WOMEN DEFENDANTS TO AVOS: What is their experience of the justice system?

Women's Legal Services NSW

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Executive summary

Women's Legal Services NSW ('WLS') undertook an exploratory study of its 2010 experience of representing women who were defendants to Apprehended Domestic Violence Order ('AVO') proceedings in order to better understand what appeared to WLS, and a growing body of anecdotal reports from other agencies, to be a growing phenomenon.

The research was limited by a number of factors and is not a random sample of all NSW cases. However the results illustrate some of the systemic issues experienced by women AVO defendants. Given the number of cases examined and the particular expertise of WLS this report should be of use for the broader legal community.

The study findings include that over two-thirds of our women clients defending AVOs reported that they were the victims of violence in their relationships. Fewer than 40% of these clients had a final AVO made against them when the case came before the court.

Many of the women defending AVOs reported that when police had been called after a violent incident, they felt that their version of events had not been viewed as credible compared with the other party, due to the circumstances of their heightened stress and anxiety.

Other women reported that they believed the other party had deliberately initiated AVO proceedings as a further mechanism of controlling their behaviour, by giving them the ability to threaten them with reports to police in the future.

In the majority of cases where women were defending AVOs, the other party's complaint related to a single incident only. In several of these cases injuries to the other party could be indicative of self-defence, such as scratching or biting on the arm or hand.

Although further research is needed to determine the frequency with which inappropriate AVOs are pursued against women defendants, it is clear from the study that in a number of cases, the applications initiated against women defendants appeared unnecessary for the protection of the other party.

This report identifies the following recommendations:

- 1. Improved data be collected and made available by key agencies in the domestic violence sector in order to build a further evidence base on the experience of women defendants to AVOs.
- 2. The Bureau of Crimes Statistics and Research undertake a discrete project into the experience of women defendants to AVOs in the justice system.
- 3. The NSW Police continue to strengthen their policies and procedures around identification of the 'primary victim' in domestic violence incidents, and provide continuous training about the nature and dynamics of domestic violence.
- 4. The NSW government take into account in its Domestic and Family Violence reforms that women defendants to AVOs may, in fact, be victims, rather than perpetrators of violence.

Introduction

Women's Legal Services NSW ('WLS') is a community legal centre that provides women with a range of free legal services, including legal advice, information, and representation in courts. It provides services in the areas of family law, domestic violence, sexual assault, victims support, care and protection, discrimination and employment law, and it also manages projects and outreaches specifically targeted at the needs of Aboriginal and Torres Strait Islander women.

This report details a research project undertaken by WLS from 2011-2013 in relation to the experience of women clients who were defendants to Apprehended Domestic Violence Order ('AVO') proceedings¹ in local courts in NSW² in 2010, including Bankstown, Blacktown, Penrith, Sutherland, Waverley, Campbelltown and Mount Druitt Local Courts. The report sets out the background to the project, the research undertaken, and commentary on the results of that research. It also includes a number of short client case studies that typify a range of the common problems that women defendants to AVOs face.

Although the project was limited by a number of factors relating to sample size and collection of data, the results illustrate some of the systemic issues experienced by women AVO defendants, and clearly highlight the need for future research and reform in this area of the law. Furthermore, given the number of cases examined and the particular expertise of Women's Legal Services in the areas of law discussed, we anticipate that this report will be of use for the broader legal community.

Background

WLS provides advice and representation to women appearing in AVO proceedings as duty solicitors, working beside the Women's Domestic Violence Court Advocacy Service ('WDVCAS'). The majority of AVOs in NSW put in place for the protection of women are initiated and brought to court by the police.³ In such cases, the women who are protected by AVOs do not generally require separate representation in court, though they may require discrete advice from organisations such as WLS in the area of family law, tenancy and other matters.

Legal representation is, however, often required where women elect to bring a 'private' AVO application. Private AVO applications may be brought for a number of different reasons, including: the complainant's reluctance to engage with police; perceived or actual inaction by police in response to complaints of domestic

¹ Domestic violence intervention orders and the legislation governing them are state and territory based instruments. In New South Wales the AVO system is governed by the *Crimes (Domestic and Personal Violence) Act 2007* (NSW); in Queensland, the *Domestic and Family Violence Protection Act 1989* (Qld); in South Australia, the *Domestic Violence Act 1994* (SA), in Tasmania, the *Family Violence Act 2004* (Tas); in Victoria, the *Family Violence Protection Act 2008* (Vic); in Western Australia, the *Restraining Orders Act 1997* (WA); in the Australian Capital Territory, the *Domestic Violence and Protection Orders Act 2008* (ACT); and in the Northern Territory, the *Domestic and Family Violence Act 2007* (NT).

² The Courts that WLS regularly visit from year to year are determined by a number of factors, including the regional level of disadvantage, and the availability of alternative legal services at particular Court locations.

³ Over the period 1999 to 2007, the proportion of private AVOs declined rapidly, and in 2007, 91% of AVO applications across the state were taken out by Police: Legal Aid NSW, *Report on Legal Aid NSW Services to People in Domestic Violence Situations* (2008) 103.

violence⁴; and cases where the police cannot act for the complainant because they are already pursuing an AVO for the other party involved (a 'cross-application').

Prior to 2008, a large component of WLS solicitors' caseload in AVO matters involved representation of applicants in private AVO applications. However, between 2008 and 2010, solicitors at WLS began to notice a sharp increase in demand for representation from a different group of women involved in AVO proceedings. These clients were women who were defending AVO applications, including those brought privately and by the police. In many of these situations, these clients complained that they were, in fact, themselves the victims of ongoing domestic violence, and that the AVO complainant was the perpetrator.

