

# Centre for Women’s Justice Super-complaint

## Police failure to use protective measures in cases involving violence against women and girls

19 March 2019

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## Executive summary

Through our work with frontline women's sector organisations who support survivors of domestic abuse and sexual violence, Centre for Women's Justice (CWJ) has become concerned that the various legal measures intended to provide protection to women are not being applied properly on the ground. This super-complaint addresses four legal powers available to the police in detail and explores the extent to which, and the reasons why, they are not being used adequately. When all the failures are taken cumulatively, CWJ believes that there is a systemic failure to meet the state's duty to safeguard a highly vulnerable section of the population.

This super-complaint draws together accounts from eleven frontline organisations, whose full reports are to be found in the annex. They include organisations working both nationally and locally, across different parts of the country.

### Failure to impose bail conditions

The Policing and Crime Act 2017 created new restrictions on the use of pre-charge bail, imposing new deadlines and demanding procedures and conditions for extending bail beyond 28 days. As a result, since April 2017 there has been a dramatic fall in the use of bail in rape, domestic abuse and harassment and stalking cases. Many suspects are released without any bail conditions, not even the most basic conditions not to contact the victim or go to her home address, which were standard practice in such cases previously.

- The biggest change is reported by Rape Crisis centres. In the majority of rape cases the parties know each other, and stranger rapes are rarer. One sexual violence service reports that in a sample of 120 current active cases, only approximately five are on bail. Another provides a snapshot of an adult victims' support worker caseload: 29 cases no bail, 3 bail, 5 unknown, and a children and young people's support worker caseload: 17 no bail, 3 bail for 28 days then lifted, 3 in custody. Others reported that a "huge proportion" have no bail or that "routinely" bail is not used.
- In domestic abuse cases the situation is a little better but still very concerning. One frontline service estimates that in standard and medium risk cases bail conditions are used in less than half of cases. In high risk cases bail is generally used, however worryingly two local women's services in different parts of the country report that they deal with some high risk cases where bail is not used, with one organisation estimating 2 to 3 such cases a week.
- The police Inspectorate, HMICFRS, reports a drop of 65% in use of bail in domestic abuse cases in the first 3 months of the new bail regime. Statistics on policing of domestic abuse published for the following year do not include figures on bail.
- There has been a large increase in suspects being invited to attend police interviews on a voluntary basis, rather than under arrest. In law bail then

cannot be used. There are anecdotal reports that this is because it is far more convenient and less resource intensive for police to interview by appointment, and avoids the onerous bail regime. Police officers may also be applying the law on necessity to arrest incorrectly, falsely believing that where a suspect is willing to attend voluntarily an arrest cannot be carried out. CWJ believes that the law allows for arrest on the grounds of a need for bail conditions to protect the complainant, and a High Court judgment in January 2017 supports this.

- A large proportion of those who are arrested are released under investigation without bail conditions, due to a failure to correctly apply the legal test, which is that bail conditions can be used when “necessary and proportionate”. Guidance, training and supervision is required by police forces to ensure that the test is applied properly to protect victims, and that release without bail conditions is not being used simply in order to avoid the additional demands imposed on police officers by pre-charge bail rules.
- When bail conditions are imposed, they are almost always lifted after 28 days. CWJ believes that there is a fundamental problem with the legislation on extensions of bail. This prevents extensions if the police investigation has not been progressed diligently and expeditiously, regardless of the level of risk faced by the victim. The 2017 Act strikes entirely the wrong balance between the rights of suspects and of victims.
- Frontline services have described the impact of the bail changes on survivors:
  - Women are living in fear: case studies in our report describe harassment and even violent assault by men who are not on bail. Even without further offending, women experience increased stress, insecurity and anxiety during a high risk period following a report to police.
  - Suspects make contact with victims leading to some withdrawing their support for the prosecution, especially where there has been a history of coercive controlling behaviour. Statistics show that the proportion of cases dropped due to victim not supporting has risen.
  - It can be more difficult for women to access help from other state bodies such as housing departments and legal aid in the family courts, as no bail means the matter is treated as not serious.
  - Lack of arrest can hinder the police investigation, for example police powers to seize a suspect’s mobile phone.
  - Lack of bail makes women feel that the police are not taking their report seriously. Sometimes family and friends (who may often also be related to or close to the suspect) doubt the credibility of the victim’s account, as lack of bail gives the appearance that there is no police investigation.

## **Failure to arrest for breach of non-molestation orders**

Non-molestation orders (NMOs) are civil injunctions that women obtain by making an application in the family court. They order the respondent not to contact the applicant, or attend her home address or a specified distance from it. A breach is a criminal offence in its own right, with a maximum sentence of five years' imprisonment. However, many frontline women's services report that in a large number of cases police take no action to enforce such orders and do not arrest for the breach offence.

- Breaches are trivialised by police officers, who do not understand them within the wider patterns of domestic abuse, harassment and stalking, and of escalating risk. Officers frequently treat breach incidents in isolation rather than seeing them in the context of the behaviour that led to the order being granted.
- Officers do not have a correct understanding of the breach offence itself, including aggravating and public interest factors, for example where child contact issues are involved.
- When women contact the police to report harassment, stalking and domestic abuse, they are often advised to obtain a NMO, rather than any policing action being taken. This outsources the effort and expense of obtaining protection to the victim. Obtaining legal aid can be a complicated process, and some women do not qualify and have to either pay lawyers, or make the court application alone. In some cases they will have to face their abuser in court. Given these practical and emotional demands, it is particularly concerning that when such orders are breached perpetrators are not arrested.
- Police officers sometimes incorrectly advise women to obtain a NMO when this is not available. Police guidance and training need to be improved so that the law around NMOs is correctly understood and officers correctly assess the inter-relationship between the criminal justice system and the family law system to find the most appropriate legal protection for each individual case.

## **Failure to use of Domestic Violence Protection Notices and Orders (DVPNs and DVPOs)**

These orders carry similar powers to a civil injunction such as a non-molestation order or occupation order. They provide a short-term breathing space of up to 28 days. The process can be pursued without the victim's active support, or even against her wishes, to protect from violence or threat of violence. Therefore, an important difference from NMOs is that DVPN/Os place the responsibility for action upon the police, rather than the survivor. This is especially relevant for particularly vulnerable women who may not feel able to give a statement or deal with a legal process in the civil or criminal courts, and can assist them to leave an abusive relationship.

- Some of the frontline organisations report that they have never come across the use of DVPNs and DVPOs, including those working in London. Statistics published by the police Inspectorate show that some police forces are not using them at all, including the Metropolitan Police who did not issue any DVPOs in 2017 and only a tiny fraction in 2016.
- In other parts of the country forces are making limited use but frontline services report many missed opportunities. One service in Leeds states that in high risk domestic abuse cases approximately 100 recommendations per month are made for such orders but statistics show that only three DVPOs per month are applied for by the police (population of Leeds 780,000). Nationally, statistics show over half a million domestic abuse crimes in the year ending March 2018, but only 5,600 DVPOs applied for, approximately 1% of crimes.
- There are anecdotal reports that police forces are not using these orders because they involve too much work for frontline officers in units that are already seriously under-resourced. Policing bodies have been raising concerns about low usage for several years since the powers were introduced in 2014, but this does not appear to have led to any significant increase in use. A new strategy and adequate funding are required if these protective measures are to make a real contribution to protecting women on the ground.

## **Failure to apply for Restraining Orders**

These orders are made at the end of the criminal process, as part of sentencing when an offender is convicted, or where is a need for protection following an acquittal, or even where the prosecution decide not to proceed with a trial and offer no evidence.

- Several frontline organisations report that the police and prosecution frequently overlook making an application for a restraining order at the end of the case. Some state that they have to routinely check, chase and push police officers to ensure that applications have been made before trial, and that their staff attend court to request that orders are sought, as otherwise this is overlooked. The concern is that when women are not supported by a voluntary organisation, restraining orders are not obtained.
- In the Magistrates Court, if an application is overlooked at the sentencing hearing there is no power to grant one later. This may be possible under the slip rule to correct a mistake, but the law is unclear, leading to confusion in court about whether the Magistrates have power to grant this or not.

## Introduction

Centre for Women's Justice (CWJ) is a charity established in 2016 with the purpose of holding the state to account on its response to violence against women and girls (VAWG). Our Director, Harriet Wistrich, and our two solicitors, are specialists in civil claims against public authorities and public law. In addition to conducting our own strategic litigation we provide training to frontline organisations in the women's sector on failures around VAWG in the criminal justice system and the legal remedies available to address them. We also provide legal advice to frontline organisations and members of the public in individual cases involving policing and prosecution of VAWG.

This super-complaint draws together failures by the police to utilise four separate legal protections that exist for the benefit of vulnerable people experiencing domestic abuse, sexual violence, harassment and stalking, the overwhelming majority of whom are women and girls. Whilst we analyse the circumstances surrounding each of these legal powers, it is important to appreciate the cumulative effect of these widespread failings, which together amount to a systemic failure on the part of the state to provide protection for some of the most vulnerable people in our society. Use of these powers can prevent serious harm and a lack of response by police creates impunity, with perpetrators perceiving that there are no repercussions for their actions, and survivors<sup>1</sup> perceiving that nothing happens when policing action is sought and that it is not worth reporting to police.

This systemic failure persists despite the Government's avowed determination to address VAWG, since, as Home Secretary, Theresa May launched a *Call to End Violence Against Women and Girls* in 2010. It also persists some five years after HM Inspectorate of Constabulary (HMICFRS) published its first thematic report on the policing of domestic abuse in 2014, with subsequent regular progress reports, the latest published only last month. The police service as a whole adopted a "positive action" approach to VAWG in 2008<sup>2</sup>, yet that has not been reflected in practice on the ground, as identified by HMICFRS in its reports. One in five women killed by a current or former partner in 2017-2018 had been in contact with the police<sup>3</sup>. It appears from the evidence reported by frontline women's services, that lack of protection for women is on the increase, partly resulting from a lack of understanding of abuse by police officers so that available powers are not properly utilised, and partly due to under-resourcing of police forces. We shall consider these factors in more detail below.

Not only is there a political and policy failure by the state to effectively tackle a social ill acknowledged to be of epidemic proportions (see statistics at page 9 below) but also a failure to meet the state's legal duties under the European Convention on Human Rights (ECHR). Our legal analysis below sets out the law around the state's positive obligations to protect the right to life (Article 2), prevent inhuman and

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<sup>1</sup> The terms victim and survivor are used interchangeably, as victim is the terminology used in criminal justice settings, but survivor is the preferred term within the women's sector

<sup>2</sup> ACPO Guidance on Investigating Domestic Abuse 2008

<sup>3</sup> The Times 12 March 2019 <https://www.thetimes.co.uk/edition/news/one-in-five-women-killed-by-their-partners-had-contacted-the-police-nc009nggl>

degrading treatment (Article 3) and enforce respect for private and family life (Article 8). When the policing of VAWG is compared to that of other crime types, these breaches are clearly discriminatory, impacting disproportionately on women and girls (Article 14).

We are concerned that the real hurdles to effective action to protect women from violence, abuse and coercion are not being tackled, and that despite the efforts devoted to it, the Domestic Abuse Bill will not produce the desired protection. The problems we see are not a lack of legal powers or a need for broad legislative change (though some changes in the law are identified in this super-complaint) but a failure to utilise existing legal powers. This seems to be due to the low priority accorded to VAWG, lack of training and effective supervision, a failure to apply deterrent sanctions on officers who disregard these duties, and chronic under-funding of frontline policing of VAWG. There seems little purpose in adding a Domestic Violence Protection Order to the statute books to lie unused, when similar existing orders are not being utilised.

## **Outline of this report**

The four protective measures addressed in this super-complaint are:

1. Failure to impose bail conditions:
  - a. Where suspects are interviewed following voluntary attendance and bail cannot be used;
  - b. Where suspects are interviewed under arrest, release under investigation without bail, or release on bail without bail conditions;
  - c. Where bail is not extended beyond 28 days
2. Failure to arrest for breach of non-molestation orders;
3. Failure to utilise Domestic Violence Protection Notices and Domestic Violence Protection Orders;
4. Failure to apply for restraining orders at conclusion of criminal proceedings;

We shall briefly outline the wider picture on policing of VAWG, and then examine each of the four protective measures separately, and for each consider:

- The view from the frontline
- Information from other sources (where available)
- The response of oversight bodies
- CWJ's analysis and recommendations for action.

Firstly, we summarise each of the four legal powers:

### **Bail conditions**

The power to release on bail only arises on release following an arrest, therefore it cannot be used where a suspect has been interviewed following their voluntary attendance for interview without an arrest. Where suspects have been arrested, new pre-charge bail provisions came into force in April 2017, under the Policing and Crime Act 2017. The presumption is of release under investigation without bail unless bail is “necessary and proportionate” and where bail is used the same test applies to the imposition of bail conditions. Typically, these conditions include not contacting the victim and not attending her home address, or an area around it.

