINOP had put both children in his car and had secured their seat belts and had locked the car doors. Just as the PINOP was driving away, the defendant has reached through the passenger ... window of the PINOP's vehicle, unlocked the door and tried to jump into the car. Both the PINOP and the defendant have reported this incident to the police. On* [date] *the defendant has contacted the PINOP by phone, the defendant has said to the PINOP words to the effect of 'Stop your bitterness'. The PINOP has hung up the phone. The defendant has then proceeded to phone the PINOP several more times. The PINOP fears further harassment and interference by the defendant.*[781]

This complaint was lodged at the same time that the woman sought a variation to her existing ADVO to place an exclusion zone around her new residence as a result of alleged stalking by her former husband. The woman's original complaint alleged a history of violence including physical violence, harassment, verbal and emotional abuse, as well as stating that '*her husband attempts to control her and since separating he is becoming more and more angry towards her*.' Thus there are differences revealed in the duration and nature of the violence/abuse alleged by the man and the woman in these two cases; the woman's complaint evidences a sustained pattern of behaviour that has been intensified with separation. In the end the man withdrew his cross application while, at the same time, consenting to the variation sought by his former spouse.

The man's cross complaint in CourtC-3 provides another example:

> *The complainant and his family a daughter and son are very fearful of the defendant, it is alleged that she is harassing family members including the boyfriend of the daughter. The son has been harassed at school and is finding same very disturbing. The defendant has been making telephone calls to ascertain the telephone number of the boyfriend of the complainant's daughter. The family only wishes to live in a peaceful environment.*

This private complaint was made approximately two weeks after the police applied for a TIO on behalf of the woman. In contrast, the woman's complaint

[780] See discussion of this case and its resolution in *Chapter 9*.

[781] Court C-29. The chamber magistrate noted on this complaint that it was a '***CROSS APPLICATION***'.

details coercive threats (*'If you don't come back to me I will bash you'*), attending her new residence (this was particularly threatening as she had sought to keep her address unknown), and specific fears for her ongoing safety. Both of these applications were eventually withdrawn. Thus despite substantive differences in the experience of violence/abuse alleged in the two complaints, the cross application proved an effective tool to generate the mutual outcome of withdrawal. The use of a cross application as a bargaining or negotiation tool is discussed in *Chapter 9*.

In some cases the complaint text is used as an opportunity to refute the allegations contained in the woman's originating complaint. For example CourtA-10 reads:

> *Since accident in 2000 the complainant has had a number of operations which prevent him from working. Defendant began to constantly demand money from the complainant which he no longer had ... Defendant does not have parenting skills and complainant has had to take responsibility for the child despite his injuries. Defendant has left the marital home twice leaving the baby in the complainant's care. The parties had daily arguments about her treatment of the child, particularly food abuse and hygiene abuse such as when she feeds the child food she has been told not to give him.*
>
> *On* [date] *the parties argued about issues including the feeding of the child. The complainant threw a stool at the table and it bounced and hit the defendant. Complainant denies intending to assault the defendant. Complainant finds the behaviour of the defendant to be harassing. Defendant left the premises on* [date] *and has not returned except to visit the child. The complainant is not aware of the whereabouts of the defendant other than when she visits the complainant and their son. The complainant seeks orders restricting defendant's behaviour towards himself and son.*

This private complaint was made a week after the man was served with a police ADVO to protect his wife. In contrast the woman's complaint alleged that she had previously separated from her husband, that he had assaulted her in the past,, verbally abused her, struck her with a stool, punched her, held her head against a glass window, and pushed her to the floor. The woman did not attend court for her ADVO, and was not served with the cross complaint; in the end the man withdrew his complaint (resulting in mutual withdrawal/dismissal).

In a similar vein the male second applicant in CourtC-25 alleged:

> *On* [date] *the ...PINOP informed the defendant that he had cancelled her mobile phone account. The defendant has then tipped a glass of juice over the PINOP's head and back*

> *and said words to the effect of 'Fuck you, as if it's going to worry me'. The PINOP fears further violence and harassment.*[782]

These allegations appear to centre on actions initiated in direct response to the man's statement and seem more like angry/retaliatory actions than actions intended to control or instil fear. In contrast, the woman's complaint alleged a history of violence (the police had attended the residence in the past), verbal abuse, a threat to kill her made via their teenage daughter, threats to harm her and a coercive threat because she had called the police: *'this is the second time you have called the cops on me you'll pay this time you wont get away with it, I'll get you…'*.

Both complainants were granted IOs for the periods of adjournment and the applications ultimately resulted in mutual orders made by consent without admissions. Thus suggesting equivalence in the use of violence/abuse not supported by a close examination of the complaint narratives.

B. Complaints that mix questionable acts with acts that could ground an ADVO

A small number of complaints alleged questionable acts, as well as acts/behaviour that could ground the making of an ADVO. However, the tone and context of the complaints raise questions about the acts of violence themselves and whether they should be seen through the lens of 'domestic violence' rather than as an act of violence, an unfortunate act or even a 'mere' hurtful act.

One example is provided by the male second applicant in Court B-11:

> *…During September 2002 the defendant attended to collect the children after a contact visit by the complainant. The defendant said while at the property 'Quick kids here's our chance, let's run did* [sic] *over'. This was clearly heard by the children, my partner and some nearby neighbours. The behaviour of the defendant creating a fear in the complainant.*
>
> *Further, the defendant is continually making false comment about the complainant and the complainant is harassed by the behaviour of the defendant. During the parties (sic) relationship the defendant punched the complainant to his chest and the parties at the time were arguing.*

[782] The chamber magistrate noted on this complaint that it was a '***CROSS APPLICATION***'.

While the complaint alleges a threat and an act of physical violence, questions are raised concerning the suggestion of 'false comment'. In contrast the woman's originating complaint made by the police stated:

> *The defendant assaulted the complainant on* [date] *by pushing her against a wall, pinned her arms to the wall, then punched her to the right bicep, twisted her right arm, raised his fist as if to hit her again. Threats of police complaint caused the defendant to stop any further assault.*

After four appearances at court these cases were resolved via mutual withdrawal with undertakings. Thus despite differences in the experience of violence/abuse neither party has the protection of an ADVO.

In another case, a man made a private complaint alleging stalking behaviour, but the additional matters alleged in the complaint raise questions about whether this complaint could ground an ADVO:

> *The complainant is subjected to a restraining order at the inst (sic) of the defendant ...*
>
> *Both the parties have previously frequented the ...Club at* [suburb]. *Saturday night* [date and time] *the complainant was in the company of persons other than the defendant then at the front of the club.*
>
> *The defendant uninvited approached the complainant's group and the defendant immediately sat at the table with the group of persons then including the complainant. The defendant was in close proximity to the complainant and the defendant was telling persons at the table incidents that occurred between herself and the complainant.*
>
> *The complainant finished his drink.*
>
> *The complainant then immediately left the club in fear of the action/s by the defendant. The action/s of the defendant were contrary to those of the PINOP who have obtained restraining orders.*
>
> *The complainant returning home phoned for the assistance of the police in this matter and the police indicated to approach the court.*
>
> *Since the separation: The defendant has been sighted driving slowly past the home of the complainant. The defendant has been stalking the complainant.*[783]

The woman's complaint alleged that the man had attempted to break into her house and in so doing had damaged her door and smashed the front window. The woman's ADVO was finalised by consent 20 days prior to the man's cross application. The man withdrew his cross application on the first day at court on the basis of the woman making an undertaking.

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[783] CourtB-33.

The two female second complainants in this category stand in contrast to the male complainants outlined above. For example the complaint for the woman in CourtB-14 reads:

> *Prior ADVO proceedings against the defendant at* [Local Court] *and order made on* [date]. *Further: Family Law proceedings at* [Local Court, file number]. *The complainant has been seeking to live separate and apart from the defendant. The defendant contrary to the wishes of the complainant remains in the Family home. The defendant is a continual (sic) obstructionist towards the complainant. The defendant is continually arguing with the complainant. Most of the time the defendant is hitting the complainant. The complainant is harassed by the talk, talk, talk, of the defendant husband.*

This private complaint was lodged by the woman four days after being served with the application made by the police on behalf of her former husband. The way in which the chamber magistrate drafted this complaint appears trivialising (this is particularly evidenced in the reference to '*talk, talk, talk*'). I would suggest that more might have been evident from this woman's experience if the chamber magistrate asked the woman what she meant by '*most of the time…hitting*' her, and what she meant by '*obstructionist*'. As I have discussed in terms of the poor quality of the drafting of complaints, this complaint appears to evidence an almost verbatim rendering of the woman's words in the final sentence.[784] The man's originating complaint contains reference to having a previous ADVO against him, and alleged that his former wife had pushed and punched him. The parties in this cross application were separated under the one roof. These cases resulted in mutual orders on the first appearance at court.

In the second case, the woman had lodged a cross application approximately two weeks after the police had applied for an ADVO on behalf of her former spouse.[785] In this case the man (20 years her senior) had sponsored her immigration to Australia as his spouse. The man's complaint alleged events linked to a property dispute. He stated that when the parties were discussing the property division the woman became angry and threw a glass of water at him which '*narrowly missed* [his] *head*' and that she then '*had her fists clenched and was saying "I want to kill him*"'. In contrast the woman's private complaint alleged very little that could be characterised as abuse or violence, although there is a suggestion of financial abuse (failure to pay child support and the

[784] See *Chapter 4*.

[785] CourtC-20.

termination of the lease where she currently resides with the child of the relationship, in this way she alleged that her former spouse was '*wilfully orchestrating the finances so that the victim will be forced to live below the poverty* [line]'). These cases were contested and after the hearing the magistrate dismissed both applications. The transcript of this hearing[786] revealed that there may have been more substance to the woman's complaint (although these were not drawn out by her solicitor), as the woman had been granted permanent residency on the basis of the domestic violence[787] before the ADVO proceedings. While the magistrate refused to grant either ADVO he noted that the man has 'some sort of dominance over' the woman.

C. Complaints centring on the woman's use of her ADVO

A common theme in the interview and court file samples was the suggestion by some men that their need for 'protection' arose due to the woman's alleged misuse of her ADVO. That is, the male second applicants alleged that the woman had threatened to report him for a breach of her ADVO or had done so, or that she had engaged in behaviour that provoked him to breach the ADVO. This misuse of the ADVO was variously characterised as harassing, threatening or intimidating. Only male second applicants made allegations of this kind; no woman made an allegation of this kind. This category of complaint which centres on women's use of the law, or the perceived 'victimisation' of men that might result from the exposure of his behaviour, has been documented in other research that has sought to compare men's and women's experience of domestic violence,[788] and in research on the arguments variously articulated by fathers' rights groups frequently connected to the spectre of false allegations.[789]

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[786] Appended to the court file.

[787] Migration Regulation 1994 (Cth), Division 1.5 provides that a person who is a victim of family violence may claim exemption from the two-year duration of a sponsored spousal relationship to gain permanent residency. Evidence is required, such as a criminal conviction, a judicially determined protection order (there are also provisions were the protection order was not so determined, eg resolved via mutual undertakings) and the provision of statutory declarations from 'competent people' (eg a doctor, psychologist, nurse, social worker, or a manager of a women's refuge or counselling service specialising in family violence).

[788] Bagshaw & Chung, above n137 at 10.

[789] Miranda Kaye & Julia Tolmie, 'Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law' (1998) 12 *Australian Journal of Family Law* 1 at 35-37.

Three of the women interviewed were subject to a cross complaint of this nature.[790] In all three cases the cross application was made at the same time that the man was charged with contravening the woman's ADVO.

The complaint against Frances read:

> *...The Defendant has been conducting herself in a manner that is intimidating and harassing towards the complainant. The defendant currently has an ADVO in force against the complainant. The defendant is deliberately difficult when dealing with issues regarding the children of the marriage. The defendant conducts her activities and manner with the sole intention of causing the complainant to feel emotionally and mentally abused. The defendant deliberately declines to inform the complainant of genuine issues regarding the children which in turn encourages the complainant to make contact which is in contravention of the orders. ...The defendant continues to pursue enforcement of the ADVO with ... actions that are either brought on by incitement, emotion and provocation as well as vexatious allegations. The complainant generally believes that the defendant's actions are malicious and the complainant seeks an order for release.*

Frances's former husband, represented by a barrister, sought to have his cross application listed at the same time as the contravene charge (his third contravene charge), which concerned the making of harassing phone calls. Frances explained that she saw this as trying to '*mix up*' the criminal charge with the cross application by suggesting that the charge was only prosecuted because of her own malicious and vexatious enforcement of her ADVO.[791] It's purpose then was '*to put the blame on me for basically anything he was going to do in the future, by saying this has provoked me*'.[792]

Similarly Louise explained that the purpose of the cross application against her was to say that *'I was using my AVO as a threat towards him – that's what he was saying.'* Louise read the full text of her former spouse's complaint in the interview, at the same time she provided commentary (reproduced on the right-hand side of the page in plain text) on his allegations:

Yep well – um they're all a little bit ridiculous but anyway.

The [date] *um the complainant rang the defendant about the children because the defendant was going to Darwin for a holiday. During the phone call the defendant's mother was in the background saying 'hang up, call the police, have him charged,*

[790] Frances, Lillian and Louise.

[791] By this time Frances's former husband had been charged with four breaches of her ADVO.

[792] Frances's former husband was however successful in obtaining an IO ex parte on the basis of this complaint. See *Chapter 9*.

he's a stalker'.

Um that didn't – that didn't happen at all um 'cause I don't – I don't ever contact him and my mother hasn't spoken to him for 18 months. I just said 'oh yeah' to him.

Um [date] *the defendant asked the – the complainant to change contact weekends. The complainant said 'no'. The defendant said 'I will call the police if you don't swap weekends with me'. At about that time the defendant contacted the police and alleged that the complainant had called her a fucking something. At the time the complainant had* [a]*witness to the alleged event but nothing was actually said.*

…He was swearing at me so I rang the police and said I shouldn't have to put up with his abuse, calling me you know different names and the police ended up contacting him and that's why – I think that's why he applied for this AVO because he thought he was going to be in trouble about collecting the kids and abusing me so he just went one better. Yeah. …

[date], *the defendant rang the complainant at 5 o'clock. She asked the complainant to bring the girls home immediately or she would notify the police and have the complainant charged. ... in the same conversation the defendant said I have an AVO against you and if you don't do as I say you will be charged or go to gaol.*

Um he kept the children for an extra day and all I did was ring him and say 'could you please send the girls home'. Ah I didn't say anything about – about the police and that he'd go to gaol or anything like that.

Um [date] *the parties saw that* [name of child] *was upset. The defendant told the child 'your daddy is bad and he's going to gaol'. The* [date] *the defendant has arranged for a third party to be personally present at contact handovers and there have been fewer incidents since the complaint was taken out. Um the complainant has been threatened by the defendant who has on many occasions indicated a willingness to make a false allegation to the police and have the complainant charged. The police have already been contacted by the defendant in relation to an alleged breach although the police have apparently been satisfied that the allegation was false and no action has been taken ... Recently the defendant has said to the complainant that the police will believe me and not you because I already have an AVO against you. The complainant fears further harassment and threats from the defendant unless an apprehended violence order is made on mutual terms for his protection.*

So everything that I've read there is totally made up from him (laughter) basically. Um the part about the police um being satisfied that my complaint … wasn't a breach and there was no action taken. … he put that in there … because the police wanted to interview him and he refused … so the police hadn't even interviewed him about my complaint.

These cross complaints by and large demonstrated no allegations that could support the making of an ADVO. As Louise explained '*as far as I'm*

concerned…what I read out to you there's nothing in that that would say that he was - [scared] *of me'*. Similarly Lillian argued:

> *It was like petty. There was nothing that I was being violent. He was just worried – he's more saying that I was provoking him to breach the AVO. In case he did anything wrong I was leading him on, I was making him do it and that's how it was. Ever anything went wrong it was always my fault. ...So – that's the bottom line, answers it all. Because he doesn't state that I'm around his place or stalking or anything like that so he just really pinpoints things that he didn't think I could follow up …and… there was no grounds for that AVO.*

Four male second applicants in the court file sample also made complaints that alleged that the woman had misused her ADVO.[793]

CourtC-24, a private complaint lodged by a male second applicant at the same time that his former wife sought to extend her existing ADVO, provides an excellent illustration of this type of complaint. His complaint reads in full:

> *The defendant has an AVO against this complainant, which she has sought to have extended for 2 years.*
>
> *The Victim states that the defendant has been provoking the victim in breaches of the order, and that the provocation is of itself, harassment.*
>
> *The victim is involved in coaching junior soccer. The defendant has approached members of the soccer committee and made derogatory comments to the committee about the victim. She advised them that she has an AVO against him, and that he should not be involved in soccer training.*
>
> *About 3 weeks ago, the victim was at a soccer game with his son, and the defendant attended and took photographs. The victim was embarrassed and intimidated by the photo taking.*
>
> *The victim also believes that the defendant has been make (sic) extremely derogatory comments to other people, such as that the victim is a wife basher.*
>
> *The victim fears that if an order is not made, the defendant will continue to provoke him, and continue to harass and intimidate him.*

In contrast, while there were no reasons provided for the woman's application to extend her ADVO, her original complaint detailed a history of domestic violence, including physical assaults, verbal abuse and threats to kill. The physical violence included reference to a specific incident: '*on* [date] *involved the defendant physically assaulting the PINOP by grabbing her around the throat and bashing her head against a vehicle'*. There appears then to be a

[793] CourtB-5, CourtB-10, CourtC-13 and CourtC-24.

substantive difference in the types of matters that the woman and her former husband complained about in their respective applications. The woman's application clearly detailed a history of domestic violence including a range of acts/behaviours perpetrated against her; in contradistinction the man's complaint centred on her actions informing people that there was an ADVO in force against him. On the final day at court both applications were withdrawn.

CourtB-10 provides another example:

> *The defendant currently has an AVO out on the applicant. The defendant is harassing the applicant by turning up at his place of work and at his home. The defendant continues to call the applicant leaving text messages and making calls to his place of work. The defendant harasses the applicant by taking his car and leaving hers in place of his and giving keys to work colleagues to give to the applicant. The defendant has AVO orders not to contact the applicant (sic) and her continuous calls are intimidating the applicant. The applicant does not want the defendant to force him* [into] *breaching an AVO and wants to restrict her from contacting him.*

The man had consented to the woman's ADVO without admissions one week before he lodged this cross application. The woman's complaint detailed threats and property damage. By the time the man had lodged his cross application he had been charged with three offences of breaching the woman's ADVO. For two of these offences he was found guilty (the other was deemed a 'coincidence').[794] On the second appearance the man withdrew his cross application.

In CourtC-13 the man lodged a cross application three days after the woman's ADVO first appeared at court. The man's cross complaint reads as follows:

> *The defendant and the victim are married and the relationship was terminated on* [date] *after an altercation, where the victim was charged with an assault, and a telephone interim order obtain (sic)….*
>
> *The victim has left the former matrimonial home. During the course of the relationship there was animosity between the parties. The defendant would regularly tell the victim to get out of the house, which is now solely the victims* [sic] *and for which the victim made financial contributions.*
>
> *At the time the interim order was made the victim sought advice from the police as to what happens if the defendant contacts him. He was advised to hang up. Since the interim order was made the victim has received five telephone calls, and to avoid the possibility of an allegation of breach of the AVO, the* [victim] *has not spoken to the defendant.*

---

[794] This man's antecedents, appended to the court file, indicated that he had been charged with, but found not guilty of, three previous contravene ADVO offences.

> *All five telephone calls were to the victim's place of business. He has had to take his phone off the hook, which interferes with his business.*
>
> *On about* [date]*, the defendant wrote to the victim inviting him to the home to have contact with the child. The victim has declined such invitation, even though he wishes to see his son.*
>
> *The victim fears that the defendant is trying to provoke the victim into breaching the order.*

It is worth noting that the woman's IO did not prevent the man having contact with her. The woman's complaint details the 'altercation' referred to in the man's complaint, which involved a series of connected acts during which the man threw cushions and fruit at the woman, spilt laundry powder over her head, '*forced her head onto the stove top*', '*pushed her over the sink holding her around the neck and preventing her from breathing*', and punched her in the face. On the first occasion when both matters were listed at court together IOs were made in both cases, and on the next occasion both were withdrawn.

What is particularly disturbing about this category is the extent to which a small number of the professionals interviewed also considered that women misuse their ADVOs and provoke breaches of their order.[795] Similar views were expressed by some police in the study conducted by Susan Miller in the USA, who stated that protection orders were used by some women as a mechanism to exact 'revenge' or as a 'payback'.[796]

Three of the police interviewed in the current study expressed some displeasure that they were unable to charge women with 'aiding and abetting' a breach of an ADVO.[797] PP3 perhaps conveyed the strongest view in this regard:

> [W]*hen police investigate domestic violence they tend to investigate it with a gender bias in my view. Ah domestic violence victims are more often than not female, but um females have a particular way to 'torment' domestic violence perpetrators, I use inverted commas, and by that I'm saying they usually establish ...* [an ADVO] *and then use the order to control the perpetrator so the perpetrator once the order is made against him, he'll sometimes expose himself to ... permanent control, if you like, for the duration of the order .... Representations are often made by defence solicitors to myself, as I'm the person who actually deals with the determination of representations, in relation to how many domestic violence victims aid and abet breaches of domestic violence orders.*

[795] DVLO2, DVLO4 (2/6); PP3 (1/5); and SOL5 (1/5).

[796] Miller, 'Victims as Offenders', above n21 at 68.

[797] See DVLO2, DVLO4, and PP3.

….But aiding and abetting breaching domestic violence orders is a common event and it's on that basis that I say that a perpetrator can also be a victim. I guess the short answer, or the short perception to that first answer that I gave would be perhaps advocating or justifying domestic violence to people who are tormented. ... I'm talking about matters where, when an order is in existence, how it's used against the perpetrator.

Do people get charged for aid and abet?

No…To my disappointment.

Two DVLOs suggested that perhaps mutual orders could be a way to circumvent the prohibition on charging complaints with aiding and abetting a breach; where mutual orders bind both parties.[798]

In a similar way one solicitor mentioned that he had advised a man to make a cross application '*as the woman was putting him in a position where he was continually in breach of the order and ... I felt that it was probably the only way…to try to control the situation so that he wouldn't be in breach of his order'*.[799] When asked why he didn't advise the man to seek a variation or revocation of the women's ADVO the solicitor responded:

'Cause I don't think ... these parties ...have the capacity to ... even comply with modified orders or perhaps it's in – as I said before it might be better in some cases if they… just have no contact with one another.

The concern with women reconciling with their former partners, or 'inviting them back in' was a theme in a number of the interviews, and as is demonstrated in the quote above, was linked by some professionals with the notion that 'they are both as bad as each other' or that some people need to be 'kept away from each other'. This is discussed further in *Chapter 9*.

This negative perception of women initiating contact with their former violent partners has been reflected in other studies exploring police views of civil protection orders.[800] In a recent Scottish study, Clare Connelly and Kate Cavanagh noted that this view attributes responsibility for the act of violence (and the breach of the order) to the victim rather than the offender.[801] The failure to identify what is the 'breach' and instead blaming the victim for initiating

[798] DVLO2 and DVLO4.

[799] SOL5.

[800] See Miller, 'Victims as Offenders', above n21 at 68-69; and Connelly & Cavanagh, above n332 at 280.

[801] Connelly & Cavanagh, above n332 at 280.

contact (as if that was the breach) is clear from the following comment made by DVLO4:

> *I think they should because in, like I said in the very slimmest of slim* [cross applications should continue to be available]*, there is a need for it and that we do get some victims that will want defendants to contact them and do all these things but as soon as they end up in a slight argument or whatever they'll call and report the breach of AVO to police and I don't think it's fair that they are able to use that system either, because there are a few victims that do do things like that.*

3. The lengthy 'wounded' complaint narrative

There were eight private complaints lodged by men from the court file sample that fit a different profile (one first applicant and seven second applicants).[802] In these cases the man's complaint consisted of a lengthy, often handwritten, complaint appended to the summons notice. I have termed these 'wounded' complaint narratives. No female applicant made a complaint of this kind. These lengthy complaints are characterised by a tone that seeks to position the man as the victim, either because he was 'wounded' by the termination of the relationship or because he has been pursuing his 'rights' to contact his children. These complaints frequently provided a direct response to the allegations raised in the woman's complaint.