These clients reported to WLS that they had ended up as the defendant to an AVO for a number of different reasons. Many reported that when police had been called after a violent incident, they felt that their version of events had not been viewed as credible compared with the other party, due to the circumstances of their heightened stress and anxiety. Others reported that they believed the other party had deliberately initiated AVO proceedings as a further mechanism of controlling their behaviour, by giving them the ability to threaten them with reports to police in the future. A typical scenario involving a WLS woman defendant client is set out in Case Study 1 below.

Case Study 1

X (the woman defendant) and Y (the male protected person in a police application) had been in a de facto relationship, and had been separated for 2 years. X alleged an extensive history of violence perpetrated by Y during their relationship and following separation. Some of the violence, but not all of it, had been reported to police.

AVO incident

X and Y had a verbal fight in the street about who was responsible for dropping their daughter to playgroup that morning. Y threatened X with a closed fist saying "I'm going to hit you in the face". X pushed Y away from her. Y then picked X up by her neck and swung her into the path of an oncoming car. Y called the police alleging X assaulted him and police applied for an AVO for his protection.

Result

The matter was resolved at a hearing, with both parties making undertakings⁵ in terms of the mandatory AVO orders for a period of two years.

⁴ Throughout this report we have used the term 'domestic violence' which is intended to include domestic and family violence and sexual violence.

⁵ An undertaking is an oral or written promise made by the defendant to the court. In the context of AVOs, an undertaking will often include a promise to abide by the same conditions in the AVO. However, unlike an AVO, a breach of an undertaking does not involve criminal sanctions.

Issue

Police need to carefully analyse who the primary victim is in any situation of violence, paying attention to any recorded police history of AVOs or associated reports. It is important that police do not take a single incident

the relationship as described by the parties.

AVOs have received comparatively little attention in both criminological and legal literature, perhaps because of their character as a civil order rather than a criminal charge. When WLS began to research the issue, it appeared that there was little known information about women defendants to AVOs,⁶ and their particular experience of the justice system.⁷

Furthermore, while some of the available research examined the phenomenon of cross-applications (where both parties pursue AVOs against the other) WLS believed that it was important to define such legal relationships broadly. For example, exclusively defining a cross-application as proceedings that happened concurrently would not capture the experience of those women that had a history of violence against them, or those women that decided to pursue legal protection some time after they became a defendant to an AVO. Through engaging with a number of different service providers tasked with responding to domestic violence situations, it became clear to WLS that women defendants were generally overlooked and misunderstood in the making of particular policy and legal decisions, in ways that could significantly impact upon their lives.

For example, in 2011 the NSW Parliament's Social Issues Committee initiated the Domestic Violence Trends and Issues in NSW Inquiry ("Inquiry"), which, among other issues, reported upon the significant trend of rising female arrest rates in relation to domestic violence. As the Inquiry's report noted, the number of females arrested as offenders increased significantly between 2001 and 2010, with an average yearly increase of 10 per cent, compared to the average yearly increase of arrest rates for

⁶ Internationally, there is some recognition of intervention orders against women being used as a form of continuing violence in a relationship. See, for example: Susan L. Miller and Nicole Smolter (2011) 'Paper Abuse: When all else fails, batterers use procedural stalking' 17(5) *Violence Against Women*; Jeff Landers, 'How some men are upending domestic violence laws to scam an advantage in divorce' *Forbes*, 22 May 2012.

⁷ A notable exception is the work that has been conducted by the Australian Domestic Family Violence Clearing House, as well as doctoral research conducted by Jane Wangmann (2009) 'She said...' 'He said...': Cross Applications in NSW Apprehended Domestic Violence Order Proceedings, thesis submitted to fulfil the requirements for a doctorate of law, Sydney University. Professor Julie Stubbs, Dr Jane Wangmann, Dr Lesley Laing and Ms Betty Green are also currently conducting a research project that is expected to provide useful information in relation to the experience of domestic violence victims with police: "Pro-arrest policies, dual arrest and the policing of domestic violence" funded by Office for Women's Policy, NSW Department of Family and Community Services and by research grants from the Faculties of Law at UNSW and UTS. For an examination of the issue in Queensland, see, for example: Heather Douglas and Robin Fitzgerald, (2013) "Legal processes and gendered violence: cross-applications for domestic violence protection orders" 36(1) UNSW Law Journal 56-87.

males of 2 per cent.⁸ While the majority of the participants who addressed the Inquiry saw this trend as concerning, and many attributed it to shortcomings in police policy and practices, a minority of participants strongly suggested that the rise was due to either the increasing violence of women, or policing practices finally reflecting the 'true' rate of violence perpetrated by women in domestic relationships.⁹ In the view of WLS, such hypotheses were deeply concerning, not only because they run counter to the weight of evidence as recognised internationally in CEDAW¹⁰ and enshrined in NSW legislation¹¹ that domestic violence is predominantly perpetrated by men against women and children, but also because they did not account for the predominant experience of WLS clients who were AVO defendants, who reported that they themselves were the primary victim of violence.

The Inquiry concluded that, given the divergent views of participants and the lack of reliable evidence to determine the causes or consequences of this trend, there was a need for further studies to be undertaken.¹² As a Community Legal Centre (CLC) WLS recognised that it was uniquely placed to document the experience of our clients to inform the evidence base for future law reform work in this area. In 2012, it was decided that WLS should review all of its closed files from the year 2010 where women were defendants to AVOs, to determine whether any conclusions could be drawn about the profile of this client group, and the experience of women defendants to AVOs in the justice system more generally.

Conducting the Research

In 2012, WLS developed a standard set of questions (data form) that was used to collect relevant information from our 2010 court files where women were defendants to AVOs. In 2010, WLS acted for 93 clients, who appeared as defendants in 105 AVO matters.¹³ A number of clients also had related AVO proceedings for their own protection.