### **Arrest for breach of non-molestation order**

A non-molestation order (NMO) is a civil order granted by the family courts under the Family Law Act 1996, which typically orders the respondent not to contact the applicant directly or indirectly, not to attend her home address or an area around it or other locations such as her place of work or study. An NMO is only granted where the applicant and respondent are or have been in an intimate or family relationship.

Breach of an NMO constitutes a criminal offence<sup>4</sup>, triable either-way offence in the Magistrates Court or the Crown Court, carrying a maximum sentence of 5 years’ imprisonment.

### **Domestic Violence Protection Notices and Orders**

A DVPN can be issued by the police for 48 hours, and before its expiry the police can apply to the court to grant a DVPO for up to 14 to 28 days. These order a perpetrator not to contact a victim or survivor and not to attend her home address, including moving out of the address if they are co-habiting. These orders can be obtained by the police regardless of whether the survivor has provided a statement, supports a prosecution or an application for an order, and even against her wishes.

### **Restraining Orders**

A restraining order is made by a criminal court at the conclusion of a prosecution, upon the application of the prosecutor. It must be made at the sentencing hearing where there has been a conviction. It can also be made following an acquittal, and even where the prosecution has decided to offer no evidence against the accused.

### **Methodology**

The four protective measures covered in this report have been brought to our attention during our training sessions with women’s sector frontline organisations as raising issues in their day to day casework. No doubt there are others that are relevant, but these appeared to be the most significant.

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<sup>4</sup> Created by Family Law Act 1996 s.42A

We have sought data from frontline women's organisations on their experience of these measures and eleven organisations who have provided data are listed in the annex and their contributions can be found there, with three organisations providing data anonymously<sup>5</sup>. We made requests for data to those services who had participated in our training, or who we had advised in individual cases, and other services reached us through word of mouth, with two responding to a request circulated by Women's Aid England. There is no reason to think that these organisations are not typical of the sector as a whole, but we have not used any formal research methodology in producing this report. We sought a reasonable balance between organisations dealing with domestic abuse and those working with survivors of sexual violence. We have obtained data from three organisations operating nationally across England and Wales and eight locally, with some geographical spread around the country and working in several police force areas<sup>6</sup>. Also included in the annex is a Masters dissertation from 2018 which is an exploratory study of the use of bail in rape cases based on interviews with six survivors, ISVAs and specialist sexual offences officers<sup>7</sup>.

We would stress that the twelve documents in the annex contain detailed and rich accounts and analysis. There is only space to pick out a few key pieces of information and quotes for inclusion in this report and those dealing with the super-complaint are asked to read the documents in the annex in full.

## **The policing of VAWG – the wider picture**

The HMIC report of 2014 painted a damning picture of the policing of domestic abuse. Its introduction begins with:

The extent and nature of domestic abuse remains shocking. A core part of the policing mission is to prevent crime and disorder. Domestic abuse causes both serious harm and constitutes a considerable proportion of overall crime. It costs society an estimated £15.7 billion a year. Seventy-seven women were killed by their partners or ex-partners in 2012/13. In the UK, one in four of young people, aged 10 to 24, reported that they experienced domestic violence and abuse during their childhood. Forces told us that crime relating to domestic abuse constitutes some eight percent of all recorded crime in their areas and one third of their recorded assaults with injury. On average the police receive an emergency call relating to domestic abuse every 30 seconds.

Its main findings were summarised as follows:

The overall police response to victims of domestic abuse is not good enough. This is despite considerable improvements in the service over the last decade, and the commitment and dedication of many able police officers and police staff. In too

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<sup>5</sup> Frontline services work closely with the police and sometimes feel that criticism of police performance may impact negatively on their work and the service received by survivors

<sup>6</sup> Unfortunately we were unable to obtain data from local organisations in Wales.

<sup>7</sup> Produced by Sarah Learmonth, a student on the MA Woman and Child Abuse course at London Metropolitan University

many forces there are weaknesses in the service provided to victims; some of these are serious and this means that victims are put at unnecessary risk. Many forces need to take action now.

Domestic abuse is a priority on paper but, in the majority of forces, not in practice. Almost all police and crime commissioners have identified domestic abuse as a priority in their Police and Crime Plans. All forces told us that it is a priority for them. This stated intent is not translating into operational reality in most forces. Tackling domestic abuse too often remains a poor relation to acquisitive crime and serious organised crime.

The concerns raised in this super-complaint need to be seen against this background. The subsequent progress reports from HMIC have demonstrated that, whilst there has been some improvement, this is limited and serious problems remain.

The 2015 Progress Report found some improvements at policy level, but there remained huge inconsistencies between forces, suggesting that policies are “not translating into effective practice”<sup>8</sup>. The February 2019 Progress Report contains a survey of the views of 350 non-police domestic abuse practitioners. Almost two thirds felt there had been some improvement since the 2014 HMIC report and a fifth of them a large improvement. Conversely, and worryingly, this means that over a third consider that there has not been any improvement since 2014, and the vast majority believe that any improvement is not large.

Even more worryingly, domestic abuse progress reports and the HMICFRS PEEL 2018 report suggest that in some respects the situation is worsening, in particular arrest rates for domestic abuse are falling “at an alarming rate”<sup>9</sup>. The 2017 Progress Report stated that:

HMICFRS continues to have concerns about the falling levels of arrest in domestic abuse cases and the variation in the arrest rates from force to force. Many of the practices we identified, such as not arresting the perpetrators of domestic abuse and not charging them are contrary to force policies. For example, most forces have a positive action policy, which means that in general the force would support the arrest of a suspect, and any officer deciding not to arrest a suspect would need to justify that decision to a supervisor. This suggests that the actions of some frontline officers are not being adequately managed, monitored and supervised, with some not following the policies and practices set for them by police leaders.

A joint thematic inspection by HMICFRS and the CPS Inspectorate of the criminal justice response to harassment and stalking in 2017 also identified widespread failings by police to understand and act upon these offences. It recognised that many victims were survivors of domestic abuse who had left coercive and controlling relationships and were then subjected to long-standing stalking and harassment. It states that:

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<sup>8</sup> 2015 Progress Report pages 17 and 68

<sup>9</sup> 2017 Progress Report page 10

On too many occasions the police failed to take robust action to protect victims... The combined effect of these failures was to leave victims vulnerable to repeat victimisation and serious harm, either during the criminal justice process itself or afterwards<sup>10</sup>.

With this context in mind we now turn to the four failings outlined in our super-complaint.

## **1. Bail conditions**

The new regime for pre-charge bail which came into force in April 2017 tipped the balance of rights heavily in favour of suspects and against victims. The initial intention was to address situations where suspects remained on bail for an unlimited period of time without judicial oversight, which in some prolonged investigations could be for years. Under the new regime the presumption is for release under investigation without bail unless bail is “necessary and proportionate” and for bail conditions to be imposed where “necessary and proportionate”. When bail is used, an officer of Superintendent rank or above must authorise any extension beyond 28 days and an extension beyond three months must be authorised by an Assistant Chief Constable or Commander. Beyond six months further extensions must be authorised by the court. There are conditions which must be met before extensions can be granted. These time limits were opposed by the police before the passing of the Act on the grounds that they would introduce considerable bureaucracy.

### **1.1 The view from the frontline**

All the frontline organisations that provided data reported a widespread lack of bail conditions in cases involving domestic abuse, harassment and stalking and rape. This is highly surprising given that the first three of these behaviours invariably involve repeat victimisation and in the majority of rape cases the parties know each other. Many, if not most, such cases involve vulnerable women.

Frontline organisations report that women are living in fear, exposed to persistent and dangerous men, as our three bail case studies illustrate. Whilst they may be in fear even if bail conditions were used, and in some cases conditions may have been breached, bail conditions at least represent an attempt by the authorities to provide protection during the critical period following a report to police. The fact that some suspects do respect bail conditions is demonstrated by our case study below in which the survivor was contacted as soon as the initial 28 day bail period was over. In some areas officers are reportedly telling suspects that they may not contact the complainant, and in one a template letter is even used, however there is no formal legal force behind this. This practice only demonstrates that there is a perceived need for protection (see more below on proportionality).

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<sup>10</sup> Joint HMICFRS and CPSI report on police and CPS response to harassment and stalking July 2017 pages 12-13

## **Rape cases**

Information from Rape Crisis centres shows that there are no bail conditions in place in the vast majority of cases, and in the small minority where bail is used it is not extended beyond 28 days. For example, a breakdown of the caseloads of two ISVAs provided the following snapshot in January 2019:

From an adult ISVAs caseload:

3 known to have or have had bail conditions in place (one had them removed when law was changed)

20 where no bail conditions have been used

5 unknown if bail has been used

9 unknown if it was used initially but known to be no bail conditions in place now

From a children and young persons' ISVA's caseload:

3 had bail for 28 days at start of investigation - bail now ended

2 held in custody throughout investigation

1 already in prison for unrelated crime

17 no bail

1 out of the country, voluntary return sought initially but not complied to, arrest now pending

One Rape Crisis centre reports that in a sample of 120 current active cases, approximately five are on bail. Another Rape Crisis centre states:

“For the ISVA team, a huge proportion of the cases that we work on involve the perpetrators being voluntarily interviewed and so no bail conditions are imposed. If bail is used it is only in very particular circumstances and we almost never see an extension beyond 28 days... so often conditions are simply dropped after this time even though risks haven't necessarily changed.”

A third Rape Crisis Centre reported:

- Since the introduction of the Bail Act, we do not see bail conditions as a matter of course. Routinely, perpetrators are asked to go into the police station for a voluntary interview and consequently released under investigation. This includes perpetrators who are being investigated for childhood sexual abuse.
- We were told at a police-facilitated training about the bail changes that granting of bail moving forward will be where it is necessary and proportionate. This has not been the case.
- One of our ISVAs has seen so few cases where a perpetrator has been arrested and had bail conditions. She thinks it is probably less than five in the whole time she has been working at RASASC, since starting in November 2017. She has supported approximately 90 clients in that time. She wasn't here before the changes to the Bail Act.

An officer from a Sexual Offences Team interviewed for the Masters dissertation stated that:

Post-April our office [Sexual Offences Team] conditional bail rate has probably dropped by about 80%. We can't work this system

### ***Domestic abuse, harassment and stalking***

All the organisations reported release under investigation without bail as being very common and having increased significantly since the changes to the bail regime in April 2017. Many of them provide IDVA services and therefore work primarily with high risk victims.

For example, one IDVA service reported:

This is an area of rapid increase since new Policing and Crime Act 2017. We are increasingly seeing 'Under Investigation' on daily basis.

A service working with women presenting a range of risks in London reports that the majority of standard and medium risk cases did not have bail conditions in place, and that occasionally even some cases at MARAC, which by definition are high risk cases, do not. An organisation in another part of the country, Leeds, describes the following events at MARAC:

When attending the Daily MARAC / MASH as discussed above we routinely hear that suspects are being invited into the police station in order to be voluntary interviewed (VA). I would say on average 2-3 cases a week. This is happening when the perpetrator has been assessed as posing a high risk of harm or of homicide to the victim. Our IDVA's routinely challenge that VA is not appropriate in high risk cases due to this meaning bail conditions cannot be put in place. The police are sometimes asked to review this decision but in practice this does not change this practice. I would suggest that in the last 3 years there has been a significant increase in the number of suspects being invited in for VA.

An experienced worker at the National Domestic Violence Helpline reports that calls to the helpline indicate that bail is being used less and less, and has even heard from women callers that they have been told by the police that they "*don't do bail any more*".

### ***Impact of lack of bail conditions***

Prior to April 2017, in cases involving violence against women bail conditions were applied routinely for the duration of the investigation prohibiting contact with the complainant and attendance at her home address. Bail conditions are intended to protect from a known risk and a lack of bail will place some women at risk of serious harm (see case study below on bail and voluntary attendance). Inevitably a lack of bail conditions makes women feel extremely insecure during a stressful and high-risk period following the reporting of an offence. Any contact with the suspect, and the fear of such contact, means that women are living in a heightened state of anxiety. An IDVA service describes how:

As a result of [lack of bail conditions] we see cases where perpetrators get back in touch with victims. As a result of this contact it is understandable why victims may want to retract their statements and no longer support the prosecution due to influence from the perpetrator. The knock-on effect of this is the number of suspects being charged is reducing. This also needs to be viewed in the context of coercive and controlling behaviour that without placing restrictions on a perpetrator they can continue this type of abuse and make it more difficult for a victim to seek support.

A Rape Crisis service reports instances where perpetrators have contacted survivors during an on-going criminal case, this was reported to police and nothing was done. In addition, even if there is no intimidation, any discussion of the case and the evidence by the parties following a suspects' police interview is problematic for any future trial.