CourtC-15 provides an interesting example here, as not only is the man's letter appended in full, but contrary to usual practice it was handed up in court during the first appearance of the woman's ADVO application and accepted as a complaint. While this complaint raises verbal abuse, it can be distinguished from other complaints making the same allegation due to the context and tone of the narrative. This complaint bears many similarities to those discussed earlier that set out few allegations that could ground and ADVO. It reads in full:

> *Your worship,*
>
> *In answer to* [name of W] *allegations of threats and violence as we already heard there is no history of physical violence between* [name of W] *and myself over the past eight years. In answer to the allegations of trying to run her down and stalking threats at her salon, was over exaggerated.*
>
> *I was evicted from her premises after 7 ½ years, at that time I was very confused as to why I was not good enough anymore after this short period of 7 ½ months* [name of W] *and I returned to our relationship. In this two weeks* [name of W] *and I tried to work out*

[802] CourtB-8, CourtB-21, CourtC-7, CourtC-8, CourtC-15, CourtC-18, CourtC-21 and CourtC-28.

what was happening to our love, I felt she no longer wanted, needed or loved me anymore which was a very difficult thing for myself to accept or understand.

In answer to our SMS messages of threats, [name of W] *on a number of occasions used her mobile phone SMS messages to myself regarding some obscenities, which are the following:*

(1) *on the 28th of July 2002 at approximately 11.37 am she SMSed me this message 'You stupid man, another threat on my kids the police will see this SMS message you fool'. All my SMS to this response was how are the kids?*
(2) *On the 26th of July 2002 at 11.45am I received 'you are nothing but f***ing shit. You know that. How am I supposed to love shit like that'*
(3) *On the 27th of July 2002 at 12.25am I received 'to me it was worth everything I wouldn't have put up with all your problems for so long but that doesn't not mean you didn't love me cause I never doubted that.'*

Just three short messages that I do not have dates for your worship that I received:

(1) *'Go and pick up your clothes they are outside in garbage bags, I feel sorry that you didn't believe in how much I truly loved you, you cannot be trusted anymore.'*
(2) *'I have to force myself to sop loving you it is going to hurt'*
(3) *'I'm so sorry I was so desperate to make you understand I didn't want to put this AVO on you, maybe I was gullible I'm sorry please apologise to* [name] *and* [name]*'* [?children's names]

Now in closing you worship I believe [name of W] *is hurting and is angry just as much as myself or maybe more, with this anger she has attempted to put an AVO on myself on previous occasion due to hearsay threats of a gun and shooting her and her daughter. If your worship would be so kind as to ask* [W name] *does she believe this man 'me' was not in love with her and would do almost anything for her. Now I'm left standing here defending myself due to two people wanting and needing so many different things.*

Yours sincerely…

In contrast, the police complaint on behalf of the woman alleged numerous threats to '*get her*', that he was '*definitely not going to go away*' saying things such as '*I know where you are. I am watching you*'. She alleged that he had attended her workplace, and that there was a history of domestic violence evidenced in previous ADVOs to protect her. Both cases were adjourned with mutual IOs and in the end the man consented to the woman's ADVO being made against him for six months and withdrew his application.

The devices used in this man's complaint narrative bear similarities to research by Kate Cavanagh and colleagues on the 'remedial work' undertaken by violent men to explain their use of violence.[803] Cavanagh and colleagues employ the

[803] Cavanagh et al, above n39.

concept of ‘remedial work’ devised by Erving Goffman,[804] to explore the accounts of violent men. Goffman identified three devices in ‘remedial work’ that serve to change what would otherwise be an offensive act into one that is more socially acceptable: accounts (involving the tactics of denial, blame, minimisation and reduced competence), apology and requests (here Cavanagh and colleagues extend Goffman’s work by suggesting that for violent men it is not so much requests as demands).[805] Cavanagh and colleagues argue that violent men ‘use these exculpatory and expiatory discourses… to neutralise and eradicate women’s experiences of abuse’.[806]

In the complaint quoted above we see attempts to minimise (‘*the allegations of trying to run her down and stalking threats at her salon, was over exaggerated’*); blame (the reference to the woman’s SMS messages to him involving verbal abuse, threats, and the concluding paragraph which implicates both parties in the anger and hurt of the end of the relationship); denial (‘*there is no history of physical violence between* [name of woman] *and myself over the past eight years’*); and reduced competence (his references to the end of the relationship, ‘*I was very confused as to why I was not good enough anymore’*). A strong theme in this complaint is ‘love’, romance and loss presented as an explanation for the man’s actions as well as his former partner’s.[807] There is nothing about fear (other than the loss of the relationship), and thus no apparent legal grounds for an ADVO.

Similarly the complaint narrative for the man in CourtC-8 was devoted to detailing his version of events, which like the case described above, involved ‘remedial work’, such as:

- denials: ‘*I am not an aggressive person*’, ‘[I] *never intentionally nudged…no*[r] *…tried to trip her* [over]’;
- blame: ‘*Furthermore, I say that she is an aggressive angry person, particularly at the moment. On one occasion, when I was in our rather*

[804] Erving Goffman, *Relations in Public: Microstudies of the Public Order* (1971).

[805] Cavanagh et al, above n39 at 699, 710.

[806] Ibid at 712.

[807] See also CourtC-18 (Private M 2nd) which exudes a strong theme of ‘love’ and ‘thwarted’ attempts to resurrect the relationship.

narrow kitchen entrance, she did not wait for me to leave but barged past, knocking me off balance';

- minimalisation: '*The incidents* [all of which he denied]…*have been very isolated*'; and
- different accounts of events: the woman alleged that her former husband waved a bread and butter knife under her throat and then proceeded to spread butter on her cheeks, the man counters that the '*PINOP walked right up to the butter knife in a confrontationalist way and stood glaring at me. I moved the butter knife away and in the process the butter accidentally landed on PINOP's cheek. I certainly and emphatically deny smearing butter on both her cheeks*'.

In this case the parties had been married for 14 years and were now separated under the one roof. The woman's complaint alleges that he physically nudged her, tripped her over, put his fist to her face and said '*I would just love to knock you out*', that he would purposefully turn on the hot water when she was in the shower, and threatened to throw her things on the balcony. She stated in her complaint that she found this behaviour '*intimidating and has now become frightened*'. In the end both complaints were withdrawn.

CourtB-21 presents a different example of a 'wounded complaint', where the man attempts to position himself as the victim. In this complaint the man presents himself as calm and reasonable in the face of the woman's response which is depicted as hysterical, irrational and aggressive. This type of comparative depiction is also evidenced in three other complaints, and in one of the interviews.[808] This man's complaint reads:

> *On Sunday* [date], *at the conclusion of a contact period, I was at home with the children awaiting the defendant's arrival to pick them up. At 5.56pm I received an abrupt phone call in which the defendant stated 'where the f... are you'. I replied 'here…at home with the kids waiting for you, where'd you think I'd be'. The defendant then stated 'you'd better get em here right now'* [name of park]. *I then replied 'no way, I told you days ago to pick them up here'. The defendant then stated 'you bastard, I'm coming around now'. At 6.07pm I heard the defendant thump the screen door repeatedly. I opened the door and the defendant immediately barged into the house in full view of the children, slapped me across the face and shouted, 'you f...ing asshole'. The defendant then*

[808] CourtC-18, CourtC-21; Court C-28; and Megan.

> *grabbed the bag in which the children's clothing etc were kept and stated 'I have a list of everything I gave you! Is everything here?' I hesitated and then replied 'I did pay for those clothes'; the defendant then stated to the children 'come on let's get out of here, do you want your bikes' implying to me that I should retrieve there (sic) bikes from the backyard. The defendant then stormed down the driveway with the children to a white Toyota Camry in which the defendant's father and brother were waiting. After putting the children in the back seat, the defendant then returned again to the front door and attempted to take a small potted tree, I struggled with the defendant grabbing the rim of the pot with both hands returning it to the ground. The defendant then stated 'it's not your f…ing tree'. I then replied 'get off the property NOW, you're trespassing', the defendant then pushed me back and stated 'it's my f…ing house', the defendant then returned to the car swearing and cursing under her breath. The defendant sat in the back seat next to the passenger side window beside the children; and as the car drove away, stuck her middle finger up and screamed out 'you f…ing asshole'. I yelled in reply 'stop treating me like shit then'.*
>
> *The defendant's brother* [name]*, and father* [name] *have accompanied her at contact changeover in a deliberate attempt to intimidate and cause unease. The changeover locations demanded by the defendant have often been parks or reserves which, being out-of-the-way and out of public view late in the afternoon, heightens the risk of me falling victim to potential harassment and/or assault by them.*
>
> ….
>
> *I fear a repeat of the assault of* [outlined above]*, which, both being stressful and intolerable to myself, is also extremely distressing and frightening for the children to witness and may effect the children's long-term emotional well-being.*
>
> ….
>
> *The defendant has entered the property* [M's home] *on many occasions since the* [date of separation], *and has taken property such as cash, cooking utensils, books and other personal effects. I am concerned that on a future occasion, the defendant and other third parties may confront me at my place of residence and I fear such a confrontation.*

This complaint clearly alleges verbal abuse and physical violence, however the tone of the complaint and the way in which the man seeks to cast supervised changeover as an intimidating scenario, combines to raise questions about the way in which acts are sought to be ascribed as violent. In particular the picture that he paints of supervised changeover stands in marked contrast to the reasons why the mother may have sought to have changeover take place in a neutral location accompanied by family members (all measures that are ostensibly designed to ensure her safety and that of her children). In addition the allegation about the woman swearing could in turn be read as a (legitimately) angry response at the delayed return of the children. In contrast the woman's complaint alleges a history of violence, including threats to kill her if she left the marriage, multiple phone calls, verbal abuse and threats including: *'Fuckin bitch, fuckin slut – I am going to fuck with your life for 13 years and you'll have 13 years of*

hell'. In the end the man consented to the woman's ADVO without admissions and withdrew his ADVO against her on the basis of undertakings.

Similarly part of the complaint by CourtC-28, which is two pages in length, reads as follows:

> *4*…[discussion about contact with the children]
>
> *Me: 'While I am here, what is happening ...for Father's Day? I have been trying for two weeks to get something organised….*
>
> *[w]: 'Yes, I was going to bring them over to your house for a couple of hours on Sunday morning'*
>
> *Me: 'That is a lie because the only access you were going to give me was in the park from 9am to 1pm. I wish to pick them up Saturday afternoon after work and I will bring them back or you can pick them up Sunday afternoon.'*
>
> *[w]: 'No fucking way are you going to have the kids in the house.'*
>
> *Me: 'Why?'*
>
> *[w]: 'Because I don't trust you in behaving yourself properly with the children.'*
>
> *Me: 'Excuse me, there is a Family Law Court Order that says I'm allowed to have the children.'*
>
> *5. [w] appeared angry and started saying*
>
> *[W]: 'you're a fucking asshole. I'm fucking sick of you.*
>
> *She went to slam the screen door. I grabbed the screen door with my right hand.*
>
> *Immediately, [w] lunged at my neck with her left hand and then with her right hand grabbed my left shoulder and started kicking me in the shins. She also tried to knee me in the groin. I tried to back away.*

Most of this complaint is concerned with what followed, including an alleged assault by the woman's father. The man eventually left the property, returned home and contacted the police. While waiting for the police the man consumed a considerable amount of alcohol. The police ultimately took action on behalf of the woman; they applied for an ADVO to protect her and charged the man with common assault. The man cross applied[809] and, as a private informant, charged the woman and her father with common assault.

In comparison the woman's complaint detailed previous contact with the police although no action resulted, coercive threats, and ongoing fear:

> *The defendant has spat in the face of the complainant on two separate occasions on the exchange of children re: contact by the father.*

[809] He also sought an ADVO against the woman's father.

The defendant during the relationship was violent towards the complainant – and harassment and phone calls from the defendant, since separation.

The defendant has when returning the children has thrown the children's scooters. The defendant at the time being verbally abusive, saying: 'You're sick for leaving me'.

The defendant had two weeks contact with the children during the Christmas School holidays and when the complainant phoned the defendant re the children the defendant was yelling on the phone: 'Fuckin bitch, fuckin slut – I am going to fuck with your life for 13 years and you'll have 13 years of hell'.

Prior to the separation the defendant threatened: I (sic) you ever leave me I'll kill you and the defendant has threatened the children of the parties.

The complainant has sought refuge at the home of her parents. In fear of the defendant the complainant is continually shadowed by another family member when dealing with the defendant. The complainant has recently obtained her independent accommodation.

Matters next at the Family Court on [date]– *court orders have required the complainant to inform the defendant of her address and her home phone number (to enable him to contact the children).*

While these cases were resolved by the man consenting to the woman's ADVO without admissions, and withdrawing his ADVO application on the basis of undertakings, it took six court appearances. Again the contrast between the violence/abuse experienced is clear with the man alleged to have engaged in behaviours that were long-standing, designed to coerce and control, and the woman alleged to have engaged in behaviour that was better described as hurtful, unfortunate and simply angry.

4. Summary

This chapter has explored the 'paired' narrative of cross applications. This qualitative analysis revealed three areas of difference between the complaints lodged by men and women.

First men, primarily second applicants, were more likely to be charged with criminal offences at the same time that the ADVO applications were before the court. Notably many of these charges concerned contravene ADVO offences. This suggests both a level of seriousness attached to these men's behaviour, at least to attract the attention of the police, and that these men were engaged in a repetitive form of behaviour.

Second, male second applicants were more likely to make complaints that failed to satisfy the legislative requirements for granting an ADVO. In some cases men

sought to characterise hurtful or unfortunate acts as violence, in others they sought to ascribe the woman's enforcement of her ADVO as violence or harassment. In all cases the alleged act/behaviour failed to have any connection with the legislative requirement of fear.

Third, only men relied on lengthy complaints that sought to position the man as the 'wounded' applicant. Invariably these complaints had little connection to the legislative requirements for granting an ADVO (in terms of the nature of the acts/behaviour alleged and the generation of fear). Rather these complaints engaged in a range of 'remedial' measures directed at denying, shifting blame, and minimising their own violence.

Building on the picture that started to emerge from the quantitative data analysed in *Chapter 6*, the qualitative analysis in this chapter reinforces the suggestion that the complaints lodged by male second applicants are of a different nature to those lodged by women (first or second applicants) and male (first applicants). They are different in terms of the nature and quality of the violence/abuse alleged, and in terms of its impact (fear) and function (control). Fear and control were notably absent from the complaint narratives of male second applicants discussed in this section. While in some cases the matters were resolved with the woman obtaining an ADVO and the man withdrawing; this was not always the case. In other cases the man's cross complaint, regardless of its substance, was effective in achieving mutual results, frequently mutual withdrawal even when the woman's complaint contained serious allegations of domestic violence that revealed fear, repetition and control.

While it is not suggested that all the complaints made by male second applicants fall within the frameworks discussed in this chapter, it is notable that very few women's complaints fall within these categories, nor did any complaints made by first applicants (men or women). This supports the contention that cross applications are commonly lodged for quite different reasons (reasons apart from securing protection). *Chapter 9* explores the way in which cross applications are approached and resolved in the Local Court. As will be seen in that chapter, cross applications appear to be deployed primarily as a bargaining tool to secure withdrawal.

8. Dual applications

This chapter focuses on a special category of cross applications: dual applications. These are cross applications that were made on exactly the same date. Ten of the 78 cross applications gathered in the court file sample involved dual applications (12.8%).[810] Eight of the dual applications were sought by the police[811] and two were private applications lodged on the same date.[812] This chapter focuses on police dual applications.[813]

All of the police dual applications contained *exactly* the same complaint narrative for both parties,[814] and tended to predominate at one court site which suggests a police practice in that area, at least by some police officers.[815] However the fact that nearly all the professionals interviewed,[816] had knowledge of, or experience with, police dual applications suggests that it occurs more widely than a single locale. At the same time the professionals interviewed, particularly the police, were of the view that such applications were uncommon and went against police policy which discourages dual applications.[817] However, WDVCAS4 stated that she came across dual applications '*quite frequently*'.

Police dual applications raise many of the concerns evident in research on dual arrest under mandatory and pro-arrest policies in the USA,[818] including the suggestion that the police have failed to examine wider contextual issues to

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[810] None of the women interviewed were involved in dual applications.

[811] CourtA-1A, CourtA-3, CourtA-6, CourtA-8, CourtA-13, CourtA-18, CourtC-16 and CourtC-30.

[812] CourtB-18 and CourtB-32A.

[813] It is unclear how private dual applications are generated; is it coincidence? Or does one party know that the other has attended court and does so on the same day? These questions are unable to be answered from the data available in this study.

[814] While the complaints for both parties contained the same text, this does not mean that the allegations were identical; some complaint narratives, while used for both parties, indicated that the male party and the female party engaged in different acts.

[815] Six of the eight police dual applications were identified at CourtA. Martin also noted a tendency for dual arrests to be confined to certain areas: above n685 at 153. See also Mary Finn & Pamela Bettis, 'Punitive Action or Gentle Persuasion: Exploring Police Officers' Justifications for Using Dual Arrest in Domestic Violence Cases' (2006) 12 *Violence Against Women* 268 at 268.

[816] DVLO1, DVLO3, DVLO4, DVLO5, DVLO6 (5/6); MAG1, MAG2, MAG3, MAG4, MAG5 (5/5); PP1, PP2, PP3, PP5 (4/5); SOL1, SOL3, and SOL6 (3/5); and WDVCAS1, WDVCAS2, WDVCAS4, WDVCAS5 (4/5). However, WDVCAS3, DVLO2, PP4, SOL2 and SOL5 stated that they did not have any experience or contact with police dual applications.

[817] DVLO1, DVLO3, DVLO4, DVLO5, DVLO6, PP1, PP2, PP3. See NSW Police Service, 'SOPS', above n398 at [4.10].

[818] See Hirschel & Buzawa, above n48; Martin, above n685; Miller, 'Paradox of Women Arrested', above n665; Feder & Henning, 'A Comparison', above n685; Finn & Bettis, above n815 .Concern about the arrest of women for domestic violence, in dual and single situations, has been raised in NSW: see Redfern Legal Centre WDVCAS, 'Submission: Domestic Violence Charges – Female Defendants', submission to the Ombudsman and NSW Police Service (2006), unpublished paper, copy on file with author; and Baker, above n312 at 31.

assess whether someone is a domestic violence perpetrator and who might need protection. Similarly, Anna Stewart, who identified a large number of police dual applications (22% of the cross applications in her study were dual applications) in her research on respondents to protection orders in Queensland, concluded that these are 'presumably taken out when the police cannot, or will not, identify who is the victim and who is the perpetrator'.[819]

In this chapter I first detail the characteristics of dual applications gathered in the court file sample. This discussion is tentative and exploratory due to the small number of dual applications. Second I explore, through the interviews with police, the role and decision-making processes of the police when faced with both parties alleging that they are the 'victim'. Third I analyse two case studies in detail. These case studies were selected because additional material was available on the court files that shed a different light on the complaint narrative suggesting divergent experiences of domestic violence by the men and women involved. Finally I explore 'primary' or 'predominant' aggressor policies, implemented in many USA jurisdictions, as one method to assist police in cases where both parties are making allegations against each other.

1. The nature of dual applications

A. Limited narrative in dual applications

The quality of complaint narratives in police dual applications was even more inadequate that those for cross applications generally.[820] Two dual applications simply contained statements suggesting that violence took place; there was no information about what that violence was or who was involved.[821] The complaint narrative for CourtC-16, for example, read:

> *The parties have been in an ongoing patchy relationship for about the past two years. There are current issues relating to the custody and care of the child of the union which has resulted in Family Law enforcement action and urgent applications coming before the court in the past few days and the next few days. The parties have allegedly been involved in an altercation at the ... premises* [the woman's house] *today. Each party is alleging adverse conduct by the other and all issues relate to the apparent wish of the*

[819] Stewart, above n12 at 85.

[820] See discussion in *Chapter 4*.

[821] CourtC-16 and CourtC-30. Both were TIO applications, which raises questions about how the content of these complaint narratives met the threshold for a TIO application (or order).

> *father to take their child to see his father. Police consequent became involved and police have fears for both parties.*

In other cases complaint narratives did detail the types of violence alleged to have been perpetrated by each party:

> *The parties have been in a relationship for the past five years. There is a history of DV. Police were called to the residence by a neighbour at approximately 10.30 pm tonight to find* [the woman] *on the front lawn crying. She told the police that* [the man] *kicked and punched her.* [The man] *was located inside and he was also crying. He also alleged that* [the woman] *kicked and punched him. Both parties have been spoken to and* [the man] *interviewed and they both admit hitting and kicking the other party during the course of the evening. Police are unable to determine who is the main aggressor.*[822]

However, even in this complaint, the absence of information beyond the presenting incident means that it is difficult to say anything about the context of the violence, and who might be in 'fear' and hence in need of protection.

i. History of violence

Dual applications were less likely, compared to cross applications made on different dates,[823] to refer to prior experiences of violence. Yet research on dual arrest from the USA indicates that this is an area of gender difference, with women more likely to have a recorded history of prior victimisation and men more likely to have prior reports of perpetration including prior arrests.[824]

Only three (3/8) police dual applications referred to a history of violence.[825] Like other cross applications this 'history' was included in a routine way and implicated both parties,[826] an implication reinforced by the use of the same complaint narrative for both parties:

> *The Parties have been in a relationship for the past five years. There is a history of DV. …. Police are unable to determine who is the main aggressor but are satisfied that a DV offence has been committed by each party against the other and have fears for continued DV due to the history of violence in the past.*[827]

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[822] CourtA-1A.

[823] See *Chapter 6*.

[824] Martin, above n685 at 150; Henning & Feder, 'Who Presents the Greater Threat?', above n264 at 76-77. Another study that compared dual arrests in Connecticut found that while there was little difference in the perpetration of prior physical abuse, men were more likely than women to have perpetrated sexual abuse and issued threats to kill: Feder & Henning, 'A Comparison', above n685 at 163. Thus the authors concluded that men's prior use of violence was more severe with more severe consequences: at 166.

[825] CourtA-1A, CourtA-18, and CourtC-16 (referred to as an '*ongoing patchy relationship*'). CourtA-18 specifically noted that there was no '*recorded*' history of violence.

[826] See *Chapter 6*.

[827] CourtA-1A.

Two police dual applications failed to mention a 'history of violence' in the complaint narrative, yet additional information appended to the court file indicated that there had been prior violence. In one case the woman had a current ADVO against her partner (information that should have been readily available to the police),[828] and in the other medical evidence was presented at the hearing which documented past injuries sustained by the woman.[829] This raises questions, at least in these two cases, about the appropriateness of the police applying for an ADVO to protect both parties. It further suggests that dual applications may result from poor or 'lazy' police investigative practices.[830] It is particularly problematic that *the same* complaint narrative is used for both parties when there are clear differences in the experience of violence. These two cases are explored as case studies later in this chapter.

ii. Types of violence alleged

The eight police dual applications were overwhelmingly concerned with acts of physical violence, with seven alleging physical violence on the part of both parties.[831] Three of these complaints noted visible injuries sustained by one[832] or both[833] parties. Only one case mentioned another form of abuse (verbal abuse) in addition to physical violence.[834] Four complaints referred to an argument[835] the nature of which was unspecified (that is to say, it was unclear what was meant by this term, for example was it meant to imply verbal abuse or intimidation, or simply a heated discussion). The use of the term 'argument' within the context of other acts of violence and abuse, and in the context of an ADVO application, suggests that the 'argument' was of a different nature than simply a disagreement. As noted above, in one complaint the only reference to an act that might ground an ADVO was the use of the term 'altercation' without any further

[828] CourtA-6.

[829] CourtC-30.

[830] See also police view that dual arrests are the result of laziness: Miller, above n21 at 63.