The data form had seven parts:

- 1. General information about the client, including the court in which their matter was determined, their age, cultural and linguistically diverse ("CALD") status, disability status, Aboriginal and Torres Strait Islander status, and their relationship to the other party.
- 2. Information about situations where the client had in place a final AVO for their own protection, or were currently pursuing an AVO against the other party for their protection, and the circumstances leading up to those proceedings.
- 3. Information about the client as an AVO defendant, including information about the circumstances that led to those proceedings.
- 4. Information about associated criminal charges against the WLS client.

⁸ NSW Legislative Council Standing Committee on Social Issues (2012) *Domestic Violence Trends and Issues in NSW*, Report 46 p 26 [2.47].

⁹ NSW Legislative Council Standing Committee on Social Issues (2012) *Domestic Violence Trends and Issues in NSW*, Report 46 p 29 [2.55].

¹⁰ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence Against Women*, UN Doc A/47/38 (1992).

¹¹ Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 9(3)(b).

¹² NSW Legislative Council Standing Committee on Social Issues (2012) *Domestic Violence Trends and Issues in NSW*, Report 46, 205.

¹³ The difference in numbers is explained by some clients having multiple AVOs pursued against them in 2010, either in the same matter or in unrelated matters.

- 5. Information about associated criminal charges against the other party.
- 6. Information about any history of violence between the parties not captured by the current or pending AVO proceedings.
- 7. Information about any on-going Family Court proceedings, in order to capture any possible associations between family law and AVO matters.

A team of solicitors completed the data forms using the information available on the file. The team's lead solicitor was responsible for explaining the form to the other solicitors, and making a decision about how the material on files was to be interpreted to answer data form questions, in the event of ambiguities.

Where the material on the file was insufficient to answer aspects of the data form, the answer recorded was 'unknown'. Solicitors were also asked to 'flag' files that they read which appeared to show obvious circumstances where an AVO should not have been brought, or where there appeared to be inappropriate or unusual action taken by police. An example of one of these cases is set out at Case Study 2 below.

Case Study 2

X (the woman defendant) who had an intellectual disability, and Y (the male identified victim in a police application) who had physical and intellectual disabilities, were previously in a relationship, but remained friends after separating.

AVO incident

At Y's house one evening, Y claimed that X started yelling. Y called police. X told police that she hadn't said anything to Y, but that she thought that Y was 'going funny.' Both parties agreed there were no threats or physical assaults by any party. The police took out an immediate provisional AVO against X on the basis of police fears that 'due to the angry [sic] and intellectual disability, the POI may lash out and assault the VIC who has a physical disability'.

Result

After the first court mention, police withdrew the AVO proceedings on the basis of undertakings made by X.

Issue

In matters where the defendant has a cognitive or severe mental health impairment, there should not be a blanket exception to the making of an AVO. However, full consideration should be given as to whether an AVO is the most appropriate mechanism for the protection of a person. This includes considering whether there are alternative options available, and whether the defendant is likely to understand the orders and implication of a breach.

The results and commentary on the data are set out separately in the following two sections. The data is drawn from the entire women defendant client base of WLS in 2010 (95 clients and 103 AVO applications) and no further sample was taken among them for the presentation of these results.

In reading the results below, it is important to note that this report draws comparisons between men and women's relative experience in pursuing cross-applications. However, because WLS does not represent men, our study did not include matters where a male party was the sole defendant. Therefore, conclusions about the experience of female defendants compared to male defendants generally were harder to draw.

Data results

General information about the client

Location

In 2010, the greatest proportion of AVO matters were seen by WLS at Blacktown Court (31.4%) followed by Mt Druitt (23.8%) and Penrith Courts (22.9%). Significantly smaller numbers of clients were seen in a range of other courts across the State. Importantly, these numbers reflect the ongoing commitments that WLS made in 2010 to provide ongoing duty solicitor services at these courts, and do not demonstrate that a greater number of women defendant AVO matters were heard in those courts.

Age

The majority of women defendants to AVOs that WLS saw as clients were aged 33-40 (35.2%). Aside from this group, there was a fairly even spread over the age ranges 18-25, 26-32, and 41-55 (each about 20%). Only a very small proportion (2.9%) was over 55.¹⁴ Compared to the overall profile of WLS clients in 2010, women defendants were statistically more likely to be younger than other clients.¹⁵

Disability

In over a quarter of matters, clients reported having a disability (28.6%). In these matters, more than half (58.6%) reported as having a psychological disability. Once again, these figures should be treated carefully, as there is a clear correlation between incidents of experiencing domestic violence and ongoing psychological harm. Many of the forms of disability reported, such as depression and anxiety issues, are also consonant with WLS clients being the victim of violence.

Aboriginal and Torres Strait Islander and CALD status

In 12.5% of matters, the client was Aboriginal and/or Torres Strait Islander. In 26% of matters, clients were born in countries other than Australia, and an interpreter was needed in 13.5% of matters. Once again, these figures do not necessarily support the conclusion that Aboriginal and Torres Strait Islander and CALD clients are statistically over-represented in AVO defendant matters, as the figures may be at least partially explained by the demographics of Western Sydney, where the majority of WLS court services take place.

¹⁴ An interesting comparison may be made between these figures and those provided by the Bureau of Crime Statistics and Research, which provide that both male and female victims of domestic assault are most statistically likely to report to police if they are in the age range 18-24 (62% of victims reporting) and least likely to report if they are 50 and over (28% of victims reporting): NSW Bureau of Crime Statistics and Research (2011) *Trends and patterns in domestic violence assaults: 2001 to 2010* (Issues paper no 61, Katrina Grech and Melissa Burgess), Figure 15.

¹⁵ In the year 2010, the total WLS client breakdown by age was 18-25 (14%) 26-32 (20%) 33-40 (26%) 41-55 (30%) and over 55 (10%).