A lack of bail conditions can have other wider ramifications for survivors. A Rape Crisis service reports that it can be more difficult for women to obtain assistance from statutory services such as local authority housing departments because bail is treated as an indication of seriousness of an offence. They also describe how a woman was advised by several family law solicitors that she would not be able to obtain legal aid for a family law case because the suspect had not been arrested and put on bail. The service goes on to state that:

This highlights both the practical but also symbolic power of bail which is commonly understood in our society to mean that someone is suspected of a crime. Where there is no bail used there is often very little evidence that an individual is even under investigation. In one case the suspect was taken off bail due to the legal changes to its use. Shared family members subsequently accused the victim of having fabricated the entire ongoing investigation and called her mental stability into question. In this case the investigating officer had to send an email which confirmed that there was in fact still an investigation ongoing despite the suspect not having any bail conditions in place. We find that bail conditions are rightly or wrongly taken to indicate the legitimacy and seriousness of the matter under investigation. When bail is not used this can mean that those who report such crimes may lack confidence that they are being believed and taken seriously by police as well as others in a position to offer help.

Research conducted for the Masters dissertation also points to bail conditions being treated as relevant to perceptions of the victim's credibility:

The ISVAs were explicit: when a perpetrator was arrested, questioned and conditional bail was granted, it suggested the allegation was credible and influenced the level of support survivors received:

*'[Granting bail] forms part of that evidence doesn't it, where people are making judgements about whether or not it's a lie, which they're assuming most family and friends are assuming it's a lie or a false allegation' (ISVA2).*

Organisations report other effects of lack of bail, including that evidence cannot be gathered from suspects, eg *“one of our ISVAs had to push really hard for a perpetrator’s mobile phone to be taken, because they had to arrest him to get it.”* They also describe the overall sense for survivors that because there is no arrest and no bail the matter is not being taken seriously, in their own eyes and those of the suspect, eg *“Frustration and anger around the fact that the investigation has little to no impact now on the lives of abusers when it is so disruptive for survivors”*.

### **Reasons for lack of bail**

Several frontline organisations express the view that interviewing suspects by appointment without arrest is far more convenient for the police, and takes up far less police time than going out to arrest. One organisation noted that over recent years there has been a closure of some custody suits, so that there are fewer and they are busy so it is much easier to have a suspect come in by appointment without the need for a custody officer. A Rape Crisis service describes how:

We have also heard anecdotally that bail applications put a huge strain on the DIs whose workloads have increased exponentially. We heard that signing off on bail applications was taking up a lot of their time, which might explain some of the reasons other officers are not applying for it. Our notes from a meeting we attended on this stated that the a police officer “estimated she would have on average 40 applications for extensions per week”. At the same meeting, we noted that “police think they will never meet ‘exceptional circumstances’ to extend bail beyond the 3 months”.

It would appear that under-resourcing coupled with the bureaucratic demands of bail extensions make voluntary attendance a far more attractive option than arrest and bail.

## **1.2 Information from other sources**

HMICFRS has documented a reduction of 65% in bail granted in domestic abuse cases within the first three months of the new bail regime, to 30 June 2017<sup>11</sup>. There are no comparable figures for rape cases, where data from frontline organisations suggest bail is now used even less frequently than for domestic abuse. The use of bail across all crime types is reported to have dropped by 75% within the first six months of the new regime<sup>12</sup>. *The Times* has reported that figures it obtained in 2018 revealed that police bail has been used in 4 per cent of cases since the reforms were introduced in April 2017, down from 30 per cent of cases. These would cover all offence types, not only cases involving violence against women.

The HMICFRS PEEL Police Effectiveness report for 2017 commented that:

Overall, domestic abuse bail has reduced by 65 percent... The College of Policing has given some initial consideration to how this legislation has been implemented. However, it is important that an unintended consequence of this legislation is not

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<sup>11</sup> HMICFRS Progress Report on Domestic Abuse of February 2019

<sup>12</sup> HMICFRS PEEL Police Effectiveness report for 2017, pages 63-64

less protection for vulnerable victims, nor a feeling on their part that they are less supported and protected by the police.<sup>13</sup>

Unfortunately figures on use of bail in domestic abuse since mid-2017 have not been published. The Office for National Statistics Domestic Abuse Data Tool contains HMICFRS figures for use of voluntary attendance and bail to year ending 30.6.17, but for the subsequent year all other categories of data are published with these two figures omitted. As there are no comparison figures for either 2016 or 2018 in the Data Tool no patterns can be drawn.

The HMIC Progress Report on Domestic Abuse of 2017 notes that “the use of arrest is falling at an alarming rate” and that falling levels of arrest are linked to increased use of voluntary attendance to “manage demand”<sup>14</sup>.

The report describes how:

In some cases officers had invited perpetrators to attend police stations to give their accounts, otherwise known as voluntary interviews, rather than using a power of arrest. Not only did this give entirely the wrong impression of the seriousness with which the police were treating the case, it also meant that bail conditions could not be imposed to protect the victim while the investigation progressed.

The use of voluntary interviews also extended the time taken to investigate offences, because appointments were sometimes made at the convenience of the alleged perpetrator and the investigating officer, rather than putting the needs of the victim first.<sup>15</sup>

The report identifies further knock-on effects of lack of police bail:

The ability of prosecutors to argue that bail conditions are necessary and proportionate to protect the victim when the case is heard at court is limited when the police have already decided not to impose bail conditions.

In addition, the lack of positive action by the police in imposing bail conditions when appropriate could in certain circumstances allow the perpetrator to make representations regarding the seriousness of the behaviour alleged to have taken place.<sup>16</sup>

The joint HMIC and CPSI inspection on harassment and stalking published in July 2017 stated in its conclusions that:

We found that if an investigation was started, victims were often badly let down throughout the criminal justice process. One reason for this was the failure to impose bail conditions on perpetrators, which sometimes left the victim at risk of

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<sup>13</sup> Page 23

<sup>14</sup> Pages 9-10

<sup>15</sup> Pages 53-54

<sup>16</sup> Page 65

further offending. Changes have recently been made to the use of bail. While it is too early to assess the effect of these changes, we will remain alert to any indication that forces and the CPS are failing to protect victims by not imposing or applying for bail conditions respectively, when appropriate<sup>17</sup>.

A further trend reported is of an increase in the number of investigations concluded because the victim had withdrawn support for the prosecution. The HMICFRS reports an increase from 2016 to 2017 from 14% to 17%<sup>18</sup>. In January 2019 *The Independent* newspaper reported Home Office figures for the year ending September 2018 showing a sharp rise in the proportion of cases recorded as “victim does not support action”, increasing to 42% for violence, 35% of rapes and 29% of sexual offences<sup>19</sup>. This pattern chimes with reports from frontline organisations that contact from perpetrators where bail conditions are not in place sometimes results in victims withdrawing from the criminal justice process.

Another indirect impact of the bail reforms which may well contribute to higher attrition rates is the increasing length of investigations where bail is not used, as identified in the Masters dissertation:

*Bail dates also had an important influence on investigation timescales, ‘bail would have kept a focus on the investigation. By making the decision to say we’ll release pending investigation, there are no checks and balances in that’ (officer in Sexual Offences Team). Officers worried that the significant drop in their use of conditional bail could increase investigation delays and consequently, withdrawal rates: ‘Longer term we’ll see a rise in drop-outs during the progression of the investigation. People will just say I don’t want to deal with this anymore’ (Sexual Offences Team).*

Finally, we note that in its reports HMICFRS states that police forces do not understand the reasons for the significant fall in arrests in domestic abuse cases<sup>20</sup>. Forces do not appear to be considering the likelihood that this is due to increased use of voluntary attendance in place of arrest.

### **1.3 The response of oversight bodies**

It appears that the impact of the changes to bail, experienced by our frontline organisations almost two years after their introduction, were identified by policing bodies early on. Yet despite this no decisive action has been taken to tackle the problem and police oversight bodies still appear to be at the information gathering stage.

For example, the HMICFRS PEEL Police Effectiveness report for 2017 noted that

*This year, we started to examine the effect of changes to legislation that limit the occasions on which an accused person can be released on bail in the course of the investigation. Many forces are now releasing increasing numbers of suspects under*

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<sup>17</sup> Page 86

<sup>18</sup> PEEL Police Effectiveness report for 2017 page 47

<sup>19</sup> [Link to Independent article](#)

<sup>20</sup> For example, February 2019 Progress Report page 38

investigation. This is not a substitute for police bail; restrictions cannot be placed on individuals to, for example, prevent them from contacting witnesses or otherwise interfering with an investigation. It is important to establish whether this change is having a detrimental effect on victims. It is too soon to draw conclusions at this stage<sup>21</sup>.

The same report, published in March 2018, stated that

Forces across the country expressed concerns regarding the fall in the use of bail. There needs to be a better understanding of the extent to which bail is now being used appropriately. The police service needs to understand the impact of the legislation and whether the increased use of 'release under investigation' is having a harmful effect on victims.

The College of Policing has completed a limited review of the new bail legislation since it was implemented and the national policing lead has conducted some initial research with a number of police forces. This use of bail needs to be the subject of close, continuing scrutiny and we will continue to engage with interested parties and examine the results as they emerge. Recommendation 4 addresses this potential problem.

Recommendation 4 required that:

By September 2018, all forces should review how they are implementing changes to pre-charge police bail, working with the National Police Chiefs' Council lead.

The review should include an assessment of how far vulnerable people are being affected by these changes.

As soon as possible, forces should then put into effect any necessary changes to make sure they are using bail effectively, and in particular that vulnerable victims get the protection that bail conditions can give them.

This recommendation does not put forward any specific guidance on the issues, for example on the use of voluntary attendance and the test on necessity for arrest, (see page 20 below), the correct implementation of the test for bail under the 2017 Act, or the practical and legal problems around bail extensions.

Six months have now passed since September 2018 and it is not known whether forces have implemented any changes, but certainly reports from frontline organisations of the position in the first two months of 2019 do not indicate that there has been any improvement on the ground.

CWJ notes that recent HMICFRS publications, including the Domestic Abuse Progress Report of February 2019 do not set out any views on the source of the problems surrounding the reduction in bail or propose any specific changes that

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<sup>21</sup> Page 47

forces should make. A year has now passed since HMICFRS' call on forces to make changes in general terms, without identifying the changes required. At the time of writing, HMICFRS is planning a thematic inspection of the use of release under investigation and bail, alongside the next PEEL inspection, due to begin in the autumn of 2019, to further investigate the impact of the 2017 Act. We understand that this will include a detailed examination of decisions made upon release from custody. We are concerned that there should also be a focus on the use of voluntary attendance, as such cases would not be captured, and on bail extension decisions.

We note that the Independent Office of Police Conduct (IOPC) "Learning the Lessons" Bulletins do not contain any materials on the impact of the bail reforms of April 2017 on victims of crime, or on cases involving violence against women.

We welcome the recognition by HMICFRS that urgent remedial action is required to address the unintended consequences of the bail reforms. However, we are concerned that the policing oversight bodies have not provided forces with an analysis of the root causes of the negative impacts on victims' safety and clear proposals for improvement. We call on the oversight bodies, particularly College of Policing and National Police Chiefs' Council (NPCC) to issue clear guidance to forces as soon as possible on how to address the problem as a matter of urgency. HMICFRS can then investigate the position, including whether and how that guidance is being implemented, in the autumn of 2019.

In our view, almost two years on from the bail reforms there is a need for urgent action to curb the way in which the 2017 Act has been implemented in cases involving violence against women. The time for exploring the impact of bail changes is over and a decisive strategy is required to urgently address the far-reaching consequences, as vulnerable people remain unprotected.

We now turn to our own analysis of the underlying legal issues around the reduction in use of bail and then our proposed actions.

#### **1.4 CWJ's view of the legal position**

A lack of bail conditions can arise from one of three things:

- a) A suspect being interviewed following voluntary attendance, so that there is no power to use bail;
- b) A suspect who has been arrested being released under investigation without bail, because it is not deemed "necessary and proportionate" to either use bail at all or to impose bail conditions;
- c) A failure to extend bail beyond the initial period of 28 days.

We analyse each of these three inter-connected provisions separately.

## a. Voluntary attendance

It is clear that the reduction in the use of bail has gone hand in hand with a steep rise in the use of voluntary attendance of suspects for interview, as opposed to interview under arrest. One Rape Crisis centre states:

We have seen the increased use of voluntary attendance interviews occurring at the same time as the changes to the bail regime in April 2017. This suggests voluntary attendance is being used to avoid granting bail. Police officers have told at least two members of staff as such.

Voluntary attendance is linked to the application of Section 24 of the Police and Criminal Evidence Act (PACE). This requires that before an officer can arrest a suspect, not only must s/he have reasonable grounds for suspicion, but must also consider the arrest to be necessary for one of six specified purposes. Whilst this provision has been in place since January 2006, the use of voluntary attendance for interview has reportedly increased rapidly in the last few years. This may well be connected to the new bail regime, and a desire to avoid the use of bail, with its cumbersome bureaucracy.

Legal judgments have established that when an officer is satisfied as to the suspect's identity and address and that he will attend an interview voluntarily, necessity criteria under Section 24 are not met and the person should not be arrested<sup>22</sup>. Such a situation arises commonly in cases involving violence against women, compared to other crime types such as shoplifting or burglary, where a suspect's identity may be unclear and there is clearly a flight risk. However, these legal judgments did not involve situations where there was any need for bail conditions to protect the victim.