[831] CourtA-1A, CourtA-3, CourtA-6, CourtA-8, CourtA-13, CourtA-18 and CourtC-30. This stands in contrast to the private dual applications, and cross applications generally, which document a wide range of act/behaviours: CourtB-18 the woman alleged a history of violence, physical violence, threats to kill her and other family members, while the man alleged physical violence, threats to harm and verbal abuse. CourtB-32A the woman alleged a history of violence, physical violence, verbal abuse, threats, telephone harassment, while the man alleged a history of violence, physical violence, verbal abuse, stalking and property damage. For cross applications generally see Table 6.5.

[832] CourtA-18: the man sustained scratches to the forearms and the woman had '*no visible injuries*'.

[833] CourtA-6, CourtA-13 and CourtC-30.

[834] CourtA-3.

[835] CourtA-3, CourtA-6, CourtA-8, CourtA-13 and CourtA-18.

information.[836] No police dual application contained allegations about threats or sexual violence.

In three dual police applications criminal charges were laid against one or both parties. In two of these cases only the man was charged, both with common assault.[837] In the remaining case, both parties were charged with multiple offences including assault and property damage. The man was also charged with breach ADVO.[838]

The emphasis on physical violence and injuries is reflected in research on police decision-making regarding dual arrest in the USA.[839] The emphasis on physical violence is perhaps not surprising in the studies investigating arrest; however, the range of acts that can ground an ADVO are wider and one would expect to see greater reference to the full range of potentially violent or abusive acts within these complaints.

Given the limited nature of the complaint narrative and the small number of cases involved, very few differences emerged in the type of acts of physical violence perpetrated by men and women involved in dual applications. However, it is worth noting that only men (2) alleged that they had been scratched,[840] and only men (2) alleged that a weapon/object had been used against them (a kitchen knife and a spoon).[841] Like women's use of weapons documented in *Chapter 6*, the items allegedly used by women appear to be what was 'on hand' rather than a traditional weapon.[842]

iii. Who holds fears?

As outlined in *Chapter 6*, in order to grant an ADVO the court needs to be satisfied that the person fears the commission of violence in the future and that that fear is reasonable. Like cross applications generally, statements regarding

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[836] CourtC-16. CourtC-30 also used the term 'altercation' however the complaint also noted that both parties sustained injuries and therefore has been coded as physical violence.

[837] CourtA-1A (result of charge unknown), and CourtA-3 (charge withdrawn two days after the dual applications were withdrawn).

[838] CourtA-6 (Olivia and John) quoted in *Chapter 1* and as a case study later in this chapter.

[839] Martin, above n685 at 148; Finn et al, 'Dual Arrest Decisions', above n710 at 578.

[840] CourtA-6 and CourtA-18.

[841] CourtA-8 CourtA13. This was also the case in the private dual applications: CourtB-18 and CourtB-32A.

[842] Melton & Belknap, above n36 at 344. Women's use of weapons has been noted as a factor in dual arrests in the USA: see Henning & Feder, 'Who Presents the Greater Threat?', above n264 at 74; Feder & Henning, 'A Comparison', above n685 at 163; Miller, 'Victims as Offenders', above n21 at 2.

fear were included in dual applications in a routine way to conclude the complaint narrative.[843] 'Fear' was mentioned in four police dual applications and in all of these applications 'fear' was cast as the fears held by police, rather than the fears held by the parties, for example:

> *The police have fears for the safety of the husband and wife and are seeking an order for their protection from each other.*[844]

The court does not need to be satisfied as to the fears held by the police, but rather is concerned with the fears held by the alleged victim.

The absence of reference to fears held by the victim in these complaint narratives is of concern for two reasons: (1) it fails to address the requirements of the legislation; and (2) the generation of fear is one area where research has indicated clear gender differences.[845] Its absence means that it is not possible to ascertain whether there were any gender differences in the experience and context of domestic violence in these cases.

B. The resolution of dual applications

Dual applications were resolved in a similar way to cross applications generally, see *Chapter 9*.

Half of the police dual applications were resolved by mutual withdrawal (4/8) at either the first or second mention.[846] Three cases resulted in mutual orders at the first mention.[847] Only one police dual application proceeded to a hearing which resulted in the woman's complaint being dismissed; after which the man withdrew his application.[848] Thus in five cases (5/8) no person (10 of 16 people) obtained the protection of an ADVO.

The dominance of mutual withdrawal resonates with Margaret Martin's findings concerning dual arrests in Connecticut where those arrests were more likely to result in *nolle prosequi* (this means that no current court action will be taken but

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[843] See *Chapter 6*.

[844] CourtA-8. See also CourtA-1A, CourtC-16 and CourtC-30 (this case referred to the likelihood of repetition).

[845] See references above n264. See also *Chapter 6*.

[846] CourtA-1A, CourtA-3, CourtA-13 and CourtC-16. CourtC-16 is included here as neither party attended court and thus the matter was not determined on its merits, despite it being marked on the file as 'mutual dismissal'.

[847] CourtA-6, CourtA-8 and CourtA-18. CourtA-6 (Olivia and John) is included because ultimately both parties ended up with an ADVO against each other; Olivia consented to John's ADVO and Olivia withdrew her application as it transpired she already had an ADVO against John.

[848] CourtC-30. This is presented as a case study later in this chapter.

if another incident takes place within 13 months then the case can be reopened; if nothing happens the 'record is expunged', effectively this means no prosecution[849]); 79 per cent of women and 82 per cent of men involved in dual arrests were not prosecuted as compared to 69 per cent of single arrests.[850]

Research has indicated that one of the explanations police proffer for the practice of dual arrests is that the court is better placed to assess the competing versions of events.[851] This suggests that police may be abdicating their responsibility to the court because they have not conducted an adequate investigation. This view is supported by one DVLO in the present study who suggested that some general duties officers are simply '*lazy*':

> *… they don't want to actually make any investigation into who the offender is. Yeah okay both parties might have injuries but domestic violence injuries ... follow a pattern, and I get cops all the time ...*[who] *can't be bothered finding out who* [is] *the victim and the offender, so all they'll do in the event is put them both on as persons of interest and both on as victims .... Maybe they've both got injuries, maybe they've both been fighting, you know, it's really difficult. But generally sloppy police work, they can't be stuffed doing it because they don't, they don't think they have to - go 'Oh crap she won't front up to court anyway' and ... 'he'll get off' and... 'we'll be back here next week'. So for them that's, that's definitely the police mentality.*[852]

Evidence from this study, and from Hunter's work, indicates that this notion that the 'court can work it out' is countered by the administrative practices of the Local Court dealing with ADVOs, where very little, if anything, of substance is heard in any ADVO complaint, let alone cross complaints, which are largely resolved via some form of settlement.

C. Legal representation

Dual applications create a conflict of interest for police prosecutors in that they are unable to represent a person as a victim in one case, and then immediately afterwards prosecute that person as a defendant. This was emphasised in the interviews with DVLOs and police prosecutors,[853] as well as by other

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[849] Martin, above n685 at 149.

[850] Ibid at 151.

[851] Finn et al, 'Dual Arrest Decisions', above n710 at 567-568. The other key justification identified in the USA research is that the arrest process can put victims in contact with services that can assist them (thus the arrest process has benefits): Finn & Bettis, above n815 at 275 and 282-83. This was not raised in the interviews conducted in this study and hence is not explored, however, the contradiction evident in this justification is noted.

[852] DVLO1.

[853] See DVLO1, DVLO3, PP1 and PP2.

professionals.[854] Generally, when asked about the impact of dual applications, the police confined their discussion to this problem, and rarely mentioned the impact of dual applications on victims.[855]

To address this conflict of interest, the police prosecutor either withdraws the appearance of the police in one or both cases at the first court appearance,[856] or separates the complaints.[857] Withdrawing the appearance of the police does not withdraw the complaint in its entirety, simply the police appearance for that complainant. The complaint would then be treated as a private complaint and the complainant would have to represent themselves or instruct a legal representative. The decision about which case to withdraw from is determined by the prosecutor in consultation with the investigating officer and/or the DVLO. PP3 suggested that this is done by examining the merits of the complaint (however this seems of little assistance where complaints are identical, short and of poor quality) and whether one party has been charged.

With one exception,[858] there was no notation on the court files that the police had withdrawn their appearance from one or both cases, or any notation regarding private representation. The status of police representation in these dual applications is therefore unclear. If representation by the police prosecutor did continue, this is troubling given the rate of settlement of dual applications at first mention (either by withdrawal or mutual orders), as it suggests a lack of independent advice in resolving the cases.

D. Impact of dual actions

It is beyond the scope of this study to document the negative impact of dual applications on victims of domestic violence. This information is not revealed in the court files, and no women interviewed were involved in dual applications. However, it is important to note that dual applications are likely to have a potentially profound impact; they are 'an action of consequence'.[859] Research on dual arrest documents multiple consequences, some of which directly relate to

[854] See MAG3, MAG4, MAG5, SOL2, SOL3 and WDVCAS1.
[855] The exception was DVLO1.
[856] MAG2, MAG5, PP3 and WDVCAS1, WDVCAS4 and WDVCAS5.
[857] PP1, PP2 and PP5. See also SOL3.
[858] CourtC-30. The only case that proceeded to a hearing.
[859] Martin, above n685 at 154. See also Hirschel & Buzawa, above n48 at 1458.

the criminal nature of that action (for example conviction, criminal record and resultant impact on employment). Dual arrest may also restrict a person's ability to access services (that is to say, victims of domestic violence who have used violence may be excluded from support services because they are also viewed as 'perpetrators'),[860] it may negatively impact parenting orders,[861] and most significantly it may make a victim 'reluctant to call the police to report subsequent abuse'.[862] These potentially negative impacts arising from dual arrest may also arise following dual applications, mutual orders and cross applications more generally. This is explored further in *Chapter 9*.

2. The role of the police when both parties make allegations of violence

A. The dominance of incidents and physical violence

What emerges from the complaint narratives for dual applications is a sense that an alleged incident of physical violence by both parties was sufficient to generate police action. This was confirmed in the interviews with police where the primacy of incidents came to the fore in their discussions of the practice of dual applications.[863]

The police interviewed were generally of the view that police should not apply for an ADVO to protect both parties arising from the same incident, but were unclear how to determine which party they should seek an order for. While the police were not directly asked about decision-making processes in the context of dual applications, it is notable that there was virtually no reference to the types of legal or extra-legal factors raised in research on decision-making regarding arrest for domestic violence.[864] Certainly there was no reference to any extra-legal

[860] Osthoff, above n38 at 1527.

[861] Hirschel & Buzawa, above n48 at 1459.

[862] Ibid. See also Miller, 'Victims as Offenders' above n21 at 130; Martin, above n685 at 155.

[863] The police interviewed in this study do not generally attend incidents (although some DVLOs do, particularly if they also have a general duties role). The DVLO's role includes verifying the actions taken by the attending or investigating officer. This involves examining the COPS entry and action taken. The prosecutors' role is to prosecute cases initiated by the police, whether ADVOs or criminal charges. They will often advise police about their actions, the nature of the evidence provided, and specifically the conflict of interest generated by police dual applications.

[864] Factors such as the behaviour/culpability of the victim, the presence of the perpetrator at the scene, the use of drugs and/or alcohol by one or both parties, who contacted the police, presence of children, relationship between the parties, whether still cohabitating, number of previous contacts with the police: see Dana Jones & Joanne Belknap, 'Police Responses to Battering in a Pro-Arrest Jurisdiction' (1999) 16 *Justice Quarterly* 249 at 254-56; Lynette Feder, 'Police Handling of Domestic Violence Calls: The Importance of the Offender's Presence in the Arrest Decision' (1996) 24 *Journal of Criminal Justice* 481; Buzawa & Buzawa, above n244, ch9. See also Jones & Belknap, above n864, at 271 who noted that pro-arrest policies that are embedded within a progressive integrated response to domestic violence for a

factors concerning whether the woman satisfied idealised notions of a 'genuine' victim, whether she was affected by alcohol or other drugs, whether she was 'mouthy', 'hysterical' or aggressive towards the police – factors which have been suggested in other research as a determinant of police decision-making in the context of dual arrest.[865] Indeed there is a substantial amount of literature that indicates that the general police response to alleged offences (not just domestic violence cases) is influenced by extra-legal factors such as the demeanour of the parties.[866]

Instead the main factor that emerged in these interviews was the reliance on an incident framework. While some police spoke about applying for an ADVO for the 'victim', the majority spoke in terms of incidents. Importantly, even when identifying incidents, the police suggested approaches that divided events into discrete parts where the position of victim and defendant might shift (that is to say, that a person might be a victim in the first part of the action, but a defendant in the second part). PP1 captured these multiple dimensions in his interview:

> *…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. If it happens out of one incident well, generally speaking, part of the investigating officer's role is to find out where the truth lies, …like who do we believe? Who is the victim? Who is the defendant? You know, it gets very, very messy. We'll generally have to, I believe just say 'well … on our investigation we believe this is the true victim' and that's who we're bound to have responsibility to represent and you may even need to…flick the other one, so to speak….it's very murky.*

Even though this prosecutor talks about identifying 'who the victim is' it is linked to an incident framework. This prosecutor notes that in most cases it is possible to identify separate incidents, and that in only a small number of cases would the prosecution decide to withdraw from one case and proceed with the other. This notion of being able to identify, and separate, discrete incidents was raised in a number of interviews:[867]

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long period of time 'decrease the likelihood' that extra-legal factors 'influence the police response'. See also Carolyn Hoyle, *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (2000), ch 5.

[865] See Miller & Meloy, above n43 at 95; Feder & Henning, 'A Comparison', above n685, at 155; Osthoff, above n38 at 1533.

[866] Eg see Richard Ericson, 'The Police as Reproducers of Order' in Tim Newburn (ed), *Policing: Key Readings* (2005) at 215-246.

[867] DVLO3, DVLO4, DVLO5, DVLO6 (4/6); PP1, PP2 (2/5).

> *...sometimes they're taken out when there's two separate incidents. You can take them out for both parties and that's fine. But they're usually heard separately, they're not heard on the same day…they're probably not cross applications, they're individual applications because they're relating to two different matters.*[868]

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). 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'.[869] This vision of discrete incidents is clearly illustrated in the comments from police explaining when dual applications would be appropriate; the first quote is from a police prosecutor:

> *they're really hard* [police dual applications] *because we don't know who, who the real victim of the matter is ... they're mainly the cases where victims have been a victim for a long time and then all of a sudden she's had enough and she just, you know, either stabs the bloke, you know she really just ups the ante like um yeah just like just goes crazy …and starts beating him but because the police have got, the police know this lady, she's been a victim for so long they've sort of got, they know about her situation, they would, or when they get there she might say, 'Well he was standing over me, threatening me so I did this'. The police just to cover their own backsides would apply for both. The police couldn't determine so the police will take the view, ... we need to put some protection in place to stop these two from killing each other um but I can't decide who is right, who's wrong so let's just take it to the court.*
>
> … how do the prosecutors deal with that?
>
> *Normally, normally we would ask that the different matters go to another court.*
>
> Oh okay so separate them.
>
> *Just separate them so a prosecutor here might deal with Victim A ... and the other one can go to another court. We would never do that as a cross-AVO…in the same court with the same prosecutor, wouldn't make sense. It'd be terrible because I would be saying my victim's a victim but then I'd also be cross-examining her as a defendant. Wouldn't work.* [870]

[868] DVLO3.

[869] Hirschel & Buzawa, above n48 at 1456.

[870] PP2.

And the second from a DVLO:

> *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 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.*[871]

Police officers in Susan Miller's study of women arrested for domestic violence also spoke about separate incidents based on the elapse of time.[872] 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'.[873] Miller argued that this focus on whether a crime has occurred illustrates a 'simplistic approach' to domestic violence that is part of the 'incident-driven philosophy' of the criminal legal system 'that is devoid of contextual understandings and explanations of violence'.[874] 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[875] (with the exception of cases that fit legal definitions of self-defence). The call for greater context may appear difficult in the legal setting where incidents and 'dichotomous thinking' are predominant, however as Miller argues:

> [P]olice exercise discretion at every citizen-police encounter and use selective enforcement strategies to decide whom to arrest. Surely it is not too much to desire a more considered and informed approach to making arrest decisions in domestic violence situations.[876]

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[871] DVLO5.

[872] Miller, 'Victims as Offenders', above n21 at 62-63.

[873] Ibid at 63.

[874] Ibid at 75.

[875] Hirschel & Buzawa, above n48 at 1458.

[876] Miller, 'Victims as Offenders', above n21 at 131. See also McMahon & Pence, above n21 at 52.

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 about future protection from the outset – that is their function and purpose – this is a key difference to the criminal law. These questions are not necessarily premised on a single incident which is the focus of the decision to charge.

The NSW legislation requires a police officer to apply for an ADVO where that officer believes or suspects that certain offences have taken place, or are likely to take place 'against the person for whose protection an order would be made'.[877] The focus on the need for protection could be stronger if the legislation made a specific link to the protective nature of an ADVO in the same way it does when specifying when a court can make an order. The legislation provides that the court needs to be satisfied that the person fears, and that that fear is reasonable, that certain acts may be perpetrated against them in the future by the defendant.[878] 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 domestic violence.

Given the poor quality of the documentation of complaints in dual police applications in the present study, there appears to have been little consideration as to whether one or both parties required protection. Rather it seems that the police involved were unwilling to conduct a thorough investigation, and in turn minimised and trivialised the events by failing to do so. This interpretation of police practice is supported by the DVLOs interviewed who said that lack of investigation was the main reason for dual applications.[879]

[877] *Crimes Act* 1900 (NSW) s562C(3), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s49.
[878] *Crimes Act* 1900 (NSW) s562AE, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s16.
[879] DVLO1, DVLO5 and DVLO6.

B. Apply for the 'victim'

Three DVLOs spoke about applying for the 'victim' or whoever is '*most needy*'.[880] Only DVLO1 explained what this might involve, making it clear that the identification of the victim was not negated by the victim's own use of violence. DVLO1 took the view that a woman should not be penalised for fighting back in the context of her own victimisation. This view was clearly in the minority (where most police interviewed were more focused on whether an offence had taken place, whether there were separate incidents, rather than the context for the act in question):

> [T]*here's only one perpetrator and there's only one victim, every now and again she might fight back and good on her and the cops aren't going to penalise her for that. Um none of the cops I know anyway. Certainly they're not going to be taking out an AVO against her because she managed to hit him with the frying pan one time like you know. She might have old bruises and old broken bones and everything like that. We're not going to punish her for that.*[881]

DVLO1 was the only police officer who mentioned 'fighting back' or self-defence as a factor in women's use of violence. Similarly in a study of police decision-making regarding dual arrest in Georgia, Mary Finn and Pamela Bettis remarked 'to our surprise, that either party might have been acting in self-defense was not mentioned by any of the officers'.[882]

The other two DVLOs who referred to the need to identify the victim failed to articulate how this might be done; one simply referred to the person who is '*most needy*'[883] and the other said '*we usually have to pick a party*' to represent.[884] Neither clarified how a police officer might determine 'need' or make such a choice – there was no articulated connection to victimisation. Both of these DVLOs stated that they would refer the other person to the chamber magistrate to pursue a private application.[885] This complies with NSW Police policy which states that a police officer is to apply for an ADVO for the PINOP and if the 'defendant seeks an order [the police officer is to] direct this person to see the

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[880] DVLO1, DVLO3 and DVLO4.

[881] DVLO1.

[882] Finn & Bettis, above n815 at 282.

[883] DVLO3.

[884] DVLO4.

[885] See also PP2.

chamber magistrate'.[886] Whether such a referral is appropriate requires greater investigation. Attending police might find referring the other person to the chamber magistrate a useful deflection tactic (that is to say, by providing this person with an alternative legal avenue they may not be angry with the police applying on behalf of the other person). However, this approach is problematic because it suggests that both parties have grounds to seek an ADVO and that the prime motivation for the police making a decision to apply for one person is the conflict of interest generated by making a dual application, rather than any assessment of who is the victim and who requires protection. As one DVLO explained:

> *…I think by…referring the other party on to the chamber magistrate is good because it makes us, um, it takes that onus off us and just that conflict, like how do you prosecute* [both] *you know.*[887]

While the concern in this chapter has centred on the making of dual applications, the other risk of both parties alleging that they are the victim is the very real possibility that the police will take no action.[888] Hirschel and Buzawa caution researchers to examine all possible police responses to a domestic violence incident, since researchers who focus on dual arrest risk seeing police that practice dual arrest as problematic but fail to identify those that 'do nothing' as being of equal concern.[889] DVLO6 raises this possibility:

> *If they really can't find a victim or a …defendant, they'll take conflicting…versions and not make any application…so if there's a verbal argument and they're both saying they've got fears, or he's making one allegation and she's making another allegation and they* [the police] *can't decide who is right or wrong, they'll be no application.*

3. Case studies: The light additional material provides

In this section I present two case studies. In these cases additional material was available on the court file which highlights the limited and distorted picture portrayed in the complaint narrative. These case studies present a number of interesting contrasts to the position articulated by the police in their interviews.

[886] NSW Police Service, 'SOPS', above n398 at [4.10].

[887] DVLO6

[888] Finn et al 'Dual Arrest Decisions', above n710 at 578. Using hypothetical scenarios to assess police decision-making regarding dual arrest in Georgia (which has a primary aggressor policy) this study found that if both parties sustained injuries, 45.8% of the police surveyed would arrest both parties, 36.5% would take an informal option, and 17.7% would only arrest the man. The decision to pursue an informal option when both parties were injured was higher than when only one person was injured (when only the wife was injured 20.7% of police said they would pursue an informal option).

[889] Hirschel & Buzawa, above n48 at 1450, 1461-1462.

Far from appearing '*murky*', or '*messy*',[890] this additional information instead confirms an inadequate police investigation. This in turn suggests that it is not merely the presentation of incidents and injuries that leads to dual applications, but rather problems with the police assessment of competing versions of events and how they apply their understanding of domestic violence to the case at hand.

A. Olivia and John

The most glaring case involves Olivia and John,[891] quoted at length in *Chapter 1*. The sheer inadequacy of the narrative contained in that police dual application, given the events documented in the charge fact sheet, is quite simply astounding. As described earlier, Olivia certainly perpetrated acts against John such as kicking him, damaging his stereo, and scratching his back.[892] However, these were performed in direct response to his vicious and sustained attack on her, which included head-butting her until she was bruised and bleeding. On the first date that the dual applications appeared at court, Olivia consented to John's ADVO against her, and her application was withdrawn because it transpired that she already had an ADVO against John.[893] This prior ADVO should have indicated to the police Olivia's history of victimisation and provided important context to her actions. In fact the charge fact sheet provides quite a clear contextual discussion of Olivia's acts within the presenting incident. One can only surmise that there was some level of frustration experienced by the police, perhaps they had attended on multiple occasions, perhaps they felt that Olivia should have separated from John.[894]

At the very least this case supports the contention that if there were incidents of physical violence perpetrated by both parties resulting in injuries, then this alone was sufficient to generate a dual application. This strict legal (or formal) approach also emerges in the dual arrest research where some police have complained that it is not their role to investigate 'background' to the incident, but rather 'my job is to decide whether or not a criminal act occurred and if so, what

[890] PP1.
[891] CourtA-6.
[892] Finn et al, 'Dual Arrest Decisions', above n710 at 571.
[893] It is worth noting that Olivia's existing ADVO was strengthened at this time by adding an exclusion order.
[894] See discussion of police frustration: Ombudsman, above n11 at [3.1]. See also Katzen, above n15 at 229.

criminal act and who committed it'.[895] In turn this approach raises questions about what the police are meant to do when faced with evidence that both parties have used physical violence against each other (and these acts cannot be easily defined as self-defence). Approaches to assessing who is the perpetrator of domestic violence, such as predominant and primary aggressor policies, attempt to navigate this territory. These approaches are discussed at the end of this chapter.