Identity of the Other Party

In the clear majority of cases, the other party was male identified (86.7%), and overall, the relationship of the other party to the client was most likely to be an intimate partner (68.9% of matters) followed by a non-intimate family member (26.2%). Where the relationship was with an intimate partner, in the vast majority of cases (89%) the relationship had ended at the time the client was interviewed. Where the relationship was with a non-intimate family member, the other party was most likely to be a son or daughter (36.4%) or another relative of the client (36.4%).

Where the client was seeking or had a final AVO for their own protection

Was there a pre-existing AVO for the WLS client's protection?

Only 14 clients (13.3%) had a current final AVO in place for their protection when WLS first took instructions. In situations where a final AVO was in place, in the majority of cases AVOs had been sought by police. The majority of clients reported that their AVOs were made in terms of the mandatory orders only,¹⁶ however, there was often some uncertainty in instructions given to solicitors about the details of previous AVO orders.

Was there a concurrent AVO for the client's protection?

A concurrent AVO application was made for the client's protection at some stage in proceedings against them in 17 cases (16.2%). In the clear majority of these cases, the application for the AVO for the client's protection was made by police. In six cases, the AVO application was made before an application was made against the WLS client, and in eight cases, afterwards. In all of these cases, the cross-application was made within a close time frame (within one month or less), and three cases were recorded as having been made at the same time. Given the relatively short time frame in which cross-applications were made, it is reasonable to assume that for both WLS clients and the other parties, the initiation of AVO proceedings against them provided the impetus to seek one for their protection.

What behaviours did clients report in the application for their protection?

In the majority of cases (76.5%) the AVO application for the client's own protection described multiple incidents contributing to their fear of the other party. In most of these cases (69.2%) these incidents had occurred over the last three to four months. However, in a significant 30.8% of cases clients reported experience of multiple incidents over the previous two years.

The majority of applications for the client's protection reported physical violence (52.9%) and threats (58.8%). Where physical violence was reported, the most common behaviour was punching and slapping. Three of these respondents reported seeking medical attention of some kind for physical violence. The most

¹⁶ In NSW, the standard mandatory orders on an AVO application are as follows:

¹a) The defendant must not assault, molest, harass, threaten or otherwise interfere with the protected person(s) or a person with whom the protected person(s) has/have a domestic relationship.

b) The defendant must not engage in any other conduct that intimidates the protected person(s) or a person with whom the protected person(s) has/have a domestic relationship.c) The defendant must not stalk the protected person(s) or a person with whom the protected person(s) has/have a domestic relationship.

common form of injury recorded by the client was bruising (85.7%) either to the face, arm or abdomen.

In all of the applications made by police for our clients' protection, there was only one incident where the application for an AVO described the client's injuries. In this particular incident, injuries were also described as visible on both parties. In the majority of police applications for the client's protection (70.6%) the client expressed fears for herself. However, police fears for clients were only expressed 31.3% of the time.

What did clients report as exacerbating factors in the violence against them?

WLS clients believed that a variety of different factors had contributed to the violence against them. Out of a total of 17 matters, in six incidents clients reported that the other party's alcohol use or drug use was a factor in the violence. In a further six incidents, the other party's mental health condition was cited by the WLS client as an exacerbating factor. In four incidents, parenting arrangements were reported a factor in relation to the violence.

How often were provisional, interim and final AVOs¹⁷ made for WLS clients?

In cross-applications for the client's protection, provisional AVOs were not made in 70.6% of cases, and 'unknown' in a further 17.6% of cases. Non-provisional (interim) AVOs were also rarely made at any stage in concurrent applications for the client's protection (23.5% of cases). Finally, in cases where concurrent applications for the client's protection were made (17 cases) it appears that only two cases resulted in final orders being made, although the result of at least six clients with applications for final orders for their protection was unknown.

As discussed below, these figures would appear to show that women defendants to AVOs are relatively unsuccessful in seeking AVOs for their protection where there is a concurrent application on foot against them. These figures are concerning, since they highlight the possibility that cross-applications may be used as 'bargaining chips' by perpetrators of violence to offset the AVO to which they are a defendant.

The client as an AVO defendant

Who made the AVO application against the client?

In the majority of cases, the AVO application against the WLS client for the protection of the other party was made by police (87.5%).

How often were both parties accused of violence?

In 20% of cases, the application against the WLS client was related to the same incident as an application for her protection.

¹⁷ Provisional AVOs are court orders made in response to urgent applications by police for protection. They take legal effect immediately upon being served on the defendant. Interim AVOs are court orders made where the court finds that a person is in need of protection before the final disposition of the matter. Interim orders can extend and/or modify provisional orders, or be applied for and made at a mention. Final AVOs are made when found necessary by a court after a hearing, when they are consented to, or when they are undefended after service has been effected. They are also made upon a finding of guilt for certain personal violence offences. Their usual duration is for 12 months or two years.

What behaviours were clients accused of in applications against them?

In the majority of cases (68%) the other party's complaint against the WLS client related to a single incident only. The majority of these incidents occurred in a short time frame (i.e. the last three to four months) and only a very small percentage complained of incidents over a long-term time frame (6.1%).

Threats (47.6% of incidences) were the most common acts complained of by the other party, followed by physical violence (39.8%). In cases where physical violence was reported, the most common kind of physical violence complained of by the other party was punching and or slapping (66.7%) followed by scratching and biting (23% each). Interestingly, in situations where biting occurred, it almost always (80%) occurred on the arm or hand. In WLS' view, it is important for police and courts to take notice of the fact that a bite on the hand or arm is likely to be a mechanism of self-defence, rather than an affirmative act of violence.¹⁸

The most common injuries described in the application were scratch marks or lacerations to the other party (60%) followed by bruising (35%) or bite marks (20%). Bruising was most commonly 'other facial bruising' (not a black eye).