Whilst voluntary attendance has many attractions for the police, its use may also arise from a misconception amongst officers that they do not have the power to arrest and cannot arrest in many cases because the suspect's identity is not in question and he would attend voluntarily. Section 24 PACE does not overtly refer to the need for bail conditions as a valid basis for necessity (where none of the other criteria for necessity under Section 24 apply).

One IDVA service states that:

We have heard Officers in the [MARAC] meeting saying there is not the necessity to arrest hence why [voluntary attendance] is happening. We raise concerns about this practice but this does not seem to alter this decision. There appears to be a lack of understanding that the police can have a necessity to arrest in order to implement bail conditions.

In our view a need for bail conditions in order to provide protection for the complainant can and should make an arrest necessary within the meaning of Section 24. There are a very limited number of court decisions on the application of Section

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<sup>22</sup> *Richardson v CC West Midlands* (2011) and *Hayes v CC of Merseyside* (2011)

24 and, as far as we are aware, only one which considers the question of bail (and none, as far as we are aware, which consider the position since the bail reforms in April 2017). In a judgment in January 2017<sup>23</sup> Mr Justice Jay analysed the question of whether it could ever be lawful to arrest a suspect under Section 24 solely in order to impose bail conditions. He expressed the view that the need for bail conditions can make an arrest necessary on either one of two grounds under Section 24, namely to allow the prompt and effective investigation of the offence (24(5)(e)) or to protect a vulnerable person from the accused, including preventing interference with them (24(5)(d)).

PACE Code of Practice G on the statutory power of arrest sets out the necessity criteria under Section 24 in paragraph 2.9, with some discussion of the kinds of circumstances that can arise. Unfortunately, it does not mention a situation where bail is needed in order to protect a victim.

PACE Code G Note 2G states that if a person attends a police station voluntarily for interview, their arrest before interview would only be justified if either new information had come to light or it had not been reasonably practicable to arrest them before they attended police station. This means that in most cases under current guidance either officers must arrest a suspect out in the community or not at all.

In our view, where bail conditions are needed officers should never invite the suspect to attend voluntarily for interview as they have the power to arrest under Section 24. Alternatively, PACE Code G should be amended so that on arrival at the police station on a voluntary attendance a suspect can be arrested in order to facilitate use of bail.

We do not know what most police force internal guidance and training on this issue is. However, the College of Policing Authorised Professional Practice (APP) does not appear to address this issue. Its guidance headed “Voluntary attendance / Voluntary interview”<sup>24</sup> contains no discussion of when voluntary attendance is appropriate or inappropriate. It deals solely with the treatment of suspects and there is no mention of bail or the impact of voluntary attendance on victims. Its guidance on lawfulness of arrest<sup>25</sup> simply refers to the need for an offence to be lawful in accordance with Section 24 PACE and contains a link to Code G paragraph 2.9, and there is no mention of voluntary attendance. The guidance on bail (see page 23 below), either in relation to domestic abuse or generally, also makes no mention of voluntary attendance.

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<sup>23</sup> *R (TL) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 Cr. App. R. 29

<sup>24</sup> within the Investigation APP, section on investigative interviewing  
<https://www.app.college.police.uk/app-content/investigations/investigative-interviewing/#voluntary-attendance-voluntary-interview>

<sup>25</sup> within the Detention and Custody APP, section on response, arrest and detention  
<https://www.app.college.police.uk/app-content/detention-and-custody-2/response-arrest-and-detention/#lawful-arrest>

The College of Policing guidance headed “Pre-charge Bail Management”<sup>26</sup> at paragraph 8 encourages forces to collect data on how the new bail provisions are being used and sets out categories of data for forces to collect. All of these relate to circumstances where there has been an arrest. There is no link made between the new bail regime and use of voluntary attendance and all voluntary attendance cases would fall outside of these datasets. Similarly, the Annual Data Return mentioned at paragraph 8.1 applies to all cases where bail has been used, and does not measure the use of voluntary attendance or release under investigation. We are concerned that the reducing use of bail and the reasons for it are not being addressed.

#### **No bail conditions – voluntary attendance**

A woman in Yorkshire reported her ex-husband for repeated rapes during their 13-year marriage, which had been characterised by domestic abuse. He was interviewed by the police and released without bail conditions.

Whilst the rape investigation was still on-going, he came to her home address one night at around 2am. She opened the door and he pushed his way in and held her hostage for approximately 5 hours. During this ordeal he broke a glass and cut her with it, and also tied her to a table.

When she later made a complaint to the police about her vulnerability during the rape investigation the police force stated that the suspect was interviewed voluntarily and therefore no bail conditions could be imposed.

She has now submitted a further complaint that her ex-husband should not have been interviewed voluntarily but under arrest so that he could be subject to bail conditions.

### **b. Use of bail following an arrest**

As set out above, a suspect will be released under investigation without bail unless bail and bail conditions are “necessary and proportionate”. We will consider each of these terms separately. As far as we are aware, there have not so far been any legal judgments on the application of this test under the 2017 Act.

#### **Necessary**

Where there has been repeat victimisation, as in virtually every domestic abuse, harassment and stalking case, bail conditions are necessary to provide protection to the victim, given the risk of the behaviour continuing. Arrest and interview may themselves increase risk, and it is well established that there is a heightened risk of violence at or shortly after separation, which is when many reports of domestic abuse to police are made. In the majority of rape cases the parties know one

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<sup>26</sup> within the Detention and Custody APP, section on response, arrest and detention  
<https://www.app.college.police.uk/app-content/detention-and-custody-2/response-arrest-and-detention/#pre-charge-bail-management>

another, the suspect may well be able to contact the victim, and may well be unaware of the fact or nature of the survivor's account to the police until the police interview, which increases risk of contact afterwards.

Furthermore, the custody officer is not required to have substantial grounds for believing in the necessity of any conditions, only that such conditions 'appear' to be necessary for one of the specified purposes<sup>27</sup>

### **Proportionate**

Where the parties do not live together, as in the majority of harassment, stalking and rape cases, the restriction on a suspect's liberty posed by bail conditions which prohibit contact with the victim or attendance at her address is minimal or non-existent. Bail conditions are therefore proportionate, and protection of survivors should be the primary consideration across the board.

Where the parties are co-habiting, bail conditions requiring the suspect to stay at another address will involve considerable disruption for him. However, if he returns to the home address in many cases the victim will feel the need to move out, taking any children with her, involving even greater disruption to her life and to the children's attendance at nursery, school etc as well as to friends and family who assist. If she goes to a refuge this will have to be outside her local area and require children to change schools. Alternatively, if they remain living under one roof there is an increased likelihood that she will withdraw her support for the prosecution. She may decide to reconcile with the perpetrator and remain in an abusive relationship. Given both these potential outcomes, bail conditions which require the suspect to move out of the family home are proportionate in a great many cases.

Clearly there will be many variable factors in individual cases which have to be considered on their merits, especially where the parties have children together. However, in comparison to other crime types, the starting point must be that bail conditions are necessary and proportionate in the overwhelming majority of cases involving domestic abuse, harassment, stalking and sexual offences where the parties know one another.

### **College of Policing Guidance**

The guidance on "Pre-charge Bail Management" sets out the provisions under the Policing and Crime Act 2017 and states that "necessary and proportionate" have not been specifically defined in the Act. It then sets out relevant factors based on the application of Article 8 ECHR<sup>28</sup> to the private and family life of the suspect. Whilst Article 8 requires a balancing of rights and some of the factors relate to the rights of victims, the discussion should include an analysis of ECHR standards from the perspective of victims and the state's positive obligations (see page 48 below for our fuller account of the state's duties to protect). In our view where these rights conflict, the right of victims to safety and protection would clearly outweigh the respect for a suspect's private life.

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<sup>27</sup> Ed Cape 'Defending Suspects at the Police Station' paragraph 10.118

<sup>28</sup> European Convention on Human Rights

The College of Policing guidance on domestic abuse<sup>29</sup> does seek to balance the rights of victims and suspects, stating that in domestic abuse cases suspects should be released on bail during an investigation, for no longer than reasonably required to complete the investigation and normally no longer than three weeks, unless the investigation is protracted.

This domestic abuse guidance is strongly supportive of the use of bail:

Officers should make every effort to consult victims prior to making the bail decision. Custody officers should refer to victim statements, interview records and any available victim personal statements before making decisions relating to conditional bail. They should ensure that bail conditions help to protect victims, children and witnesses from intimidation...

**No contact means no contact!**

- Officers should make it clear to the suspect that contact means any method of communicating with the victim, including sending flowers or cards, texting, messaging, Twitter, Facebook and other forms of social media. It also includes any communication via a third party that is not expressly permitted by the bail condition, be that a friend of the suspect, a member of the victim's family or one of their children, eg, sending messages back with the child after permitted contact with the suspect.
- Ignoring this could amount not only to breach of bail but also witness intimidation, which is a serious offence.

These two sets of guidance – general guidance on bail and guidance on domestic abuse - make no reference to one another, with no apparent attempt at consistency between them. The guidance on the 2017 pre-charge bail regime should make clear that bail is considered necessary in domestic abuse cases (as well harassment, stalking and sexual offences cases). There should be guidance on the level of risk faced by the victim that justifies bail conditions and how to balance the risk to the victim with rights of the suspect in a proportionate manner.

In any event, the domestic abuse guidance on bail is clearly not being applied by a great many officers given that suspects are released under investigation as a matter of routine, sometimes even in high risk cases. We also note a lack of similar guidance in sexual offences cases.

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<sup>29</sup> within the Major Investigation and Public Protection APP <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/post-arrest-management-of-suspect-and-casefile/#bail-pre-and-post-charge>

### **No bail conditions – release under investigation**

A woman in West London experienced repeated rape and violence from her husband throughout their marriage. When her child was a few months old, she reported the abuse to the police. The husband was released under investigation without bail conditions. She was subsequently informed that several other women had previously reported sexual offences perpetrated by him to the police.

The husband continued to harass the woman after she reported to the police and so she felt that she had no choice but to borrow money to obtain a non-molestation order and occupation order as she was frightened for hers and her child's safety. She was unable to obtain legal aid. He owned a number of properties and had considerable access to resources.

The husband breached the terms of the civil order repeatedly. He texted her, approached her and her home address and shared sexual images taken of her without her consent. In addition, cars belonging to her family, her family home abroad and the office of her solicitor were all vandalised. The husband left the country and some of the digital breaches were carried out abroad. The police eventually arrested him for breaches of the civil order but he was never charged either for these or for harassment or stalking. She remains extremely fearful for her own and her family's safety.

### **c. Extensions of bail time limits**

The 2017 Act applies stringent terms for extensions of bail periods by the police and the court. One of the requirements that must be met for extending bail is that the police investigation is being conducted diligently and expeditiously<sup>30</sup>. An extension beyond three months can only be granted for cases designated as being exceptionally complex. Even in domestic abuse cases the APP states that there should only be an extension beyond three weeks where there is a "protracted investigation or other compelling consideration".

Whilst speeding up investigations is an admirable aim, in reality, especially with very stretched resources and increases in reporting of domestic abuse and sexual offences, the criteria to extend bail may not be met because investigations have not been progressed swiftly enough. This is a windfall for suspects and leaves victims exposed through no fault of their own. Even in a case which is clearly high risk and there is no question that bail conditions are required, if the investigation is not progressed properly there will be no bail after an initial 28 day period. This cannot be acceptable and achieves a wholly improper balance between the rights of suspects and victims. The 2017 Act is built around a framework of protections for suspects: as a further example, the Act requires that before bail is extended the suspect or his legal representative must be informed and any representations made by them

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<sup>30</sup> Condition C, Section 63 Policing and Crime Act 2017

considered<sup>31</sup>, without any requirement to consult victims<sup>32</sup>. Furthermore, 28 days is not a long time to be on bail, and neither is 3 months in cases that are not minor. It is unlikely that investigations can be concluded in these time-frames, for example many rape investigations take around a year. The reforms were initially motivated by a need to address far longer periods on bail.

In our view a change to the 2017 Act is required to achieve a proper balance between the needs of victims and of suspects around extensions to bail. This Act and its impact also fly in the face of the Government's policy on domestic abuse and the attempts to increase protections through the Domestic Abuse Bill now going through Parliament. Article 8 rights of suspects should not outweigh the needs of victims and the state's positive duties under Articles 2, 3 and 8, indeed such cases could be a matter of life and death (as is well known, on average two women a week are killed by a partner or ex-partner). In addition, the fact that hurdles for extension are so high, and set what may often be unachievable timetables for investigations, is likely to encourage officers to avoid the bail regime altogether, preferring voluntary attendance or release under investigation without bail. The system creates perverse incentives due to the onerous demands of the bail regime at a time when police resourcing is under strain, especially in units dealing with violence against women.

Another particular problem created by bail limited to 28 days is that after this time has passed, especially if there have been no breaches, it will often be far more difficult for a survivor to obtain a NMO, than if there were no bail conditions from the outset and her NMO application had been made quickly following the last incident. She is then excluded from both kinds of protection. The grant of legal aid for an ex parte application for a NMO is based on very recent harm. The imposition of bail conditions for the lifetime of the criminal case, or at least for a significant period, such as six months (a typical period for a NMO) avoids this problem.