How these dual applications were approached once they appeared in court is less clear. On the first mention day when the ADVOs were resolved it is unlikely that the charge fact sheet was also before the court. In any event once Olivia consented to John's ADVO, and withdrew her own it is unlikely that there would have been any further inquiry into the nature of the applications. Questions should be raised about whether, given Olivia had a pre-existing ADVO, further investigation should have been conducted by the magistrate about whether mutual orders were warranted in this situation. It was only in relation to the charges against Olivia, which took over a year to be finalised, that more in-depth questions were raised about the nature of her behaviour by her legal representative. In the end the charges against Olivia were withdrawn.

At this stage, it is important to reiterate that protection orders pose a different question than that posed in the decision to arrest and charge; it implicitly asks 'who requires protection?' This question does not appear to have been asked in the case of Olivia and John.

B. Brenda and Joel

The case of Brenda and Joel involved an urgent dual TIO application, in which the complaint narrative provided virtually no information about the incident that gave rise to the application:

> *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*

[895] Police officer quoted in Miller, 'Victims as Offenders', above n21 at 63.

each party there is the likelihood or probability of further violence between the parties. The matter still remains subject to further investigation.[896]

The dual applications were mentioned at court on four occasions before being listed for hearing, some seven months later. During this time the parties were protected by mutual IOs granted by consent. On all occasions Brenda and Joel were legally represented (although it is unclear when, or if, the police withdrew their appearance for either or both parties). On the day of the hearing Brenda's case was heard first. As part of her evidence Brenda provided a letter from her doctor that detailed two visits to the surgery to have injuries examined and that she had informed the doctor were sustained as a result of her husband's actions. The injuries reported included bruises to her hands, wrist and foot; bruises to two fingers and minor skin abrasions on the back of her hands.[897] At the hearing three people gave evidence: Brenda, Joel and another person (it is unclear who this person was or their relationship to the parties).

The magistrate declined to grant Brenda's ADVO because nothing had taken place in the seven months from the date of the TIO application to the date of the hearing; with this lapse of time, the magistrate concluded that he could no longer consider that any fears held by Brenda were 'reasonable'.[898] This is despite the fact that the magistrate found that Joel did assault Brenda as documented in her medical certificate, that Joel threatened her saying 'I'll find you wherever you are', and that the incident that led to the present TIO application concerned Brenda trying to leave the residence and Joel preventing her from doing so. In this incident Joel took Brenda's mobile phone, a struggle ensued where Joel hit Brenda and 'eventually she bit him, in order to get him off her'. The magistrate appeared to fail to note that Brenda's actions were more defensive than offensive in nature, or that Brenda's actions, in the context of her attempts to leave, is suggestive of a pattern of control exercised by Joel rather than by Brenda.[899]

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[896] CourtC-30.

[897] There was another exhibit: correspondence from the woman's former husband to the then Department of Immigration and Multicultural and Indigenous Affairs (now the Department of Immigration and Citizenship) dated three days after the incident that gave rise to the police dual application in which her former husband sought to withdraw his immigration sponsorship of his wife as a result of her violence against him, he claimed she '…has a third party (lover)' and that they no longer live together 'I don't know where she is living'. See Dasgupta, 'Framework for Understanding', above n43, at 1371 for a discussion of measures designed to undermine a woman's immigration status as violence that is not captured by act-based measures such as the CTS.

[898] Like the magistrate in this case, SOL3 was also of the view that there should be 'some time nexus' component to the fear test. See a similar emphasis in a Northern Territory case in Spowart & Neil, above n16 at 83.

[899] See references on the heightened risk for women at the time of separation: above n602.

In reaching this decision, it does not appear that the magistrate canvassed or considered that the IO that protected Brenda was proving effective and that was why there had been no further incidents. A similar point was made by Miranda Kaye and colleagues in their research on domestic violence and parenting arrangements post separation, where the absence of further allegations was not 'interpreted as a case in which the [interim] order had actually worked … but was instead construed as a situation where the perpetrator was no longer a danger'.[900]

Following the dismissal of the woman's application, the man withdrew his application.

This case raises a range of matters about how domestic violence is understood in legal practice. This magistrate clearly saw a time lapse between incidents as relevant to the continuing existence of fear and in so doing viewed each incident in isolation rather than part of a continuum of experience.

4. How should the police respond to competing allegations about violence?

How the police should respond to an incident where both parties allege that the other party has been violent, and/or where both parties have sustained injuries as the result of the other's actions, raises critical questions. Most importantly it presents a number of challenges about how to look beyond the incident to consider the context of the acts. Hirschel and Buzawa outline these challenges in the context of dual arrest:

> The notion of a dual arrest in an intimate partner violence case challenges the traditional legal identification of a victim and offender in cases involving violence. It also challenges researchers to promote the use of definitions of domestic violence that examine the entire context of the relationship rather than specific acts of violence.[901]

'Primary' or 'predominant' aggressor policies have been implemented in the USA as a method to assist the police to determine who should be arrested when both parties have claimed that the other used physical violence against them

[900] Kaye et al, above n15 at 50.

[901] Hirschel & Buzawa, above n48 at 1450.

and/or that they have both sustained injuries.[902] There has been recent interest in these concepts in Australia, in part motivated by concerns about an increase in the number of women being arrested for domestic violence offences.[903] In general these policies, and in some jurisdictions legislation, require the police to look beyond the presenting incident[904] to consider: whether there is a history of violence perpetrated by one party against the other, the nature of the injuries sustained by both parties, the likelihood of violence in the future, and whether one person was acting in self-defence.[905] The intention is to encourage the police to investigate competing claims within a wider contextual framework. Evidence concerning the impact of primary or predominant aggressor policies varies – in some jurisdictions there has been a decrease in the number of women arrested following the introduction of such policies, and in other jurisdictions the arrest rate of women has continued to rise.[906] As Trish Erwin, for the Battered Women's Justice Project (San Francisco, USA), pointed out, if police officers do not possess an adequate understanding of domestic violence and the nature and context of women's use of violence, they will be unable to understand the rationale for the imposition of questions and issues to determine who to arrest.[907]

Erwin explored the problems with the structure and language of primary/predominant aggressor policies. This language, at least initially, led police to focus on 'who hit first' rather than wider contextual issues about how violence starts, continues and is sustained in the relationship.[908] Such approaches appear more concerned with 'participation' rates rather than a 'proportional analysis'.[909] In many ways this approach is almost inevitably driven by the criminal justice system's concern with the 'incident'. As a result of this initial focus on 'who started it' most states have changed the language to 'predominant

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[902] In 2000, 24 states had adopted 'primary aggressor language': Ibid at 1460.

[903] Redfern Legal Centre, above n818; Baker, above n312; Rochelle Braaf & Clare Sneddon, *Arresting Practices: Exploring Issues of Dual Arrest for Domestic Violence* (2007).

[904] Hirschel & Buzawa, above n48 at 1460.

[905] See summary of USA primary/predominant aggressor policies or legislation: Sandra Murphy & Mary Fenske, *Primary Aggressor Chart* (2008) available at <http://data.ipharos.com/bwjp/documents/Primary%20Aggressor%20Chart%20Final.pdf> (13 February 2009).

[906] Finn & Bettis, above n815 at 271; William DeLeon-Granados, William Wells, Ruddyard Binsbacher, 'Arresting Developments: Trends in Female Arrests for Domestic Violence and Proposed Explanations' (2006) 12 *Violence Against Women* 355 at 364-5; Hirschel & Buzawa, above n48 at 1460; Miller & Meloy, above n43 at 92; and Finn et al, 'Dual Arrest Decisions', above n710 at 568.

[907] Trish Erwin, *When is Arrest Not an Option? The Dilemmas of Predominant Physical Aggressor Language and the Regulation of Domestic Violence* (no date), at 13-14.

[908] Ibid at 5.

[909] Hamberger, 'Towards a Gender-Sensitive Analysis', above n43 at 132.

physical aggressor', 'principal physical aggressor' or 'dominant aggressor'.[910] These changes in terminology have not necessarily brought about the changes sought.[911]

Whether it is termed 'primary' or 'predominant' aggressor there are also problems with the emphasis on injury as an indicator of who should be arrested in a given situation. Erwin points out that injury, and related notions of visibility and severity, are very poor indicators, on their own, of 'who is the predominant aggressor'. These highlight the importance of police knowing the difference between offensive and defensive actions, and being aware of injuries that are not visible at the time the police attend an incident.[912]

Erwin's commentary on this issue raises important concerns about the way in which primary/predominant aggressor policies are conceptualised. First, self-defence is generally presented as the last consideration, rather than the first question (was one person's use of violence was legal?).[913] This type of question thus stands outside the determination of who is the predominant aggressor and 'who poses a threat to the other person'.[914] One of the attractive things about this approach is that it immediately focuses attention on the separate acts performed by the parties (was one party using self-defence), rather than starting with questions that centre on the 'mutual' conflicting allegations.

In turn we need to consider whether the law can in fact accommodate the nuances sought to be introduced by such aggressor policies:

> Predominant physical aggressor language is, in some ways, trying to make the law do what it does not want to do: it is designed to remedy power differentials in the use of violence within intimate relationships, but it is at odds with the goal of the law in providing a neutral standard upon which to determine a legal action, eg probable cause. It is not an end run to 'always arrest the guy', but asks officers to consider …that violence has different meanings in different contexts. Unfortunately, implementing [predominant physical aggressor] raises problems for victims, law enforcement and prosecutors alike.[915]

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[910] Erwin, above n907 at 5.

[911] See references above n906.

[912] Eg injuries relating to strangulation or choking: see Department of Justice, Alberta, *Domestic Violence Handbook for Police and Crown Prosecutors in Alberta* (2008) at 91-94.

[913] See also McMahon & Pence, above n21 at 64.

[914] Erwin, above n907 at 21 provides a diagram about how such a process would operate.

[915] Ibid 14-5.

This resonates with the cautions raised in other research in this field about the disjuncture between seeing domestic violence as a 'process' or contextual issue, and the predominant legal view that has an incident focus.[916]

5. Summary

This chapter has explored the special category of cross applications referred to as dual applications. The number of dual applications gathered in this study was small and the information about them highly limited; this creates difficulties in analysis. This information was supplemented by the in-depth interviews with police. What emerges is a policing approach that emphasises incidents and physical violence, often with accompanying injuries. While this might suggest that these cases concern more serious events, this is certainly not the picture that emerges from the complaint narratives; rather what emerges from those narratives is a lack of police attention, a lazy approach to police investigation, and an approach that appears to undermine both parties' claims to protection. The complaint narratives suggest a level of mutual culpability in the incident. In turn all but one of the police dual applications gathered in this study were resolved in a mutual way, via withdrawal or mutual orders. However, the detailed case studies presented at the end of this chapter suggest that a different picture of the cases emerges when further information is available beyond the limited complaint narrative.

The next chapter explores in greater detail the way in which cross applications generally are approached by the legal system and personnel – here, many of the factors brought into focus concerning dual applications such as incident definitions, mutual culpability, 'both as bad as each other', and a failure to assess the claims but rather seek some settlement are also evident.

[916] Hirschel & Buzawa, above n48 at 1456; Miller, 'Victims as Offenders', above n21 at 131; and McMahon & Pence, above n21 at 52.

9. Before the court

> The life of this legislation…is found not in the appellate record of doctrinal interpretation, but in the day to day functioning of the … Magistrates Court.[917]

This chapter explores how professionals working in the ADVO system respond to cross applications and how they attempt to unravel the competing claims made by men and women. It explores the underlying conception of domestic violence that these professionals bring to their work. It does this by examining three interrelated facets of the ADVO legal process:

1. women's encounters with legal representatives and magistrates;[918]
2. the making of interim orders and the final disposal of cross applications;[919] and
3. how professionals understand domestic violence and the competing claims raised in cross applications.

What emerges is a 'paired' approach to cross applications, where such applications tend not to be viewed as individual claims for protection, but rather a paired case that gives rise to mutual outcomes. This paired approach is contrasted with the experiences of the women interviewed. This demonstrates a disjuncture, or a lack of appreciation of the impact of cross applications and the mutual resolution of such applications, on victims of domestic violence seeking protection from the legal system.

1. Cross applications before the local court

A. Engagement with key professionals

i. Legal representation

The vast majority of first applicants in the court file sample were legally represented (89.7%). This reflects the high rate of police initiated applications

[917] Hunter, 'Women's Experience in Court', above n58 at 69-70.

[918] Some women also commented on the police and the WDVCASs, however, these did not relate to cross applications, and therefore are not discussed.

[919] The other key decision concerns the orders included in an ADVO. This is beyond the scope of this study; while I noted the orders made in the court file sample and for the women interviewed, it was not possible to make any comments about the negotiation or decision-making processes that led to those orders. This involves a complex interplay of what orders were sought, the substance of the complaint, and the role and approach of legal representatives and magistrates.

(police initiated over 70% of first applications, Table 6.3), which means that the police prosecutor acts in these cases. It also reflects the fact that at all three courts where the court file sample was gathered, the WDVCAS provided free legal representation to women who sought private applications.[920] The rate of representation for second applicants was lower (64.1%); most likely reflecting the lower level of police involvement (police initiated only 11.8% of second applications, Table 6.3).

The police prosecutor represented over half of the women interviewed (6/10).[921] These women provided varied, and sometimes mixed, assessments of that representation. Chloe, for example, appreciated having police representation; it made her feel that she '*had someone on my side*' and was believed. Despite this general appreciation, Chloe, like most of the women represented by the police, lamented that she was unable to speak with the prosecutor prior to court.[922] The NSWLRC and the Ombudsman have both documented this problem.[923] As one police prosecutor admitted '[I spend] *next to no time*. *In fact I can confidently say* [I have] *never* [spoken with a victim before a mention]', and that before a hearing he '*rarely*' did so.[924] Police prosecutors operate under considerable resource constraints, this means that they are often not allocated cases until the day of court, and hence are frequently unfamiliar with the details of cases.[925] These are all factors that impede the quality of representation.

Keira's comments reflect on this lack of communication. For Keira's first ADVO, which was police initiated and not accompanied by a cross application, the defendant indicated that he was prepared to consent without admissions to a final ADVO if it was made for six months. The police accepted this offer, however, Keira countered:

> *...you couldn't talk to them* [the police prosecutors] *... they wouldn't listen to you. Um when you said 'no' to something; like I disagreed with the six months ... they still put that on the*

[920] A number of WDVCASs have trained solicitors rostered on to provide representation to women who have sought private ADVOs. In 1999 the Legal Aid Commission formalised this process establishing a Domestic Violence Solicitor Scheme which operates in 12 courts: Legal Aid NSW, *Report on Legal Aid NSW Services to People in Domestic Violence Situations* (2008) at 19.

[921] Chloe, Frances, Janet, Keira, Lillian and Louise.

[922] See also Janet, Keira, Lillian and Louise.

[923] See NSWLRC, 'AVOs' above n11 at [3.21]; and NSW Ombudsman, above n11 at [6.1].

[924] PP3. See also PP5, but note that PP5 considered that this work was performed by DVLOs.

[925] NSWLRC, 'AVOs', above n11 at [3.21].

> *table and just totally disregarded how I felt. Um they might be professional lawyers but I'd been living in the situation and I probably was in a better position to know what was necessary to ensure this never happened again … I honestly believe that if the* [first] *ADVO … had been for 12 months that would have been a sufficient gap.*[926]

Keira's former partner abided by this ADVO, but recommenced his harassing behaviour once it expired. As a result the police sought another ADVO to protect Keira. This time the defendant lodged a private cross application and was successful in having the two ADVO applications adjourned to another court. Unfortunately it appears that the police at the first court failed to forward Keira's file to the new police LAC handling the case. Thus on the day of the hearing the police prosecutor had no information about Keira's case; he was therefore not in a position to proceed with the hearing and had to pursue settlement. In contrast the defendant was fully prepared with a barrister and a solicitor. Keira felt excluded from the negotiations and discussions that took place:

> *So I showed up to court, everyone else had a police officer assigned to their case, I'm just sitting there going 'OK, whatever' and then his lawyer approached…the police prosecutor and they went around the corner,* [and] *had a discussion, I'm in tears going 'can someone talk to me' um and then … you have to go straight into court. So his lawyer, he …had organised everything and knew exactly what was happening before anyone had even spoken to me…*

This case was resolved via mutual withdrawal with undertakings. While many of the problems with Keira's case were the product of poor communication between one LAC and another, her experience led her to conclude that if she sought another ADVO she would make a private application at a court where the WDVCAS provided legal representation,[927] so that she would be able to speak to the lawyer face-to-face. Keira stated '*I'd never go through the police prosecution again'*.[928]

The advent of a cross application creates a number of difficulties for police applicants. This is because the police will not act for that applicant in defence of the cross application.[929] Thus a police applicant will be required to either represent themselves, or engage a solicitor, in defence of the cross application. If the person engages a solicitor, this creates an awkward situation where the first

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[926] Keira.

[927] See above n920.

[928] See also Lillian.

[929] A police prosecutor, however, has discretion to represent victims as defendants in cross applications at mentions: NSW Police Service, 'SOPS', above n398 Appendix G at [7].

applicant (generally the woman) will have two legal representatives partially briefed on the case, whereas the defendant, (generally the male) who is more likely to have made a private ADVO application, will retain one private lawyer for both applications.[930] There are obviously advantages with engaging a single representative to conduct both cases.[931]

While Legal Aid is ostensibly available to people who are defendants in ADVO cross applications, this does not always take place.[932] Rosemary, for example, was initially successful in instructing a private solicitor with a grant of Legal Aid to represent her in her private ADVO application and in defence of the cross application. The complaint for the cross application was weak appearing to have no grounds for an ADVO. It alleged that Rosemary had removed personal and joint property from her former husband's residence, '*much more than ... her entitled share of the matrimonial property*' and that Rosemary had '*scratched*' his car when she was removing these items and '*turned off* [a freezer] *spoiling all the items*'.[933] These initial cases were resolved with Rosemary obtaining an ADVO ex parte while the cross application was dismissed because her former husband failed to attend court. However, three months later Rosemary's former husband sought another ADVO, based on exactly the same complaint, at a Local Court a considerable distance from where she resided.[934] Rosemary's solicitor was unable to obtain Legal Aid to defend this new application as there was now no accompanying complaint from Rosemary. She could not afford to travel to the new court or engage a private solicitor to appear for her. Her solicitor wrote a letter to the Local Court with a detailed history of the proceedings requesting that Rosemary's former husband's complaint be struck out. It is not known what transpired at the new court, whether the magistrate made reference to this letter, or whether Rosemary's former husband provided oral evidence to supplement his complaint; ultimately Rosemary's former husband was granted an ADVO ex parte against her. Thus effectively resulting in mutual orders.

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[930] See Tables 6.2 & 6.3.

[931] This was recognised by PP1.

[932] See above n373. Legal Aid policy changed in March 2008. This may mean that more defendants in cross applications obtain aid.

[933] Compare Rosemary's complaint quoted in *Chapter 5*.

[934] WDVCAS4 also mentioned this phenomenon of court shopping and proposed a state-wide database enabling courts to check whether there had been previous ADVO applications.

ii. Magistrates

The women interviewed provided mixed impressions of the magistrates who determined their cases: some were impressed while others identified deficiencies. Women who attended court in metropolitan Sydney on multiple occasions generally appeared before different magistrates. In comparison, women who resided in smaller communities generally had the same magistrate handle their case. The women in this latter group identified advantages with this consistency; it meant that the magistrate was familiar with their case, had knowledge about what was taking place in their relationship, and about the acts and patterns of behaviours that the defendant used. This was seen as being of particular benefit when the cross application was lodged. For example, Louise, who lived in a rural area, made positive comments about having the same magistrate for her ADVO application and the cross application lodged after her ADVO was finalised:

> [The magistrate] *he would remember us because we'd been to court so many times and he was the judge that did the day in court ... when my ex-husband fought my AVO. ...Yeah so he had a fair history of the whole thing.*[935]

It is arguable that magistrates located in smaller, rural courts are able to adopt an approach that takes account of context when approaching domestic violence cases. In these courts many of the key professionals know each other, and are likely to know the complainants and defendants that attend court on multiple occasions; this provides a contextual picture unable to be constructed in metropolitan courts.

Those women whose ADVO application and cross application were listed in metropolitan courts on multiple occasions generally encountered different magistrates and thus made comments about variation in judicial approaches. Other professionals also commented on this variability.[936] Marcella's case, for example, was adjourned '*about nine or ten*' times, always before a different magistrate. She was critical of the first magistrate who made '*automatic*' mutual IOs without regard to the allegations contained in the two complaints. Marcella, however, had positive comments about another magistrate who appeared to question the substance of her former husband's complaint suggesting that the

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[935] See also Janet.

[936] DVLO5, DVLO6, PP1, PP5, SOL1, SOL2, SOL5 and WDVCAS4. This variability has been noted in other research/reports: see Hunter, 'Women's Experience in Court', above n58 at 132; NSWLRC, 'AVOs', above n11 at [3.41]; and VLRC, 'Consultation Paper, above n377 at [8.56].

matters he alleged did not make him fearful. In contrast this magistrate noted that Marcella's allegations concerned a '*history of domestic violence*'. The approach of this magistrate made Marcella feel supported and believed. Marcella, however, criticised the magistrate listed to hear her ADVO and the cross application. This magistrate made it clear that she '*was not really interested in hearing*' the matters, and gave the impression that she viewed it as '*wasting the court's time*' as a result this magistrate 'encouraged' the parties to negotiate. In the end the parties agreed to mutual consent orders.

Keira's case, discussed above, which was transferred from one court to another, also commented on variation between magistrates. At the first court she felt that the magistrates had a good understanding of domestic violence, however at the second court she felt the opposite:

> [At the first court, the magistrates] *seem*[ed] *to have a much better understanding of domestic violence um they never ever once asked me to do a mutual undertaking ... it was kind of like 'Okay, this is serious and she's making serious allegations* [a sexual assault]....[At the second court the magistrate] ... *asked me to go to counselling together, rather than sending it to hearing and I* [was] *just like totally outraged that they would even suggest* [that] *when I'm applying for an* [ADVO], *'what makes you think that I want to sit down with him and discuss our problems'. Um and you know* [my former partner] *sat there and went 'yeah I'm quite happy to go to counselling... and work out our differences.' And the judge was like looking at me going 'well he's happy, why aren't you?' [laughter]*

A critical determinant of women's encounters with the legal system rests on the demeanour of the judge or magistrate determining the case. James Ptacek examined civil protection order proceedings in two Massachusetts courts in 1992-1993 and identified five types of judicial demeanour: good natured, bureaucratic, firm/formal, harsh, and condescending/patronising.[937] In the present study, the brevity of proceedings meant that most women had few comments to make about magistrates let alone assessments of demeanour. Court observations confirmed this brevity,[938] and the centrality of procedural issues. This meant that overwhelmingly the demeanour of the magistrates observed was 'bureaucratic'.[939] Ptacek describes the bureaucratic approach as one in which the judge is passive, less engaged in the process, displays little empathy for the victim, maintains emotional distance from the parties and the nature of their

[937] Ptacek, above n13.

[938] A characteristic of the bureaucratic approach: ibid at 102.

[939] Hunter reached a similar assessment in Victoria: 'Women's Experience in Court', above n58 at 107.

claims, asks fewer questions, and concentrates on the paper-work rather than the people in court.[940] This approach has consequences for women seeking protection:

> Bureaucratic judges were viewed by the women as distant and unconcerned and less likely…to spend sufficient time with them. The human connection that women found so supportive with good-natured judges was absent from their experience with bureaucratic judges. Instead of recognition and compassion, women described feeling like just another case.[941]

Hunter emphasises that institutional environments characterised by high workloads reinforce routine or bureaucratic approaches.[942] These features are clearly present in the NSW Local Court.

Consideration also needs to be given to whether the dominant bureaucratic approach in ADVO proceedings might have additional consequences for cross applications. As some of the women interviewed commented, the advent of the cross claim created a situation where they felt that they had to constantly demonstrate that they were the victim, that they were not to blame, and frequently meant that they documented their own behaviour in minute detail to avoid further accusations about their own behaviour.[943] Coming before a bureaucratic magistrate not only provided no scope for these corrective stories to be told, but also meant that these women never received messages that countered the effect of the cross claim or that validated their experience of violence. This is because a bureaucratic approach governed by procedure and brevity provides little, if any scope, for women to be able to put forward their claim for protection or to challenge the claim made by the cross applicant. Rather in a bureaucratic approach a cross claim simply got dealt with, or processed, often through a mutual settlement leaving the woman's story untold and unheard.