The most common threat was a threat of violence to the other party (85.7%). Where harassment occurred, it was far more likely to be telephone harassment rather than any other kind (95.7%). In the majority of cases, medical treatment was not sought for physical violence (76.3%).

Where an application was made by police, injuries were only described as visible on the other party and not on the client around one quarter of the time (27.6%). In the majority of cases, there was no injury described in the application, or injuries were not described as visible on either party (together, 58.6%).

The other party expressed fears for themselves in their application 56.9% of the time, while the applicant officer expressed fears in 40.2% of cases.

What did the other party report as exacerbating factors in relation to violence?

In applications for an AVO for the other party's protection, the most common aggravating factors described were the client's mental health condition, and the WLS client's use or overuse of alcohol. Parenting arrangements were also an aggravating factor in relation to around 25% of the cases complained of by the other party.

How often were provisional, interim and final AVOs made against WLS clients?

The most common last known result for a client was a final determination at a mention, signifying (as shown below) that in the majority of cases the matter did not proceed to a hearing. Provisional AVOs were made against 38.2% of WLS clients.

¹⁸ For further commentary upon the kinds of violence that women and men are more likely to report in Australia and the higher likelihood of women's violent behaviours being more consistent with self-defence, see, for example: Jane Wangmann (2010) 'Gender and Intimate Partner Violence: A Case Study from NSW', *University of New South Wales Law Journal*, 33(3), 945. For related commentary from the United States, see, for example, Alesha Durfee, 'The Gendered Paradox of Victimization and Agency in Protection Order Filings' in Garcia and Clifford (Eds.) (2010) *Female Victims of Crime*, 243.

In 31.6% of the cases, WLS clients consented to an interim AVO being made. Interim AVOs were most likely to contain orders 4, 7 and 11 as additional orders.¹⁹

Where the application was a final AVO for the other party's protection, the results were as follows: final orders made (39%) dismissed at hearing (22%) withdrawn by the other party or police (34%) and unknown (5%). Strikingly, in 91.7% of cases where final orders were made against WLS client, they were made by consent, rather than being contested.

Associated criminal charges against the client

Charges were laid against the client in 18 cases (17.8%). The majority of these were for assault (55.6%) or property damage (44%). The result of these charges was unknown in the majority of cases (88.2%, or 15 incidences). The penalty was also unknown in the majority of these cases.

Associated criminal charges against the other party.

Charges were laid against the other party in two cases (2%) for assault. One (1) case resulted in a conviction but the penalty was unknown for both.

Other history of violence between the parties

In 66.7% of cases, the client complained of a history of violence by the other party. Most dominantly (96.7%) this was disclosed in instructions to WLS. In 60% of the cases where historical violence was disclosed, it was physical violence, the most dominant form of which was punching and/or slapping (89.5%).

In 19% of cases there had been previous expired or non-concurrent AVOs for the protection of the client, and in 8% charges had been laid against the other party, with convictions resulting in 4% of cases.

In 8% of cases, there had been previous expired and non-concurrent AVOs for protection of the other party from the WLS client. Two charges had been laid previously against a WLS client with a conviction in one case.

Relevant family law proceedings

Of those parties who had children under 18 years the majority (67%) had no formal family law arrangements in place. In around 10% of cases, the parties had current or pending family law proceedings.

A 68R application²⁰ was only made in one instance, and was dismissed.

¹⁹ Order 4 provides that a defendant must not go within a particular distance of the premises at which the protected person(s) may from time to time reside or work; Order 7 provides that the defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant's legal representative, or for the purpose of a referral for mediation under the Community Justice Centres Act 1983; and Order 11 provides that the defendant must not destroy or deliberately damage or interfere with the property of the protected person(s).

²⁰ Under s 68R of the *Family Law Act 1975* (Cth) a Court making a family violence order is vested with jurisdiction to revive, vary, discharge or suspend an existing parenting order or arrangement made under that Act. Previous State and Territory reports on the use of s68R in family violence proceedings appear to demonstrate that its use is comparatively rare: Australian Law Reform Commission (2010) Report 114, *Family Violence – A National Legal Response* [16.19].

Generally speaking, it was difficult because of the extremely small sample size to draw concrete conclusions about the interaction between family law proceedings and AVO matters.

Commentary on data results

As discussed further in the section below, there are limitations on the conclusions that may be drawn from the data described above. Notwithstanding this, there are a number of interesting trends that emerge from the results of the data form that are worthy of discussion.

Women defendants to AVOs report that they are victims of violence

One of the most striking results is that in two-thirds of all of the cases, women defendants to AVOs reported that they had been the victim of violence in their relationship. A significant number also reported that they were the victim of violence during the incident where the police had attended and taken out an AVO for the other party. While the number of clients who had a previous final AVO against the other party was closer to one in five, it is possible that this disparity may be consistent with the high rates of under-reporting of domestic violence.

A minority of women defendants to AVOs have final orders made against them

Only 39% of WLS clients defending AVO proceedings had final orders made against them. As discussed further below, it is necessary to consider the possibility of sample bias in interpreting these results. For example, WLS' own advocacy on behalf of those women defendants could be associated with the high rates of dismissal or discontinuance during court proceedings. However, the relatively low rate of success by parties pursuing AVOs against WLS clients may raise the question of whether all of the AVOs brought against women defendants were done so appropriately.²¹

Of those applications that did result in final orders being made against WLS clients, it is also striking and problematic that nearly all were made by consent, rather than being made as the result of a contested hearing.