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<sup>31</sup> Section 63 Ibid

<sup>32</sup> The College of Policing APP on domestic abuse instructs officers to "make every effort" to consult victims on an initial release on bail, but not on bail extensions, and this is not a statutory requirement

### **Bail conditions lifted after 28 days**

A woman in London reported attempted rape, sexual assault, revenge porn and false imprisonment perpetrated by her ex-partner. The perpetrator was arrested and released on bail with bail conditions not to contact her.

The bail conditions were then lifted after 28 days. The police did not notify her of this and did not put any other safety measures in place. On the same day that the bail conditions were lifted the perpetrator made multiple attempts to make contact with her. This was reported to the Sexual Offences Investigations Trained officer (SOIT) but no actions have been taken to safeguard her as the SOIT stated the attempts to contact her did not have any “malicious intent”. The officer did not consider putting any other safeguards in place or advise her of any alternative safety options (such as applying for a civil protection order).

Since then she has been petrified of leaving her home and is unable to continue leading her everyday life as she is scared that the perpetrator will try to contact her again.

### **CWJ recommendations for action:**

- HMICFRS should conduct a thematic inspection to examine all above practices, including a strong focus on the link between voluntary attendance and use of bail and on the application of the provisions for extending bail. This inspection should address what steps are being taken by forces to remedy the reduced use of bail in cases involving violence against women, both forces’ own initiatives or applying guidance from College of Policing and NPCC.
- Fresh guidance should be produced by the College of Policing within its APP on “Pre-charge Bail Management” and by NPCC on the use of pre-charge bail, stressing the need for victim protection and the appropriateness of bail conditions in cases involving domestic abuse, harassment, stalking, sexual offences and other coercive offences where the parties know one another, based on the approach within the APP on domestic abuse. The guidance should set out the primacy of the state’s obligations towards victims under Articles 2, 3 and 8, as against suspects’ Article 8 rights.
- Guidance should be produced by College of Policing and NPCC explaining that a need for bail conditions can fulfil the necessity criteria under Section 24 PACE.
- Code G paragraph 2.9 should be expanded to include a need for bail conditions as one of the potential criteria under Section 24(5)(d) and (e).
- Code G Note 2G should be amended to permit arrest on arrival at the police station following voluntary attendance for the purpose of imposing bail conditions.

- Consideration be given to legislative change which would permit release on bail and the imposition of bail conditions after an interview of a suspect under caution conducted following voluntary attendance.
- The pre-charge bail regime under the 2017 Act be amended to allow less onerous procedures with realistic timeframes for investigation, in order to facilitate the use of bail. Considering should be given to removing or extending bail extension periods.
- The 2017 Act be amended to allow extensions to bail where bail conditions are necessary and proportionate, even if the investigation has not been conducted diligently and expeditiously. The provisions should be amended to ensure that victims are not disadvantaged or put at risk as a result in delays in investigations. Detailed consideration should be given to whether legislative change is required or whether this can be achieved by some other route. If legislative change is needed HMICFRS is asked to identify an appropriate vehicle for this in any forthcoming legislation, including possibly the Domestic Abuse Bill.
- HMICFRS should inspect the training on Section 24, voluntary attendance, and use of bail, by police forces. The application of any new guidance by College of Policing and NPCC on voluntary attendance and bail conditions, including supervision, should be monitored by forces and HMICFRS.
- IOPC should address the inappropriate use of voluntary attendance and failure to utilise bail correctly in its Learning the Lessons Bulletins and train its staff to apply the correct approach to these within its casework.

## 2. Arrest for breach of non-molestation orders

Breach of a non-molestation order is a criminal offence, triable either way, with a maximum sentence of 5 years. Sentencing Council Guidelines set a starting point for an averagely serious breach at 1 year's imprisonment<sup>33</sup>, roughly equal to the starting point for a theft of £10,000<sup>34</sup>, therefore this is by no means a minor offence.

### 2.1 The view from the frontline

#### ***Failure to arrest***

Frontline organisations report that failure to arrest for breach of this offence is common, with a couple of organisations raising this unprompted as a particular issue of concern in advance of CWJ's training sessions. The National Domestic Violence Helpline reports that this issue arises in a large number of calls received. Paladin, the National Stalking Advocacy Service, examined 40 cases at random (from

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<sup>33</sup> Sentencing Council Breach Offences Definitive Guideline in force from 1 October 2018 page 23 category 2 culpability B to A

<sup>34</sup> Sentencing Counsel Theft Offences Definitive Guideline page 6 category 3 culpability A

approximately 2,000 cases dealt with per year) and found a failure to arrest for breach of a NMO in 16 of them. Every organisation that provided data to us and works with survivors of domestic abuse reported failure to arrest to be a problem, though one organisation primarily expressed concerns about very long delays and no charges brought which make survivors feel that civil orders are ineffective.

A local authority IDVA service reports that:

At least half, if not higher of all current IDVA cases where there is a NMO / RO in place, breaches have not been pursued by police. Comments from the IDVA team have included that often the police approach to breach of a NMO is:

- Not taken seriously, it was only a minor breach....
- Not enough evidence to suggest it was a breach
- A complete lack of understanding about what 'indirect contact' or 'intimidating behaviour' is
- At worse the responsibility of the breach is placed on the victim, 'you responded to...' 'you made contact....'

One frontline service describes how and why more minor breaches are not acted on by the police:

The main problem is that police do not view many types of breaches of orders as their paradigm idea of what constitutes a breach. Their idea of a breach is threats, assaults, a perpetrator turning up at a woman's house. Breaches such as repeat contact, for example sending repeat text messages, or approaching women in public places, are trivialized and not treated as breaches.

The National Domestic Violence Helpline describes how:

Frequent breaches include contact such as letters, cards and e-mails, walking and driving past her house when they have been ordered not to approach her address or go into a particular area. Police officers often do not seem to regard such actions as breaches and do not understand the fear that women live with day to day.

It appears that officers treat incidents in isolation, rather than part of a pattern of behaviour, often a very protracted one. So, for example receipt of text messages or e-mails may not appear to be a serious matter, but the conduct that led to the NMO being granted may have included sending 30 messages a day. If prohibited conduct continues and the order is not enforced, it effectively becomes meaningless in the eyes of both the survivor and the perpetrator. Organisations report that survivors lose trust in the police and cease reporting breaches.

Trivialisation is clearly apparent from comments such as those described by one organisation:

Women are told, for example, that he hasn't really done anything, or where there are repeat calls from a withheld number they may say "how do you know it's him".

Another organisation states that when women report breaches, even threatening text message, they are often told to ring 101, an indication that police do not view this as a serious matter. Trivialisation stems from a lack of understanding by officers of the dynamics of domestic abuse, especially after a relationship has ended, and lack of appreciation of escalating risk.

One organisation states that it is quite common for abusers to make contact with victims shortly before an order is due to expire. Typically, they will tell a friend or family member of the victim to tell her that they intend to move back in when the order finishes (although most NMOs prohibit contact indirectly through third parties). In such circumstances police often taken no action. In one case a third party passed a message on to a woman from her abuser that he was coming after her, in breach of the NMO. She did not report this breach to the police because they had not taken any action on previous occasions. As a result, when she applied for legal aid to extend the NMO this was refused because she had not reported and did not have a Crime Reference Number.

A particularly problematic area arises around child contact. A number of frontline organisations report that police officers view this as a valid reason for contact, even when there is a NMO in place. One organisation reports that “*some extremely negative comments have been made in relation to child contact: ‘dad just wants to see his children’, ‘be reasonable’ etc.*”. Another organisation reports that in such situations police view this as a civil matter for the family courts, rather than a criminal matter. In fact, using contact arrangements with children in the context of a breach is an aggravating factor under the sentencing guidelines and close proximity to children is a public interest factor in favour of prosecution under the CPS legal guidance<sup>35</sup>. Furthermore, child contact is often used by fathers as a means of continuing to perpetuate harassment, abuse and control over their ex-partners. For all these reasons, breaches occurring around children and child contact should be treated more seriously, rather than less.

Finally, some frontline organisations report problems in enforcement of NMOs where police systems do not have accurate records. A frontline service reports that:

A further problem arises when women obtain an NMO and we e-mail a copy to the police station, but it is not logged onto the system. Poor record keeping means that the existence of the NMO can be difficult to trace when there is a problem later.

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<sup>35</sup> CPS Legal Guidance “Civil Proceedings and legislation”

### **Failure to arrest for breach of non-molestation order**

A woman in Buckinghamshire suffered long-standing domestic abuse and eventually her husband was arrested for common assault and criminal damage. She then obtained a non-molestation order, which he did not contest, and he agreed to move out of the family home. The order stated that he must not contact her or their son directly or indirectly except through solicitors, must not come within 100 meters of her home address and must not encourage or incite others to do any acts which would breach the order.

Later that year the husband, with two other men, attempted to break into her home. He was seen and intercepted by a neighbour, who provided a statement to police and was willing to attend court. At first the police agreed that he should be immediately found and arrested. However, they delayed and soon after downgraded this to calling him in for a voluntary interview. She warned the police that he had been repeatedly invited in for voluntary interviews in the past and had avoiding coming in. They ignored her concerns and eventually gave up trying to contact him. To date he has never been arrested for this offence and never interviewed.

Following this incident the woman was harassed and stalked by her husband. She reported this to the police who again invited him for a voluntary interview which he failed to attend. It was only when she raised this at the next family court hearing that his barrister advised him to attend. The police interviewed him and he agreed to an undertaking that he would stop daily calls and e-mails to her, however he was not charged with the breach of the NMO or harassment or stalking. When she raised the attempted break-in at a hearing in the family court he relied on the lack of an arrest and accused her of perjury.

### ***Appropriateness of NMOs***

A related issue raised by a number of organisations is the use by police of NMOs as an alternative to taking policing action. Whilst in some circumstances a NMO may be an appropriate measure alongside a police investigation, in many cases it is treated as the solution and police simply advise the woman to obtain a NMO and refer her to an organisation that will assist her to do this.

The National Domestic Violence Helpline reports that:

We receive many calls from women who say that they contacted the police to report conduct by a perpetrator such as harassment, stalking or other abuse and the police have not taken any action but advised them to obtain a civil injunction. These women were expecting some kind of policing response. Sometimes they are told that there were no witnesses or other evidence but often the police do not regard it as a criminal matter unless there are threats being made. This is despite the fact that repeated unwanted contact amounts to the criminal offence of harassment.

This issue is part and parcel of the inadequate response to harassment and stalking, identified by HMIC and CPSI in their joint inspection published in 2017. The majority of harassment and stalking cases involve ex-partners and many have a history of domestic abuse.

In effect, police officers are placing the burden of obtaining protection upon victims themselves, and outsourcing the effort and expense involved to them. The burdens around bail are described above and the section below on DVPNs and DVPOs describes how the amount of work involved is cited as a key reason why police officers are not using those measures.

Women's Aid have told HMICFRS that as a result of the changes to bail

Some police officers have been advising victims to apply for non-molestation orders in cases where they haven't used bail, thereby placing the responsibility on the victim to protect themselves<sup>36</sup>.

It appears that many officers treat NMOs as being simply available to women on demand, without any appreciation of the hurdles and difficulties involved in obtaining such orders. The National Domestic Violence Helpline worker states:

It seems that police officers have little understanding of what is required to obtain an NMO. This is quite a demanding process for a woman to go through. Firstly, she may have to apply for legal aid which means providing bank statements, mortgage details and other financial documents. Some women obtain legal aid but then have to pay a contribution, which can be quite large depending on their income. Those who cannot obtain legal aid either have to prepare the court application themselves or pay a solicitor. Many women represent themselves without solicitors. A detailed written statement must be prepared along with a court application form and these must be lodged with the court urgently. In many cases where an order is granted ex parte at the first hearing the perpetrator may challenge the order and the woman has to attend a second hearing where she must confront him in court. In some cases, such as those involving repeat e-mails and text messages it is unlikely that an order will be granted ex parte and she will have to face the perpetrator at a hearing.

Therefore, obtaining an NMO is not a quick and easy alternative to a DVPO or DVPN, but quite an involved process. However, a very large number of women do go through this process to try to obtain protection.

### ***Advice on NMOs***

Not only is there an excessive reliance by the police on NMOs, but police officers sometimes wrongly advise women to obtain NMOs in situations where they are not available. Frontline services report that police officers do not appear to have an understanding of the conditions for obtaining a NMO. For example, in our case study

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<sup>36</sup> HMIC Domestic Abuse Progress report Feb 2019 page 41

on Restraining Orders below, when a RO had been overlooked at sentencing the officer in the case advised the woman concerned to obtain a NMO instead. She was in work and would not qualify for free legal aid so this would mean a considerable sum in legal fees. A family law solicitor advised that it was highly unlikely that a NMO would be granted given the passage of time since the last incident and the intervening conviction.