B. Key decisions in the court process

i. The making of interim orders

As outlined in *Chapter 4*, IOs provide urgent protection until an ADVO application is finalised. The legislative guidance for granting an IO is minimal;

[940] Ptacek, above n13 at 101-02.

[941] Ibid at 153.

[942] See Hunter, 'Women's Experience in Court' above n58 at 107.

[943] See Frances and Lillian.

the court simply needs to be satisfied that it is 'necessary or appropriate to do so in the circumstances'.[944] This is often the first key court decision encountered by a complainant and hence plays an important role in whether a complainant feels that their case has been considered. Thus the making of mutual IOs (or no IOs) in cross applications may lead an applicant to feel that their individual case has not been assessed, and to question whether the law can assist in unravelling the competing claims.[945]

Most first applicants in the court file sample were granted an IO (78.9% of female and 56.3% of male first applicants; this is not statistically significant $\chi^2 = 3.4$, df = 1, $p>0.05$). In comparison less than half of second applicants obtained an IO (43.8% of female and 44.2% of male second applicants; this is not statistically significant $\chi^2 = 0.002$, df = 1, $p>0.05$). Women first applicants were more likely than all other applicants to have an IO, and just under half of these were granted to the woman alone (46.3% of women first applicants who were granted an IO were the only person to have such protection). In the majority of these cases the woman's ADVO was listed prior to the cross application. In contrast, for all other applicants the IO was likely to be mutual. See Table 9.1.

Table 9.1: Interim Orders - Court File Sample

	1st applicant (68)			**2nd applicant (68)**		
	1st female (52)	1st male (16)	**TOTAL**	2nd female (16)	2nd male (52)	**TOTAL**
Interim order	**41** (78.9% F 1st)	**9** (56.3% M 1st)	**50**	**7** (43.8% F 2nd)	**23** (44.2% M 2nd)	**30**
Mutual IO	*22 (53.7% of those with an IO)*	*7 (77.8% of those with an IO)*	*29*	*7 (100% of those with an IO)*	*22 (95.7% of those with an IO)*	*29*
IO for one person	*19 (46.3% of those with an IO)*	*2 (22.2% of those with an IO)*	*21*	*0*	*1 (4.4% of those with an IO)*	*1*
No interim order	**11** (21.2% F 1st)	**7** (43.8% M 1st)	**18**	**9** (56.3% F 2nd)	**29** (55.8% M 2nd)	**38**

[944] *Crimes Act* 1900 (NSW) s562BB(1), now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s22(1).

[945] See Spowart & Neil, above n16 at 84.

The interviews with women provided some insight into the process of granting IOs.[946] In cases where the cross applications were listed together, it appeared that mutual IOs were granted in a routine or '*automatic*'[947] fashion as a measure to preserve the 'status quo',[948] 'keep the peace',[949] or some gesture towards formal equality.[950]

Keira, who had sought two ADVOs, one when hers was the only application before the court, and the second which was accompanied by a cross application, was able to contrast the processes. In the first case Keira was required to give brief evidence to support her IO. However in the second case, when there was a cross application, Keira felt that a different approach was taken; no evidence was heard and Keira expressed the view that the legal representatives and magistrate started from the presumption that both parties would have an IO, the only question was about the terms of those IOs, not the more fundamental question whether an IO was 'necessary or appropriate' for one or both parties.

Even when a cross application appeared before court on its own, a situation where it might be expected to receive greater scrutiny, some women questioned the basis on which an IO was granted to the cross applicant. Frances's former husband, for example, lodged a cross application against her after her own ADVO had been finalised. Frances had not been served when this cross application was first listed at court and therefore did not appear. On this day at court her former husband requested an IO, which was granted ex parte despite his written complaint revealing no grounds to support an ADVO (quoted in *Chapter 7*). In fact Frances's former husband's cross application was listed on the same day he faced a charge of contravening her ADVO. On the next return date for the

[946] Chloe, Janet, Kate, Lillian, Louise and Rosemary (6/10) who had an IO and their former partner did not, could not recall whether the man had sought one.

[947] Marcella. See also Keira.

[948] The 1999 survey of NSW magistrates found that just over half (57%, n=39) of magistrates would grant an IO in a cross application. Most of these magistrates (over 70%, 28/39) would do so on a mutual basis, and a significant minority (17%, 5/28) indicated that this was to preserve the status quo: Hickey & Cumines, above n57 at 70.

[949] DVLO3 and SOL5.

[950] Formal equality approaches advocate a gender-neutral approach, treating men and women exactly the same: see ALRC, *Equality Before the Law: Women's Equality* (1994) at [3.8]-[3.9]. In contrast the 'differences' or 'special measures' approach acknowledges that there are differences between men and women that might require additional measures in order to achieve equality. Formal equality and differences approaches tend to be the most popular conceptions of equality evident in law and legislation. Both have key limitations. In response to the limitations and theoretical deficiencies of these approaches Catharine Mackinnon has articulated a 'subordination' approach which theorises equality (and the lack of equality) as a product of power: see 'Difference and Dominance', in *Feminism Unmodified* (1997); and *Sexual Harassment of Working Women* (1979). For an overview of approaches to equality see Graycar & Morgan, above n63 at 28-55.

cross application (and charge), Frances was at court and her solicitor successfully argued that the IO should not continue.[951] Frances's former husband eventually withdrew his ADVO application. In her interview Frances reflected on the absurdity of her former husband being granted an IO:

> *I think the first time the magistrate saw it and made interim orders it's just ridiculous, like um you know he sees a complaint's been made it's got to be looked at, well OK, you look at it and you go 'yeah all right mate you're up here on a breach, you're doing this out of spite' and throw it out. Like it seems so black and white to me that I can't understand how they can't actually see through some of the complaints.*

The magistrates interviewed articulated varied approaches to the making of IOs in cross applications.[952] Two magistrates referred to *Smart v Johnson*[953] (which requires that when an IO is contested the parties must give evidence and be provided with an opportunity to cross examine) and thus described their approach in legalistic terms: taking evidence, allowing cross-examination, taking submissions, and making a determination.[954] The remaining magistrates (3/5) spoke about determining IOs in a less legalistic manner. MAG1 described his approach as follows:

> *Well I suppose you look at ... who issued the complaint first and ... the substance of the complaints and form an opinion then as to whether ... there should be an interim order for one or both... depending on the terms of the interim order too, of course, you know* [if] *she's asked for* [an exclusion order]*...Sometimes ...I have declined to make an order or a mutual order...* [that would] *exclude either from the premises ...*[or] *on the basis that they can make Family Law applications in respect of the children where the children seem to be the sticking point...*[955]

Two magistrates described making IOs in the context of the work environment. MAG2 was quite candid about the lack of time available on a list day:

> *I mean we're guilty of this* [making mutual IOs] *... than we are in terms of final orders because we don't have time to take evidence on interim orders and the only way that you can mollify everybody on that point is to just make* [mutual] *interim orders....*[956]

This discussion has highlighted the variable approach to granting IOs in cross applications. It would appear that those cases that are listed on their own, at least

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[951] It is not known whether this was the same magistrate who granted the IO.

[952] See also DVLO5, PP2, PP5, SOL5 and WDVCAS4. See similar comments in Victoria: Hunter, 'Women's Experience in Court', above n58 at 132.

[953] *Smart v Johnson* (Unreported, NSW Supreme Court, Dunford J, 8 October 1998). See *Chapter 4*.

[954] MAG3 and MAG5.

[955] MAG1.

[956] See also MAG4 quoted above n458 infra text, and DVLO4.

at some stage, are likely to be considered on their own merits, as an individual case rather than as part of a cross application. This is seen in both the court file and interview samples. At the same time, questionable decisions about the granting of some IOs are evidenced in the cross application against Frances, and in the perceived automatic granting of mutual IOs in the cases of Keira and Marcella. The interviews with magistrates confirm this variable practice and emphasise the impact of the work environment in generating mutual outcomes which appear aimed at preserving the status quo, 'mollifying' or 'keeping everyone happy'.

ii. The resolution of cross applications

As explained in *Chapter 4*, ADVOs applications are resolved in three ways: (1) a final order may be made by consent, determined ex parte or after a hearing; (2) dismissed; or (3) withdrawn. Most are resolved by consent orders, followed closely by withdrawal. Reflecting these modes of resolution, cross applications may be resolved by:

- mutual withdrawal (where both parties withdraw their ADVO application, usually on the basis of undertakings);
- mutual orders (where both parties obtain an ADVO generally by consent without admissions);
- only one person obtains an ADVO and the other person's application is withdrawn or dismissed;
- mutual dismissal (where both applications are dismissed).

Mutual withdrawal predominated in the court file sample; 45.5 per cent of cases were resolved this way, all at mention. This was followed by mutual orders (28.8%). With one exception, mutual orders were made at a mention with both parties consenting without admissions. The third way in which cross applications were resolved was by one person obtaining an ADVO and the other person's ADVO being withdrawn or dismissed (18.9%). Notably all the people who were successful in obtaining an ADVO were women, most of whom had lodged their ADVO application first in time (10/12 excluding the dual applications). More hearings were held for this type of resolution than for any other mode of resolution (8/14 were determined after a hearing for either the ADVO or a related

charge). Mutual dismissal was the least likely way in which cross applications were resolved (7.8%). See Table 9.2.

Table 9.2 Resolution of cross applications – court file sample

	Cross applications made on different dates (n=67)*	Dual applications (n=10)	TOTAL (n=77)*
Mutual withdrawal	30 (44.8%)	5 (50%)	35 (45.5%)
Mutual orders	20 (29.9%)	2 (20%)	22 (28.6%)
One person obtains an order and the other person did not	12 (17.9%)	2*** (20%)	14 (18.2%)
Mutual dismissal**	5 (7.5%)	1 (10%)	6 (7.8%)

*CourtB-8 was excluded, as it was not finalised at the time of the fieldwork.

** The delineation between mutual withdrawal and mutual dismissal was not always clear. Often magistrates mark cases that are withdrawn as 'withdrawn and dismissed', others simply as 'withdrawn'. Dismissal following a contested hearing (indicated as dismissal in the table) is clearly different to dismissal on the basis of non-attendance (indicated as withdrawal). Given the significance of dismissal following a hearing I have included here CourtC-30 where the woman's application was dismissed after a hearing, after which the man withdrew his application.

*** In CourtA-6 the woman consented to the man's order and withdrew her own, as she already had an ADVO against him. So in effect there were mutual orders.

The data in Table 9.2 aggregates the results from the court file sample (that is, it displays the paired results rather than the results for each case). To enable a comparison with the resolution of ADVOs generally we need to look at the results for individual cases. Looking at individual results (n=154) we find that only 58 people involved in cross applications obtained an ADVO (37.7%), while 96 people did not (62.3%). This does not compare favourably with the making of ADVOs generally: in 2002,[957] 50.7 per cent of complainants obtained an ADVO and 49.3 per cent did not.[958]

These results suggest that the lodgement of a cross application is more likely to result in a person *not* obtaining an ADVO than obtaining one. The extent to which the results for cross applications represents the way both cases are dealt with (that is to say that the results are mutual, rather than individual) also emphasises the way that cross applications are approached as one case (a 'paired' approach) rather than two individual cases requiring consideration and determination.

[957] The year that the court file sample was determined.

[958] Local Courts NSW, '2002', above n65 Table 2.4.

The resolution of the cross applications in the interview sample was different: over half (6/10) of these women obtained an ADVO while the cross applicant did not, usually because the cross applicant withdrew his application or failed to attend court.[959] For the remaining women, two agreed to mutual withdrawal,[960] one consented to mutual orders without admissions,[961] and one woman's application was dismissed while her former partner was successful in obtaining an ADVO against her.[962]

Most of the cases in which the woman was successful and her former partner was not (4/6), involved a gap between the finalisation of the woman's ADVO and the lodgement of the cross application.[963] Thus in these cases the woman's application was considered *on its own*, similarly the cross application was considered *on its own*. This is quite different to the court file sample, where the cross applications in that sample were generally those listed *together*,[964] and hence tended to be treated as a 'pair' with identical outcomes. This suggests that when cross applications are on foot at the same time, negotiation, bargaining, and an approach that treats the applications as a 'pair' comes to the fore. In comparison when the originating and cross applications are considered separately, due to a gap in time, each complaint appears to be either scrutinised on its merits, or the cross is unable to wield its power as a bargaining tool to facilitate identical outcomes. The use of cross applications as bargaining tools is discussed below.

Keira and Kate's cases were resolved by mutual withdrawal; the most common mode of resolution in the court file sample. In Keira's case, detailed above, she felt she had no option but to accept mutual withdrawal with undertakings because of the failure in communication between one police LAC and another, which meant that the police were unprepared for the hearing. While Keira was not happy with this result, she noted that she obtained 'conditions' in the undertaking

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[959] Chloe, Frances Janet, Louise, Lillian and Rosemary.

[960] Kate and Keira.

[961] Marcella.

[962] Megan.

[963] In the remaining cases (Chloe and Rosemary) the man failed to attend court, thus the woman's ADVO was granted ex parte and the man's was dismissed. However, as discussed above, Rosemary's former husband lodged another application which was successful (thus ultimately resulting in mutual orders).

[964] See discussion of bias in the court file sample in *Chapter 3*.

that she would not have obtained in an ADVO (for example agreement not to enter a particular public place).[965]

Kate's ADVO application and the cross application also resulted in mutual withdrawal, however, without undertakings. At the time of the interview this had proved an effective result for Kate as her former husband ceased his harassment. While Kate clearly saw her former husband's application as a face-saving, retaliatory exercise, she was ultimately happy with the result as she knew that he would contest her ADVO application and she '*didn't want to have to see him every fortnight*' at court.

One magistrate expressed a preference for resolving ADVO cross applications by way of undertakings (rather than orders).[966] Others recognised that in some cases undertakings were the only option available, particularly if the complaint narrative for one or both parties was weak.[967] This again emphasises the importance of the quality of the complaint narrative (*Chapter 4*) when competing claims are before the court. A well-drafted complaint can make the difference between obtaining an ADVO or settling for an undertaking. These are the cases, following Durfee's conceptualisation, that have been identified as 'border cases'.[968] It is worth noting that magistrates, while recognising the legally impotent nature of an undertaking, often took steps to imbue it with a level of seriousness. For example, MAG2 explained that she accepted undertakings '*in the most draconian way*'; requiring the defendant to articulate the undertaking in court as a method of conveying the court's intolerance for domestic violence.[969]

C. Settlement: The cross application as a 'bargaining tool'

Settlement, an outcome already emphasised in ADVO proceedings,[970] assumes a greater role in cross applications, where the deployment of a cross application operates as a bargaining tool to generate a particular outcome (generally mutual withdrawal). Many professionals and the women interviewed made reference to a

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[965] See above n477 and infra text for an explanation of an undertaking and is non-enforceable nature.

[966] MAG4.

[967] MAG2. See also PP1.

[968] See Durfee, above n401 at 135-36. See discussion in *Chapters 4-5*.

[969] See also MAG4.

[970] See *Chapter 4*.

cross application within this framework referring to it as a 'bargaining tool' or a mechanism to 'level the playing field'.[971]

This 'tool' analogy was used in two ways: (1) as a tactic used by cross applicants; and (2) as leverage able to be harnessed by professionals to facilitate settlement. While these two aspects might seem like much the same thing, one is perceived as negative, while the other is cast in a positive way (by professionals).

i. A tool used against the originating complainant

The predominance of mutual withdrawal as an outcome of cross applications (demonstrated in Table 9.2), lends support to the contention that the primary motivation for making a cross application is tactical, to achieve withdrawal, rather than a measure to obtain protection. This resonates with the argument that the claims made by fathers' rights groups about domestic violence are more about reducing specialist services for women, than about increasing the safety of men and women who experience violence. Such stances undermine the claim by fathers' rights groups for victim status.[972] The success of cross applications to generate mutual withdrawal supports this contention. Keira, whose case was resolved via mutual withdrawal with undertakings, described this tactical process:

> *'If you'll drop yours, we'll drop ours' ... I guess that was the most baffling thing about the whole thing was that he had a cross application and then just used it as a bargaining chip ... even though it's not meant to used like that, everybody knows it is ...and so you just let* [him] *get away with it.*[973]

Similarly some women described the cross application as a method of '*levelling the playing field*',[974] '*game playing*' and a '*tit-for-tat*' exercise.[975] Other women described the making of the cross application as a method of vindicating male pride, for example as an exercise in which the man sought to '*save face*'[976] by making the woman '*look like the villain*',[977] or that the cross application was an

[971] See DVLO1, DVLO4, DVLO5, DVLO6 (4/6); MAG1, MAG2, MAG5 (3/5); PP2 (1/5); SOL1, SOL2, SOL3 (3/5); WDVCAS3, WDVCAS4, WDVCAS5 (3/5). See Keira and Kate.

[972] See Kimmel, above n108 at 1333, 1354; and Flood, 'The Debate Over', above n183.

[973] Keira. See also DVLO1, DVLO5, DVLO6, PP2 and PP3.

[974] Kate.

[975] Chloe.

[976] Marcella. See also Rosemary.

[977] Kate.

'*ego trip*'.[978] The powerful effect of this bargaining chip was summarised by Keira when she reflected on what she would do if faced with another cross application: '*I'd just say 'okay, well I've got to drop it and just walk away'. And just live with that fear because it's easier than going to court 25 times to have exactly the same outcome'.*

A number of professionals also acknowledged that cross applications function this way.[979] Three professionals specifically drew a connection between the use of the cross complaint as an exercise in reasserting power.[980] These professionals noted that for victims of domestic violence seeking legal protection can be an empowering process, where the violence against them is acknowledged and validated.[981] This potential empowerment is undermined by a cross application:

> *..when a victim goes to the police and gets an order the power shifts… to the victim…and I think when the other party takes out an order they try and gain some power back. That's what they do, and if you have an order you know then he might have a bit of the power back because he then has the ability to say 'okay, well you drop your order, I'll drop mine'.*[982]

Similarly MAG5 noted that some male defendants do not like the '*fact that women are standing up for themselves, supported by the infrastructure of the legal system, they don't like it. So they've got to get theirs back, you know*.'

While recognising a cross application as a form of power-play, two DVLOs cast cross applications as beneficial because they deflected or diffused the cross applicant's anger by providing the cross applicant with an avenue to have their claims heard, thus '*taking the heat off the victim*'. It is important to note that these DVLOs were of the view[983] that cross applications were generally resolved following a hearing (a view not supported by Table 9.2).

> *I feel that it's* [a cross application] *positive because it's an … outlet for* [the cross applicant's] *frustrations. It may not be the most optimum way…but if they feel like …*

[978] Rosemary.

[979] DVLO1, DVLO4, DVLO5, DVLO6 (4/6); MAG1, MAG2 (2/5); PP2 (1/5); SOL1, SOL2, SOL5 (2/5); WDVCAS3, WDVCAS4, WDVCAS5 (3/5).

[980] DVLO1, MAG5 and PP2.

[981] See Goldfarb, above n265 at 1514-15; Stubbs & Egger, above n63 at 11; Stubbs & Powell, above n402 at 113; Karla Fisher & Mary Rose, 'When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection' (1995) 41 *Crime & Delinquency* 414 at 417.

[982] PP2. See also DVLO1 and WDVCAS4.

[983] A small number of professionals shared this view, that most cross applications were resolved with only one person obtaining an order either at hearing or at mention: see DVLO2, DVLO3, DVLO5, DVLO6 (4/6); PP1, PP5 (2/5); SOL1 (1/5); and WDVCAS1 (1/5).

they're going to get their day in court and be heard…so at the end of the day [the cross application is] *really irrelevant because the truth will come out* [at the hearing] *and the right AVO application will be* [granted].[984]

… you know the victim might feel like, 'Oh my God I can't believe that he's taken a cross-application', she might feel violated or betrayed but because we know the system, we know the drill, we know it's not gonna reflect on any, it's not gonna reflect on the police there being a cross-application. We know that it's actually gonna calm the situation.[985]

… Because he's had his day, he's got his bit of control back for a little while until the magistrate makes the decision.[986]

The dominance of settled outcomes undermines the belief held by these two DVLOs that cross applications are beneficial. While these DVLOs acknowledged the impact on victims, their belief in the benefits of a cross application and what they saw as the ultimate outcome, stands in contradistinction to the profound impact that the women interviewed spoke about:

I was trying to do something to help myself by getting the AVO and it just seemed like it was not going to happen and he was the one that's going to win again and that really upset me.[987]

CAS2 highlighted the impact that a cross application has on women:

… It can either … make them withdraw and go home and hide or – or make them angry and make them get through it. And it is different because um …– I don't know how you put this in, but when a woman goes to court and is getting an AVO, that's hard enough in itself, and often they don't feel like victims they feel like they've done something wrong to be in court, all that sort of stuff. …[I] *spend a lot of time with women who haven't done anything wrong … then they've got this thing slapped on them and it says that they have and that they've got … prove they're innocent.*[988]

In this way, cross applications are not merely a data source to examine men's and women's competing allegations about domestic violence, but are also deployed by some men to undermine and counter women's claims for protection and their sense of empowerment in taking legal action.

ii. A tool used by professionals

Professionals interviewed (particularly legal representatives and magistrates) often perceived cross applications as a positive, or at least a convenient, tool to accelerate settlement, or to calm the situation. For example MAG2 stated that

[984] DVLO5.
[985] DVLO5.
[986] DVLO6.
[987] Janet. See also Rosemary.
[988] See also WDVCAS4.

when faced with a cross application she takes the view that '*we must be able to get a settlement out of here somewhere*' and that it functions as an '*open door to …settlement'*[989] Similarly SOL3 described a cross application as a useful '*negotiating tool*'. It was not always clear what the desired outcome was; rather it appeared that settlement was the goal, regardless of the form that settlement took.

Like other areas of judicial practice discussed in this thesis, magistrates' approach to finalising cross applications varied. MAG2 admitted that she approaches cross applications in a different way to applications that present on their own:

> *…to my shame I shouldn't treat them differently, but you do….yes, hers is about, you know, shocking dreadful, scumbag violence and his is about two phone calls to work or something, you know. Like normally you'd be looking at his going '…I don't really think there's enough here'…If it was on its own, you'd hose it out probably.*[990]

Instead settlement is sought. As MAG2 went on to describe:

> *…I use it as a tool, and I think of myself as perhaps one of the more enlightened members of the bench, so I can't imagine how it's used by others to try and clear out the list.*

When pursuing settlement MAG2, noting that it was a '*compromised world*', focused on whether she felt that the woman had the capacity to continue with her application if it were contested: Would she be intimidated or harassed to withdraw? Would she be able to sustain cross-examination? Thus MAG2 took the view that it was better for the woman to obtain an ADVO in mutual circumstances, than for her not to obtain one at all:

> [Mutual] *orders are useful sometimes to … get an uncontested order out of somebody that you wouldn't … without a dreadful hearing and a shocking shouting match and the possibility that he would …intimidate her so badly before the hearing date that she wouldn't come* [along]*….I guess you sort of make a decision – you get a pretty good judge of character as to whether you can look at someone and think, 'am I going to see you in two months time when this is on for hearing…?' You know, the fight's almost gone … and in two months time* [her] *resolve, there will be nothing left.*

In this vein PP1 stated '*some victims don't want to give evidence and they don't want to get in the witness box, so you try and do the best you can*'. Professionals interviewed by Hunter in Victoria also noted that the prospect of a hearing may

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[989] See also MAG1.

[990] See also MAG1.