The high rate of consent to orders being made may demonstrate a reluctance to face the other party in court, or of generally high levels of intimidation of women defendants by the other party. WLS regards these factors as pragmatic, though regrettable, choices made in the context of ongoing systemic abuse by perpetrators of violence: for many clients, having court proceedings concluded is a relatively higher priority than remaining engaged in the court system with a violent partner or family member in order to have an AVO against them dismissed. An example of a scenario involving these factors is described in Case Study 3 below.

Case Study 3

X (the woman defendant), and Y (the male identified victim in a police application) were married for 8 years and had recently divorced. In the police Application for Y's protection, it was noted that there had been an extensive history of violence and previous AVOs. X's instructions were that each of these AVOs had been for her protection.

²¹ For a more detailed comparison of how effectively the AVO system works for men and women in the particular context of ADVO cross-applications, see: Jane Wangmann (2009) 'She said...' 'He said...': Cross Applications in NSW Apprehended Domestic Violence Order Proceedings, thesis submitted to fulfill the requirements for a doctorate of law, Sydney University.

AVO incident

The parties met in a car park to discuss an incident concerning the family home. Y became angry at X, and pushed her forcibly into her car, putting heavy pressure on her neck. As they were leaving the car park in their own cars, the parties continued yelling at each other and were stopped by a passing police car. Y told police that he needed an AVO to stop the verbal

Result

After one court mention where Y did not turn up or give instructions to the police, Y instructed police to pursue the AVO. Not wanting the matter to continue any longer, X consented to an AVO being made in the mandatory terms 1(a)(b)(c) for 12 months.

Issue

In matters where women defendants believe they will be able to comply with AVO conditions, they may feel under some pressure to consent rather than give evidence at a hearing against their violent ex-partner. However, an AVO being put in place for the protection of a violent ex-partner may give that person further scope to manipulate and control the defendant's behaviour, including by threats to make further reports to police and have the defendant charged for breach of AVO.

Women defendants to AVOs are rarely granted orders for their own protection

As detailed in the results above, women defendants who sought provisional, interim or final AVOs for their own protection were successful on only a very low number of occasions. Given the extent to which WLS clients reported that they were the victim of violence, these statistics are concerning.

Where cross-applications are on foot, it is important that both solicitors and courts do not simply dismiss the importance of protection proceedings by concluding that the relationship was simply one of mutual violence where neither party is in 'greater need' of protection from the other.²² This is particularly true given that it was evident in a number of cases that in instances where a cross-application was on foot, a mutual agreement to 'drop' the AVOs was considered a bargaining chip by some parties, and even by courts and police. In all cases, it is extremely important that AVO applications are treated upon their merits, and finalised and dismissed accordingly.

Applications against women defendants were mostly made by police

The clear majority of AVO applications made against women defendants were initiated by police. While this is consistent with the vast majority of AVOs overall being initiated by police,²³ this fact may militate against a potential hypothesis that the rise in numbers of women AVO defendants is primarily attributable to an increase in the knowledge by other parties of how to manipulate the system in private

 ²² As Wangmann notes, this approach not only fails to protect primary victims of violence, but also obscures the visibility of domestic violence, reinforcing the picture that both parties are responsible for violence: Jane Wangmann (2012) 'Incidents v Context: How does the NSW Protection Order System Understand Intimate Partner Violence?' 34 *Sydney Law Review* 716.
²³ Legal Aid NSW, Report on Legal Aid NSW Services to People in Domestic Violence Situations (2008) 103.

applications. Furthermore, it suggests that in any reform of the law in this area, an examination of police policy and practice is crucially important.²⁴ In a legal system in which police are encouraged to take domestic violence seriously, but rarely initiate concurrent AVO proceedings against both parties, it is clear that effective training is of the utmost importance for police to be able to identify who is most in need of protection when conflicting allegations are made.

Private applications against women defendants were frequently vexatious

In many of the private applications brought against WLS clients, instructions were given that that the applications were without basis, or were brought for the sole purpose of intimidating the WLS client. In spite of the relative decline in the percentage of private applications for AVOs brought overall, this dynamic continues to be a persistent problem encountered by WLS clients. An example of a typical case in this regard is illustrated in Case Study 4 below, based on an incident that WLS assisted with in 2013.

Case Study 4

X (the woman defendant), and Y (the male private AVO applicant) had been in a brief dating relationship, and had consensual sex together once. About a week after this occurred, Y came to X's house and forced her to have sex with him. X made a report of the assault to police. Police declined to pursue charges against Y on the basis of a lack of evidence.

AVO incident

A week later, X saw Y at the local shopping centre and confronted him about the sexual assault. Y initiated a private AVO application against X, alleging that she had been harassing and following him.

²⁴ It is also of interest to note the relatively high rates at which police express fears for male protected persons in domestic violence applications when compared with female protected persons in our sample. While it is difficult to say what is driving this trend, it may be that men may be less likely to report as holding fears of women than the reverse, either for reasons of gender or because such fears are genuinely less likely to be held. It is also possible that police may take the view that male victims of domestic violence may not be taken seriously unless a strong case is made that they have fears for their safety. Alternatively, Police may believe it is a requirement that they list their fears, in order to bring the AVO within the scope of s 16 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which governs the situations in which Courts may make an AVO. However, if this is the case, it is WLS' position that police should express their fears in all cases where they are genuinely held, irrespective of an additional legal imperative to do so.

The result

The matter was resolved at the third court mention when X made undertakings not to have any further contact with Y.

Issue

Use of AVO system by male perpetrators of violence to further intimidate and harass victims.

Differences and similarities in applications for and against women defendants

In a comparison of AVO applications for and against women defendants, it is notable that women defendants were likely to report multiple incidents of violence against them, over a longer period of time, and with higher rates of physical violence. In comparison, the majority of complaints against women defendants relayed a single incident over a short time frame, most commonly in the form of a threat.