It is important to stress that in some circumstances NMOs provide a better remedy than DVPN/Os or bail conditions. A NMO order usually lasts for six months or a year in contrast to police-imposed restrictions which are limited to 28 days (if bail is not extended). Breach of a NMO is a criminal offence, unlike breaches of the other two restrictions, which can only trigger an arrest, though as noted above this makes little difference if NMO breaches are not acted upon. Very often a NMO will not be granted if there are bail conditions or other order in place. If there have been no breaches it may well be harder to obtain a NMO after 28 days when a DVPO or bail are about to lapse, than to obtain one immediately after the last. This will vary from case to case and court to court, depending on the degree of risk, and, according to an experienced family law solicitor, also depending on how busy the family courts are.

Whilst a NMO order may provide the best protection in some cases, if a woman is unlikely to apply, or won't qualify for legal aid, then this may not be a viable option (see section on DVPN/Os at page 37 below for discussion on particularly vulnerable women). From the perspective of survivors, the easiest and swiftest protection is the traditional imposition of bail conditions for the lifetime of the criminal case.

We also note that some women prefer to seek a NMO to keep matters in the civil courts in the hope of avoiding an escalation, especially where they do not wish to support a prosecution. Women may feel empowered by making their own application, under their own control, with a direct rapport with the court on conditions tailored to their needs. We do not under-estimate the value of NMOs, but merely stress that they should not be used by the criminal justice system as an alternative to policing action.

Therefore, the decision on the best legal tool is a complex one and depends on factors in the individual case. It is not known whether police officers receive any training on the law around NMOs, which form part of the family law system rather than the criminal justice system. We note that the College of Policing APP on domestic abuse contains misleading guidance on NMOs. It states that "*The victim may apply for [civil injunctions] even if the perpetrator is subject to bail conditions or a DVPO, as those offer only short-term protection.*"<sup>37</sup> However, whilst there is no prohibition in law on a NMO being granted alongside bail, in practice NMOs are often refused on the grounds that there is another form of protection. When this has expired a NMO may or may not be granted, depending on the circumstances, as noted above. The College of Policing needs to have an accurate overview of how the

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<sup>37</sup> <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/arrest-and-other-positive-approaches/#civil-orders>

criminal justice and family justice systems inter-relate, and ensure that information given to complainants is correct and in their best interests.

The family courts issue approximately 27,000 NMOs per year<sup>38</sup> therefore a great many women choose to go through this process seeking protection. It is unacceptable that when these orders are breached they are not enforced by the police. Often women were advised by the police to obtain such orders in the first place, instead of providing a policing response.

## **2.2 Response of oversight bodies**

We are concerned by the lack of attention given to breach of NMOs by oversight bodies within their publications, which may well indicate a lack of appreciation of the importance of these orders and of the failure to enforce them. In most HMIC publications on domestic abuse they are referred to only in passing or lumped together with breach of orders generally, which itself is given little prominence within lengthy reports. Usually the focus is on breach of DVPN/Os, despite the fact that in 2018 more than five times as many NMOs were granted as DVPOs<sup>39</sup>. The section on DVPN/Os below contains a discussion on the chronic under-use of these remedies. Furthermore, breach of a DVPO is not a criminal offence, unlike breach of an NMO, therefore the response to the latter would be expected to be more robust. The fact that NMOs are the only protective order within the control of women themselves to obtain, further increases their importance, as the existence of an NMO demonstrates that a woman has gone to some lengths to try to gain protection.

The very extensive 2014 HMIC report on domestic abuse mentions the existence of civil injunctions but contains no discussion on their use, responses to their breach or even of the fact that breach is a criminal offence. The 2015 Progress Report contains a section headed “Breaches of DVPOs and Other Orders”<sup>40</sup> with a focus on DVPOs, with statistics on breach of DVPOs broken down by force. Recommendation 5 at the end of that section relates solely to DVPOs and not other orders. The 2017 Progress Report also contains a section on “Breaches of DVPOs and Other Orders”<sup>41</sup> with a focus on breach of DVPOs and no separate mention of NMOs except in one case study. Similarly, the HMICFRS Domestic Abuse Data Tool records rate of breach of DVPOs but not of NMOs. A word search on “breach” in the joint HMIC & CPSI report on harassment and stalking identifies breaches of bail conditions and restraining orders, with no mention of NMOs.

Although there is no analysis of figures, HMICFRS reports do contain accounts from domestic abuse practitioners expressing concerns on this issue. The 2015 Progress Report states that<sup>42</sup>

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<sup>38</sup> Ministry of Justice Family Court Statistics Quarterly, England and Wales, July to September 2018 published 13 Dec 2018 show 6,837 NMOs granted in that quarter, which multiplies to an annual figure of 27,348.

<sup>39</sup> 4,878 DVPOs granted by the court in year ending March 2018 according to the HMICFRS Domestic Abuse Data Tool Nov 2018, as compared to approximately 27,000 NMOs – see footnote 38

<sup>40</sup> Page 58 - 60

<sup>41</sup> Page 38

<sup>42</sup> Page 58-59

There were concerns raised by domestic abuse practitioners and victims HMIC spoke to about the lack of appropriately robust action in enforcing breaches of DVPOs, as well as non-molestation orders and restraining orders...

Victims consistently expressed disappointment with the lack of action taken when orders or bail conditions were breached. Some victims described a history of breaches where they perceived very slow or no action at all had been taken by the police. This had a detrimental effect on these victims and their confidence in the police and criminal justice process. They explained that they felt they had gone through a lot to obtain these orders and injunctions and for the police not to respond quickly and decisively was a significant disappointment to them...

Respondents to the practitioner survey also reported a lack of police action in relation to offenders who breach bail conditions or non-molestation orders, which led to loss of victim confidence in the police.

It is therefore disappointing that no data is collected by HMICFRS on NMO breaches and there are no specific recommendations or actions raised in HMICFRS reports on failures to arrest for breach of NMOs, given that Parliament has decided to make this a serious criminal offence. Sentencing Guidelines now address a wide variety of aggravating features. Accounts from frontline organisations for this super-complaint indicate that many officers do not understand the seriousness of this offence, or sometimes even what conduct amounts to an offence.

It is noteworthy that in the February 2019 Progress Report, in tables of the top five competencies identified by domestic abuse practitioners as requiring a lot of improvement on the part of police officers, “responds effectively to breaches of orders and bail” was ranked highest for requiring improvement amongst specialist officers and second highest for frontline officers generally.<sup>43</sup>

The IOPC (and its forerunner the IPCC) have given little or no attention to the issue in their “Learning the Lessons” Bulletins. Two cases are included since 2011 where NMOs were granted and various issues of concern arose<sup>44</sup>. These involved fatalities, which is why they had come to the IPCC’s attention, but these cases turn on their own particular facts and do not necessarily capture routine systemic failings. The June 2007 Bulletin was devoted to domestic violence and raises many valid points, but there is no mention of breaches of NMOs. The March 2018 Bulletin is a thematic issue on Protecting Vulnerable People and contains sections on responding to breaches of restraining orders and on using DVPOs, but nothing specifically on NMOs. It is extremely helpful that the IOPC is taking a thematic approach in its watchdog role, rather than only addressing individual cases, however failure to arrest for breach of NMOs does not appear to have been identified as a persistent problem. There are several case studies over the last ten years relating to failure to arrest for breach of bail conditions. Now that the use of bail has declined the need to respond adequately to breaches of NMOs is even more important.

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<sup>43</sup> Pages 23-24, 2017 was the most recent year for which data was provided

<sup>44</sup> December 2011 Bulletin page 4, November 2014 Bulletin page 8

The oversight bodies appear to have a blind spot when it comes to the importance of NMOs and the devastating impact upon survivors of failures to enforce them. These orders are obtained by women at considerable effort, financial expenditure and emotional cost. When these attempts fail and NMOs are breached, but no policing action is taken, women are put at risk, civil orders appear to both parties to not be worth the paper they are written on and perpetrators enjoy impunity.

### **2.3 CWJ recommendations for action:**

- Guidance and training on NMOs is required so that frontline officers:
  - Understand breaches within the wider context of on-going patterns of domestic abuse, harassment and stalking
  - Treat breach incidents not in isolation but in the context of the behaviour that led to the order being granted
  - Understand and properly appreciate the emotional impact of breaches on survivors
  - View breaches as part of an assessment of escalating risk
  - Have a full understanding of the nature of the offence of breach of a NMO, including the public interest factors in favour of prosecution and aggravating features
  - Have an accurate understanding of the processes that must be gone through to obtain a NMO, including eligibility for legal aid and legal costs
  - Are able to correctly assess the most suitable option in each individual case, as between the various protective orders: bail, NMO, DVPN/O
- Police forces should ensure that individuals approaching the police to report offences should not be advised to obtain an NMO in place of policing action
- Forces should examine the response to breaches of NMOs and reasons for failure to arrest where breaches are reported, including the supervision of frontline officers. Forces should ensure that complaints about failures to arrest are dealt with robustly as under-performance and disciplinary matters.
- Police forces and HMICFRS should monitor the response to breaches of NMOs and the circumstances in which victims are advised to obtain NMOs.
- Forces should collect data on the number of reports received of breaches of NMOs, the number of arrests and of charges for breaches.
- Forces should review their systems for recording NMOs and for identifying the existence and terms of a NMO when there is a report of a breach, especially in an emergency situation, to ensure efficient recording and response.

- Enforcement of NMOs should be given far greater prominence by forces, HMICFRS in its inspections and data gathering and the IOPC in its strategic work and Learning the Lessons Bulletins
- College of Policing and the National Police Chief's Council should issue detailed guidance to forces on the inter-relationship between protective orders in the criminal justice system and in the family justice system.

### **3. Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs)**

These orders carry similar powers to a civil injunction including a non-molestation order or occupation order. They prohibit a suspect from molesting a protected person and can require a suspect to leave an address and not come within a specified distance of an address. They only provide a short-term breathing space of up to 14 to 28 days, so are far more short-lived than an NMO which typically lasts for 6 months or a year. The initial 48 hour period of a DVPN is intended to allow a survivor to be referred by the police to a local support agency so she can be helped to make decisions going forwards.

The College of Policing APP on domestic abuse spells out that:

[The DVPN/DVPO process can be pursued without the victim's active support, or even against their wishes, if this is considered necessary to protect them from violence or threat of violence. The victim also does not have to attend court. This can help by removing responsibility from the victim for taking action against their abuser.](#)

An important difference from NMOs is that DVPN/Os place the responsibility for action upon the police, rather than the survivor. This is especially relevant where a survivor is particularly vulnerable and may not feel able to leave an abusive relationship, give a statement or deal with a legal process in the civil or criminal courts. She may fear the abuser and his retaliation for her taking action against him, or fear facing him in the family court in an NMO application. Some women are not capable of obtaining NMOs: they may lead chaotic lives due to drug or alcohol dependency, mental health problems, illiteracy or just having a lot of children and other demands to deal with. They may not have documents required to get legal aid or may not qualify for legal aid and not be able to afford to pay a solicitor, and be too intimidated to face the court process as a litigant in person. Some women do not appreciate the degree of risk they are in from a violent partner and do not take steps to protect themselves, although the risks are clearly apparent to professionals. In a range of situations active police intervention may be more appropriate than an expectation that a woman will obtain an order herself. A final point is that an occupation order to remove a perpetrator temporarily from the family home can be far more difficult to obtain in the family court than a NMO, but a DVPN/O can achieve this for a short time.

### 3.1 The view from the frontline

Most of the organisations who supplied information for this super-complaint reported that DVPNs and DVPOs were under-used and some services in London had never come across them in their casework. The National Domestic Violence Helpline reports that they very rarely hear of DVPNs or DVPOs from callers, whereas in contrast, discussing NMOs with callers is extremely common.

An organisation based in London states that:

Our [domestic abuse] advice service rarely see the police using DVPN or DVPO to provide safety to survivors. The police appear to advise survivors to try and obtain a civil injunction instead of accessing the resources available to them in the form of DVPOs and DVPNs. Additionally, we found that in many instances where there is a need to remove the perpetrator from the home the police are still reluctant to issue DVPNs despite it being the best tool to use at those circumstances.

We've never seen a DVPN or DVPO used in the ISVA service.

A local authority IDVA service states:

This is getting slowly better, but still far too many missed opportunities for DVPN / Os when an offender is not charged and released NFA. Naturally we see more DVPN's than O's – it has been suggested that this is due to being unable to locate the perpetrator to serve the notice in time to proceed to the order.

A women's service working across the South East of England states:

[We] keep stats on whether the police have ever considered or applied for a DVPN/ O. In literally a handful of cases each quarter do the police actually use this measure I know other forces use this regularly but it should be a consideration for every arrest in my view, intimate partner abuse or not.

Total referrals from Southampton and Eastern Hants (Sept-Feb) = 380  
DVPN: Requested – 10 (2.6%) Issued – 9 (90%) DVPO: Granted – 5 (51%)

So when asked for [DVPNs] are often given but the feeling from the advocates are that they are not being used enough or that the officers are unsure how and when they should be requested. Our advocates have had training around this and are pushing for them to be used.