‘frighten’ some women; it may entail being cross-examined by the defendant, and the outcome is unknown.[991]

MAG4 presented a different approach. As noted in *Chapter 4* this magistrate adopted a general approach of avoiding hearings, if possible, in ADVO matters. MAG4 explained his approach to cross applications:

> *I try to ah approach them in a calm, logical manner. I point out the cost factor ... I point out the fact that I observe A, B and C within their various applications and I point out the fact that it appears to me that they’ll continue to have some form of relationship by reason of whatever that I may be able to identify. ... I point out orders can be made against one, both, none. If they breach an order they could both end up – ah if it’s serious enough, spending time in custody. …. What I do is try and take them through the range of matters that can occur and then I encourage them to work with their practitioners to come to a resolution and point out that they are the architects that brought them before the court. The court doesn’t have any magic wand. The court could get it wrong. …. So what I try and do is make them feel responsible for coming up with the resolution to their problem.*

What is interesting about this approach is the way that MAG4 articulates the cases as a ‘pair’ (‘*they are the architects*’ and ‘*their problem*’) rather than identifying and responding to the individual claims for protection. It also ignores the fact that these claims arise in the context of domestic violence where negotiation and resolution, which assumes some equality between the parties, may not be possible. A similar approach was observed at CourtD where a case listed for hearing settled on the basis of mutual withdrawal with undertakings. In accepting this settlement the magistrate commented, ‘*thank you for being able to resolve this amicably and saving the court so much time*’.[992] Again the ‘problem’ of the cross application was cast as one for both parties to resolve together, rather than an issue about who might require protection, who might be in fear, and thus what the implications of such a settlement might be for the parties.

So while the approach of the three magistrates outlined above all resulted in ‘dual’ outcomes, the first maintained a focus on the individual nature of the claims, while the other magistrates viewed the claims as a pair.

Time and resource limitations also play an important role in generating settlement. These are not only constraints faced by the court,[993] but are also faced

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[991] Hunter, ‘Women’s Experience in Court’, above n58 at 119.

[992] Observation CourtD (26 November 2006).

[993] See *Chapter 4* and the discussion of granting IOs above.

by the parties involved. The prospect of multiple court appearances, a lengthy wait until the hearing date, combine to make settlement appear attractive as complainants and defendants juggle concerns about work, child care and legal costs. This was recognised by a number of professionals:

> *I think sometimes victims back down and end up agreeing ... because they just see the whole process being so drawn out and, and some victims you know, they have to go and get themselves a legal representative and they might not have the money, they mightn't have the time, they've taken time off work already just to come to the AVO matter in the first place. You know they might have kids and some of them just think, 'Oh you know, I'm just gonna agree'.*[994]

Some magistrates may highlight these factors as a method of encouraging settlement.[995]

Solicitors expressed mixed views about the way that cross applications were used as a '*negotiating tool*'.[996] SOL5 pointed out that if his client's complaint contained '*serious concerns about violence, I probably wouldn't bother talking*'.[997] Obviously a well-drafted complaint is critical to the ability to be able to take such stands in the negotiation process.[998] SOL1, however, suggested that cross applications provide less room for bargaining, as there are only two options that negotiation centres on: mutual withdrawal and mutual orders.

Other professionals' criticised lawyers for advising clients to take out cross applications simply to obtain a negotiation tool.[999] The solicitors provided a different account of such advice. SOL2 noted that the first person that seeks an ADVO may not necessarily be the person that requires protection, and in this case he would advise his client to seek a cross application '*as a necessary response*'. However, SOL3 admitted that he has advised clients to seek a cross application in order '*to have a negotiating tool*'. For example SOL3 noted that a cross application may be a useful tool when the original defendant risks losing

[994] PP2. See also MAG2, MAG3, MAG4 and PP1.

[995] See MAG4.

[996] SOL3.

[997] See also SOL3.

[998] See *Chapter 4*.

[999] DVLO1, DVLO3, DVLO4, DVLO6, WDVCAS2, and WDVCAS5.

his gun licence if an ADVO is made against him,[1000] or that it might be a useful tool in related legal proceedings (for example to generate a property settlement).

iii. The impact of mutual outcomes

The perceived impact of mutual outcomes (particularly mutual orders) revealed disparity between the views held by professionals and the women interviewed. Professionals generally viewed mutual orders as an attractive way to resolve cross applications because they avoided a contested hearing yet the woman still obtained an order.[1001] Most professionals did not identify any negative outcomes arising from mutual orders.[1002] DVLO2, for example, stated that mutual orders are '*easier*' and the parties '*can both go home and everyone is happy*'.[1003] In this way it appears that 'lawyers and judges often think that whether the protection order is mutual makes little real difference'.[1004] Marcella and Rosemary counter this view of being 'happy' with mutual orders.

Marcella's case was the only one in the interview sample that resulted in mutual orders by consent on the same day at court. Marcella agreed to this settlement to avoid the risk of not obtaining an ADVO. Like related debates about 'choice' and tension between victimisation and agency,[1005] Marcella reflected on this 'choice' within the limited and risky options available to her:

> [I]*t could go either way* ... [if] *they don't find me to be credible enough ... the risk was too much when it comes to this – I couldn't take that so I – I took the option of ... just agreeing. Because otherwise, I know that – I had a feeling that he can ... lie so much ... he is very good with words. ... but I think ...I did the best choice because I cannot* [not have an ADVO] ... *so I* [had to] ...*compromise.*

As Hunter has pointed our there is little, if any, 'interrogation of the freedom or fairness' of a woman's consent to mutual orders.[1006]

Rosemary ultimately ended up with mutual orders, although as discussed above, these were determined on different dates at different courts. In her interview

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[1000] *Firearms Act* 1996 (NSW) s11(5)(c).

[1001] Eg see MAG2 quoted above.

[1002] DVLO2, DVLO3, MAG1, MAG2, MAG4, SOL1, SOL2 and WDVCAS3. See also DVLO4, MAG4, WDVCAS1 and WDVCAS2 who only identified difficulties with mutual orders if the parties still resided together, or had children together. However DVLO1, SOL1 and SOL5 did identify problems with mutual orders and enforcement. See also PP5 who stated that mutual orders '*are just pretty confusing*'. PP3 said that he was unable to comment on any impact.

[1003] See also SOL1.

[1004] Topliffe, above n13 at 1055.

[1005] See Schneider, above n19 at 75-77.

[1006] Hunter, 'Having Her Day in Court', above n449 at 64.

Rosemary described how her solicitor attempted to alleviate her concerns about being subject to a mutual order, yet Rosemary's comments stand in marked contrast to how professionals interviewed in this thesis appeared to view mutual orders as being of little consequence for victims of domestic violence:

> [My solicitor] *...said 'look don't worry about it'. He said ... 'you know you haven't done nothing wrong, the court* [and]*... the police know that you haven't done nothing wrong', he said 'everyone's got a little mark against them somehow'... So he said 'don't worry about it' ... But it does worry me, you know, because ... having ... something on me that I haven't done. It's not right... And that really gets to me ... it's not fair.*

In a similar way WDVCAS2 noted that some of her clients consented to mutual orders to '*get it over and done with*' but that they also struggled with this '*because they are saying, "I don't see why I should because I haven't done anything"*...'.[1007]

USA research documents a range of potential negative outcomes for women as a result of mutual orders, including that they: add fuel to the suggestion that men and women are equally violent, fail to place responsibility on the perpetrator, negatively impact on the woman's credibility, and may create problems for subsequent enforcement of orders (police may be confused about who to arrest, if anyone, or whether to arrest both parties).[1008] In this way WDVCAS coordinators noted that mutual orders '*mark*…[a woman] *as a perpetrator*',[1009] and place her at risk of being alleged to have breached the ADVO.[1010] WDVCAS4 concluded that mutual orders provide women with '*less protection*' because:

> *... as soon as anything* [be]*comes the least bit complicated the police just bow out and are likely to say 'it's a family law issue' or something...the woman has said 'you know I called the police...and um the police have taken notice of him' with* [him] *brandishing an AVO, he says...'she's violent to me too', so* [the police] *see that – they use that as evidence of her violence and a lack of her credibility....It impacts on her protection in a negative way.*

In contrast other professionals were of the view that mutual orders created no additional difficulties:

> *No, no mutual orders are fine it just means they've both got orders against them. So I don't think there is any problem with mutual orders. I mean police independently*

[1007] See also WDVCAS5.

[1008] See Jane Golden, 'Mutual Orders of Protection in New York State Family Offence Proceedings: A Denial of "Liberty" Without Due Process of Law" (1987) 18 *Columbia Human Rights Law Review* 309; Topliffe, above n13; Zorza, above n13; Minnesota Supreme Court Task Force for Gender Fairness in the Courts: Final Report, above n13 at 878-879; *Report of the New York Task Force on Women in the Courts* (1986). In Australia see Spowart & Neil, above n16 at 84.

[1009] WDVCAS4.

[1010] WDVCAS4.

> *investigate every incident and if they've got mutual orders and they've both breached their orders well then police take action against both of them.*[1011]

However, as demonstrated in the discussion of dual applications in *Chapter 8*, this faith in the thoroughness of a police investigation when both parties make allegations is open to question.

The other reason professionals offered for considering that mutual orders were of little consequence was that they had never come across a breach of a mutual order. DVLO6, for example, suggested that mutual orders work well and are '*positive in the sense that very rarely do you ever see a breach*'. SOL1 also stated that '*we*['ve] *never had…any negative feedback about* [mutual orders]'. Thus the absence of a breach is viewed positively; with no consideration of the possibility that one or both parties did not report the breach due to a loss of faith in the police and the legal system. In contrast to this 'no problem' assumption, research from the USA has found that some women involved in dual arrests will not contact the police in the future as a result of that arrest.[1012] This was confirmed by WDVCAS3 who noted that women whose cases resulted in mutual withdrawal tend '*not to call police because … they don't want to go through it again… they think the system's let them down*'.

Four professionals noted that mutual orders would have a negative impact on a woman's credibility in ADVO and other legal proceedings.[1013] As DVLO1 noted mutual orders '*blur the line between who's the victim and who's the offender*'. Similarly DVLO5 stated that a cross application '*may put a bit of doubt in your mind…is my victim really a victim, can she be a defendant*'. WDVCAS4 noted that mutual orders would '*negate*' or counter a woman's ability to access some of the protective measures available for victims of domestic violence in the family law system. MAG2, even though she recognised that this was not necessarily the case, explained that if she saw that the parties had mutual ADVOs in a family law application that would give '*a heads up about mutual antagonism between*

[1011] DVLO3. See also DVLO2.

[1012] See above n862.

[1013] DVLO1, DVLO5, MAG2 and WDVCAS4.

the parties',[1014] and that '*in the back of your mind … they're both as bad as each other kind of idea comes up, which is totally wrong…'*.

In this vein Frances noted that in her subsequent dealings with the Family Court, her former husband's solicitor would raise the cross applications '*to make* [the violence] *sound really two-sided. Like … we were both this hysterical violent couple that were out to get each other*'. This was even though Frances obtained her ADVO after her former husband held her in a siege, and the cross application lodged some time later, and subsequently withdraw, coincided with her former husband being charged with contravening her ADVO.

SOL3 presented an entirely different view stating that mutual ADVOs were appropriate when there were family law proceedings as this would mean that '*both parties* [would] *be treated equally*'. Such an approach, drawing on notions of formal equality,[1015] fails to recognise any differences in the experience of violence by one or both parties and how that might be important in the determination of any subsequent family law proceedings.

The dominance of mutual outcomes (withdrawal and consent orders), combined with the view of professionals that mutual outcomes were of little consequence, stands in marked contrast to the experiences of the women interviewed. These women described the cross application has having a great impact on them (regardless of the outcome) where it was frequently described in terms of undermining their claims and blaming them for the violence. In turn, for those cases that resulted in mutual outcomes, the women spoke about the way in which such results were 'unfair' or left them feeling that their legal actions against their former partner were without consequence.

2. Implementation: The professionals who facilitate the ADVO system

Chapter 2 raised concern about the gap between the intention and content of the law and its implementation. This was identified as a particular issue for developments in the law generated as a result of feminist activism, such as the

[1014] See also DVLO5.

[1015] See above n950.

development of civil protection orders to respond to domestic violence. In this part of the chapter I explore whether the practice of the law gives effect to the progressive elements of the NSW ADVO system (outlined in *Chapter 2*); that is whether it moves beyond the criminal law's focus on discrete incidents of violence.

A. Domestic violence: definitions versus practice

Most of the professionals interviewed articulated broad, well-developed understandings of domestic violence when asked the general question: How do you define or understand domestic violence? Only four professionals confined their response to the legislative definition.[1016] For those who articulated broad definitions this incorporated reference to:

- a wide range of acts and behaviours;[1017]
- power and/or control;[1018]
- women as the predominant victims of domestic violence;[1019] and
- patterns of behaviour, a history of behaviour, or repetition.[1020]

These are all features reflective of feminist definitions of domestic violence discussed in *Chapter 2*. MAG5 made specific connections between the experience of domestic violence 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 think violence is a political issue really. It's very hard ...for some people to grasp that. They see it on a micro* [level]*…as a dispute, rather than a political issue of the subordination of women and the use of violence to control one's subordinate and they don't understand, they think women are stupid for going back…*[1021]

Other professionals made distinctions between behaviour that is domestic violence and that which is not:

[1016] MAG1, MAG3, PP5 and SOL3. DVLO4 and PP3 also largely relied on this definition but mentioned other factors as noted below n1017 & n1019.

[1017] 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).

[1018] DVLO1, DVLO5, DVLO6 (3/6); MAG2, MAG4, MAG5 (3/5); SOL1, SOL2, SOL6 (3/5); WDVCAS1, WDVCAS2, WDVCAS4, WDVCAS5 (4/5).

[1019] DVLO1, DVLO4 (2/6); MAG2, MAG3, MAG5 (3/5); PP1, PP2, PP3, PP5 (4/5); SOL1, SOL2, SOL6 (3/5); WDVCAS1, WDVCAS4 (2/5).

[1020] DVLO1, DVLO4, DVLO5 (3/6); SOL1 (1/5); WDVCAS5 (1/5).

[1021] See also DVLO1 and SOL1.

> *It's not a one-on-one argument, and it's not just bad manners, and it's not just being rude to somebody. It's…violence or intimidation or harassment…against somebody who…is of unequal power…*[1022]

However, these broad understandings of domestic violence tended to not be reflected in answers to practice-orientated questions. This is seen most clearly in the way some professionals: defined cross applications by reference to time and incident features (discussed in *Chapter 1*), approaches to dual applications (discussed in *Chapter 8*), the reliance on popular notions about victims and perpetrators, and the struggle some professionals appeared to have with how to label and respond to people who use violence in the context of their own victimisation.

The police, in particular, presented understandings of domestic violence largely predicated on incidents. This was particularly evident in their approaches to dual applications, where a number of the police interviewed spoke about the possibility of separating incidents, even those that appeared to be part of a sequence of events.[1023]

A small number of professionals also made mention of various popular notions about domestic violence. While it is not possible to ascertain the extent to which such comments pervaded the individual's own work, nor that of the profession as a group, it is worth noting the resiliency of these popular notions within the context of cross applications. This raises concern not only about what understanding of domestic violence these professionals apply to their work, but also the way in which for more complex cases, like cross applications, such notions may have greater traction.

i. 'Both as bad as each other'

Professionals were asked in their interview whether they thought a person could be a victim *and* a perpetrator, and whether they thought there were cases where the making of mutual orders would be appropriate. For many these questions led to responses premised on ideas that some parties are '*as bad as each other*',[1024]

[1022] MAG2. See also MAG5 and WDVCAS4.

[1023] DVLO3, DVLO4, DVLO5, DVLO6, PP1, and PP2.

[1024] DVLO3, MAG1, MAG2, PP3, WDVCAS2, WDVCAS3, and WDVCAS5. While MAG4 does not use this phrase, he described relationships where the behaviour of the parties had '*become so out of control…so entrenched…just an intense dislike, probably a hate more*'.

'*as crazy as each other*'[1025], involved in '*toxic*' relationships,[1026] '*playing each other*',[1027] and that some people '*need to be kept away from each other*'[1028] via the '*boundaries*' that an ADVO can provide.[1029] In summary, three WDVCAS coordinators (3/5), two DVLOs (2/6), three police prosecutors (3/5), two solicitors (2/5) and three magistrates (3/5) made some comment to this effect (total 12/26). As PP3 stated:

> *There are some people who need an order and in the same breath should have an order against them. There are just some people in this world that should never come into contact with each other.*

When asked whether a person can be a victim and a perpetrator, PP5 responded:

> *I think it is possible, I'm not saying this is the case all the time, but a lot of the relationships they're not one-off instances. They're very toxic um inappropriate, often immature relationships ... and the abuse or the violence within it is ongoing, it is habitualised often and it seems as though ... it is a normal way of conducting themselves and it can go both ways. ...* [O]*ccasionally* [the victim will] *end up withdrawing a matter saying, 'I gave as good as I got'. So it seems to go both ways on occasions.*

One magistrate even drew on commonly myths about female behaviours:

> *I think I can accept that there are some cross parties who can be just as violent and commit domestic violence offences as the other. And I don't doubt, and it's raised from time to time, quite often actually, that one party, for example, nags the other and eventually he or she loses control and commits a domestic violence offence. That's quite ... a common allegation*.[1030]

In a less pejorative way, DVLO4 stated that '*there have been a number of incidents and both parties on separate occasions have been at fault and that's very rare'*.

It is possible that the cases these professionals are referring to involve 'situational couple violence', and hence are evidence of Johnson's model of low-level, non-escalating mutual violence.[1031] However, further research needs to be conducted on two fronts before such a conclusion can be reached: (1) precisely

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[1025] PP2.

[1026] PP5.

[1027] SOL3.

[1028] DVLO6, MAG2, PP3 and SOL5. WDVCAS4 described this as the attitude of the magistrate who sat at her local court.

[1029] WDVCAS2 also made reference to a case that she thought her service '*didn't need to get involved in*'; that is to say it was not a case involving 'domestic violence'. However she ended up suggesting that mutual orders could be appropriate in this case '*to give them boundaries*'.

[1030] MAG1.

[1031] See *Chapter 2*.

what types of cases and relationships these professionals are describing; and (2) an examination of the cases themselves to ascertain the context of the use of violence and abuse by both parties. The first area is important as it focuses on the conception professionals apply to their work, and has resonance with the work of Erez and King where they found that lawyers tended to view domestic violence through the spectrum of 'situational couple violence' whether this was the case or not.[1032] The second area is important because it emphasises the importance of context, rather than simply incidents, in determining the nature of the violence and abuse used by one or both parties when determining who is experiencing domestic violence and who requires legal protection.

ii. Associated factors

Closely connected to this notion that both parties are 'as bad as each other' and need to be 'kept away from each other' was the suggestion by a small number of professionals that mutual orders were appropriate where one or both parties used alcohol and/or other drugs,[1033] or suffered from a mental illness.[1034] DVLO5, for example, described a case where:

> [B]*oth parties had mental health issues…. Um there was a long history of them trying to separate... She would always invite him back into the house …and there'd be constant confrontations and …it was either her or him … in the end I think we had two separate incidents … police represented her where he had badly assaulted her and she had an AVO and then vice versa, she badly assaulted him and* [we] *ended up getting an AVO for him. In the end it was the right thing to do, just to keep them apart.*

DVLO6, in the same interview, continued:

> *AVOs need to be put in place to keep those parties* [who use drugs and alcohol] *away* [from each other]*, like especially when … she's inviting him* [back]*, and of course, he comes back, and we all know that.*

This type of rationalisation is particularly problematic in cases where one or both parties have a mental illness, which gives rise to questions about the capacity of that person(s) to understand the terms of an ADVO and the consequences of breaching it. Such attitudes imply a 'we know best' approach to cases that have additional layers of complexity. At a fundamental level the views expressed by

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[1032] Erez & King, above n232 at 224.

[1033] MAG1 and SOL1.

[1034] DVLO4, DVLO5, DVLO6 (3/6).

professionals in this regard focused on factors other than the perpetration and experience of violence in determining who requires protection.

iii. Misuse of ADVOs.

The views held by a small number of professionals that women misuse their ADVOs either by initiating contact with the defendant or provoking a breach of the order was canvassed in *Chapter 7*.[1035] In addition to that area of perceived misuse, some professionals also raised the ever-popular contention that people seek ADVOs to gain advantage in family law matters.[1036] This was raised in two ways: the first was within that notion of tactical advantage,[1037] the second was the use of the cross applications as a way to counter allegations of violence in the family law setting.[1038] These are quite different arguments, one draws on common assumptions about why people, particularly women, apply for an ADVO at the time of separation, and the other recognises the way that a cross application may be a tactic to counter the other person's claims about violence in family law proceedings. There was a general view that cross applications were more likely to take place when there were also family law disputes.[1039]

Other professionals drew attention to the way that ongoing family law disputes provide a setting, or context, for violence and abuse in some cases.[1040] Johnson and Janet Johnston have both suggested that separation may give rise to a situation-specific form of violence (that is to say that the violence is defined by the situation, and not by control which would evidence a more sustained and control-instigated form of domestic violence, what Johnson refers to as 'intimate terrorism').[1041] This stands in marked contrast to Martha Mahoney's call for separation assault to be named as a specific harm experienced by women,[1042] and fails to take account of the extent to which separation has been identified as one

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[1035] DVLO2 and DVLO4 (2/6); PP3 (1/5); SOL5 (1/5).

[1036] Ninety per cent of respondents to the NSW magistrates' survey agreed that ADVOs were used as a tactic in Family Law proceedings: Hickey & Cumines, above n57 at 37.

[1037] DVLO1, DVLO2, DVLO3, DVLO6, MAG1, MAG3, MAG4, MAG5, PP3, PP4, and SOL3. This was not necessarily the view held by all these professionals, rather a number recognised this perception and noted that some parties appeared to be motivated by this perceived advantage.

[1038] DVLO1, DVLO5, MAG2 and WDVCAS4.

[1039] DVLO1, DVLO4, DVLO5, MAG1, MAG4, MAG5, and PP1.

[1040] DVLO3, SOL3, and PP1.

[1041] Michael Johnson & Joan Kelly, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46 *Family Court Review* 476 at 479-80; and Johnston & Campbell, above n37 at 196.

[1042] Mahoney, above n257.

of the most dangerous times for women attempting to leave a violent partner.[1043] It also minimises the extent to which the experience of violence and control might motivate women to initiate separation. This area requires further investigation as the heightened risk of violence at the time of separation for women, means that it is not surprising that women seek an ADVO at the same time as they initiate family law proceedings in relation to children and/or property.[1044]

A small number of professionals also spoke about cross applications that have no foundation as a misuse of the ADVO system.[1045] Thus unlike the common refrain that women misuse ADVOs to gain advantage in family law matters or to have an order by which to 'control' the behaviour of their former partner (see *Chapter 8*), these professionals asserted that cross applications that had no foundation, like many of the cases analysed in *Chapter 7*, were initiated not to seek protection but rather to counter and undermine the woman's claim for protection, and hence represented a misuse of this legal process.

The incident-focused approach, the reliance on popular notions about domestic violence and the reference to associated factors (such as alcohol, drugs and mental health issues) suggest that professionals have failed to translate broad understandings of domestic violence into practice. In this regard it is revealing the way that some magistrates noted the difficulty of putting their training/education into practice in an overloaded work environment. MAG2 explains this *'tension between how ideally you would run an AVO list'* and the reality of having to deal with *'160 matters'* on a single day. Thus she concluded that magistrates needed *'more ideas about how to cope – how to deal with matters expeditiously and in the spirit of the legislation*'.[1046]

Research needs to be conducted about the way in which education about domestic violence can have a better fit with the demands of the institutional setting. This is an area beyond this thesis, however the contrast between the definitions proffered for 'domestic violence' and then the application of this

[1043] See references above n602.

[1044] Criminal Law Review Division, *Apprehended Violence Orders: A Review of the Law* (1999) at 9.

[1045] DVLO3 and DVLO4. See Sarah Todd, 'Fears about Abuse of Legislation are Unjustified: The Other Half of the AVO Story' (1994) 32(11) *Law Society Journal* (NSW) 38.

[1046] See also MAG3 above n439 and infra text.

knowledge, or more accurately its lack of application, emphasises the importance of this area in the continuing ‘gap’ in implementation particularly for magistrates and police officers.