While the fact that a complaint relates to a single issue or to events over a short time frame should by no means diminish the importance of any complaint, the stark contrast between the number and incidence of violence complained of in applications for and against the WLS client is a notable difference between the two groups.

Both women defendants and other parties were also highly likely to report parenting factors and alcohol use as an aggravating factor in the violence against them. While alcohol has frequently been documented as an aggravating factor in violence against women,²⁵ it is less clear that disputes about parenting matters, especially prior to separation, are acknowledged as a trigger.²⁶ It is also notable that the primary factor said to have been a trigger for the violence of women defendants was their mental health. While a significant proportion of WLS clients did report having mental health problems, a claim that a woman's mental condition is unstable should be treated with a high level of caution. Women's mental health is likely to be compromised as a result of experiencing violence, and should not be viewed as an 'aggravating' factor in violence towards them. Furthermore, claims of women's poor mental and emotional health have historically been used to discredit them as untrustworthy or unreliable. Indeed, such claims may in fact be regarded as a continuation of a pattern of behaviour constituting violence against women.²⁷

Limitations and factors associated with the sample size

WLS recognises that a number of limitations are inherent in our research methodology. The first relates to sample size. According to the Bureau of Crimes Statistics and Research (BOCSAR) in 2010, the total number of matters involving

 ²⁵ NSW Bureau of Crime Statistics and Research (2011) *Trends and patterns in domestic violence assaults: 2001 to 2010* (Issues paper no 61, Katrina Grech and Melissa Burgess), 4.
²⁶ It is, however, relatively well accepted in Australian literature that pregnancy can be a factor associated with increased violence against women. See, for example: J Webster et al (1994) 'Domestic violence in pregnancy: a prevalence study' 161(8) *Medical Journal of Australia* 466; Australian Domestic and Family Violence Clearing House and Angela Taft (2002) *Violence against women in pregnancy and after childbirth*, Issues Paper 6.

²⁷ It is further appropriate to use caution with the term 'mental health issues' as a catch-all term, particularly considering the growing body of evidence and community understanding that issues such as depression and anxiety are commonplace in the general community.

women AVO defendants who were 18 years and over in NSW was 3549.²⁸ Our sample size of 105 files, then, represented around 3.4% of the total number of matters involving women AVO defendants overall. While this percentage is by no means insignificant, it was important for us to note that the sample represented a relatively small number from which to be able to draw quantitative conclusions about the experience of women AVO defendants.

Further, the sample is not representative of NSW cases involving women defendants in AVO cases. First, the cases were not randomly selected from across the state. Secondly, a number of our cases were triaged by a WDVCAS worker experienced in understanding the dynamics of domestic violence. These workers are generally well placed to identify when a women defendant to an AVO matter has been the perpetrator of serious violence and is, in fact, not herself a victim of violence. In such cases, it is unlikely that she would end up being referred to WLS at court for legal advice through the WDVCAS.

A different kind of limitation on the data sample relates to the nature of assistance given by WLS to women AVO defendants. Since WLS typically appears in AVO matters as duty solicitors, our files may not reflect the entire experience of our clients in the justice system. For example, even when WLS accompanied some women defendants through the entire court process, the police processes that had led up to the AVO proceedings was sometimes difficult to determine, either because of a lack of available paperwork, or a client's inability to give complete instructions about their engagement with the police. Furthermore, in a number of instances WLS were called upon to appear for only one mention, and were not informed of the later final result of the proceedings. This was particularly the case where criminal charges were associated with the AVO, as WLS does not give criminal law advice. As discussed above, the advice and representation given by WLS to our clients may also have biased the sample reflected in the data form.

Finally, it is important to note that it is difficult to determine how the results WLS derived should be interpreted without some other comparison group or point of differentiation. As noted, our data form allowed us to compare the experience of our client with that of the other party in terms of how successful an individual was in finalising an AVO cross-application. However, those results cannot properly be read as applying to the broader experience of AVO male defendants generally, as there are likely confounding factors associated with the circumstances of a cross-application.

Each of the above factors highlights the pressing need for further research by researchers, policy makers, police, CLCs and other key agencies in the domestic violence sector in order to better contextualise the results of WLS' study.

Implications for policy makers

The relative invisibility of the existence of women defendants to AVOs as a discrete group has the potential to create poor policy outcomes. The fact that significant numbers of women defendants report that they are the victim of violence may have impact upon multiple policy areas, a number of which are discussed below.

²⁸ Data provided by Bureau of Statistics and Crime Research to the author on 15 May 2013.

Police policy and practice

Although much further research is needed to determine the frequency with which inappropriate AVOs are pursued against women defendants, it is clear from the research that in a number of cases, the applications initiated against women defendants appeared unnecessary for the protection of the other party.

NSW Police have in place a Domestic and Family Violence Policy in which they undertake, when investigating a domestic violence incident, to look at 'all the circumstances of the incident [and] the history of domestic violence between the two parties'.²⁹ This policy is also supported by clear Standard Operating Procedures detailing the manner in which officers are required to determine the primary victim in any case of domestic violence.³⁰ While the NSW Police are to be commended for having such standards in place, it is clear that gaps still remain in the implementation of such policies, and that continuous training of officers about the nature and dynamics of domestic violence incidents remains extremely important.

While AVOs are of a civil character, there are multiple consequences that may follow on from being the defendant to an AVO application. There are serious consequences, including criminal charges, for breach of an AVO. An AVO record may also impact upon an individual's future ability to work in particular industries, especially in the sphere of social and community work, and work involving contact with children. These consequences highlight the reasons for which it is highly undesirable that any person be subject to an AVO in a situation where it is not warranted, and the need for police caution in this area.