An IDVA service in Leeds deals with high risk cases at daily MARAC meetings. They report that West Yorkshire Police have tried to address the problems around use of DVPOs by setting up a specialist DVPO team. However, this is not translating into high use of these orders on the ground. Their account contains official figures for 2018 which show that on average only 3 DVPOs per month were applied for in Leeds (population 780,000). The IDVAs report that DVPN/Os are recommended in

about one third of MARAC cases, approximately 5 per day. This amounts to 100 cases per month, therefore on average in 97% of cases no DVPO application is made.

They also state that:

In February 2018 WYP [West Yorkshire Police] set up a DVPO Team. This means the police officer would issue the DVPN and complete this initial paperwork. The DVPO application is then tasked to the DVPO Team. Here their case workers prepared the application paperwork, they attend Court and make the applications which means front line police officers do not need to undertake this role. It was hoped that the introduction of this team would increase the number of DVPO's granted across West Yorkshire. Although this has happened in some parts of the county this does not appear to be the case in Leeds.

If a DVPO is granted in Leeds there is a DVPO IDVA seconded to the WYP DVPO Team. Her role is to contact all victims to update if an order has been granted and go through the terms... I would suggest DVPO's are not being routinely granted for victims assessed as medium risk as we have had no referrals from this IDVA for victims assessed as medium risk.

One frontline domestic abuse organisation working primarily in London boroughs has never come across DVPN/Os in their casework. After learning about them at a CWJ training they raised this possibility with officers at MARAC, but were told that it is preferable to just investigate and prosecute offenders. Whilst this may be fine if bail conditions are imposed, often they are not. Furthermore, in many cases police investigations are not taking place and women who approach the police are advised to obtain a NMO without any policing action being taken (see section 2 above). Most importantly, DVPN/Os can be used in circumstances where a survivor requires protection but does not support a police investigation or a prosecution and such orders can fill a gap for a particularly vulnerable group of women.

The Leeds-based organisation discuss their views on reasons for the failure to use DVPN/Os. They describe how applying for these orders is time-consuming in the context of a lack of resources within policing units dealing with high risk cases. They also identify a lack of awareness and understanding amongst officers (despite training). In particular the fact that a victim did not support use of an order is routinely given as a reason for not using them at MARAC, despite the fact that it is precisely in such circumstances that these orders can provide some protection where no other action may take place. The case study below provides an illustration of a difference of opinion on this between frontline officers and the DVPO Team.

We were initially of the opinion that DVPN's / DVPO's were not being granted as frontline police officers did not have the training, experience or time to put these measures in place. Prior to February 2018 the Officer in the Case (OIC) would be required to prepare all the paperwork and attend court in order to make the application. This is quite time consuming. We hoped that the introduction of the WYP DVPO Team would mean there was an increase in officers applying for these. This has not happened.

We believe one of the reasons for this is lack of training and awareness of these orders. Training has been provided by the WYP DVPO to all districts within the county but Leeds does not seem to have seen an increase in the number of applications. Quite often at MARAC we hear from the Police Rep a DVPO was considered and deemed not appropriate as the victim did not support this. The guidance is quite clear that although victim's wishes can be considered the order can be granted without their consent. Although the IDVA's try to challenge this view through the MARAC there does not appear to be the desire for change or to challenge this. There seems to be a feeling that due to the high volume of police call outs / high risk cases we deal with in Leeds there is no time or resources within the police to do this.

The London-based organisation which has never seen DVPN/Os used, and raised this possibility at MARAC, was told that:

these were too cumbersome, there is no capacity for them and they are not used. We were told that obtaining them is a long process, that they may not be granted in the end, and that "the Super won't allow it".

The same organisation reports that they have come across high risk cases at MARAC where there are no bail conditions.

### **3.2 Information from other sources**

The 2014 HMIC report on domestic abuse pre-dates the introduction of DVPN/Os in mid-2014, however the 2015 Progress Report reports that their use has been extremely varied and opportunities to use them are being missed, as well as a lack of action when they are breached<sup>45</sup>. A chart of DVPOs applied for to 31 March 2015 by force<sup>46</sup> shows huge disparities: Greater Manchester Police (where the new orders were piloted) applied for 1,515 orders, six forces applied for 100 to 300, and 17 forces for less than 50. The report states that:<sup>47</sup>

In a number of forces officers explained that they were reluctant to use DVPOs due to the bureaucracy around obtaining them and the time involved in the preparation when they are still seeking a decision whether to charge a perpetrator or not. Feedback was received that often two officers needed to be involved, one to investigate the primary offence and build the case for prosecution and another working in parallel to prepare the case for a DVPO should a decision not to charge be made. If response officers received training on DVPOs, this has generally been via an online training package and not face-to-face. Respondents to the practitioner survey highlighted a lack of police support of DVPOs. It was felt that reluctance to apply for DVPOs may be due to a lack of training on their use.

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<sup>45</sup> Page 18

<sup>46</sup> Page 57

<sup>47</sup> Ibid

As part of Recommendation 5 HMIC instructed that:

- The National Oversight Group should ensure that, by April 2016, further consideration is given to increasing the use and effectiveness of DVPOs. The Ministry of Justice should provide clear guidance on the DVPO process and sentencing guidelines for breaches of these orders.

### **Failure to use DVPN and DVPO**

A young woman in Leeds, aged 17, suffered abuse from a perpetrator aged 18. They have a child together and Children's Social Work Service are involved and the child is subject of a Child Protection Plan. The young woman has previously been under the supervision of Social Services as a child in her own right.

The young woman disclosed on-going domestic violence and abuse. She was assessed as high risk and discussed numerous times at MARAC meetings. She had been advised by Social Services to report all incidents to the police as part of child protection. She started to do this. The perpetrator attended her address and assaulted her and left before the police arrived. The following day he came to her address again and was sleeping in her shed in the garden. He was arrested for a number of offences.

After previous incidents the young woman felt unable to support a prosecution and provided retraction statements. This time she told police she supported prosecution for the last incident. He was arrested, but then released without charge and with no bail conditions.

The MARAC meeting recommended that the police issue a DVPN due to the high risk of further violence and child safeguarding concerns. The IDVA followed this up after the meeting and was told the police failed to do this. The rationale the OIC provided was that the young woman did not support a prosecution, although this was not the case. In her statement she also stated that she wanted him to stay away and leave her alone.

The IDVA sent an enquiry to the police DVPO Team and asked them to review the case. They responded that there were grounds for an order and the OIC's rationale was incorrect. It was now too late to ask the officer to issue a DVPN retrospectively to allow them to apply to the court for an order.

The IDVA service offered the victim support including safety planning and help to obtain a non-molestation order, as there were no other restrictions in place. She told the support service that she felt let down by the police and felt like 'what is the point in reporting' in future given the lack of response when she did support police action.

Since 2015 the position has not improved but actually gone backwards. In the 2017 Progress Report HMIC stated that:

Many forces are still not using DVPOs as widely as they could, and opportunities to use them are continuing to be missed. Over half of the forces that were able to provide data on the use of DVPOs reported a decrease in the number of DVPOs granted per 100 domestic abuse related offences in the 12 months to 30 June 2016 compared to the 12 months to 31 March 2015...

The use of DVPOs has not improved since our last inspection of forces. Many victims that HMICFRS spoke to were unaware of these orders, which is disappointing considering that they were introduced in 2014. We had expected that the use and knowledge of this important safeguarding tool would be more widespread by now.

The HMICFRS Progress Report February 2019 shows that in 2017 the Metropolitan Police did not issue any DVPOs and only a tiny fraction in 2016. It also shows that four other forces issued none in 2016 or 2017, considerable variation around the country and a reduction between 2016 and 2017 in half of forces (21 out of 40) in the number of DVPOs per 100 domestic abuse-related offences.<sup>48</sup>

Despite this, inexplicably, the February 2019 reports states that “overall the picture is positive”<sup>49</sup>. It notes a 14% increase in the number of DVPOs granted between 2016 and 2017, but this is a percentage of a very small number (see below). The same paragraph states that “over a third of forces who gave DVPO data state they are using them less”.

The Office for National Statistics Domestic Abuse Data Tool figures for the year ending 31 March 2018 shows over a million domestic abuse-related incidents (1,198,094) and half a million domestic abuse crimes (599,775), but only 5,674 DVPOs applied for (and even fewer DVPNs). This represents 0.5% of all domestic abuse-related incidents and less than 1% of domestic abuse crimes. In the bigger picture of policing of domestic abuse these orders are insignificant.

The Data Tool also shows that for the same period, in 62% of domestic abuse crimes there was no arrest, therefore bail was not an option. As discussed above, in many cases bail is not used even where there is an arrest, and particularly for standard and medium risk cases. DVPOs are clearly not filling the gap that has opened up with the radical reduction in use of bail, and appear to be an even more onerous tool for the police than pre-charge bail.

Overall the evidence shows that DVPN/Os are not being used effectively as a tool to provide protection to women across England and Wales.

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<sup>48</sup> Page 42

<sup>49</sup> Ibid

### 3.3 Response of oversight bodies

CWJ is concerned that repeat monitoring by HMICFRS of the inadequate use of DVPN/Os is having little impact. The February 2019 Progress Report yet again exhorts certain forces to improve their performance:<sup>50</sup>

Given the protection that these orders can give victims and their children, we recommend that all forces review their use as a priority. Forces need to have monitoring processes in place, supported by accurate data, to make sure they are using these powers effectively.

This approach seems to be having little effect given the very limited and even decreasing use of these orders from 2014 onwards.

Furthermore, HMICFRS only identifies 9 out of 43 forces in February 2019 as needing to improve their use of powers.<sup>51</sup> Yet it is clear that nationally use of these powers is almost insignificant when compared to the volume of domestic abuse, without even considering other forms of violence against women and girls.

Back in the 2017 Progress Report HMIC had identified the obstacles and recommended that forces take robust action:

When we asked about the low use of orders and notices during this inspection, the reasons cited included officers lacking experience in using them, and the orders being seen as too much work and being expensive. One force recognised that the system it had in place for the management of DVPNs and DVPOs was applied inconsistently and was not working effectively. It is the policy of another force to use these notices and orders in high-risk cases only. This means that victims in medium and standard-risk cases are potentially exposed to unnecessary harm.

The importance of DVPOs being underpinned by robust risk management processes and their applicability in all forms of domestic abuse (not just incidents of physical abuse) should also be reinforced during training. Forces need monitoring processes in place, supported by accurate data, to ensure that they are making effective use of these powers. This work should be included in the updated domestic abuse actions plans proposed in Recommendation 3.

Now that DVPN/Os have been in place for almost five years it seems that something more is required if they are to play a meaningful role in protecting victims.

The IOPC has devoted some attention to DVPN/Os in 2018. Its thematic Learning the Lessons Bulletin of March 2018 focuses on protecting vulnerable people and contains a detailed case study involving use of a DVPN. It highlights the availability of these measures, contains a link to the relevant College of Policing APP and asks

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<sup>50</sup> Page 43

<sup>51</sup> Ibid

policy makers and managers within forces to take steps to ensure that all officers understand the process for requesting a DVPN.

Thematic work such as the March 2018 IOPC material is welcomed and CWJ looks to the oversight bodies to find a way to translate useful guidance into a change in policing practice on the ground.

### **3.4 CWJ recommendations for action:**

CWJ considers that a new strategy is required on use of DVPN/Os as part of a wider drive to ensure that all women at risk have a protective order in place and that such orders are enforced.

The following would enable these orders to be used appropriately:

- College of Policing review its guidance and the training provided by forces to frontline officers on which protective orders are appropriate in different circumstances. Use of bail may be the simplest step but where this is not an option for good reason, officers should be aware of the factors for deciding whether DVPN/Os or NMOs are most appropriate.
- Forces provide training and supervision for frontline officers on the circumstances where DVPN/Os are essential: for example where a victim is particularly vulnerable and is unlikely to take steps herself to obtain an NMO, or will be unable to obtain an NMO due to funding or failure to meet the legal requirements, or prefers an order where she does not have to face the suspect in court.
- In particular such training should address the obligation upon officers not be merely reactive to the demands of others, but aware of the state's positive duty to protect those predictably at risk of violence. This means addressing the needs of victims who do not support policing action, or fail to recognise or act on the risks they face, who are generally amongst the most vulnerable.
- Training on DVPN/Os must go hand in hand with training on NMOs, to stress that those should not be the default position, as they impose the cost of protection on victims themselves, but they may be preferable in some circumstances because they provide a much longer period of protection and give the survivor more control over the conditions and process as a whole.
- Training should cover the inter-relationship between availability of bail, NMOs and DVPN/Os so that officers are equipped to consider the best course of action in each case and do not advise victims incorrectly on the law and availability of NMOs.
- The training and its implementation and monitoring by forces should be inspected by HMICFRS and reviewed by the other policing oversight bodies.
- Considering should be give to simplifying and streamlining the procedures surrounding the granting of DVPN/Os to increase their use.

- Forces and HMICFRS also examine the supervision of cases where no policing action has been taken despite a victim being deemed at risk, or where there are no protective orders in place, and review why DVPN/Os were not utilised. Forces ensure that complaints about failures to use DVPN/Os are dealt with robustly as under-performance and disciplinary matters.