B. The struggle to describe violence between intimate partners that is not ‘domestic violence’

A number of the professionals interviewed appeared to struggle with how to describe, or label, a person’s actions/behaviour against an intimate partner, if it was not domestic violence.[1047] And hence how to respond to acts of intimate partner violence, if not as domestic violence. The professionals appeared to find it difficult to step outside the familiar dichotomies of victim and perpetrator to enable a more complex position for some people who experience and perpetrate violence. Two WDVCAS coordinators, for example, described cases in which the women had admitted to using violence against their partner. When discussing these cases the coordinators found it difficult to both condemn the violence and explain the woman’s behaviour. WDVCAS1, for example, described a case where the man obtained an ADVO against his wife[1048] because she had ‘*yelled and screamed*’ and thrown objects at him after she discovered that he had sex with a 15 year old: …*you know she admitted it, she was throwing things at him and you know pummelling him and basically just so angry with him, which is not excusable*’. WDVCAS1 was of the view that this ADVO:

> *... made it very clear to her that her behaviour wasn’t okay as well. I mean…I believe that she was really the one that was abused…but her behaviour was violent and abusive and I think that the cross application…helped them both realise that…*

Similarly DVLO3 stated that a cross application might be appropriate as it would provide a victim with ‘*something to think about before she retaliates after she's been continually baited*’. In this way MAG2 agreed that ‘*technically*’ a person could be a perpetrator and a victim in that both can perpetrate violence. MAG2’s more detailed response to this question, however illustrates the struggle with language, incidents and appropriate legal responses:

> *I …keep thinking of particular* [cases] *over the last few weeks where um you know she’s been the subject of terrible abuse and um intimidation and but you know she got the knife*

[1047] See DVLO4.

[1048] The woman was also charged with common assault to which she pled guilty and was placed on a good behaviour bond.

> *out and stabbed him the other day and um so yeah, both sides can certainly perpetrate violence.* [pause] *Okay, yeah I'm uneasy about that but yeah.*

A cross application complicates or blurs the process of identifying 'the victim'. This is well described by DVLO1:

> [When there is only one ADVO application] *you know exactly who the enemies are, you know who the defendant is, you know who the victim is and you deal with it that way. …With cross-applications …everyone's sort of you know confused about it, no one's really knowing who did what to who … you know it's not really a cut and dried situation of 'oh we can hate him because he hit her'.*[1049]

However rather than this confusion generating the need for a more forensic process, DVLO1 suggests that the police become '*blasé*' about the case and the manner in which they deal with it: the prosecutors '*don't pump up very much with cross applications because they're thinking "she's gonna get up in five minutes as the defendant"…the magistrate…can see that she's listed as a defendant as well.'* Keira also commented on this blasé approach stating that once her ADVO was accompanied by a cross application '*the police lost interest*'.

As noted in *Chapter 2* the legal system appears to be particularly reliant on the dichotomies of victim and perpetrator. The need to identify 'a victim' and 'a perpetrator' is evidenced in the incident-driven approach[1050] that was described in *Chapter 8* regarding dual applications. In that chapter a number of police reverted to identifying separate and discrete incidents in order to deploy the labels of victim and perpetrator, rather than considering broader contextual questions beyond the mere perpetration of an act of violence. The following case example and DVLO5's description of the police approach illuminates this emphasis on incidents:

> *I had one where this woman suffered years of domestic violence and verbal abuse from* [her partner]*… and subsequently she had her children taken off her* [as a result of his violence] *… and he went to gaol for a while. He came out, he started harassing her again. He came to the door screaming at her, she just opened the door up and hit him across the head with a golf stick. She ended up being charged and she said to me, 'But it was just years of domestic violence. I just snapped.' Ended up charging her* [and sought an ADVO to protect him. Both of which were eventually withdrawn as it was deemed] *….not in the public's best interest … to continue with the process.*

[1049] DVLO1.

[1050] See Miller & Meloy, above n43 at 92. See also Hirschel & Buzawa, above n48 at 1458.

> So the fact that she retaliated, would that make her a perpetrator or a defendant? Are they different things?
>
> *Well in our eyes there's no difference, they're just a defendant, the perpetrator is the defendant.*
>
> So if there's an incident of violence between people that are in a domestic relationship that's sufficient?
>
> *That's, they're just known as yeah the defendant.....To me a perpetrator is like the verb of defendant, like that's what he does.*

Two professionals, both legal representatives (one a police prosecutor and the other a solicitor) actively resisted the use of the terms 'victim' and 'perpetrator' drawing on their role in the legal system, and the role of the court in making determinations. SOL3 explained that solicitors would not be '*receptive*' to this language, and in accordance with their role would refer to a 'complainant' and 'defendant', or an 'alleged victim' and 'alleged perpetrator'. In a similar way PP3 stated that 'victim' and 'perpetrator' were '*layman's term*[s]' and not '*legal concept*[s]'.[1051] PP3 goes on to note that being a defendant in an ADVO does not necessarily make one a perpetrator.[1052] While these two legal representatives eschewed this language for reasons connected with their role in the legal system, their view provides some resonance with the need to be precise about the language that we use and that involvement with the legal system does not, of itself, indicate the presence of domestic violence or the role and position of the people using that system. This is particularly the case in cross applications.

3. Summary

This chapter examined the how cross applications are approached and responded to when they appear in court. The chapter has examined two areas: (1) how cross applications are handled and resolved, and (2) the understanding of domestic violence held by professionals through the lens of cross applications.

The first part of the chapter revealed that cross applications tend to be treated as a pair generating identical outcomes. This appears to be a consequence of the way a cross application operates as a bargaining tool and the intersection with the overloaded work environment. Approximately 75% of the cross applications in the court file sample resulted in mutual outcomes (mutual withdrawal or mutual

[1051] Follow-up email communication with PP3 (17 November 2006).

[1052] Ibid.

orders). Overwhelmingly these cross applications were resolved at mention; a brief and procedural court day. This means that cross applications find no forum in which the competing claims are assessed and determined. When compared to the resolution of ADVOs generally it was revealed that cross applications were more likely to result in a person not obtaining an ADVO. This was confirmed in the different results achieved in the sample of women interviewed who were more likely to be involved in cross applications that were lodged some time after the finalisation of their own ADVO. The time lapse between the woman's application and the subsequent cross application meant that both applications were considered on their own, rather than as a pair. Thus in this sample we saw more women obtaining an ADVO as the only successful party. This suggests that when ADVOs appear on their own they are more likely to be determined on their merits rather than through a settlement process that emphasises paired or mutual outcomes. Thus many of the women and professionals interviewed recognised that the primary function of the cross application was as a 'bargaining tool' rather than as a measure to ensure protection.

Most of the professionals interviewed understood domestic violence in terms that reflected feminist definitions of domestic violence discussed in *Chapter 2*. However this understanding failed to be translated into practice when faced with cross applications and the constraints of the work environment. Invariably the professionals interviewed returned to incident-driven definitions of domestic violence, and a small number reiterated popular notions about domestic violence. This disjuncture supports the suggestion that the training and education of professionals has failed to convey the way that knowledge has practical application; the critical implementation question. This area requires further research.

The lack of time available to consider competing claims, makes mutual resolution of cross applications highly attractive. The way in which time, or lack thereof, plays an important role in how ADVOs are dealt was highlighted through the contrasting experiences of women whose cases appeared in rural courts compared to metropolitan courts. In the rural courts the women spoke about how the magistrate possessed greater knowledge about their cases (that is contextual knowledge); a situation not possible within the current resource

constraints of the metropolitan courts. This has adverse impacts for people involved in cross applications (and ADVOs more generally) who find their cases dealt with in brief bureaucratic proceedings and in a manner that appears to give little attention to concerns about fear, or the need for future protection.

This chapter highlighted two key dimensions of legal practice in approaching and resolving the competing claims presented by men and women in cross applications. The first is that there is little attempt to unravel such competing claims, rather mutual outcomes tend to be preferred and promoted. In addition any claims that are made are viewed through the lens of incidents (which itself allows for mutual outcomes to be promoted) rather than the lens of context. Thus, what many complainants are left with is a story about mutuality rather than a consideration of who experienced domestic violence and who requires protection.

10. Conclusion

This thesis examined the use of cross applications in ADVO proceedings in order to investigate two interrelated issues: (1) the recurrent debates about whether men and women are equally violent in their intimate relationships, and (2) the content and nature of cross applications, and the way they are approached by key professionals and ultimately resolved before the court. It did this through multi-method fieldwork: in-depth interviews with women involved in cross applications, in-depth interviews with key professionals, documentary analysis of court files, and court observations.

The debate about gender symmetry in the perpetration of domestic violence has long animated the sociological literature. *Chapter 2* highlighted the key differences between the two sides of the debate (simplistically cast as family violence versus feminist): the different conceptual frameworks that underpin the respective research, the extent to which acts beyond physical violence are taken into account, and the identification of discrete acts without reference to the context in which they take place.

While there has been extensive criticism of the criminal law for its incident-based approach to domestic violence, reflective of the approach of family violence research (*Chapter 2*), little attention has been paid to the conception that underlies legal practice concerning civil protection order systems (a form of legal protection specifically designed to more appropriately respond to domestic violence). The analysis of cross applications in this thesis, involving men's and women's competing claims about violence, provides for such an examination.

The contributions of this thesis to the debate about gender and domestic violence are threefold:

1. It investigated official data (a data source neglected in this debate[1053]) in conjunction with other data (in-depth interviews and court observations) to explore claims about gender equivalency in the perpetration of domestic violence.

[1053] Melton & Belknap, above n36 at 337.

2. Through the use of multiple methods and different data sources in a single study, it illustrated the way that different research methods highlight different aspects of the allegations made by men and women about domestic violence.
3. It extended this debate into the legal arena by exploring what theoretical understanding of domestic violence underpins the civil protection order system, a system ostensibly designed to better address domestic violence.

The extent to which this thesis addressed these areas was limited by the quality of ADVO complaint narratives. The complaint narratives gathered in the court file sample were frequently inadequate; many provided insufficient detail about events, referred to a history of violence and fear in a routine manner, included irrelevant information, and frequently concentrated on a single, discrete incident (*Chapter 4*). This was evident through the court file analysis (*Chapter 6*), and was the subject of scathing comments from the magistrates and police prosecutors interviewed (*Chapter 4*). The poor quality of the ADVO complaint narratives not only placed constraints on the research exercise (*Chapters 6-8*), but it is also a key finding of this thesis that raises critical questions for the legal process: how is the legal system able to make determinations, and effective and appropriate protection orders, in the context of such paucity of information?[1054]

While the study focused on cross applications, its findings revealed a number of issues of concern for the ADVO system more broadly: namely, the continuing practice focus on incidents, the limited and narrow picture of domestic violence that is presented to the court and relied on by key professionals working in the ADVO system, and the overriding emphasis on settlement.

In this concluding chapter I draw together the key findings and theoretical questions that guided and challenged this study, and highlight areas that require further research and investigation.

[1054] See similar conclusion regarding allegations of family violence in the family law arena: Moloney et al, above n37 at 119.

1. Men's and women's allegations about domestic violence

A. Are cross applications evidence of gender symmetry in the use of domestic violence? A methodological illustration

i. The quantitative picture

The quantitative data presented in *Chapter 6* compared the allegations men and women made in the court file sample. This revealed few differences.

Both men and women, whether as first or second applicants, made a wide range of allegations across the spectrum of violence and abuse. At least half of complainants made allegations about physical violence (58.8%), other forms of abuse (52.9%), and threats (50.0%). Sexual violence was, however, notably absent from the complaint narratives (Table 6.5). While this absence might be explicable for a range of reasons,[1055] it is troubling in this, the main legal forum to address domestic violence in NSW, and requires further research given what is known about the coexistence of different forms of violence and abuse in domestic violence.[1056]

Furthermore, both men and women alleged that a wide range of different physical acts were used against them (Table 6.6). These acts ranged from what might be perceived as 'minor' acts (such as pushing) to more 'serious' acts (such as choking or using a weapon). However, some acts appeared to be more likely to be used by men, and other acts were more likely to be used by women. While the numbers were small, they are consistent with other research showing gender differences in the type of physical act used, particularly the greater use of weapons/objects by women.[1057] Frequently these weapons/objects were items that were 'on hand' rather than items traditionally viewed as weapons.[1058]

Allegations about threats and the context in which they are issued appeared more fruitful with some indication that women experience more threats pre and post separation than men, and more threats that can be described as coercive. The number of complaints that made reference to threats and provided details about

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[1055] See *Chapter 6*.

[1056] See references above n695 & n747. See also research that has noted a similar absence in family law and civil protection order proceedings, above n694.

[1057] See Melton & Belknap, above n36, and references at above n713.

[1058] Ibid at 344.

the nature and context of those threats was however very small and the discussion in *Chapter 6* is, as a result, tentative. However it resonates with research by Melton and Belknap who found that men were more likely than women to issue coercive threats.[1059] In contrast only men in the present study made complaints that alleged that women threatened to use their legal rights against them (for example, by obtaining an ADVO, or reporting them for a breach of that ADVO), and only men nominated that they were in 'fear' that the woman would 'provoke' them to breach her ADVO.[1060] These tentative differences are consistent with an understanding of domestic violence as an exercise of coercive control, and warrant further research with a larger sample.

The comparison of men's and women's claims in the second applicant category were more revealing with a number of gender differences reaching statistical significance: women second applicants were more likely than male second applicants to make allegations about physical violence, other forms of abuse, and to state that they were in fear of their current/former partner. The finding regarding the presence of fear is particularly important as it implies an experience of domestic violence that is characterised by control. It is also consistent with other research that has found gender differences in the extent to which acts of violence generate fear, with women being the more fearful.[1061]

There were a number of other differences that did not reach statistical significance that were consistently in the direction of indicating that the complaints made by male second applicants were of a different nature: men were more likely than women to lodge their complaints second in time (75% of men were second applicants); these applications were more likely to be private applications and hence did not attract police attention, and male second applicants were less likely than male and female first applicants and female second applicants to have alleged a history of domestic violence in their complaints. This apparent trend requires further investigation with a larger sample to ascertain whether these are gender differences in the nature and type of allegations that form ADVO cross applications.

[1059] Melton & Belknap, above n36 at 341.
[1060] See men excluded from Table 6.10.
[1061] See references above n264.

This quantitative analysis, then, reveals little more than that men and women are alleged to use a wide range of different forms of violence/abuse against their current/former intimate partner; it does not tell us whether there were any differences in the nature and context of the acts perpetrated, how each act or behaviour did or did not relate to previous events, or the way the act functioned in the relationship. In this way it is consistent with the limited picture afforded about the perpetration of domestic violence presented in other quantitative studies. Rather than accepting this quantitative data as evidence of 'symmetry' or 'mutuality' in the use of violence, this thesis investigated these allegations further through qualitative analysis. This qualitative investigation, while limited by the inadequacy of many complaint narratives, builds on the picture, already suggested by the quantitative data, that the ADVO complaints made by male second applicants were of a different nature to those of other complainants involved in cross applications (that is, different to male and female first applicants, and female second applicants).

ii. The qualitative picture

Qualitative data was analysed in *Chapters 5-8*. This analysis shed a different light on, and posed additional questions about, the quantitative data analysed in *Chapter 6*.

Chapter 5 described the broad and extensive violence/abuse experienced by the women interviewed pre and post separation from the perpetrator. A key finding in this chapter was that the women interviewed actively described their experience of domestic violence in terms of control; in contrast the complaint narratives prepared on their behalf invariably focused on a single incident and thus failed to adequately reflect their experience or the context of control. In addition they described a broad spectrum of acts of violence and abuse in a manner that is not captured by approaches that focus on a designated list of acts; a number of the women interviewed mentioned acts/behaviours that would not easily fit within traditional categories of, or questions about, domestic violence, for example, perpetrators reporting women to different agencies, forcing the woman to read or listen to news stories involving domestic violence, and continuing unwelcome messages of 'love'.

Chapter 7 revealed that there were distinct differences between women's allegations and some men's allegations. Three key areas of difference emerged:

- *The presence of criminal charges.* Men (77.3% of people charged), particularly male second applicants, were more likely than women to be charged with a criminal offence at the same time that the ADVO applications were before the court (Table 7.1). This suggested a level of seriousness attached to some men's behaviour, or, at the very least, that these men engaged in behaviour that attracted the attention of the police. Even more significant was the fact that only male second applicants were charged with contravening an ADVO. This suggests that these men were engaged in a repetitive, patterned use of violence that accords with feminist understandings of domestic violence (*Chapter 2*).

- *A questionable characterisation of acts as violence or abuse.* A small group of complaints, primarily lodged by male second applicants, sought to characterise acts/behaviour as violence or abuse in a questionable manner. Many of these complaints centred on acts that were described as 'harassment'. In all the cases examined, rather than the acts/behaviours being violent or abusive, they were better characterised as hurtful or unfortunate; they certainly appeared to have no connection to 'fear' (the ADVO legislative requirement), or to control. The *function* of the alleged act/behaviour was critical to the analysis of these cases, drawing on the feminist work discussed in *Chapter 2* which emphasised the importance of examining context when ascribing meaning to acts or behaviours (whether those acts involve physical violence or other forms of abuse).

  It is in this area of 'other' forms of abuse, rather than acts of physical violence, that the importance of context may be underscored in progressing understandings of domestic violence based on control. Unlike acts of physical violence, other acts of abuse do not start from an assumed position of 'violence'. What I mean by this is that perhaps it is when we look at 'other' forms of abuse that questions about the function of that act/behaviour (is it for controlling purposes and hence domestic violence, or not) can gain greater traction in debates about gender equivalency in the perpetration of

domestic violence. As has been noted, Stark advocates this different focus by arguing that work on domestic violence needs to be redirected from 'violence' towards 'coercive control'. Stark presents many case studies that highlight the extensive and varied acts of abuse and control experienced by women separate from or in addition to acts of physical or sexual violence. Importantly he emphasises the many minor forms of violence and abuse experienced by women that, when viewed on their own, appear minor and trivial, but when viewed together comprise a picture of coercive control.

The different nature of cross applications as a data source in the debate on gender perpetration of domestic violence is highlighted in the cases where men alleged that women were misusing their ADVOs. Cross applications are not only a mechanism through which a person may raise counter allegations about violence (and hence a data source to compare men's and women's allegations), they are also a legal mechanism that appears to be initiated tactically, as a 'bargaining tool', to bring about a particular resolution (mutual withdrawal) (*Chapter 9*). Thus a cross application may simply be a legal claim designed to counter or undermine the first person's allegations. Cross applications therefore cannot simply be investigated as potential examples of gender equivalency, or cases of mutual violence, but must also be seen as a possible extension of the violence and abuse itself. Many of the women interviewed saw the cross application lodged by their former partner as harassment, a breach of their ADVO, or another way to hurt them (*Chapter 5*). This was also recognised by some of the professionals interviewed. This dimension poses further questions about how to define and understand domestic violence; the use of a legal mechanism, a cross application, to generate withdrawal is certainly not an act/behaviour asked about in standardised research instruments measuring the prevalence of domestic violence. Indeed the use of the law against victims of domestic violence is rarely depicted as part of their continuing experience of violence, yet it is seen that way by victims and clearly evidences a type of act that is directed at exerting control (or reasserting control). In this way some research

in the family law arena has characterised multiple vexatious applications as a 'weapon against women and their children'.[1062]

- *Lengthy 'wounded' complaint narratives*. In eight cases men (one first applicant and seven second applicants in the court file sample) lodged complaints that were of a distinctly different kind; these were lengthy complaint narratives appended to the ADVO application, in which the man sought to characterise himself as 'wounded' or the 'true' victim. The content and nature of these complaint narratives, as argued in *Chapter 7*, engaged in what Cavanagh and colleagues, drawing on the work of Goffman, have characterised as 'remedial work'.[1063] Invariably these complaints incorporated denials, shifted blame (particularly onto the woman), downgraded the seriousness of the acts that the man was prepared to admit to, and/or provided a different account of the events alleged in the woman's complaint. In some of these complaints the man also sought to characterise himself as the (calm) victim and the wronged person, in contrast to his former partner who was depicted as hysterical, irrational and in some cases aggressive.

The qualitative analysis presented in this thesis, then, revealed gender differences in men's and women's accounts of, or allegations about, domestic violence in terms of who engages in repeated behaviour, who seeks to identify acts that perhaps were never intended to come under the purview of the term 'domestic violence', and who engaged in remedial work to recast the violence perpetrated in the relationship. Invariably these were features of the complaint narratives lodged by male second applicants.

Case examples, which juxtaposed men's and women's complaints, were presented to illustrate these qualitative differences (*Chapter 7*). This method highlighted the importance of reading and comparing paired narratives in cases where violence is suggested to have been mutual. Dobash and Dobash emphasised in their work on differences in men's and women's use of violence

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[1062] ALRC, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, (1995) at [2.30]. See also Belinda Paxton, 'Domestic Violence and Abuse of Process' (2004) 17 *Australian Family Lawyer* 7, at 7, 11-12.

[1063] Cavanagh et al, above n39.

the necessity of comparing men's and women's accounts of 'shared' events.[1064] While I did not interview men and women involved in the *same* cross application for safety reasons,[1065] it was possible to compare the shared narratives through the paired comparison of ADVO complaint narratives. Such an approach, as demonstrated in *Chapter 7*, is vital to comparing men's and women's allegations about the use of violence within a contextual framework.

iii. Summary

Like other research, this thesis found that quantitative data provided a limited understanding of domestic violence.[1066] However, even this limited data suggested that the claims lodged by male second applicants (over 75% of men in this study were second applicants) were of a different nature. This suggestion was reinforced by the examination of qualitative data. The qualitative data confirmed the importance of looking beyond discrete acts as the sole indicator of the presence of domestic violence. While control is not a feature that emerges within ADVO complaint narratives for a variety of reasons (see discussion below), other contextual elements which point to this feature were evident such as: the experience of violence pre and post separation, repetition, the use of multiple acts, the presence of coercive threats, the generation of fear, and the attempts to undermine women's claims for protection. In addition the qualitative analysis revealed that cross applications are not only a data source to explore debates about gender equivalency in the perpetration of domestic violence, but also reveal that some men's allegations fall within a totally different category; a category that seeks to utilise a legal mechanism as a way to challenge women's claims for safety. That is to say, some men's claims were not concerned with women's use of violence, but rather were concerned with women simply doing things men did not like, such as pursuing their legal rights, telling others about the man's behaviour, calling the men names, swearing at them and so on.

[1064] Dobash & Dobash, 'Working on a Puzzle', above n19 at 332.

[1065] See above n318 for differences between the sample used by Dobash and Dobash and the sample in the present study.

[1066] See Melton & Belknap, above n36 at 343.

2. The NSW civil protection order system and cross applications

This thesis asked whether the much criticised narrow focus of the criminal law on discrete incidents of violence (a criticism that resonates with feminist criticism of family violence research) is replicated in the civil protection order system, a system specifically designed to address the key limitations of the criminal law.

Chapter 2 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 translated into practice. Thus despite its legislative promise, practice within the ADVO scheme continues to focus on a narrow depiction of violence; one that is dominated by incidents of largely physical violence. This reflects the long-standing problem of implementation noted in much work on the outcomes and barriers faced by feminist law reform efforts (*Chapter 2*). 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 decision- makers 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.[1067] Does the translation of gendered harms into existing legal categories and rules mean that the intended outcome is lost, diminished, or bears little relationship to the harm it was intended to address? Should the law be the only site for intervention?

[1067] Smart, 'Feminism and the Power of Law', above n283 at ch4 and discussion of 'de-centering law' at 163-65.

This study of cross applications has revealed that practice under the ADVO legislation continues to convey a narrow understanding of domestic violence. This is evidenced in the poor quality of complaint narratives, the continuing dominance of an incident focus rather than a more contextualised approach, and the lack of space for stories about domestic violence to be told and heard as a result of constraints inherent in the court setting.