In the case of women defendants with children who are also victims of violence, police electing to bring an AVO for the protection of the other party may leave women unable to seek an AVO that also protects their children from the other party. This is because Section 48(3) of the *Crimes (Domestic and Personal Violence Act) 2007* specifies that only police can bring an AVO application where a child is listed as the protected person. Although it occasionally occurs, it is highly unusual that police act for both parties in AVO cross-applications.

Family Law

Although the sample size collected by WLS was too small to comment upon how and whether AVO proceedings were used for collateral purposes in family law disputes, it is clear that women who wrongly become the defendants of domestic violence orders may be disadvantaged in any family law proceedings that follow. Under the *Family Law Act 1975*, courts are empowered to consider any history of family violence in making decisions regarding which parties or parents that children will live and spend time with.³¹ While such powers are clearly necessary and appropriate, it is deeply concerning that women defendants who are, in fact, primary victims of violence, may be looked upon less favourably in Family Court proceedings because of being wrongly identified as an aggressor.

 ²⁹ NSW Police, Operational Programs, *Domestic and Family Violence Policy 2012*, p 14.
³⁰ Correspondence between the author and NSW Police Senior Program Officer, Domestic Violence on 27 May 2013.

³¹ The importance of family violence in determining what decisions are in the best interests of a child was particularly underscored by amendments made to the Family Law Act in 2011, see: *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

Housing

It is common for WLS clients to report that they have been refused accommodation in a refuge based on being a defendant to an AVO application. While we understand it is not a formal policy to exclude women from accessing refuge accommodation based on being a defendant of an AVO it is concerning that women defendants to AVOs may be refused emergency accommodation. Where women defendants to AVOs are still in relationships with the perpetrators of violence, AVO proceedings against them may have the effect of limiting their options to leave the relationship. This may also have a disproportionate impact on CALD women, who may not have extended family support networks in place, and low-income women, who may not be able to afford private rental accommodation.

NSW Government Domestic and Family Violence Policy

The absence of consideration of women defendants to AVOs is also evident in other current and proposed government frameworks that regulate the response to domestic violence in NSW. An important recent example of this is the NSW Government Domestic and Family Violence Framework for Reform (the Framework) and NSW Domestic and Family Violence Justice Strategy (the Strategy).

Both the Framework and Strategy allow for information sharing without informed consent. It is not yet clear how victims of violence who are the primary victim but have incorrectly being identified as the primary aggressor can correct incorrect information held about them.

Significantly, the Framework proposes, among other measures, a mechanism for police and service providers to identify individuals at serious threat of escalating violence who will be referred to safety action meetings. The safety action meetings will be attended by government and non-government organisations in order to develop safety plans for those individuals judged to be at a high safety risk.

Although reporting of violence to police and being the protected person in an AVO application is one of the primary ways in which an individual might be judged to be at an increased risk of violence, it is not clear that there is any mechanism envisaged for determining the cases in which the protected person may in fact be a perpetrator of violence, and the women defendant the individual in need of a co-ordinated service response.³² Without a clear means of determining such issues, resources and time could be wasted by agencies for which genuine victims have a considerable need.

Conclusion and recommendations

This report has set out the results of a discrete project undertaken by WLS, which had the aim of building an evidence base with which to inform policy and legal practice in the area of domestic violence and intervention orders. While the results of this research point to a number of suggestive trends, it is clear that more needs to be done by others working in the sector to form a comprehensive picture of the experience of women defendants to AVOs and their experience of the justice system.

³² After advocacy by WLS and others around this issue, the Department of Families and Communities, who are driving the reforms, acknowledged that a shortcoming in the proposed reforms was the lack of appropriate strategies to identify and respond to the primary aggressor of violence: Department of Families and Communities, Women NSW, *Developing a new domestic and family violence framework for NSW*, update 3, April 2013.

While the research undertaken was relatively labour-intensive for solicitors in a community legal centre to undertake, CLCs are also well placed to communicate the experience of otherwise marginalised clients to policy makers. It is hoped that by WLS sharing its experience, others working in the field of domestic violence may be able to undertake similar projects to build a profile of the way in which different state and territory laws and policies affect the situation of women defendants to intervention orders, in order to build a more comprehensive evidence base in this area.

In NSW, the Bureau of Crime Statistics and Research (BOCSAR) has done excellent work in the past in detailing both the effectiveness of AVOs for victims,³³ as well as trends in domestic violence assaults.³⁴ We see value in BOCSAR being able to undertake a comprehensive study into the experience of women defendants to AVOs in the justice system in order to build a qualitative picture of the nature and extent of the issue, and to examine whether the issue is particularly prevalent in different areas of NSW. In a larger study such as that proposed, we suggest that consideration should also be given as to whether the experiences of women defendants to a former partner's application for protection differs to those women where the other party was not their partner or former partner, as such differentiation may shed important light on the particular dynamics of domestic violence in intimate partner relationships.

Since the majority of AVO applications brought against women (and brought generally) in NSW are initiated by police, it is crucial that policy makers and advocates continue to engage with police to strengthen their approach to the identification of primary victims in domestic violence situations. Furthermore, it is crucial that police continue to take notice of and monitor the emerging phenomenon of women defendants to AVOs, and recognise the potential for perpetrators of violence to try and manipulate the system against female victims of violence.

Finally, this report should bring to the attention of policy and decision makers, particularly those in the NSW government, the situation of women defendants when considering further reforms to domestic violence laws and practices. If, as this report suggests, the AVO system may be used as a further weapon of intimidation by perpetrators against victims of violence, this may be highly relevant both in terms of legislative reform to the AVO system, and in terms of putting in place measures to identify perpetrator and victim beyond their status in AVO proceedings.

 ³³ NSW Bureau of Crime Statistics and Research (1997) An evaluation of the NSW
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