## 4. Failure to apply for Restraining Orders

### 4.1 The view from the frontline

The National Stalking Advocacy Service Paldain found that within a random sample of 40 files, in five a restraining order (RO) had not been applied for. Several frontline organisations state that they have to routinely check, chase and push police officers to ensure that applications for restraining orders have been made prior to trial, and that their staff attend court to request that orders are obtained, as otherwise applications are overlooked. For example, one organisation in London states:

Our caseworkers always feel the need to raise requests for Restraining Orders with the officer in the case, and check up on whether a request has been made, otherwise they will be overlooked. We continually chase and our caseworkers attend sentencing hearings to ensure that an order is applied for, as we have no confidence that this will be done automatically. We also raise requests at MARAC in high risk cases. In other cases it can be very difficult to communicate with the officer in the case and our caseworkers have to do a lot of chasing. We would expect that without an advocate many women will not be able to do this alone.

The concern is that women who have not been supported by a local advocate may not benefit from an order when one could and should have been granted. Women who are not supported by a professional will also be unaware of the availability of a RO in a variety of situations and many prosecutors may not consider this. For example, another organisation states that:

We also hear of cases where Restraining Orders have not been requested at the sentencing hearing. These include cases where the perpetrator was sent to prison but a Restraining Order was needed for when he is released, and also to stop him trying to contact her directly or indirectly whilst he is in prison. Often these are not applied for unless the woman, or those supporting her, push for it. Also, many women don't know that a Restraining Order can be granted even if the accused is acquitted or the prosecution offer no evidence.

We also note that although the police should include a request for a RO in the papers when they send a case to CPS, there is an independent duty on prosecutors to consider the need for one and request the necessary information from the

police<sup>52</sup>. Therefore, where no application is made this represents a failing on the part of prosecutors preparing the case, as well as police forces.

We have encountered an additional difficulty which is illustrated by the case study on ROs below. This is that a RO can only be granted at a sentencing hearing<sup>53</sup>. When a request for an order has not been made and the sentencing hearing is over, it is unclear whether, and how, in law this can be remedied in the Magistrates Court. It should be possible for the court to grant an order later under the slip rule, which grants a power to the Magistrates to re-open cases to rectify a mistake<sup>54</sup>. However, this slip rule is not clear on whether the mistake that is remedied must be a mistake by the court or can also be a mistake by the prosecutor<sup>55</sup>. The case study tells the story of a woman who, acting on the advice of CWJ, requested that the CPS apply for a RO under the slip rule. Despite initial resistance the prosecutor made the application. The Magistrates Clerk advised the Magistrates that they did not have the power to grant an order as there had not been an error by the court, however the Magistrates granted one anyway. There is a lack of clarity that needs to be addressed.

This case study also illustrates the considerable hurdles that women face if they do try to have the lack of a RO reversed. That woman attended the court alone with a letter prepared by CWJ setting out her legal position, but was told by court staff that there was nothing they could do. It was only when she refused to leave the building and began to cry that they finally agreed to place the letter before a lawyer, and later that day she was told that the matter had been listed for a hearing in two days' time.

## 4.2 Response of oversight bodies

We have been unable to locate any reference to this issue in the HMIC reports or Progress Reports on domestic abuse. The joint inspection by HMICFRS and CPSI on harassment and stalking contains several references to this as an aspect of "victim care". The report notes failures to request ROs and failure to consult with victims on conditions for ROs<sup>56</sup>. It also notes that the College of Policing guidance is confusing and that the MG5 form does not have a space for rationale or conditions for a RO, and should be revised<sup>57</sup>. The inspection found that in the vast majority of the case files reviewed a RO was obtained where required. These may include cases where support workers have had to advocate for victims to ensure that ROs are sought, but the difficulties experienced by frontline organisations are not identified. There is no reference to requests for ROs in the IOPC Learning the Lessons Bulletins.

There does not appear to be a recognition on the part of oversight bodies that failure to request ROs is a wide-spread problem experienced by victim support services and represents a serious failing on the part of the state to provide essential safeguarding.

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<sup>52</sup> CPS Legal Guidance on Restraining Orders

<sup>53</sup> Power to grant an order under s.5 Protection from Harassment Act 1977

<sup>54</sup> S.142 Magistrates Court Act 1980

<sup>55</sup> The same problem with wording does not arise in the Crown Court slip rule Section 155 Powers of Criminal Courts (Sentencing) Act 2000 which provides a power to alter a sentence within 56 days

<sup>56</sup> Page 65

<sup>57</sup> Page 71

Even the discussion in the harassment and stalking report amounts to no more than a few references totalling a little over a page within a 91-page report. The matter is treated as an administrative problem, and there is no mention of the need for police training, supervision and monitoring to be tackled to ensure that this protective measure is used and victims' safety placed at the forefront. The College of Policing APP on domestic abuse contains helpful guidance for officers on obtaining victims' views on a RO. There is a helpful checklist for reducing risk in identified cases, which has as its first bullet point "implementing legal interventions" including use of ROs. The problem therefore appears to be one of implementation on the ground, rather than a lack of guidance.

### **Lack of Restraining Order**

A woman in London was stalked by a colleague, who would repeatedly turn up outside her home address and on her route to work, watch her balcony, follow her on buses and send her unwanted e-mails and gifts. He was prosecuted under the Protection from Harassment Act and pleaded guilty in the Magistrates Court.

However, at the sentencing hearing two weeks later no request was made for a Restraining Order (RO), as the police officer had forgotten to include this in the paperwork sent to CPS and the prosecutor also overlooked it. The woman was not present at this hearing and was told almost two weeks later that there was no RO in place. The police advised her to obtain a non-molestation order (NMO) instead.

A family law solicitor advised that it was highly unlikely that a NMO would be granted because two months had now passed since the last incident and a month since the guilty plea. Furthermore, the woman was working and would not qualify for legal aid so would have to pay a solicitor or make the court application herself.

The woman requested a late application by the prosecution for a RO utilising the slip rule in section 142 Magistrates Court Act 1980, which gives the court power to re-open a case to correct a mistake. She attended the Magistrates Court with a letter but the court staff refused to take this from her. It was not until she insisted that she would not leave the building and began to cry that they finally agreed to give the letter to a lawyer for consideration. Later that day she was told that the section 142 application would be heard in two days' time.

When the woman attended court two days later the prosecutor initially told her that the case was finished and was not planning to make a further application for a RO. It was only on her insistence that the matter had been listed that the prosecutor finally read her letter, and agreed to make the application.

In court the Magistrates Clerk advised the Magistrates that section 142 did not give them the power to re-open a case where there was no error by the court, but an error on the part of the CPS. Despite this the Magistrates granted a RO that the perpetrator have no direct contact and not enter her street for three years.

### **4.3CWJ Recommendations for action:**

- The importance of applying for a RO and the various situations in which one can be obtained should be given prominence within all training on domestic abuse, harassment and stalking and sexual offences for frontline officers.
- Forces also examine the supervision of cases where ROs are required to identify where they are being overlooked and reasons for this. Forces ensure that complaints about failures to apply for ROs are dealt with robustly as under-performance and disciplinary matters.
- Applications for ROs should be subject of investigation by HMICFRS in all domestic abuse inspections, including the supervision and monitoring of this by police forces. Clear recommendations should be made to forces where failure to apply for ROs is identified.
- The CPS should alert all prosecutors to the need to ensure that applications for ROs are put forward in all circumstances where victims require protection, including where there is no conviction or the defendant will be in custody.
- The CPS should instruct prosecutors on the importance of requesting ROs under the slip rule where they are overlooked at sentencing.
- The DPP issue guidance to prosecutors to clarify that where an application for a RO has not been made at sentencing due to an oversight, the slip rule in the Magistrates Court, can and should be used to request an order.
- The same guidance be added to materials available to Magistrates and Judges, including in training for the judiciary, on their powers to grant orders under the slip rule.
- Consideration be given to amending the wording of S.142 Magistrates Court Act 1980 to clarify that a RO can be granted at a later date after a sentencing hearing where it is in the interests of justice to do so. Alternatively, a separate provision could allow this which is not dependent on there being an earlier mistake (as in the Crown Court). Consideration be given to including amendments to the relevant legislation within the Domestic Abuse Bill, or other legislation.

## **The law on protection and investigation of violence against women and girls**

It is well established that there are positive duties on the state under Articles 2, 3 and 8 ECHR to take reasonable measures to protect individuals known to be at risk, and to investigate offences effectively.

The Article 2 duty to protect the right to life is engaged where there is a real and immediate risk, and was established as long ago as 1998 in the well-known case of *Osman v UK*. “Real and immediate” does not mean that a risk needs to be imminent,

as the duty arises in any situation where the risk is “present and continuing”<sup>58</sup> and therefore applies beyond a 999 call situation, whenever an on-going risk exists. The Article 2 duty applies not only where there has been a fatality, but in any situation where a person’s life is in danger, therefore in a great many high-risk cases.

There is a similar duty on the state under Article 3 to prevent inhuman and degrading treatment inflicted by non-state actors (ie private individuals such as partners and ex-partners). The threshold under Article 3 must be met and it is well established that significant physical injury amounts to inhuman and degrading treatment, as does rape<sup>59</sup>. However inhuman and degrading treatment goes wider to encompass many other less obvious aspects of domestic and sexual abuse, applying the definition of the European Court in *Pretty v UK* (2002):

actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterized as degrading and also fall within the prohibition of article 3.

Where the Article 3 threshold is not met, Article 8 may be engaged, requiring respect for private and family life, for example in cases of harassment and stalking and wherever the “physical and moral integrity of the person” is harmed<sup>60</sup>. In *R(Waxman) v CPS* (2012)<sup>61</sup> Lord Justice Moore-Bick found a breach of Article 8 in a case of very persistent harassment and stated that there was no dispute that “*in certain circumstances Article 8 imposes on the state a positive obligation to take effective action to protect a person’s private and family life, including his physical and psychological integrity.*” The judgement refers to a number of decisions of the European Court of Human Rights and there are a great many more, including reference to an Article 8 duty within *Osman* itself<sup>62</sup>.

Taken together, the various duties under the Human Rights Act clearly establish a legal obligation on the state, through its police force, to provide protection from domestic abuse, harassment, stalking and sexual violence and to investigate such offences adequately. This is no more than would be expected in a civilised society and is a duty which most people would assume on a common sense basis. Protective orders which are properly enforced are reasonable measures which the state can be expected to deliver, as reflected by our legal framework.

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<sup>58</sup> *Rabone v Pennine Care NHS Foundation Trust* (2012) paragraph 39

<sup>59</sup> *DSD and NBV v Commissioner of Police* (2018) paragraph 128

<sup>60</sup> *X and Y v Netherlands* (1985)

<sup>61</sup> [2012] EWHC 133 (Admin)

<sup>62</sup> *Osman v UK* paragraph 128, *MC v Bulgaria*, *Jankovic v Croatia*, *A v Croatia*, *Hajduova v Slovakia*, *CAS v Romania*, *Szula v UK*, *Remetin v Croatia*.

## **Conclusion**

In our view it is crucial that each of these failings is not considered in isolation, but that the police oversight bodies have in mind the bigger picture and ask themselves how protection can be achieved in practice for all women reporting domestic abuse, harassment, stalking and sexual violence. This means having the most suitable protective order in each case, which is then actually enforced.

Police bail, the traditional staple tool for protection, previously used on a routine basis across the board, has been cut back heavily with disastrous effect in VAWG cases. Bail conditions for the duration of the criminal case is the simplest form of protection.

Specialist powers created to protect women (the offence of breach of NMO, DVPN/Os and ROs) are under-utilised and even misunderstood and ignored in the criminal justice system. Their use and importance does not appear to be particularly high on the agenda of oversight bodies.

Ultimately the funding of police units dealing with domestic abuse, harassment, stalking and sexual offences needs to be sufficient to enable them to use the legal tools at their disposal. In addition, officers need improved guidance, training and supervision and forces need to deal with failings robustly through their under-performance and/or disciplinary processes.

The combined effect of the failings raised in this super-complaint is that women are dangerously exposed. In our view this amounts to a systemic breach of the state's obligations under the ECHR, namely Articles 2, 3, 8 and 14 taken together. This is an unacceptable state of affairs and urgent steps are needed by policing bodies to remedy the situation.

**Report by Nogah Ofer, solicitor at CWJ March 2019**

**With special thanks to staff at all the organisations who provided data and case studies, both named and unnamed.**

## **Annex**

The Annex contains data from the following:

1. Leeds Domestic Violence Service
2. Rape Crisis South London
3. National Domestic Violence Helpline run by Women's Aid
4. Southall Black Sisters
5. Cambridge Rape Crisis
6. A local authority IDVA service
7. Paladin, the National Stalking Advocacy Service
8. West London Rape Crisis Centre and VAWG Advice Service, Women and Girls' Network
9. Aurora New Dawn
10. Anonymous contribution - organisation working with domestic abuse survivors
11. Anonymous contribution - organisation working with sexual violence survivors
12. Masters dissertation by Sarah Learmouth, written for the MA in Woman and Child Abuse at London Metropolitan University 2018