A. A narrow depiction of the experience of domestic violence

i. ADVO complaint narratives

This thesis found that most complaint narratives for ADVO cross applications were of poor quality. Many of the narratives examined were brief, focused on a single incident (generally the most recent), included irrelevant information, and when references to fear and past experiences were included this was done so in a routine fashion. This narrative analysis drew primarily on the work of Durfee (*Chapter 4*).[1068]

The absence of detailed information about current and past experiences of domestic violence, and the impact that violence has had on the complainant means that the court has inadequate information when making determinations about many ADVO matters. While this may not present a problem in 'serious' incidents (or those that are easily 'visible' and corroborated), such as the siege incidents experienced by Lillian and Frances, it does create problems in cases that are more complex; that is, those cases Durfee described as 'border cases'.[1069] Border cases are those that are not clear-cut because little evidence is available, the allegations are contested, the parties do not conform to traditional notions of victim and perpetrator (or complainant and defendant), or the complaint centres on incidents that do not neatly fit the legislative requirements. Thus if the complaint narrative is poor in a border case this may influence the approach taken by professionals: Is this case worth pursuing, or is settlement the only option? How much effort should I allocate to it? As argued in *Chapter 4*, cross applications represent just such border cases in that, by their very nature, they disrupt the legal system's inclination to dichotomise cases of domestic violence into victim and perpetrator roles. Thus settlement may be emphasised to a greater

[1068] See also Trinch & Berk-Seligson, above n400; and Ptacek, above n13.

[1069] Durfee, above n401 at 135-36.

extent in cross applications than for ADVOs generally. Significantly, as demonstrated in *Chapter 9*, the pursuit of settlement in cross applications is more likely to result in neither party obtaining protection (mutual withdrawal). In contrast a well-drafted complaint may mean that legal practitioners are less likely to accept mutual withdrawal or consent orders and instead elect to proceed to a hearing.[1070]

The poor quality of many complaint narratives raises questions about the understanding of domestic violence that underpins legal practice in the ADVO system. The absence of in-depth, detailed accounts of domestic violence that portray the context of domestic 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. For example, the presence of an ADVO is often relied on in subsequent or concurrent family law proceedings; if the detail and quality of the ADVO complaint narrative is lacking, then this obviously has implications for the extent to which domestic violence is taken into account in the family law proceedings.[1071]

The limited information about domestic violence conveyed in the complaint narratives is compounded by the constraints of the institutional environment in which ADVOs are determined. The excessive workload in many Local Courts, the extreme brevity of proceedings, and the connected emphasis on settled outcomes means that little, if anything, is evident in the court proceedings about domestic violence, or other forms of violence between current/former intimate partners. This institutional environment is discussed below.

ii. The continuing dominance of incidents

Not only did incidents dominate the complaint narratives examined in this thesis, but incidents appeared to continue to dominate the practice of key professionals. This is despite the progressive legislative framework (*Chapters 2* and *4*), and despite the generally well-developed understanding of domestic violence that key professionals brought to their work in implementing the legislation (*Chapter 9*).

[1070] A comment to this effect was made by SOL5.

[1071] See Moloney et al, above n37 at 119.

As discussed in *Chapter 9*, many of the key professionals interviewed defined domestic violence by reference to power and control, repetition, patterns of behaviour and a broad range of different types of acts of violence and abuse. This reflects feminist conceptions of domestic violence discussed in *Chapter 2*. However, this understanding appeared not to be translated into practice; instead incident-based definitions came to the fore. This was most clearly seen in two areas: how professionals defined a cross application, and police approaches to dual applications.

While definitions of cross applications varied across, and within, the professional groups interviewed, a majority articulated a definition dependant on incidents and without reference to the history of the relationship. For these professionals a cross application either concerned with the same incident or was lodged within close time proximity; if an application did not fit these criteria then it simply concerned a fresh, or separate, incident. Thus a subsequent ADVO application by a defendant would not be viewed within the context of the earlier ADVO let alone the broader relationship. This may lead to inappropriate or unsafe outcomes when courts do not take the contextual elements of fear, history and repetition into account.

When discussing dual applications, the police interviewed (DVLOs and prosecutors) tended to adopt an approach in which 'incidents' could be identified (and hence separated) as discrete events in which a person was a perpetrator in one incident, and a victim in the next (*Chapter 9*). This took place even in those cases where the 'incidents' were closely linked in time; in fact they appeared more as a sequence of events. Police responses not only highlighted the dominance of incidents, but the dominance of physical violence as determinants of police practice concerning ADVOs; all the complaint narratives for dual applications concerned physical violence and did not refer to any other form of violence/abuse.

The complaint narratives that formed the police dual applications were of extremely poor quality; they were very brief, focused on a single incident, used identical complaints for both parties, and referred to a history of domestic violence 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). This fails to accord with NSW Police procedures which specify that a complaint should include: a short history of the relationship; detail the most recent incident as well as any past history of violence including harassment, threats and stalking; and information about the victim's fears regarding this behaviour.[1072] 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 the protection of an ADVO, the poor quality of the complaint narratives suggested a different reason. Rather than the cases being difficult or 'messy', 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.[1073] Thus it is difficult to know how the introduction of 'primary' or 'predominant' aggressor policies might assist police when competing claims are made, as the issue, in at least the cases analysed in this thesis, appeared to be less a problem in identifying who might be the victim than an unwillingness to investigate sufficiently.

Considerable attention has focused on questioning the adequacy of the police response in relation to criminal offences in the USA and Canada following the rise in dual arrests and single arrests of women after the introduction of mandatory or pro-arrest policies.[1074] Dual ADVO applications raise similar concerns about some police practices and understandings of domestic violence. In *Chapter 8* I argued that this concern was heightened in dual applications because of the way in which civil protection orders start from a different premise than the police response to a possible criminal offence. That is to say, civil protection orders are not simply concerned with whether an offence has taken place, but rather 'who needs protection?' and 'who is fearful?' These questions necessitate more than simply that an incident has taken place; these questions, which should be at the forefront of the ADVO system, arguably give emphasis to contextual issues in the implementation of the legislation. The continuing

[1072] NSW Police Service, 'SOPS', above n398 at [4.1].

[1073] Also suggested by DVLO1.

[1074] See references above n48.

emphasis on incidents means that recognition of the importance of these questions has not been translated into practice.

iii. 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 exponentially since ADVOs were first introduced, without additional resources.[1075] The magistrates interviewed complained about this and noted the constraints it placed on the way they conducted their work.

One of the most striking features about the conduct of the ADVO list day was the extreme brevity of proceedings (*Chapter 4*).[1076] This meant that on most occasions there was no public comment made about the allegations contained in the complaint, instead the time was spent determining procedural matters. Thus there were few opportunities in which to observe judicial comments about domestic violence, let alone to assess judicial demeanour.[1077] Given the speed of proceedings and their procedural focus, the only conclusion that could be reached regarding judicial demeanour was one of a bureaucratic approach. It was not only judicial demeanour that must be characterised as bureaucratic but also the general practice of the ADVO list day. As argued by other authors who have studied magistrates' courts,[1078] and Hunter specifically within the protection order jurisdiction,[1079] this means that cases tend to be dealt with in a routine way with similar results that do not reflect the individual circumstances of each case.

The workload of the Local Court means that magistrates do not have sufficient time to devote to each case; this may mean that evidence is not taken, or not taken at length, and settlement is emphasised over other modes of resolution. This was reflected in the court file sample where very few cases proceeded to a hearing (a process that was more likely to result in only one party, in this study all women, obtaining an ADVO). Only 11 (n=77)[1080] cases in the court file sample were determined via a hearing. Only one cross application was heard in

[1075] Hunter made similar comments regarding Victoria: 'Women's Experience in Court', above n58 at 60.
[1076] See similar findings in Victoria: Ibid at 100-127.
[1077] Emphasised in the work of Ptacek, above n13.
[1078] Carlen, above n445; McBarnet, above n445; and Baldwin, above n140.
[1079] Hunter, 'Women's Experience in Court', above n58 at 60.
[1080] One case was excluded as it was not finalised at the time of the fieldwork, see Table 9.2.

the interview sample.[1081] The absence of hearings, particularly for cross applications, means that the competing allegations were never conveyed in full, tested or determined.

iv. *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',[1082] and, as Galanter pointed out, a product of a legal arena with limited resources and a high workload.[1083] The emphasis on settlement was discussed generally in *Chapter 4*, and specifically in relation to cross applications in *Chapter 9*. Settlement can mean one of two outcomes: obtaining an order (by consent) or not obtaining an order (by withdrawal). Most cross applications are resolved via mutual withdrawal with or without undertakings (*Chapter 9*). This means that a cross application most commonly results in neither party obtaining an ADVO (62.3% of people in the court file sample did not obtain an ADVO); this stands in contrast to the general outcome for ADVOs where only 49.3% did not obtain an ADVO.[1084]

Complainants and defendants are faced with considerable 'encouragement' to settle their ADVO cases; for example, consent is promoted as a method of saving time (particularly that of the court), avoiding having to return to court on multiple occasions (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 (*Chapter 9*). A cross application combines with these factors to generate even greater pressure to settle.

Some cross applications are initiated to undermine, or counter, the first person's claim for protection (usually the woman's claim). In this respect cross applications were invariably described by the women interviewed, and by a number of professionals, as a 'bargaining tool' (*Chapter 9*). Hence, even in an environment in which settled outcomes are emphasised, 'settlement' took on a

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[1081] Megan. Keira, Lillian and Rosemary's ADVO application and cross application were all listed for hearing but settled on the day at court.

[1082] Hunter, 'Having her Day in Court', above n449 at 61.

[1083] Galanter, above n442 at 95 and 121.

[1084] This is still a high rate of withdrawal in ADVOs generally.

heightened role in cross applications, and played a powerful role in generating mutual withdrawal and to a lesser extent mutual orders.

While both women and professionals recognised the role of a cross application as a bargaining tool, they tended to do so in different ways: women invariably viewed cross applications as negative (even where the woman was successful and the man was not), while professionals tended to view cross applications as a useful, almost positive, tool to generate settlement and hence finalise the case. This highlighted a disjuncture in the way in which women and professionals viewed and approached cross applications. The women interviewed invariably spoke about cross applications as a form of abuse or harassment (*Chapter 5*), and while some professionals also recognised this, many went on to consider mutual orders as unproblematic (*Chapter 9*). That is to say, many viewed the fact that the woman (whom they usually identified as the primary victim) obtained an order as a good result, and one that was not undermined by a mutual order. However this justification offered by many professionals was countered by the fact that less than 30 per cent of cross applications were resolved this way (Table 9.2). It also ignored the profound impact women described in being subject to mutual orders (see Rosemary and Marcella in *Chapter 9*).

An outcome reached by settlement means that there is no formal determination of the competing claims and no consideration of whether there are differences in the nature or context of the allegations contained in the separate complaints. Instead a 'mutual' approach is taken. That is to say regardless of the settlement reached it will apply to both parties as though the allegations were equally valid and of an identical nature with the same impact. This thesis has demonstrated, particularly through the qualitative analysis presented in *Chapters 7* and *9*, that in a number of cases the complaints lodged by men and women were of a qualitatively different nature. The lack of a court determination means that the bulk of the cross application cases examined, while 'resolved', remained without any statements regarding who required the protection of an ADVO and who did not (that is to say, who required a domestic violence response, and who did not).

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 in NSW which addresses domestic violence. 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 two 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'. The qualitative analysis presented in this thesis does not support this assessment of the allegations.

3. What to do about cross applications? Can the NSW ADVO system take account of 'power and control'?

While most professionals interviewed viewed cross applications as problematic, albeit to different degrees and in different ways, they were generally of the view that they should continue to be available.[1085] The reasons for this varied and included that:

- a 'first in first served' approach is inappropriate as the first person who contacts the police or initiates a private ADVO is not necessarily the person who requires the protection of an ADVO.[1086]

- in some cases both parties require protection from each other, either because the parties are 'as bad as each other' (*Chapter 9*);[1087] or the woman continually invites the perpetrator to have contact with her despite the existence of an ADVO (*Chapter 7*).[1088]

- that everybody has a 'right to a day in court'.[1089]

[1085] DVLO3, DVLO4, MAG2, PP1, PP2, PP3, PP5, SOL1, SOL2, SOL3, SOL5, WDVCAS2, WDVCAS3, WDVCAS4 and WDVCAS5.

[1086] MAG3, SOL3, WDVCAS4 and WDVCAS5.

[1087] See *Chapter 2*.

[1088] DVLO2

[1089] DVLO5, MAG1, MAG5, WDVCAS1 and WDVCAS3.

This final reason is of interest given that many professionals recognised that a cross application was often a 'tit-for-tat' claim, a bargaining tool or a wielding of power. There would appear to be a conflict in resorting to notions of rights where the deployment of a cross application to generate withdrawal may be less about being heard and instead a mechanism to bring about a situation where neither claim is heard. In turn it fails to recognise that a cross application effectively counters the woman's 'right' to her day in court (given the prominence of mutual withdrawal).

A number of professionals offered suggestions that might deter unwarranted cross applications: for example the introduction of a filing fee[1090] or a fee for withdrawing an application,[1091] and the use of the costs provisions against unsuccessful applicants.[1092] A number of professionals also suggested that the chamber magistrate's discretion to refuse to issue process for ADVO applications could be reinstated.[1093] In doing so, these professionals invariably spoke with caution, noting past problems with chamber magistrates turning away victims of domestic violence.[1094] However MAG2 expressed the view that this no longer presents the same risk given improvements in the training of chamber magistrates about domestic violence.

Some jurisdictions have specifically addressed the problem of mutual orders in legislation. For example in New Zealand there is a presumption against the making of mutual orders; an order must not be made to protect the respondent/defendant unless that person has made an application and it has been 'determined in accordance with [the] Act'.[1095] Some professionals interviewed considered that this treated cross applications as a special category of ADVO,[1096] and that such provisions would be difficult to draft and perhaps create inflexible results.[1097] Others suggested that perhaps some direction in the legislation about addressing such claims '*on their own merits…*[might] *stop our* [magistrates']

[1090] PP3.

[1091] DVLO2.

[1092] MAG3, SOL3, SOL5, and WDVCAS4.

[1093] DVLO3, DVLO4, MAG2, PP3, PP5 and WDVCAS2, WDVCAS3, WDVCAS5.

[1094] MAG2, WDVCAS2, WDVCAS3, and WDVCAS5.

[1095] *Domestic Violence Act* 1995 (NZ) s18.

[1096] MAG3, PP3, SOL4.

[1097] MAG3 and MAG5, PP1

sloppy shorthand in the list [which results in] *everybody's* [obtaining] *an order*'; however, such a requirement would necessitate additional resources.[1098] This latter suggestion also connects with the view raised by a number of professionals that perhaps cross applications should be determined following a hearing; in this way the claims can be assessed separately rather than resulting in mutual settled outcomes.[1099]

While there is merit in considering ways in which cross applications might be addressed in the legislation and other administrative measures, such processes fail to tackle the more fundamental concern raised in this thesis which goes to the conception of domestic violence underlying the practice of ADVOs. The following discussion addresses questions about whether, and how, the ADVO legislative scheme can take account of coercive control in its understanding of what is domestic violence and what is not.

A. The adequacy of 'fear' as a legislative measure to address domestic violence

The only legal requirement in NSW that looks explicitly beyond discrete acts of violence/abuse is the requirement of (reasonable) fear. This is an important criterion, and one that distinguishes the ADVO scheme from schemes operating in many other jurisdictions. However, while related to coercive control, fear is not the same thing. Given that the presence of fear is a legislative requirement for the granting of ADVOs, it is troubling that it was not mentioned in over half of the cross applications that comprised the court file sample (Table 6.10). In addition, given the rate of settlement of cross applications this means that fear is unlikely to have been mentioned at all in the court process given the absence of evidence-in-chief or submissions from legal representatives in a settled case.

In practice, legal actors within the ADVO system appeared to assume that the presence of a discrete act, on its own, generates fear; that is 'an act equals fear' approach. Such an approach resonates with the approach of act-based research canvassed in *Chapter 2* where the presence of a single act of physical violence, for example, is considered an indicator of the presence of domestic violence. Perhaps if practice in the ADVO system (by police, lawyers and magistrates)

[1098] MAG2.
[1099] MAG2, PP2 and WDVCAS5.

focused more on how an act/behaviour operates (does it create fear?) and its impact and function, it might come closer to considering what domestic violence is beyond the individual acts it might comprise. It is worth noting here that there is also 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. As noted in *Chapter 8*, the legislation mandates police to apply for an ADVO when certain acts/behaviours have taken place or are likely to take place. 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. The legislation, and police practice in this area, would be strengthened (and move away from incidents as determinative features) if the police obligation to apply for ADVOs also reflected this protective purpose.

B. The absence of coercive control

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 the complaint narratives examined in this thesis. 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 (Table 6.9). Notably these acts/behaviours were only alleged by women as part of their experience. These acts on their own are very unlikely to ground an ADVO (not easily fitting within the concepts of a personal violence offence, stalking, intimidation, harassment or molestation[1100]). 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 (*Chapter 5*).

Chapter 2 highlighted the definition and conception of domestic violence afforded by feminist research based on women's experiences. Here, the emphasis

[1100] *Crimes Act* 1900 (NSW) s562AE, now *Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s16.

is not on discrete acts of violence, but rather the way in which they combine, repeat and reflect on each other to create an environment of control. As Evan Stark argued, one of the reasons why the promise of feminist work on domestic violence has stalled is because it has focused on, and developed responses for, violence rather than coercive control. This is seen most clearly in the development of legal responses, which despite their promise, have failed to address this essential feature of domestic violence. The absence of narratives about control (or even the more limited notion of fear) in the ADVO setting means that the civil system continues to perpetuate a response that addresses discrete incidents of 'violence' as opposed to 'domestic violence'.

The recurrent debates about gender equivalency in the use of domestic violence, and the increasing interest in women's use of violence as a result of the arrest of women for domestic violence, reinforce the critical nature of control to differentiate between men's and women's typical use of violence. The importance of control as a defining feature of domestic violence has also been enhanced by increased research interest in differentiating between different types of domestic violence.[1101] The work of Michael Johnson in this emerging area was discussed in *Chapter 2*. As noted in that chapter it was not possible to test the applicability of Johnson's typology due to the limitations in the complaint narratives. It is however worth noting that Anna Stewart, in her work on respondents to civil protection orders in Queensland, applied Johnson's typology and suggested that cross applications might evidence one type of intimate partner violence: situational couple violence.[1102] The need to differentiate between acts that form domestic violence (and hence require responses designed to address this form of harm, for example civil protection orders, education programs) and those that do not is important, and in this regard Johnson's typology is attractive. However, I have concerns about the application of this typology, particularly in the legal setting (*Chapter 2*). The application of such typologies in legal practice may inadvertently reinforce already long-held notions about domestic violence. My concerns in this area are substantiated by the views expressed by a small number of the professionals interviewed in this study which suggested that some

[1101] See *Chapters 1-2*.

[1102] Stewart, above n12 at 86.

professionals continue to resort to notions of mutuality ('both as bad as each other'), think that women misuse ADVOs, and hold a view that the mutual resolution of cross applications (where both parties achieve the same outcomes) is of little consequence (*Chapters 8-9*). The presence of these views fuels caution about the way in which Johnson's typology might continue to reinforce myths about domestic violence, rather than being directed at the development of more appropriate responses. That is to say that differentiation may be seen as a way for the court to manage its excessive workload drawing on already dominant notions of mutuality, triviality and provocation, rather than a method to assist the court in developing appropriate responses to different forms of violence within intimate relationships. As noted by Johnson and others, work on typologies is in its infancy, and the need to differentiate and be clear about what is and what is not domestic violence (characterised by coercive control) is important.

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.[1103] A small number of researchers have attempted to articulate approaches that could achieve this aim. For example Stark,[1104] Deborah Tuerkheimer[1105] and Alafair Burke[1106] 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 posed similar questions of the various civil protection systems.

As noted above, questions about responses to domestic violence within the civil protection order system pose different challenges than 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

[1103] See McMahon & Pence, above n21 at 48; Hirschel & Buzawa, above n48 at 1456-58; Miller, 'Victims as Offenders' above n21 at 131.

[1104] Stark, above n84 at 382-84.

[1105] Tuerkheimer, above n21; and Deborah Tuerkheimer, 'Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later' (2007) 75 *The George Washington Law Review* 613.

[1106] Burke, above n248.

order system to acknowledge and respond to dimensions of domestic violence beyond discrete acts poses quite fundamental questions for the legal response and practice. Like the conclusion reached by McMahon and Pence, I see the failure of the ADVO system to move beyond incidents as a failure that not only 'reflect[s] an inadequate understanding of the gendered nature of domestic violence', but also a failure that 'signals…weakness in institutionalized responses to domestic violence'.[1107] 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 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, 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 take 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…[1108]

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

[1107] McMahon & Pence, above n21 at 49.

[1108] *Family Violence Protection Act* 2008 (Vic), s5(1)(a)

recognised as part of family violence.[1109] In addition control and coercion are listed as separate behaviours rather than the context in which other acts/behaviours that are part of domestic violence occur. This is not the approach recommended by the VLRC in its report on family violence 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.[1110]

Thus this recommendation positions coercion, control or domination as the way in which types of acts/behaviours function. This is quite different to the approach actually 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.

4. Limitations of the study

This was a small scale study involving small samples from a variety of different data sources. Hence the results are tentative and exploratory.

Specific limitations of the study include the absence of interviews with women from different cultural backgrounds, the absence of male voices (*Chapters 1* and *3*) and the lack of data available on cross applications. In this concluding chapter I expand upon the limitations created by the absence of male voices given the findings which suggest that some men (male second applicants) make allegations of a different nature, with a different function, when compared to those made by men and women first applicants and women second applicants.

A. The absence of male voices

As noted in *Chapters 1* and *3,* this thesis would have benefited from interviews with men involved in cross applications; recruitment of men was attempted but proved difficult and ultimately unsuccessful. While access to men's complaints was possible through the court files, and the complaints lodged against the

[1109] The second reading speech does not provide any greater insight into what behaviours coercion and control were intended to address: see Victoria, *Parliamentary Debates*, House of Assembly, 26 June 2008 (Rob Hulls) at 2645.

[1110] VLRC, *Review of Family Violence Laws: Report* (2006), Rec 14 at 105.

women interviewed, a richer understanding of men's allegations about domestic violence would have been generated through in-depth interviews. This is particularly important given that the data presented in *Chapters 6* and *7* suggests that men who lodged their ADVO application second in time made allegations that appeared qualitatively different to the allegations made by men who were first applicants. Thus it is important that this research compares men as first and second applicants to see whether there are differences in the types of claims these groups of men make, and hence their experience of violence and abuse by their current/former female partner. Such a comparison may assist in differentiating between men as victims, and men who might be using the legal system to retaliate against their female partner. Little is known about men as first applicants. This group was small in the sample studied (16/68 first applicants were men). Questions remain about the nature of their claims: are they concerned with domestic violence? Is this violence characterised by control or is it of a different nature and consequence?

5. Concluding remarks

This thesis has contributed to the literature on men's and women's use of intimate partner violence, through a case study exploration of cross applications. This involved the use of official data, a data source little used in this debate, and the use of multiple methods within a single study. This study has confirmed, and actively demonstrated, the limitations of a purely quantitative approach to comparing men's and women's allegations about domestic violence, and, in turn the additional contextual information that is acquired via qualitative analysis. Through this analysis it was revealed that men who lodged their application second in time made allegations about domestic violence that was of a different nature to that alleged by women and men first applicants. This thesis then turned to the manner in which the legal system and its key players sought to unravel, if at all, the competing claims presented by men and women. The practice of professionals was hampered by the poor quality of many complaint narratives, and by a number of other factors that impact on the practice of the law in this field (for example, the continuing dominance of incidents despite otherwise well-developed understandings of domestic violence), the constraints of the

institutional environment and the emphasis on settlement. Most troubling was the failure of the ADVO system to put into effect its legislative promise of responding more appropriately to domestic violence by encompassing dimensions of fear and control, dimensions otherwise dominant in women's own accounts of their experiences. This is an issue of concern for the ADVO system generally, and is not confined to cross applications, although the case study of cross applications has served to highlight this absence. This is important given the growing recognition in the research literature of the fundamental nature of control to the experience of domestic violence, particularly women's experiences of domestic violence.

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